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;
NATIONAL RESOURCES DEFENSE COUNCIL, INC.;
MIAMI WATERKEEPER,

Petitioners

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION;
UNITED STATES OF AMERICA,

Respondents

FLORIDA POWER & LIGHT COMPANY,

Intervenor for Respondent

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

INITIAL BRIEF OF INTERVENOR FLORIDA POWER & LIGHT COMPANY

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CERTIFICATE AS TO PARTIES, RULINGS & RELATED CASES

In accordance with Circuit Rule 28(a)(1), Intervenor certifies:

(A) Parties and amici

1. Petitioners are Friends of the Earth, Natural Resources Defense Council, Inc., and Miami Waterkeeper.

2. Respondents are the U.S. Nuclear Regulatory Commission and the United States of America.

3. Intervenor is Florida Power & Light Company ("FPL"), a wholly owned subsidiary of NextEra Energy, Inc., a publicly held company. No company owns 10% or more of the stock of NextEra Energy, Inc. FPL is a rate-regulated electric utility engaged primarily in the generation, transmission, distribution and sale of electric energy in Florida. FPL provides service to its electric customers through an integrated transmission and distribution system that links its generation facilities to its customers. Turkey Point Nuclear Generating Units 3 and 4 are FPL electric generation facilities.

4. Citizens Allied for Safe Energy has submitted an amicus brief in this Court.

(B) 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__).

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

(C) Related cases

FPL is unaware of any related cases.

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GLOSSARY OF ABBREVIATIONS

APA	Administrative Procedure Act
Board	Atomic Safety and Licensing Board
Commission	Nuclear Regulatory Commission (multimember body)
EIS	Environmental Impact Statement
FPL	Florida Power & Light Company
GEIS	Generic Environmental Impact Statement
JA	Joint Appendix
NEPA	National Environmental Policy Act of 1969
NRC	Nuclear Regulatory Commission (agency as a whole)
PSU	Practical Salinity Units
SEIS	Supplemental Environmental Impact Statement

INTRODUCTION

As Respondents explain, several threshold jurisdictional problems stand in the way of Petitioners' claims. If the Court nonetheless reaches the substance of those claims, it should reject them in full.

Petitioners challenge the environmental analysis that the Nuclear Regulatory Commission ("NRC") conducted before renewing the operating licenses for two reactors at FPL's Turkey Point facility. The core of this challenge is their argument that the NRC's Environmental Impact Statement ("EIS") insufficiently considered salinity levels in the facility's Cooling Canal System and potential impacts on nearby water resources. That argument is meritless. The NRC's detailed EIS devoted over 100 pages to water-resource impacts alone. Based on the empirical evidence, the agency reasonably concluded that FPL's ongoing monitoring and mitigation have already helped reduce the canals' salinity and that such progress will continue and likely achieve the targets set by state and local regulators in advance of the licenses' new renewal terms, which begin in 2032 and 2033. This analysis more than satisfies the NRC's obligation under the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321 *et seq.*, to take a "hard look" at environmental impacts.

Facing this difficulty, Petitioners' lead appellate argument (at 27-44) centers on a different procedural objection. They argue that the NRC erroneously applied one of its procedural regulations, 10 C.F.R. § 51.53(c)(3), because FPL was applying to renew the licenses for a *second* renewal term. This objection suffers from multiple problems of its own.

To start, this objection is unrelated to the substantive environmental concerns Petitioners have asserted. The NRC's analysis of Petitioners' water-resource concerns was not affected by Section 51.53(c)(3). Instead, the agency treated the canals' salinity levels as relevant site-specific information warranting a departure from the generic environmental analysis that Section 51.53(c)(3) authorizes for specified issues that do not vary from one site to the next.

Petitioners' Section 51.53(c)(3) arguments also conflict with the regulation's context and overarching purpose. As the NRC explained, other regulations unambiguously required the EIS to use the generic environmental analysis. So the NRC's application of Section 51.53(c)(3) caused Petitioners no harm and made sense given the regulatory framework as a whole. For all these reasons, the Petition for Review should be denied if it is not dismissed on jurisdictional grounds.

STATEMENT OF JURISDICTION

FPL agrees with Respondents that the Court lacks jurisdiction over the Petition for Review because Petitioners seek review of non-final agency action and because Petitioners lack Article III standing to pursue certain claims. In accordance with Circuit Rule 28(d)(2), FPL will not repeat those arguments but will instead address Petitioners' claims assuming, for argument's sake, that jurisdiction exists.

STATEMENT OF THE ISSUES

1. Whether the NRC's alleged misinterpretation of 10 C.F.R. § 51.53(c)(3) provides any basis under the Administrative Procedure Act ("APA") or NEPA for granting Petitioners' request to set aside the license renewals.

2. Whether the NRC's interpretation of 10 C.F.R. § 51.53(c)(3) violates the regulation's unambiguous terms in light of the regulation's context and purpose.

3. Whether the extensive analysis of potential water-resource impacts in the NRC's EIS failed to satisfy NEPA's "hard look" requirement.

STATUTES & REGULATIONS

All applicable statutes, etc., are contained in the addendum to the Brief for Respondents.

STATEMENT OF THE CASE

I. Statutory and regulatory background

Two statutes lie at the center of nuclear power plant licensing. First, the Atomic Energy Act, 42 U.S.C. § 2011 *et seq.*, authorizes the NRC to issue licenses to operate nuclear power plants. *See id.* §§ 2133, 2134(b). By statute, those licenses are limited to an initial term of 40 years, but they "may be renewed." *Id.* § 2133(c). Second, NEPA requires agencies, including the NRC, to document the environmental impacts and possible alternatives to proposed "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). The NRC has treated reactor license renewals as major federal actions affecting the quality of the human environment, for which the agency prepares an EIS. *New York v. NRC* (*New York I*), 681 F.3d 471, 476 (D.C. Cir. 2012). Although NEPA requires "that the agency take a 'hard look' at the environmental consequences before taking a major action," it does "not require agencies to elevate environmental concerns over other

appropriate considerations." *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983). As this Court has explained, "NEPA is an 'essentially procedural' statute intended to ensure 'fully informed and well-considered' decisionmaking, but not necessarily the best decision." *New York I*, 681 F.3d at 476.

Two key sets of NRC regulations in turn implement these two statutes' requirements for license renewals. *See Massachusetts v. United States*, 522 F.3d 115, 119 (1st Cir. 2008). The first set, 10 C.F.R. pt. 54, "focuses on technical issues such as equipment aging" and safety systems, while the second set, 10 C.F.R. pt. 51, focuses on fulfilling the NRC's NEPA obligations. *Massachusetts*, 522 F.3d at 119.

Since 1996, the NRC has sought "to streamline its evaluation of environmental issues during license renewal by resolving many issues generically." *Nat. Res. Def. Council v. NRC* (*NRDC I*), 823 F.3d 641, 644 (D.C. Cir. 2016). It classifies issues that can "be adequately addressed generically" as "Category 1" issues and issues that "require additional assessment for at least some plants at the time of the license renewal review" as "Category 2" issues. *Id.* (citation omitted).

Category 1 issues are addressed in a Generic Environmental Impact Statement ("GEIS"). *Massachusetts*, 522 F.3d at 120. Many of the GEIS conclusions and findings were codified into NRC regulations through notice-and-comment rulemaking. 10 C.F.R. pt. 51, app. B to subpt. A, tbl. B-1. And they are periodically reevaluated, including most recently in 2013. Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 78 Fed. Reg. 37,282 (June 20, 2013).

In the course of reviewing a license renewal application, NRC staff produces a draft Supplemental EIS ("SEIS") and, after an opportunity for public comment, a final SEIS. The agency's "plant-specific SEIS addresses Category 2 issues and complements the GEIS, which covers Category 1 issues." *Massachusetts*, 522 F.3d at 120. "When the GEIS and SEIS are combined, they cover all issues that NEPA requires be addressed in an EIS for a nuclear power plant license renewal proceeding." *Id.*

II. Factual background and procedural history

On January 30, 2018, FPL applied to renew its operating licenses for two nuclear power reactors, Turkey Point Units 3 and 4, for a second

renewal term. JA__[[LBP-19-3]] (89 N.R.C. at 254). As required by NRC regulation, FPL submitted an Environmental Report along with its application. JA__[[LBP-19-3]] (89 N.R.C. at 255).

Petitioners sought to intervene in the relicensing proceeding and requested a hearing. NRC procedural regulations require intervenors to identify the specific "contentions" they wish to litigate. *NRDC I*, 823 F.3d at 643; 10 C.F.R. § 2.309(a), (f)(1). Petitioners advanced five environmental contentions, which were based on asserted deficiencies in FPL's Environmental Report. JA__[[LBP-19-3]] (89 N.R.C. at 255); *see* 10 C.F.R. § 2.309(f)(2).

The Atomic Safety and Licensing Board granted Petitioners' hearing request and concluded in a March 2019 decision that two of their contentions were admissible in part under the NRC's contention-admissibility standards. JA__[[LBP-19-3]] (89 N.R.C. at 286-95). Specifically, the Board admitted Contention 1-E to the extent it claimed that FPL's Environmental Report failed to consider mechanical draft cooling towers as a reasonable alternative to continuing to use Turkey Point's Cooling Canal

System as a means of cooling the reactors,[1] and it admitted Contention 5-E to the extent it claimed that the Environmental Report failed to attribute ammonia in nearby freshwater wetlands to the FPL reactors or consider certain ammonia-related impacts. JA__[[LBP-19-3]] (89 N.R.C. at 286). The Board also concluded that the regulation authorizing initial license renewal applicants to use the GEIS findings regarding Category 1 issues in their environmental reports, 10 C.F.R. § 51.53(c)(3), also applies to subsequent license renewal applicants. JA__[[LBP-19-3]] (89 N.R.C. at 260-76). Because this significant question of NRC procedure was an issue of first impression, the Board referred its ruling to the Commission. JA__[[LBP-19-3]] (89 N.R.C. at 273 n.46).

After the Board's March 2019 ruling, the NRC staff issued their Draft SEIS, which was over 400 pages long. JA__[[Draft SEIS]]. The Board concluded "that the new information in the [Draft SEIS] cured the omissions identified in the two contentions," and it therefore dismissed those contentions as moot in a July 2019 decision. JA__[[LBP-19-06 at

[1] An overview of Turkey Point's Cooling Canal System can be found in the NRC's EIS. JA__ (FEIS 3-3 to 3-11).

1]]. In August 2019, Petitioners asked the Commission to review the Board's March and July decisions.

Meanwhile, Petitioners had raised six further contentions based on alleged deficiencies in the Draft SEIS. Two of these contentions (Contentions 1-Eb and 5-Eb) sought to revive Petitioners' earlier contentions regarding a cooling tower alternative and ammonia discharge, while the remaining four contentions (Contentions 6-E, 7-E, 8-E, and 9-E) revolved around alleged deficiencies in the Draft SEIS's evaluation of environmental impacts on water resources. JA__[[LBP-19-08 at 8-40]]. In a lengthy decision released in October 2019, the Board found that none of these contentions was admissible, and it terminated the contested proceeding. JA__[[LBP-19-08 at 41]]. After that ruling, the NRC staff issued their Final SEIS—over 600 pages long—reflecting certain revisions in response to public comments. JA__ (Final SEIS). Petitioners did not challenge the Final SEIS, but sought Commission review of the Board's October 2019 decision.

The Final SEIS and the October 2019 Board decision carefully and extensively analyzed the license renewal's potential environmental impacts. That includes extensive discussion of potential water-resource

impacts, as well as specific evidence that FPL's monitoring and mitigation efforts have already helped control and reduce salinity levels in the Cooling Canal System. JA__ (Final SEIS 3-55, 3-59); JA__[[LBP-19-08 at 22]]. The Final SEIS recognized that future environmental conditions would affect the pace of future salinity reductions. But it also recognized that FPL's close attention to salinity levels, combined with continuing state and local regulatory oversight, gave reason to believe that FPL's efforts would be successful before the start of the new renewal terms in 2032 and 2033. JA__ (Final SEIS 3-57, 4-29); *see also* JA__[[LBP-19-08 at 20-23, 39]].

In light of the Board's October 2019 decision, and as NRC regulations require, *see* 10 C.F.R. § 2.340(a)(2)(i), the NRC staff proceeded to issue the renewed licenses and published a Record of Decision on December 4, 2019.

Petitioners filed their Petition for Review in this Court on January 31, 2020—even though their administrative appeals of the Board's March, July, and October 2019 decisions remained pending before the Commission. On April 23, 2020, the Commission agreed with the Board's

application of Section 51.53(c)(3) but did not otherwise resolve Petitioners' administrative appeals. JA__[[CLI-20-3]].

SUMMARY OF ARGUMENT

1. Petitioners' arguments concerning 10 C.F.R. § 51.53(c)(3) fail for two independent reasons—both stemming from Section 51.53(c)(3)'s circumscribed function. Specifically, Section 51.53(c)(3) structures the environmental reports that the NRC requires license renewal applicants to submit with their applications. The regulation does not govern the contents of the EIS that the NRC staff ultimately prepares before approving a license renewal. The EIS's contents are controlled by separate regulations that for all license renewals require the NRC staff to make use of the same GEIS findings that Section 51.53(c)(3) allows applicants to use in their environmental reports.

As a consequence, the NRC's application of Section 51.53(c)(3) does not prejudice environmental groups, and certainly did not prejudice Petitioners here. After all, the NRC staff addressed Petitioners' core environmental concerns—about potential water-resource impacts—using information specifically about Turkey Point rather than generically. Petitioners did not pursue any challenges to the GEIS generic findings in

accordance with NRC procedural requirements. So, in short, the action Petitioners challenge—renewing the licenses—was not affected by the agency's interpretation of Section 51.53(c)(3). And in any event the agency's interpretation was sound in light of Section 51.53(c)(3)'s language and place in the broader regulatory framework.

2. Petitioners' NEPA challenge fares no better. Contrary to their portrayal, the NRC thoroughly analyzed the renewal's potential impacts on water resources given salinity levels in the Cooling Canal System. The agency's EIS devoted over 100 pages to these issues and emphasized empirical evidence showing that FPL's efforts to improve Cooling Canal System salinity levels help to reduce canal salinity. The Board emphasized this empirical evidence as well.

Instead of engaging with this analysis, Petitioners fault the EIS for also underscoring that state and local regulators are monitoring canal salinity and requiring FPL to achieve further success in reducing salinity levels. But Petitioners' objection has no legal support—particularly where, as here, the agency engaged in its own comprehensive analysis of the environmental issues. And Petitioners' final objection—challenging the accuracy of a particular model discussed by the NRC's EIS—is a good

example of the sort of "flyspecking" efforts that cannot support a NEPA challenge. The EIS acknowledged that the model Petitioners challenge has been refined in light of new evidence and may not perfectly predict future events given uncertainty about future weather conditions. Petitioners simply have no valid complaint under NEPA and its underlying case law about the NRC's thorough and careful environmental analysis.

STANDARD OF REVIEW

This Court's review of NRC rules and licensing decisions is governed by the Administrative Procedure Act ("APA"), 5 U.S.C. § 500 *et seq*. *See NRDC I*, 823 F.3d at 648. "This court is authorized to set aside the Commission's relicensing decision only if it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id.* (quoting 5 U.S.C. § 706(2)(A)). The Court's "general posture of deference toward agency decision-making is particularly marked with regards to NRC actions because 'the [Atomic Energy Act] is hallmarked by the amount of discretion granted the Commission in working to achieve the statute's ends.'" *Id.* (citation omitted). And "to the extent NRC's technical judgment is before" this Court, the Court is generally "at [its] most deferential." *Id.* at 649 (citation omitted).

ARGUMENT

I. The Court should reject Petitioners' challenge to the agency's application of its environmental report regulations

Petitioners devote half of their argument (at 27-44) to claiming that the agency violated 10 C.F.R. § 51.53(c)(3) when it allowed FPL to rely on the GEIS, which addresses environmental issues common to all license renewals. Petitioners' interpretation of Section 51.53(c)(3) is not properly before the Court. Because the agency action that Petitioners challenge—issuing the renewed licenses—does not rest on how the agency interpreted Section 51.53(c)(3), Petitioners cannot claim that the agency's interpretation altered the outcome here. In any event, Petitioners' reading of Section 51.53(c)(3) is fundamentally flawed and the agency's contrary interpretation deserves deference.

A. The agency's application of Section 51.53(c)(3) provides no basis for setting aside the agency's licensing decision

Petitioners ignore the circumscribed role that Section 51.53(c)(3) plays in license renewal decisions. That limited role dooms Petitioners' efforts to challenge the NRC's application of Section 51.53(c)(3) in this Court. Although Petitioners can petition for review to ensure the NRC's compliance with NEPA, *see infra* Section II, they cannot use Section

51.53(c)(3) as an independent basis for challenging the license renewals given Section 51.53(c)(3)'s function in the NRC's decisionmaking process.

1. Section 51.53(c)(3)'s function is limited and confined to the start of the license renewal process

Section 51.53(c)(3) falls within a broader set of regulations (10 C.F.R. pt. 51) designed to help the NRC fulfill its NEPA obligations. *See* 10 C.F.R. §§ 51.1(a), 51.10(a). Section 51.53(c) is the provision addressing the environmental reports that the NRC requires license renewal applicants to submit "in order to aid the Commission in complying with section 102(2) of NEPA." *Id.* § 51.14(a). First, Section 51.53(c)(2) describes the information that must be included in all license renewal applicants' environmental reports. Next, Section 51.53(c)(3) articulates certain further "conditions and considerations" that apply to environmental reports for "those applicants seeking an initial renewed license and holding an operating license, construction permit, or combined license as of June 30, 1995." *Id.* § 51.53(c)(3). Among other things, "[t]he environmental report for the operating license renewal stage is not required to contain analyses of the environmental impacts of the license renewal issues identified as Category 1 issues in appendix B to subpart A of this part." *Id.* § 51.53(c)(3)(i).

The distinction between "Category 1" and "Category 2" issues has been central to the NRC's approach to license renewals for a quarter century. *See Massachusetts*, 522 F.3d at 119-20. Category 1 issues are issues that can be addressed generically because they apply to all plants or all plants in a particular sub-class, while Category 2 issues are issues that need to be addressed on a plant-by-plant basis. *See id.* at 120. Rather than analyzing "generic Category 1 issues afresh with each individual plant operating license application, . . . the agency conducted an extensive survey and generated findings, contained within [the GEIS], that answer Category 1 issues as to all nuclear power plants." *Id.* The findings in this GEIS underwent a rulemaking in 1996, were revisited and adjusted during a rulemaking in 2013, and are codified in Table B-1 of Appendix B to Subpart A of 10 C.F.R. Part 51. *See* Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 28,467 (June 5, 1996); 2013 Final Rule, 78 Fed. Reg. 37,282.

Under this approach, a license-renewal "applicant need only submit plant-specific information for Category 2 issues, as the Category 1 GEIS findings can generally be incorporated wholesale." *NRDC I*, 823 F.3d at 646 (citations omitted). At the same time, however, a license-renewal

environmental report still must address "any new and significant information regarding the environmental impacts of license renewal of which the applicant is aware"—even if that information concerns Category 1 issues. 10 C.F.R. § 51.53(c)(3)(iv); *NRDC I*, 823 F.3d at 646.

Yet the environmental report remains just a means to an end: the NRC's compliance with NEPA. The environmental report is "essentially the applicant's proposal" for the NRC staff's draft EIS. Final Rule, Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,172 (Aug. 11, 1989). NRC staff use applicants' environmental reports to prepare their own EIS, starting with a draft SEIS, which focuses on Category 2 issues and complements the GEIS's discussion of Category 1 issues. *See NRDC I*, 823 F.3d at 646; *Massachusetts*, 522 F.3d at 120. "The public then has an opportunity to comment on the draft SEIS, and NRC staff prepare a final SEIS only after reviewing the comments." *NRDC I*, 823 F.3d at 646.

The NRC staff's obligations in preparing the draft and final SEIS documents are not governed by Section 51.53(c). They are governed by separate regulations that detail what information the agency is obligated to address. *See* 10 C.F.R. § 51.71(d) (draft SEIS); *id.* § 51.95(c) (final

SEIS). There is no argument that either of these regulations is restricted to initial license renewals; they apply to any "license renewal." *Id.* §§ 51.71(d), 51.95(c). And they expressly require the NRC to "rely on conclusions as amplified by the supporting information in the GEIS for issues designated as Category 1 in appendix B to subpart A of this part." *Id.* § 51.71(d); *accord id.* § 51.95(c)(4) ("[T]he NRC staff, adjudicatory officers, and Commission shall integrate the conclusions in the generic environmental impact statement for issues designated as Category 1 with information developed for those Category 2 issues applicable to the plant under § 51.53(c)(3)(ii) and any new and significant information."). These regulations ensure that the agency's NEPA document always uses the GEIS's discussion of Category 1 issues, even when the application is for a subsequent (rather than initial) license renewal.

Contrary to Petitioners' suggestions, the GEIS contains no restriction limiting its application to initial renewals. On the contrary, it speaks broadly about renewing the license for an additional twenty years beyond the "current" term, JA__ (2013 GEIS 1-3, 1-7), and recognizes that there is no legal limitation on the number of times a license may be renewed, JA__ (2013 GEIS S-1). It consistently discusses the

effects of activities associated with a "license renewal term," a phrase that the 2013 version of the GEIS specifically defines to encompass initial and subsequent license renewals as the "period of time past the original *or current license term* for which the renewed license is in force." JA__ (2013 GEIS 7-27) (emphasis added). For this reason, the Board concluded that the 2013 GEIS "explicitly purports to assess the environmental impacts associated with a 20-year renewal period, regardless of whether this period follows the original license or a current renewed license." JA__[[LBP-19-3]] (89 N.R.C. at 270).

2. Because of its limited function, Section 51.53(c)(3) has no bearing on Petitioners' challenge to the license renewals

Given Section 51.53(c)(3)'s limited function in the broader regulatory framework, Petitioners have no basis for raising a standalone challenge to the NRC's interpretation of that provision. Even if Petitioners were correct in their interpretation of Section 51.53(c)(3), the NRC's interpretation of Section 51.53(c)(3) had no bearing on the agency decision that Petitioners challenge, granting the renewed licenses.

The Record of Decision confirms this. It does not invoke Section 51.53(c)(3), nor does it rely on FPL's Environmental Report. It relies on

the agency's own EIS, which renders Section 51.53(c)(3) and the Environmental Report moot. Petitioners are free to challenge that EIS's compliance with NEPA (although their challenge fails for the reasons discussed below in Section II), but they cannot relitigate the soundness of FPL's Environmental Report, as opposed to the agency's EIS, at this juncture. Indeed, remanding this case to the agency because of a purported impropriety in the Environmental Report "would be a meaningless gesture" contrary to this Court's precedent. *Ill. Com. Comm'n v. ICC*, 848 F.2d 1246, 1257 (D.C. Cir. 1988) (per curiam).

Petitioners' objection is particularly weak given their failure to articulate how Section 51.53(c)(3)'s implications for FPL's Environmental Report affected the result here. They identify no issue that they were precluded from bringing to the NRC's attention because of how the agency construed Section 51.53(c)(3). In conclusory terms, they assert (at 28) that "the NRC issued the renewed licenses without reviewing all of the potential environmental impacts." But they do not explain that vague assertion, much less connect the alleged inadequate review to the application of Section 51.53(c)(3). Nor do they explain how Section 51.53(c)(3) could itself have "render[ed] the Turkey Point environmental

analysis inadequate," Pet'rs' Br. 45, when Sections 51.71(d) and 51.95(c) required the agency to consider the same GEIS information. They simply ignore the obligations that Sections 51.71(d) and 51.95(c) place on the NRC staff. But as the Board (and Commission) repeatedly emphasized, those provisions undermine Petitioners' whole argument. JA__, JA__, JA__[[LBP-19-3]] (89 N.R.C. at 263 n.30, 267 & n.35, 274); JA__[[CLI-20-3 at 10-14]]. Petitioners thus fail to show that the interpretation of Section 51.53(c)(3) affected the action they challenge.

Petitioners cannot make up for that failure by insisting that the APA relieves them of having to prove such an effect. On the contrary, the APA underscores their obligation to show "prejudicial error." *See* 5 U.S.C. § 706; *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2385 (2020). There can be no showing of prejudice here given the regulations requiring the agency to use the GEIS's treatment of Category 1 issues. *See* 10 C.F.R. §§ 51.71(d), 51.95(c). The agency's NEPA document would have included that information regardless of whether FPL relied on it in FPL's Environmental Report.

Petitioners nevertheless contend (at 33-36, 43) that the APA required the NRC to conduct notice-and-comment rulemaking before

issuing its interpretation of Section 51.53(c)(3). But Petitioners do not explain how the NRC's willingness to let subsequent license renewal applicants use the GEIS Category 1 findings promulgates, amends, or repeals a legislative rule so as to trigger notice-and-comment requirements. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015). Contrary to Petitioners' assertions and as explained more fully in Section I.B. below, the agency did not amend Section 51.53(c)(3) or negate its language.

Besides, authorizing subsequent license renewal applicants to invoke Section 51.53(c)(3) or rely on GEIS Category 1 findings would at most be an interpretive rule or general statement of policy regarding the existing regulation or a rule of agency organization, procedure, or practice that simply "alter[s] the manner in which the parties present themselves or their viewpoints to the agency." *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 250, 252 (D.C. Cir. 2014) (citation omitted); *see* 5 U.S.C. § 553(b)(A). The NRC's interpretation of the regulation affects how license renewal applicants prepare their environmental reports, but it does not alter substantive rights or interests. Petitioners identify no environmental concern that could not be brought before the agency through some

sort of procedural mechanism—such as by seeking a waiver to challenge the GEIS's Category 1 findings or by identifying new and significant information that must be considered on a site-specific basis. And again, Section 51.53(c)(3) does not change the required contents of the agency's draft or final SEIS, alter the agency's obligation to comply with NEPA, or steer the NRC's ultimate decision on the license application.

NEPA does not provide a basis for Petitioners' standalone procedural challenge, either. "[T]he only procedural requirements imposed by NEPA are those stated in the plain language of the Act." *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 548 (1978). So although "NEPA 'does impose a requirement that the NRC consider any new and significant information regarding environmental impacts before renewing a nuclear power plant's operating license,' it 'does not require agencies to adopt any particular internal decision-making structure.'" *NRDC I*, 823 F.3d at 652 (citation omitted). In particular, NEPA says nothing about what sort of information the NRC should require from applicants to help the agency comply with its own NEPA obligations. And here too, the separate regulations governing draft and final SEIS documents prevent Petitioners from establishing

that the agency's interpretation of Section 51.53(c)(3) is in "conflict with NEPA, for it does not diminish the Commission's capacity to take environmental concerns into account in its decisionmaking." *Ill. Com. Comm'n*, 848 F.2d at 1259.

Petitioners make no real effort to show how their procedural challenge has any practical relevance to their substantive concerns. Although Petitioners include a footnote saying (at 19 n.13) that "most impacts to surface and groundwater" are treated as Category 1 issues under the GEIS, the NRC staff here treated the Cooling Canal System's potential to "indirectly impact the water quality of adjacent surface water bodies via a groundwater pathway" as "a new, site-specific issue" for which it prepared a non-generic, "site-specific analysis." JA__ (Final SEIS 4-22). The staff also considered potential groundwater impacts in light of "new information" about the Cooling Canal System that was unknown "at the time of the 2013 update to the GEIS." JA__ (Final SEIS 4-26). Accordingly, Petitioners cannot (and do not) contend that Section 51.53(c)(3) led the NRC staff to rely on the GEIS instead of analyzing Petitioners' water-resource concerns on a site-specific basis. The NRC staff *did* perform that site-specific analysis.

Instead, Petitioners briefly discuss (at 41-42) two Category 1 subjects unrelated to water-resource impacts—in an apparent effort to suggest that the GEIS does not consider certain environmental impacts during a subsequent renewal term. The first of these two subjects is the revision to the 1996 GEIS analysis of the environmental impacts from hypothetical severe accidents at a nuclear facility. *See* JA__ (2013 GEIS E-1 to E-2). The second is the GEIS's discussion of radiation exposure risks during a sixty-year period representing the original license term and initial renewal, as opposed to an eighty-year period encompassing two renewals. JA__ (2013 GEIS 4-138 to 4-139, 4-145).

But these issues are unrelated to the arguments Petitioners have advanced for denying FPL's application. Petitioners never raised *any* challenge to the NRC's evaluation of severe accident impacts, which received extensive site-specific discussion in the Final SEIS. JA__ (Final SEIS E-1 to E-24). Nor did they properly pursue any challenge to the GEIS's Category 1 findings on these issues by seeking the waiver that NRC regulations require. JA__[[LBP-19-3]] (89 N.R.C. at 270 n.40); *see* 10 C.F.R. § 2.335(a)-(b); *cf. New York v. NRC* (*New York II*), 824 F.3d 1012, 1021 (D.C. Cir. 2016) ("[T]he NRC's waiver provision provides an

adequate mechanism by which the petitioners can challenge the GEIS in site-specific proceedings.").[2]

It is telling that Petitioners' environmental arguments do not concern accidents or radiological exposure in this Court, either. Petitioners focus on water-resource impacts, *see* Pet'rs' Br. 44-58, which again the NRC staff assessed on a site-specific basis. Because those arguments are unrelated to Section 51.53(c) and fail for the reasons described below, *see infra* Section II, this Court's decision in *Potomac Alliance v. NRC*, 682 F.2d 1030 (D.C. Cir. 1982), is inapposite and offers Petitioners no support.

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[2] In addition to Petitioners' dispositive failure to seek a waiver to pursue the issue, Petitioners' argument concerning radiation exposure is unfounded even on its own terms. The relevant passages in the 2013 GEIS perform a straightforward incremental calculation of how much an individual person's fatal cancer risk increases during years forty to sixty if the risk increases at the same linear rate each year. JA__ (2013 GEIS 4-138 to 4-139, 4-145). A 50% increase in the time of exposure (sixty years rather than forty) leads to a 50% risk increase. *Id.* Using the same basic arithmetic, one can easily calculate the incremental effect on cancer risk for any length of exposure, including eighty years (which, being 33% longer than sixty years, would present a 33% risk increase beyond the sixty-year risk). In all events, as the GEIS notes, it is "unlikely" that a single person would be exposed for sixty straight years. *Id.* It is even more unlikely that a person would be exposed for *eighty*.

B. Petitioners' Section 51.53(c)(3) objection fails even on its own terms

Although there is no need for the Court to entertain Petitioners' interpretive arguments given Section 51.53(c)(3)'s lack of direct effect on the licensing decision, if the Court does so it should reject those arguments. The Court owes "substantial deference" to an agency's interpretation of its own procedural regulations. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *see also Beyond Nuclear, Inc. v. NRC*, 707 F. App'x 8, 8 (D.C. Cir. 2017) (per curiam). "The agency's interpretation 'will prevail unless it is "plainly erroneous or inconsistent" with the plain terms of the disputed regulation.'" *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 727 (D.C. Cir. 2016) (citation omitted); *see also Kisor v. Wilkie*, 139 S. Ct. 2400, 2411 (2019). Petitioners' reading of Section 51.53(c)(3) is unpersuasive on its own terms and certainly cannot overcome this deferential standard.

Petitioners portray their reading as required by the plain language of Section 51.53(c)(3). But that provision does not unambiguously require applicants for a subsequent license renewal to ignore or replace the GEIS's Category 1 findings. At most, Section 51.53(c)(3) simply imposes certain requirements for initial license renewal applicants and allows

their environmental reports not to include "analyses of the environmental impacts of the license renewal issues identified as Category 1 issues in appendix B to subpart A of this part." 10 C.F.R. § 51.53(c)(3)(i). The regulation does not directly address subsequent license renewal applicants. Still less does it unambiguously require them to reanalyze Category 1 environmental impacts. Nor does any other regulation. Petitioners' reading is based entirely on a perceived negative implication—that by saying that initial license renewal applicants must and may do certain things, the regulation implicitly means that *only* initial license renewal applicants must and may do those things.

As a result, Petitioners' "plain language" arguments are meritless. In substance, Petitioners' negative-implication argument invokes the canon of interpretation *"expressio unius est exclusio alterius* ('the expression of one is the exclusion of others')." *Tex. Rural Legal Aid, Inc. v. Legal Servs. Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991). But this Court has long held that, "[w]hatever its usefulness in other circumstances, . . . this canon has little force in the administrative setting." *Id.* And in any setting, "[t]he force of any negative implication . . . depends on context," with *expressio unius* applying "only when 'circumstances support[] a sensible

inference that the term left out must have been meant to be excluded.'" *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 940 (2017) (citation omitted). Such an inference is inappropriate when the included item was probably included because lawmakers thought it "was quite likely to arise." *Id.*

Just so here. When the NRC originally promulgated Section 51.53(c)(3) in 1996, it understandably was focused on initial license renewals, the sort of renewals that were soon to begin (with the first subsequent license renewal application decades away). *See* 1996 Final Rule, 61 Fed. Reg. at 28,487. As the Board concluded, "the word 'initial' in section 51.53(c)(3) is properly viewed as a non-restrictive reference to the category of renewals the agency was then contemplating." JA__[[LBP-19-3]] (89 N.R.C. at 266 n.33). At most, Section 51.53(c) is merely silent about the requirements for subsequent license renewals. But "[t]o the extent this silence renders the regulations ambiguous . . . , the Commission's interpretation is hardly 'plainly erroneous.'" *U.S. Telecom Ass'n*, 825 F.3d at 727 (citation omitted).

In fact, Petitioners' interpretation would create a conflict between Section 51.53(c) and the broader regulatory framework. Contrary to Petitioners' claims (at 36-37), it would be improper to analyze the language

of Section 51.53(c)(3) "in a vacuum." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016) (citation omitted). Instead, reviewing courts evaluate whether a regulation is subject to multiple reasonable interpretations "based on indicia like text, structure, history, *and* purpose." *Kisor*, 139 S. Ct. at 2424 (emphasis added). That is the sort of "holistic" analysis that the Board and Commission appropriately adopted. JA__[[LBP-19-3]] (89 N.R.C. at 265); JA__[[CLI-20-3 at 9-10]].

The broader regulatory framework confirms the implausibility of Petitioners' interpretation of Section 51.53(c)(3). As detailed above, the environmental report is merely an applicant's proposal for the agency's EIS, which is required to use the GEIS discussion of Category 1 issues. *See supra* Section I.A.1. Requiring applicants to ignore the GEIS discussion of Category 1 issues would result in environmental reports that "contain an overwhelming amount of information that would be of no assistance to the NRC Staff in its preparation of the draft SEIS" and would undermine the regulation's stated purpose of "improv[ing] the efficiency of the process of environmental review for applicants seeking to renew an operating license." JA__[[LBP-19-3]] (89 N.R.C. at 266 n.34) (quoting 1996 Final Rule, 61 Fed. Reg. at 28,467). For this reason too, the NRC's

interpretation of 51.53(c) is superior and entitled to deference. *Cf. N.Y. State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 419-20 (1973) ("We cannot interpret federal statutes to negate their own stated purposes.").

II. The Court should reject Petitioners' challenges to the agency's compliance with NEPA

Petitioners contend (at 44-58) that the NRC failed to comply with NEPA by renewing the Turkey Point operating licenses without giving sufficient consideration to the renewals' effect on water resources. These arguments disregard the NRC staff's comprehensive analysis of potential water-resource impacts in the EIS and the Board's sound reasons for rejecting Petitioners' arguments.

A. Petitioners cannot overturn the NRC's decision by ignoring the agency's evidence and conclusions

"Judicial review of an environmental impact statement ensures that the agency 'has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.'" *Nuclear Info. & Res. Serv. v. NRC*, 509 F.3d 562, 568 (D.C. Cir. 2007) (citation omitted). The Court's "job is to ensure that the agency took a 'hard look' at the environmental consequences of its decision to go forward with the project." *Nat. Res. Def. Council v. NRC* (*NRDC II*), 879

F.3d 1202, 1208 (D.C. Cir. 2018) (citation omitted). Its "role is *not* to 'flyspeck an agency's environmental analysis, looking for any deficiency no matter how minor.'" *Id.* (emphasis added) (citation omitted). After all, "NEPA itself does not mandate particular results, but simply prescribes the necessary process." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). For that reason, "NEPA is 'not a suitable vehicle' for airing grievances about the substantive policies adopted by an agency, as 'NEPA was not intended to resolve fundamental policy disputes.'" *Mayo v. Reynolds*, 875 F.3d 11, 16 (D.C. Cir. 2017) (citation omitted).

Petitioners fail to identify any particular flaws in the agency's decisionmaking that could support their NEPA challenge. On the contrary, it is evident that "[t]he NRC thoroughly examined the environmental consequences" of renewing the licenses in a detailed SEIS that exceeded 650 pages. *Nuclear Info. & Res. Serv.*, 509 F.3d at 569. Petitioners simply ignore much of the agency's discussion—including well over 100 pages in the EIS that examined potential water-resource impacts. *See* JA__, JA__, JA__, JA__ (Final SEIS 3-31 to 3-107, 4-21 to 4-36, 4-128 to 4-133, A-74 to A-130). The SEIS cited specific evidence that FPL's efforts

to improve Cooling Canal System salinity levels through "freshening"—adding low-saline water or freshwater—are already helping control and reduce canal salinity. For instance, the NRC staff observed that "[d]uring the first full year of freshening (June 1, 2017, through May 31, 2018), the average [Cooling Canal System] salinity was 49.5 PSU [*i.e.*, practical salinity units], which is 10.8 PSU lower than the previous year's (June 1, 2016, to May 31, 2017) average salinity of 60.3 PSU." JA__ (Final SEIS 3-55); *see also* JA__ (Final SEIS 3-59) ("Considering that the highest [Cooling Canal System] yearly salinity was 82.5 PSU (June 2014 through May 2015), it appears that a substantial reduction in [Cooling Canal System] salinity has occurred over the past several years, in part as a result of FPL's actions.").

Petitioners also ignore the Board's discussion. The Board emphasized that the evidence and analysis in the SEIS refute Petitioners' claim "that FPL's efforts to reduce the salinity in the [Cooling Canal System] have been unsuccessful." JA__[[LBP-19-08 at 22]]. The SEIS instead "shows that FPL's freshening efforts have achieved a measure of success." *Id.* It did not merely "assume[] success," as Petitioners assert (at 45). Petitioners make no effort to explain how the Board's interpretation

of or reliance on the SEIS is arbitrary and capricious. They merely repeat arguments they advanced to the Board without addressing the Board's reasoning.

B. The agency did not abdicate its NEPA responsibilities by taking state and local oversight into account

Petitioners raise a specific objection (at 46-49) to the NRC staff's observation that state and local regulators continually monitor water quality around Turkey Point. In particular, a consent agreement with Miami-Dade County obligates FPL to maintain freshening efforts; and a consent order with the Florida Department of Environmental Protection "requires FPL to maintain the average annual salinity of the [Cooling Canal System] at or below 34 PSU" beginning "by the end of the fourth year of freshening activities." JA__ (Final SEIS 3-56). Were FPL to fail to achieve that target, it would be obligated to submit a new plan "detailing additional measures, and a timeframe, that FPL will implement to achieve the threshold." JA__ (Final SEIS 3-56 to 3-59). The NRC staff recognized that "it cannot be guaranteed that the FPL will achieve the 34 PSU threshold within the 4-year timeframe." JA__ (Final SEIS 3-57). Nevertheless, the staff concluded that these "continued actions by FPL and regulatory oversight by the [Florida Department of Environmental

Protection] provide additional assurance that the [Cooling Canal System] should reach the required PSU levels within the 13-year period prior to the beginning of the subsequent license renewal period." *Id.*

It was not arbitrary and capricious for the NRC staff to take this regulatory oversight into account as a source of "additional assurance," particularly given the staff's independent review of the freshening efforts' effects to date. In fact, this Court has already rejected the argument Petitioners are advancing. For example, in *City of Oberlin v. FERC*, 937 F.3d 599, 610 (D.C. Cir. 2019), petitioners argued that the Federal Energy Regulatory "Commission impermissibly delegated its obligations under NEPA to independently review . . . potential adverse impacts" by allegedly over-relying on an applicant's "commitment to comply with safety standards promulgated by . . . a division of the Department of Transportation." But this Court "held that it is reasonable for the Commission to reference such standards as a component of its review of a pipeline's safety risks" and to "detail how . . . compliance with [those] standards would address the specific safety concerns that commenters raised." *Id.*; *see also EarthReports, Inc. v. FERC*, 828 F.3d 949, 957-58 (D.C. Cir. 2016) (rejecting objections that considering a state agency's

views was "an abdication of responsibility" and that relying on a federal agency's ability to "direct appropriate measures" was unreasonable (citation omitted)).

Those cases are consistent "with NEPA's reliance on procedural mechanisms—as opposed to substantive, result-based standards." *Robertson*, 490 U.S. at 353. As the Supreme Court has explained, "[t]here is a fundamental distinction . . . between [NEPA's] requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated . . . and a substantive requirement that a complete mitigation plan be actually formulated and adopted," which NEPA does *not* impose. *Id.* at 352.

For this reason, Petitioners miss the mark in complaining (at 47-48) that state and local regulators would revisit FPL's freshening efforts if those efforts do not achieve existing targets. Where, as here, "state and local governmental bodies . . . have jurisdiction over the area in which the adverse effects need be addressed" as well as "the authority to mitigate them, it would be incongruous to conclude that the [federal agency] has no power to act until the local agencies have reached a final conclusion on what mitigating measures they consider necessary." *Robertson*, 490

U.S. at 352-53. As this Court has recognized, "[a]llowing adaptable mitigation measures is a responsible decision in light of the inherent uncertainty of environmental impacts, not a violation of NEPA." *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 517 (D.C. Cir. 2010). Indeed, "NEPA does not require agencies to discuss any particular mitigation plans that they might put in place, nor does it require agencies—or third parties—to effect any." *New York II*, 824 F.3d at 1017 (citation omitted).

The cases Petitioners cite on this topic do not support them. Several of the cases upheld the agency actions, and they all addressed materially different circumstances—including, mostly notably, that the federal agencies in those cases had *declined* to prepare an EIS. *See Idaho ex rel. Idaho Pub. Utils. Comm'n v. ICC*, 35 F.3d 585, 595 (D.C. Cir. 1994) (agency prepared no EIS and merely required applicant "to consult with various federal and state agencies"); *North Carolina v. FAA*, 957 F.2d 1125, 1128 (4th Cir. 1992) (denying petition for review even though agency had declined to prepare an EIS because the agency independently reviewed and adopted another federal agency's assessment); *Ill. Com. Comm'n*, 848 F.2d at 1248, 1258 (upholding agency procedure because it

obligated agency to prepare "an environmental assessment" reflecting "independent staff investigation and evaluation"); *New York I*, 681 F.3d at 481 (ruling that NRC could not avoid preparing an EIS based on the agency's predictions about environmental impacts nearly 100 years into the future).

Here on the other hand, "unlike in *New York I*" and the other cases Petitioners cite, "the NRC has done exactly what NEPA requires for major federal actions; it prepared an environmental impact statement." *New York II*, 824 F.3d at 1017. "So long as that environmental impact statement complies with NEPA, . . . no more is required." *Id.*

The Final SEIS complies with NEPA. The Board correctly explained that the NRC staff did not base its analysis "solely on the existence of enforcement requirements and continuing oversight of Florida and Miami-Dade County." JA__[[LBP-19-8 at 23]]. It based its analysis on, among other things, "(1) the Staff's independent assessment of FPL's modeling for freshening the [Cooling Canal System]; and (2) the Staff's review of FPL's freshening plans and its progress in achieving freshening goals." JA__[[LBP-19-8 at 23-24]]. Petitioners do not acknowledge the Board's reasoning, or make any effort to explain why it is arbitrary and

capricious. As the Board recognized, and in line with *City of Oberlin*, *EarthReports*, *Robertson*, and other cases, the Final SEIS's discussion of state and local oversight in no way detracts from the NRC staff's analysis of water-resource impacts. If anything, it would have been unreasonable for the NRC *not* to take account of that continuing oversight of FPL's ongoing monitoring and freshening efforts.

C. The agency properly analyzed the license renewal's impacts on water resources

The remainder of Petitioners' NEPA challenge (at 49-58) similarly rests on mischaracterizations of the agency's decisionmaking. Petitioners assert that the agency was overly optimistic that freshening would help reduce canal saline levels. But Petitioners cannot prevail simply because the Board "came to a contrary conclusion," especially when that conclusion is about "a technical subject as to which [courts] owe the Commission some deference." *NRDC II*, 879 F.3d at 1214. Petitioners must identify some specific arbitrary and capricious step in the agency's decisionmaking. They cannot do so simply by (again) citing cases in which agencies declined to prepare an EIS. *See Am. Rivers v. FERC*, 895 F.3d 32, 49 (D.C. Cir. 2018). The agency here thoroughly addressed each of Petitioners' concerns and reasonably concluded that they lack merit.

For instance, Petitioners reassert (at 51-53) their argument that one of the models that the NRC staff considered—FPL's "Tetra Tech 2014a" model—was based on an unrepresentative 22-month dataset. But Petitioners do not dispute that "[t]he NRC staff and its contractors reviewed the underlying assumptions that formed the basis of [this] model and did not identify any significant issues." JA__ (Final SEIS 3-58). Nor do they dispute that FPL specifically raised this issue in its comments, explaining that "[a]s a result of continued monitoring, the model ha[d] been updated and further refined using a longer data record" and that this newer, refined model indicated that "a longer period of time would be needed to reduce the average annual [canal] salinity in the event of extended dry period or drought." JA__ (Final SEIS A-103). That is the same point that FPL's counsel made at oral argument before the Board, which Petitioners inaccurately portray as a concession that the original model was fatally flawed. JA__[[Tr. 428-29]]. On the contrary, it shows that the model can be calibrated based on new data to refine its accuracy. Petitioners also try to exaggerate this model's significance in the Final SEIS. In reality, the NRC staff acknowledged that the model might not yield perfect predictions. Specifically, "if drier conditions were to prevail,

more freshening water or longer timeframes may be needed to mitigate elevated [canal] salinities." JA__ (Final SEIS A-103 to A-104). Thus, contrary to Petitioners' claim that "the NRC swept the problem under the rug," Pet'rs' Br. 53, the SEIS fully discloses and considers this source of uncertainty in the modeling. NEPA requires nothing more.

Petitioners attempt to turn this caution against the NRC by arguing (at 54) that drier conditions will indeed prevail because of climate change. But the NRC staff acknowledged the potential effects of climate change, which do not show that FPL's freshening efforts are doomed to fail—let alone that the NRC's contrary conclusion was arbitrary and capricious. The NRC staff admitted that those freshening efforts may take longer than anticipated or may need to be reevaluated based on actual experience. Petitioners suggest (at 54-55) that this acknowledged "uncertainty in timing and the ultimate effectiveness of the mitigative actions" reflects insufficient efforts by the agency to make reasonable forecasts. JA__ (Final SEIS A-89). But Petitioners' arguments are internally inconsistent, for Petitioners simultaneously fault the agency (at 55) for projecting that freshening will probably improve salinity levels before the start of the renewed license term. Nor was it arbitrary and capricious for

NRC staff to conclude that if FPL does not satisfy its target within a four-year timeframe, FPL is nonetheless likely to meet that target within thirteen years. JA__ (Final SEIS 3-57); *see also* JA__ (Final SEIS 4-29) ("The staff's current impacts projection . . . considers the fact that the subsequent license renewal term does not commence until 2032 and 2033, for Units 3 and 4, respectively, affording a substantial period of time for ongoing groundwater remediation activities to be effective and improvement in groundwater quality to be accomplished prior to and during the subsequent period of extended operations."). In other words, the agency's analysis contemplated the possibility of a substantial margin of error in the modeling (*i.e.*, 13 years rather than 4 years) but determined that even under this remote and unlikely scenario, its impact conclusion would remain unchanged. Petitioners fail to explain how this conservative forecast violates NEPA's rule of reason.[3]

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[3] Petitioners' reliance (at 54) on *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017), is misplaced. In that case, the agency failed to assess an entire category of reasonably foreseeable effects from its proposed action. *Id.* at 1371-72. Here, although Petitioners may be dissatisfied with the NRC's conclusions or quantitative estimates, they cannot make a comparable claim. Similarly, in *AquAlliance v. U.S. Bureau of Reclamation*, 287 F. Supp. 3d 969, 1028-29 (E.D. Cal. 2018), the agency failed to ground its decision in anticipated future conditions caused by climate change. Here, in contrast, the NRC staff directly

Petitioners also err in claiming (at 55-56) that there is some inconsistency between the NRC staff's expectation that climate change may have adverse cumulative effects on groundwater resources in the various ways that the agency identified, JA__ (Final SEIS 4-132 to 4-133), and its conclusion that the renewal-term impacts from the Cooling Canal System, specifically, will be small, JA__ (Final SEIS 4-28). As the SEIS stressed repeatedly, FPL is able (and obligated) to adjust its behavior to maintain specific canal salinity levels regardless of future weather conditions.

Finally, because the NRC staff's assessment of salinity levels did not violate its NEPA obligations, there are no grounds for Petitioners' contention (at 57-58) that the agency needs to reassess alternative actions.

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analyzed the anticipated effects of climate change and found that on a cumulative basis they probably *would* adversely affect groundwater resources. JA__ (Final SEIS 4-132 to 4-133). Given that conclusion, Petitioners cannot establish that the NRC was obligated to perform more extensive modeling. *See, e.g.*, *New York II*, 824 F.3d at 1020 ("[T]he NRC need not provide a perfect analysis, only one that is 'thorough and comprehensive[.]'" (citation omitted)); *Indian River Cnty. v. U.S. Dep't of Transp.*, 945 F.3d 515, 533 (D.C. Cir. 2019) ("NEPA does not demand perfection. Instead, it requires that an agency take a 'hard look' at the reasonably foreseeable impacts of a proposed major federal action." (citation omitted)).

CONCLUSION

For all these reasons, the Court should either dismiss or deny the Petition for Review.

Dated: September 21, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Circuit Rule 32(e)(2)(B) because it contains 8,486 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1).

This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared using Microsoft Word 2016 in Century Schoolbook 14-point font, a proportionally spaced typeface.

Dated: September 21, 2020

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