UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Stephen G. Burns, Chairman
Kristine L. Svinicki
Jeff Baran

In the Matter of FLORIDA POWER & LIGHT CO. (Turkey Point Nuclear Generating Units 3 and 4)	Docket Nos. 50-250-LA 50-251-LA

CLI-16-18

MEMORANDUM AND ORDER

Citizens Allied for Safe Energy, Inc. (CASE) challenges the Atomic Safety and Licensing Board's ruling on the merits of Contention 1 in this license amendment matter.[1] For the reasons stated below, we deny review.

I. BACKGROUND

Turkey Point Nuclear Generating Station employs a cooling canal system as its ultimate heat sink. As described by the Board, "[a]fter being discharged from the plant into the cooling canal system, heated water flows over a 13-mile loop before returning to the plant, where the water is recirculated for cooling purposes and the entire process is repeated."[2] The renewed

[1] *Citizens Allied for Safe Energy Petition for Review* (June 27, 2016) (Petition); *see* LBP-16-8, 83 NRC 417 (2016).

[2] LBP-16-8, 83 NRC at 421 (citation omitted).

operating licenses for Units 3 and 4 included Technical Specifications that set an upper limit on the water temperature in the ultimate heat sink at 100 degrees Fahrenheit (°F).[3] If the temperature limit were to be exceeded, the licensee, Florida Power & Light Company (FPL), was required to shut down the plant.[4]

In July 2014, the water temperature in the cooling canal system approached the 100°F limit.[5] As a result, FPL requested license amendments to increase the ultimate heat sink temperature at Units 3 and 4 from 100°F to 104°F and to revise related surveillance requirements for monitoring the ultimate heat sink temperature and component cooling water heat exchangers.[6] FPL requested expedited consideration of the proposed amendments.[7]

The NRC Staff published the Environmental Assessment and Finding of No Significant Impact for these license amendments in the *Federal Register* on July 31, 2014.[8] Concurrently, the Staff determined that the amendments involved no significant hazards considerations and

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[3] Ex. FPL-008, Letter from Michael Kiley, FPL, to NRC Document Control Desk, "License Amendment Request No. 231, Application to Revise Technical Specifications to Revise Ultimate Heat Sink Temperature Limit" (July 10, 2014), Attachment to Enclosure (ADAMS accession no. ML16015A380) (Application).

[4] LBP-16-8, 83 NRC at 421 (citation omitted).

[5] *Id.*

[6] Ex. FPL-008, Application, Enclosure at 2.

[7] FPL initially requested that the application be approved by August 30, 2014. *Id.*, Cover Letter at 1. Shortly thereafter, in a supplement to the application, FPL requested that the NRC approve the application on an emergency basis. Ex. NRC-011, Letter from Michael Kiley, FPL, to NRC Document Control Desk, "License Amendment Request No. 231, Application to Revise Ultimate Heat Sink Temperature Limit—Request for Emergency Approval" (July 17, 2014), at 1 (ML16015A355) (requesting "timely review of this application to avoid . . . a [dual-unit] shutdown [that] would impact grid reliability"); *see* 10 C.F.R. § 50.91(a)(5).

[8] Ex. NRC-009, Florida Power & Light Company; Turkey Point Nuclear Generating Unit Nos. 3 and 4; Environmental Assessment and Finding of No Significant impact, 79 Fed. Reg. 44,464 (July 31, 2014).

indicated that it would process FPL's license amendment request under the regulations applicable to amendments granted under exigent circumstances.[9] The Staff approved the amendments on August 8, 2014, and published a notice of issuance in the *Federal Register*.[10] As approved by the Staff, the license amendments revise the ultimate heat sink water-temperature limit in the Technical Specifications and the related surveillance requirements.[11]

In response to the notice of issuance, CASE requested and was granted a hearing. The Board admitted Contention 1 for hearing, related to the environmental impacts of the proposed action, as follows:

> The NRC's environmental assessment, in support of its finding of no significant impact related to the 2014 Turkey Point Units 3 and 4 license amendments, does not adequately address the impact of increased temperature and salinity in the [cooling canal system] on saltwater intrusion arising from (1) migration out of the [cooling canal system]; and (2) the withdrawal of fresh water from surrounding aquifers to mitigate conditions within the [cooling canal system].[12]

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[9] Florida Power & Light Company; Turkey Point Nuclear Generating Units 3 and 4, License Amendment Application; Opportunity to Comment, Request a Hearing, and Petition for Leave to Intervene, 79 Fed. Reg. 44,214, 44,215 (July 30, 2014); *see* 10 C.F.R. § 50.91(a)(6) (setting forth the notice and comment process for those circumstances involving a license amendment where the NRC finds that exigent circumstances exist, in that a licensee and the NRC must act quickly and that time does not permit 30 days' notice for prior public comment, and the amendment involves no significant hazards considerations). This notice also included an opportunity for interested persons to request a hearing.

[10] Ex. NRC-006, Letter from Audrey L. Klett, NRC, to Mano Nazar, NextEra Energy (Aug. 8, 2014) (ML16015A349) (License Amendments Issuance); *see* Florida Power & Light Company; Turkey Point Nuclear Generating Units 3 and 4; License Amendment; Issuance, Opportunity to Request a Hearing, and Petition for Leave to Intervene, 79 Fed. Reg. 47,689 (Aug. 14, 2014). In this notice, the Staff reset the period to request a hearing. *Id.* at 47,690.

[11] Ex. NRC-006, License Amendments Issuance at 1.

[12] LBP-16-8, 83 NRC at 423 (as reformulated by the Board).

Following an evidentiary hearing in January 2016, the Board "conclude[d] that the [Environmental Assessment] fails to satisfy the requirements of the National Environmental Policy Act (NEPA) because of its deficient discussion of saltwater migration, saltwater intrusion, and aquifer withdrawals."[13] But the Board found that the evidence developed during the adjudicatory proceeding cured the identified deficiencies in the Environmental Assessment and obviated the need for the Staff to further revise it.[14]

The Board found that it could uphold the Staff's proposed action despite deficiencies in the Staff's NEPA documents "if sufficient evidence is developed in an adjudicatory proceeding concerning the environmental impacts of the proposed action."[15] As the Board explained, "[i]n such situations, the licensing board's findings and conclusions are deemed to amend the NRC Staff's NEPA documents and become the agency record of decision on those matters."[16] The Board generated a robust record in this proceeding based on an evidentiary hearing, written testimony, and exhibits. Based on this record, the Board found that the Environmental Assessment, as supplemented, fulfills the agency's NEPA obligation to take a "hard look" at environmental impacts and justifies the finding of no significant environmental impact.[17]

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[13] *Id.* at 420.

[14] *Id.* at 420-21.

[15] *Id.* at 447 (citing *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-15-6, 81 NRC 340, 388 (2015)).

[16] *Id.* (citing *Indian Point,* CLI-15-6, 81 NRC at 387-88; *Friends of the River v. Fed. Energy Regulatory Comm'n*, 720 F.2d 93, 106 (D.C. Cir. 1983)).

[17] *Id.* at 460; *see also id.* at 451, 455, 457.

CASE now petitions for review and seeks "proper and appropriate redress and relief of [its members'] proven grievances."[18] FPL and the Staff oppose the Petition; CASE replied to those answers.[19]

II. DISCUSSION

We will grant a petition for review at our discretion, upon a showing that the petitioner has raised a substantial question as to the following:

(i) a finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;

(ii) a necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;

(iii) a substantial and important question of law, policy, or discretion has been raised;

(iv) the conduct of the proceeding involved a prejudicial procedural error; or

(v) the proceeding raises any other consideration that we may deem to be in the public interest.[20]

We review questions of law *de novo*, but we defer to the Board's findings with respect to the underlying facts unless the findings are "clearly erroneous."[21] The standard for showing

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[18] Petition at 24.

[19] *Florida Power & Light Company's Answer Opposing CASE's Petition for Review of LBP-16-08* (July 22, 2016); *NRC Staff's Response to Citizens Allied for Safe Energy Petition for Review* (July 22, 2016); *Citizens Allied for Safe Energy Answer to NRC Staff and FPL Regarding Petition for Review* (Aug. 1, 2016) (Reply).

[20] 10 C.F.R. § 2.341(b)(4).

[21] *Honeywell International, Inc.* (Metropolis Works Uranium Conversion Facility), CLI-13-1, 77 NRC 1, 18-19 (2013).

"clear error" is a difficult one to meet—a petitioner must demonstrate that the Board's determination is "not even plausible" in light of the record as a whole.[22]

Fundamentally, CASE challenges the legality of the Board's decision to supplement the environmental record.[23] This practice, however, has a long history at the agency. The Board cited to case law from the Commission, the Atomic Safety and Licensing Appeal Board, and the United States Court of Appeals for the D.C. Circuit to support its approach, and CASE does not call these authorities into question.[24] As we recently explained, our hearing procedures "[allow] for additional and a more rigorous public scrutiny of the [FSEIS] than does the usual 'circulation for comment.'"[25] When the environmental record of decision is supplemented by the adjudicatory process, the disclosure purpose of NEPA is satisfied through the public vetting of environmental issues at an evidentiary hearing and issuance of a decision; consequently, the Staff is not required to otherwise supplement or amend its NEPA documents.[26] Relatedly, CASE asserts that the Board should have addressed the process that the Staff followed in

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[22] *See, e.g.*, *Shaw AREVA MOX Services, LLC* (Mixed Oxide Fuel Fabrication Facility), CLI-15-9, 81 NRC 512, 519 (2015).

[23] *See* Petition at 5.

[24] LBP-16-8, 83 NRC at 447. In *Friends of the River*, the Federal Court of Appeals for the District of Columbia Circuit declined to remand a NEPA case where the Federal Energy Regulatory Commission had issued a public order during the adjudicatory process that cured the deficiencies in the Environmental Impact Statement. 720 F.2d at 106.

[25] *Indian Point*, CLI-15-6, 81 NRC at 388 (quoting *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 707 (1985), *aff'd in part*, CLI-86-5, 23 NRC 125 (1986), *remanded in part on other grounds sub nom. Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719 (3d Cir. 1989)). Allowing the adjudicatory proceeding to supplement an environmental assessment, in the same manner as is done for environmental impact statements, is also appropriate. *See Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-26, 68 NRC 509, 526 (2008).

[26] LBP-16-8, 83 NRC at 447 (citing *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-262, 1 NRC 163, 197 n.54 (1975)).

conducting the Environmental Assessment and issuing the Finding of No Significant Impact.[27] At issue in the hearing, however, was the single contention admitted by the Board—regarding the adequacy of the Environmental Assessment's discussion of particular impacts—not the Staff's process for preparing the environmental assessment. CASE's dissatisfaction with supplementation generally, and with the Staff's NEPA process in this case, does not present an issue for review.

Below, we address CASE's remaining asserted errors related to the Staff's NEPA process and the Board's factual findings. CASE raises issues that are either outside the scope of this license amendment proceeding or are insufficiently supported to challenge the Board's decision. Moreover, CASE has not identified any legal or factual error in the Board's decision, either as a result of how it weighed the evidence or as a result of the supplementation. In sum, CASE has not raised a substantial question for review of the Board's decision.

1. Adequacy of the NRC Staff's NEPA Review

CASE takes issue with the Board's decision for the Board's asserted failure to explore the underlying cause of the conditions being experienced in the cooling canal system.[28] CASE further claims that the NRC is "responsible for the safe and ecologically neutral operation of the

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[27] Petition at 6-7. To the extent that CASE challenges the NRC's NEPA process generally (*see id.* at 7-8), CASE presents an impermissible challenge to the agency's generally applicable rules. Such challenges are not cognizable in individual licensing proceedings. 10 C.F.R. § 2.335; *see also Vermont Yankee Nuclear Power Corp. and AmerGen Vermont, LLC* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 165-66 (2000). Further, to the extent that CASE suggests that the Board should have directed a change in the Staff's internal procedures, licensing boards lack the authority to direct the Staff's non-adjudicatory actions, and therefore, such a remedy is beyond the scope of this proceeding. *See Shaw AREVA MOX Services, LLC* (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 NRC 55, 63 (2009).

[28] Petition at 8-9.

[cooling canal system]."[29] At issue in the admitted contention was whether the Staff's Environmental Assessment adequately described the existing environmental conditions in the cooling canal system and the reasonably foreseeable environmental impacts of the license amendment; resolution of the contention on the merits did not require a precise finding of the historical contributors to the conditions in the cooling canal system. The record nonetheless contains testimony and evidence related to the salinity levels in the canals through the years, purported causes for the rise in salinity, acknowledgement that the canals are a complex ecosystem, and FPL's mitigation measures.[30] CASE does not acknowledge, let alone challenge, these portions of the record and, therefore, does not identify any particular deficiency in the Board's decision.

In any event, NEPA does not mandate that an agency undertake studies to obtain information that is not already available, and CASE does not support its claim that the NRC must undertake studies to determine the cause of particular environmental conditions or to determine the best mitigation measures for a potential environmental harm.[31] The Staff's

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[29] *Id.* at 8.

[30] *See, e.g.*, Tr. at 412-17 (testimony of Mr. Bolleter and Mr. Scroggs, for FPL, discussing conditions in the cooling canal system as they relate to algae blooms, drought, FPL actions to manage sediment and flow distribution in the system, and power operation of all units); Ex. NRC-001, NRC Staff Testimony of Audrey L. Klett, Briana A. Grange, William Ford, and Nicholas P. Hobbs Concerning Contention 1 (Nov. 10, 2015), at 27-29 (testimony of Mr. Ford, for the Staff, describing the increase in the cooling canal system's salinity over time due to evaporation, the migration of higher salinity water from the canals into the Biscayne Aquifer underneath the canals, and the framework agreed to by FPL and the State for monitoring and potentially mitigating the hypersaline plume originating from the cooling canal system); Ex. NRC-044, Hughes et al., Effect of Hypersaline Cooling Canals on Aquifer Salinization, 18 Hydrogeology Journal 25 (2010) (ML16015A179) (non-public) (modelling effect of hypersaline cooling canals at Turkey Point on aquifer salinization).

[31] *See Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 and 4), CLI-12-7, 75 NRC 379, 391-92 (2012) (citations omitted) ("NEPA requires that we conduct our environmental review with the best information available today."); *see also Lee v. U.S. Air*

Environmental Assessment, combined with the Board's decision, disclosed the environmental impacts of the proposed action and discussed FPL's mitigation measures. CASE's assertion that the NRC must undertake studies and develop information does not raise a substantial question for review.

Similarly, CASE appears to call for the NRC to impose mitigation measures on FPL.[32] CASE claims that the Environmental Assessment, even when taken together with the Board's decision, does not remedy its members' potential for injury because the Biscayne Aquifer and surrounding waters are still being affected.[33] But NEPA, as a procedural statute, does not require any particular substantive result.[34] NEPA serves the purpose of environmental protection through "action-forcing" procedures that require agencies to take a "hard look" at environmental impacts and that provide for "broad dissemination of relevant environmental information."[35] Therefore, CASE has not identified any legal error in the Board's decision not to impose mitigation measures on FPL or direct other "substantive" actions related to water quality or saltwater migration.

Force, 354 F.3d 1229, 1244 (10th Cir. 2004); *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-16-7, 83 NRC 293, 323 (2016).

[32] *See, e.g.*, Petition at 7 (claiming need for "meaningful redress"), 22-23 (questioning the efficacy of mitigation measures due to reliance on computer analyses and criticizing the lack of "field testing" of proposed mitigation measures).

[33] *Id.* at 7.

[34] *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978); *Indian Point*, CLI-16-7, 83 NRC at 328 (quoting *Massachusetts v. NRC*, 708 F.3d 63, 78 (1st Cir. 2013)).

[35] *Methow Valley*, 490 U.S. at 350 (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)); *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-16-10, 83 NRC 494, 510 (2016).

Seemingly related to its argument that the NRC must impose mitigation measures on FPL, CASE disputes FPL's ability and willingness to follow any such measures due to its past violations of water quality standards.[36] CASE references, without more, a violation of an agreement with the South Florida Water Management District related to the movement of saline water from the cooling canal system and notice of violation issued by Miami-Dade County related to water quality.[37] But CASE does not link these two instances of past violations to the Board's decision and therefore does not raise a substantial question for review.[38]

Additionally, CASE argues that the NRC's NEPA review in this matter was flawed because there is a "limited official flow of information between the NRC Staff and State and local agencies."[39] Along the same lines, CASE challenges the Staff's point of contact for the State of Florida and would have us review these interactions.[40] As we previously held, however, the selection of the State official with whom the Staff consulted on the license amendment (an issue

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[36] Petition at 11-12 (citing LBP-16-8, 83 NRC at 452 (citing Ex. INT-004, Florida Department of Environmental Protection, Administrative Order, OGC No. 14-0741 (Dec. 23, 2014), ¶¶ 28-29; Ex. INT-005, Miami-Dade County, Notice of Violation and Orders for Corrective Action (Oct. 2, 2015), at 1 (ML16015A337) (Notice of Violation)).

[37] *Id.*

[38] In any event, we decline to assume that FPL will not comply with applicable requirements. The record indicates that FPL was issued a notice of violation by Miami-Dade County for exceeding groundwater standards for chlorides. LBP-16-8, 83 NRC at 429 (citing Ex. INT-005, Notice of Violation, at 1). But CASE has not shown a reason, for purposes of the NEPA review at issue here, to doubt that FPL will comply with environmental conditions required by State and local authorities. Indeed, the Notice of Violation, which resulted in a consent agreement between the County and FPL, demonstrates that FPL's compliance with other environmental requirements at Turkey Point is subject to ongoing oversight by the appropriate authorities. *See id.* (citing Ex. INT-006, Consent Agreement Between Miami-Dade County's Division of Environmental Resources Management and FPL (Oct. 6, 2015) (ML16015A339)).

[39] Petition at 9.

[40] *Id.* at 10.

initially identified not by CASE, but by the Board itself) is not within the scope of this proceeding.[41] Consequently, arguments related to that selection do not provide a basis for us to review the Board's decision. And in any event, CASE has not demonstrated a link between assertedly limited consultations between the Staff and State and local agencies and a specific deficiency in the environmental analysis. As a result, this claim does not present a substantial question for review.

2. CASE's Challenges to Board Factual Findings

In its petition, CASE also disputes various "ecological conclusions and statements in the Decision."[42] These assertions amount to thinly supported challenges to Board findings of fact. As noted above, CASE must demonstrate that the Board's findings are "not even plausible in light of the record viewed in its entirety."[43] None of CASE's asserted errors clears that bar. CASE does not explain how evidence in the record in any way contradicts the Board's decision.[44] Indeed, prior to the evidentiary hearing FPL and the Staff filed several motions

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[41] CLI-15-25, 82 NRC 389, 406 n.110 (2015).

[42] Petition at 13.

[43] *See, e.g.*, *MOX*, CLI-15-9, 81 NRC at 519.

[44] *See* Petition at 13-14 (arguing that the Board incorrectly found that CASE presented no evidence that the Biscayne Aquifer is freshwater but citing to portions of the testimony regarding the salinity of the L-31 E canal without demonstrating that the L-31E canal is part of the Biscayne Aquifer); *compare* Petition at 16-18 (arguing that the Board unreasonably found that adding saline water to the cooling canal system would reduce the spread of the hypersaline plume into the Biscayne Aquifer) *with* LBP-16-8, 83 NRC at 450 (concurring with the Applicant's modelling showing that diluting the salinity of the cooling canal system would reduce the spread of the plume); *compare* Petition at 18-20 (contending that the Board did not fully consider the impacts from withdrawals of freshwater from the Biscayne Aquifer and Upper Floridan Aquifer particularly with respect to "coning" and lowering of the water table) *with* LBP-16-8, 83 NRC at 454-56 (noting that FPL's modelling showed that the withdrawals from the Upper Floridan Aquifer would not "have a significant impact on the aquifer itself or on other users of the aquifer" and finding that proposed withdrawals from the Biscayne Aquifer were not freshwater and that CASE did not present any evidence to the contrary); *see* Petition at 20-23 (challenging the adequacy of the Board's finding regarding confinement of the aquifers by relying on a summary

pertaining to (among other things) the quality of CASE's evidence; it is clear that the Board took a lenient view and admitted into evidence all of the material CASE submitted relevant to Contention 1.[45] The Board's thorough decision demonstrates that it considered the entire record, including information and evidence put forth by CASE, FPL and the Staff, and CASE has not shown that the Board erred. Therefore, CASE does not present a substantial question for review with respect to the Board's findings of fact.

III. CONCLUSION

For the foregoing reasons, we *deny* the petition for review.

IT IS SO ORDERED.

For the Commission

NRC SEAL

/RA/

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Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 15th day of December 2016.

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of a report without demonstrating that the report applies to the aquifers in question). CASE also makes brief unsupported assertions regarding matters outside the scope of the proceeding—the Board's asserted failure to "address or redress" wildlife impacts in the area and the presence of cyanobacteria in the cooling canal system. *See* Petition at 15, 18.

[45] *See, e.g.*, Order (Denying Application for Subpoenas, Denying Motion for Summary Disposition, and Granting in Part and Denying in Part Motions to Strike) (Dec. 22, 2015), at 17 (unpublished) (Dec. 22, 2015, Order) (excluding only evidence outside the scope of admitted Contention 1). In its reply brief, CASE explains the lack of testimony resulted from the Board's refusal to subpoena witnesses. Reply at 3-4. But the record establishes that the Board gave CASE an opportunity to renew its request for the issuance of subpoenas, "an extraordinary remedy," and that CASE's requests did not meet our procedural requirements. Dec. 22, 2015, Order at 2-3 (internal quotations omitted); Order (Denying CASE's Application for Subpoenas) (Nov. 12, 2015), at 3 (unpublished).

Commissioner Baran, Dissenting

As I stated in my opinion dissenting in part in the *Strata* proceeding, a core requirement of NEPA is that an agency decisionmaker must consider an adequate environmental review *before* making a decision on a licensing action.[1] If the Commission allows a Board to supplement and cure an inadequate NEPA document *after* the agency has already made a licensing decision, then this fundamental purpose of NEPA is frustrated.

In this case, the Staff found that there were exigent circumstances and used the process in 10 C.F.R. § 50.91(a)(6), which allows the hearing to be held after the Staff's issuance of the license amendments. However, this regulatory provision does not relieve the agency of its responsibility to comply with NEPA. An adequate environmental review still must precede the licensing decision, and I agree with the Board that it did not.

The Board found that the Staff's environmental assessment (EA) was inadequate and it identified a litany of deficiencies. Here is a sampling of the Board's conclusions about the EA upon which the Staff based its finding of no significant impact (FONSI):

- "Such a Rube Goldberg attempt at incorporation by reference disregards the clearly prescribed methods for incorporation, and ultimately, vitiates the underlying purpose of NEPA."[2]

- "It is difficult to comprehend how the NRC Staff could deem this dramatic increase [in aquifer withdrawals] to have no practical environmental significance."[3]

- "within the four corners of the 2014 EA there is no evaluation of groundwater impacts. … The 2014 EA provides no technical analysis that would justify either of these conclusions [about impacts on groundwater resources], nor does the 2014 EA even acknowledge the potential migration of hypersaline water from the unlined cooling canal system into the

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[1] *Strata Energy, Inc.* (Ross In Situ Uranium Project), CLI-16-13, 83 NRC 566, 604 (2016) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)), *appeal docketed*, No. 16-1298 (D.C. Cir. Aug. 24, 2016).

[2] LBP-16-8, 83 NRC at 433.

[3] *Id.* at 440.

groundwater beneath the canals. Consequently, the 2014 EA does not satisfy the 'hard look' standard required under NEPA with respect to groundwater resources."[4]

- "nowhere is there any characterization of the summer 2014 temperatures as being unique, much less is there any explanation to justify such a characterization."[5]

- "the cumulative effects analysis section of the 2014 EA fails because, after noting the likelihood of higher salinity, it offers no analysis of how this might impacts the pre-existing saltwater plume."[6]

- "By failing to review and discuss the full consequences of the state-mandated mitigation measures on which the NRC Staff relied, the NRC Staff abdicated this core NEPA responsibility. Because of these glaring absences, the 2014 EA failed to take an adequate 'hard look' and is deficient."[7]

In my view, a FONSI cannot be based on such an inadequate EA. The information gleaned during the Board's hearing process is valuable, but it cannot resuscitate the flawed EA or the licensing decision that was made in reliance on that NEPA analysis.

As the Commission has observed many times, NEPA is a procedural statute.[8] It establishes a process to ensure that, when an agency makes a decision that could affect the environment, that decision is informed by a meaningful evaluation of the expected environmental impacts. A basic premise of the statute is that informed decisionmaking will help protect the environment by forcing agencies to consider the consequences of potential actions and alternatives that could be less environmentally damaging. That commonsense approach simply does not work if the agency decision precedes the environmental review. Here, the true

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[4] *Id.* at 441.

[5] *Id*. at 443.

[6] *Id*. at 444.

[7] *Id*. at 446-47.

[8] *See, e.g.*, *Entergy Nuclear Operations., Inc.* (Indian Point, Units 2 and 3), CLI-11-14, 74 NRC 801, 813 (2011).

environmental review occurred during the thorough Board hearing held 17 months after the Staff issued the license amendments. If we take NEPA's dictates seriously (and we must), we cannot avoid the conclusion that the statute was violated in these circumstances.

In federal court, a violation of NEPA, by itself, is not always sufficient to justify suspending or revoking a licensing action.[9] But the Commission is not a federal court. We have an independent responsibility to ensure that the agency we lead complies with NEPA. We should take this opportunity to refine our jurisprudence to prevent post-decision supplementation of NEPA analyses.[10]

For these reasons, I respectfully dissent. The Commission should review the merits of the Board's decision under section 2.341(b)(4)(v), on the ground that such consideration is deemed to be in the public interest. The Commission should then uphold the Board's determination that the Staff's EA was inadequate and hold that the Board cannot supplement a NEPA environmental document through the hearing process after a licensing action is taken under 10 C.F.R. § 50.91(a)(6). The Commission should vacate the license amendments and the Staff's FONSI, upon which the amendments rely. In order to re-issue the license amendments, the Staff would need to determine whether it can issue a FONSI in light of all of the relevant environmental information, including all information in the record of this adjudicatory proceeding.

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[9] *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157-58 (2010) (injunction not automatic or default remedy to cure NEPA violation); *Nw. Coal. for Alts. to Pesticides v. Lyng*, 844 F.2d 588, 595 (9th Cir. 1988); *Cty. of Del Norte v. United States*, 732 F.2d 1462, 1467 (9th Cir. 1984); *Cent. Delta Water Agency v. U.S. Fish & Wildlife Serv*., 653 F. Supp. 2d 1066, 1086-87 (E.D. Cal. 2009); *Muhly v. Espy*, 877 F. Supp. 294, 300 (W.D. Va. 1995).

[10] This approach would not require completing the hearing before making a licensing decision, and it would not change Commission jurisprudence allowing for supplementation of the environmental record before a licensing action is taken. Rather, if a licensing decision is based on an environmental document that the Board or Commission later finds to be deficient, then I would hold that supplementation of the NEPA analysis with the hearing record is not available as an option to cure the deficiency.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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FLORIDA POWER & LIGHT COMPANY	)	Docket Nos. 50-250 and 50-251-LA
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	)	
(Turkey Point Nuclear Generating Units 3 & 4)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER (CLI-16-18)** have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Herald M. Speiser]
Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 15th day of December, 2016