ORAL ARGUMENT HAS NOT BEEN SCHEDULED

No. 16-1298

In the United States Court of Appeals for the District of Columbia Circuit

NATURAL RESOURCES DEFENSE COUNCIL, INC. AND POWDER RIVER BASIN RESOURCE COUNCIL,

Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and THE UNITED STATES OF AMERICA,

Respondents,

STRATA ENERGY, INC.,

Intervenor-Respondent.

BRIEF FOR AMICUS CURIAE NUCLEAR ENERGY INSTITUTE, INC. IN SUPPORT OF RESPONDENTS AND AFFIRMANCE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties And Amici

The Petitioners are Natural Resources Defense Council, Inc. and Powder River Basin Resource Council. Respondents are the United States Nuclear Regulatory Commission ("NRC") and the United States of America. Intervenor-Respondent is Strata Energy, Inc. ("Strata"). Nuclear Energy Institute, Inc., is amicus curiae in support of Respondents and affirmance.

B. Orders Under Review

Petitioners seek review of the following:

1. NRC Memorandum and Order CLI-16-13 (June 29, 2016), which affirmed Atomic Safety and Licensing Board decisions LBP-15-13 (January 23, 2015), Mem. Order of August 27, 2013, and Mem. Order of May 23, 2014.

2. Supplemental Environmental Impact Statement ("EIS") and Record of Decision for the Ross Project.

3. NRC License No. SUA-1601, Docket No. 040-09091 (April 24, 2014).

C. Related Cases

There are no related cases.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1 of this Court, the Nuclear Energy Institute, Inc. ("NEI") represents that it is a non-profit corporation registered under section 501(c)(6) of the Internal Revenue Code. NEI has no parent companies. No publicly held company has a 10% or greater ownership interest in NEI. NEI functions as a trade association representing the nuclear energy industry. Its objective is to ensure the development of policies that promote the beneficial uses of nuclear energy and technologies in the United States and around the world.

Respectfully submitted,

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GLOSSARY

AEA	Atomic Energy Act
Board	Atomic Safety and Licensing Board
EA	Environmental Assessment
EIS	Environmental Impact Statement
NEI	Nuclear Energy Institute
NEPA	National Environmental Policy Act
NRC	Nuclear Regulatory Commission

INTRODUCTION AND STATEMENT OF INTEREST

The Nuclear Energy Institute, Inc. ("NEI") submits this brief in support of the U.S. Nuclear Regulatory Commission ("NRC"), Strata Energy, Inc. ("Strata"), and affirmance of NRC decisions granting a license to Strata for its Ross Project in Wyoming.[1]

One issue raised by Petitioners has implications beyond this case, which involves an NRC license for possession and use of radiological materials (a "materials license"). In particular, Petitioners assert that a license must be vacated if the agency has considered environmental information in an administrative hearing and has supplemented the record of decision based on the evidentiary record. This argument would, if accepted, significantly undermine authorities specifically granted to NRC under the Atomic Energy Act ("AEA"), exceed what is required by the National Environmental Policy Act ("NEPA"), and unnecessarily delay agency decision-making. In addition to affecting initial materials licenses and amendments, acceptance of this argument could impede issuance of both initial licenses and license amendments for nuclear power plants.

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[1] In accordance with D.C. Cir. R. 29(a)(4), no party's counsel authored this brief in whole or in part; neither a party nor a party's counsel contributed money that was intended to fund preparing or submitting the brief; and other than amicus curiae, its members, and its counsel, no person contributed money that was intended to fund preparing or submitting this brief. All parties have consented to NEI filing this brief.

In this case, a party has identified environmental issues—and has been allowed to ventilate those issues—in NRC's evidentiary hearing process which provides public participation beyond what is required by NEPA. If consideration of a party's admitted contention leads to development of new environmental information in the hearing process, Petitioners claim that NEPA only can be satisfied if the agency vacates the license or amendment previously issued, pending some further undefined environmental review process. This approach not only would impose procedural obligations on NRC not required by NEPA, it also would mean that the licensee could no longer rely on the license or amendment to continue to perform previously-authorized activities. If applied to reactor licensing, this approach would delay issuance of a license, as well as activities that would be permitted thereunder.[2] NRC could then be faced with new proposed contentions for hearing and further litigation of any revised NEPA documents, creating a potentially repetitive and unending cycle of reviews and hearings. These outcomes would undermine NRC and Congressional goals of an efficient, stable, and predictable licensing process.

Petitioners' position elevates process over substance. It creates the potential to impact the timing or effectiveness of NRC licensing decisions without a

[2] Unlike for materials licenses, NRC cannot issue an initial or renewed license for a reactor until the hearing process is complete. 10 C.F.R § 51.107.

corresponding improvement in the quality of those decisions. The goals of NEPA are a "hard look" at the environmental consequences of agency actions and disclosure of environmental information to the public—not an encyclopedic compilation of environmental information or endless rounds of public participation. Given the substantial investments involved in nuclear power plants and materials facilities (such as uranium mining operations or other nuclear fuel cycle facilities), Petitioners' approach could have significant financial implications—whether by causing delay in starting work under a license, suspending activities that began after issuance of a license or amendment, or prohibiting economic use of investments made after license issuance but before an adjudicatory decision.

Petitioners' approach also could have substantial practical implications. If, for example, a nuclear power plant made a physical modification to a reactor after issuance of an amendment, it should not automatically be required to "undo" the modification if additional environmental information is identified, absent a determination by NRC that such a drastic measure is necessary based on the facts of the case. Requiring NRC to vacate a license or amendment *pro forma* could even force a plant to shut down for an extended period until the additional process sought by Petitioners could be concluded. Such outcomes would be contrary to the AEA, NEPA, longstanding regulatory practice, and sound public policy.

STATEMENT OF JURISDICTION

NEI agrees with Federal Respondents' Jurisdictional Statement.

STATEMENT OF THE ISSUE

In this brief, NEI addresses the following issue:

1. Must NRC vacate a license or amendment to comply with NEPA where the record of decision has been or will be supplemented by the evidentiary record in an administrative hearing on the licensing action?

STATUTES AND REGULATIONS

Applicable statutes and regulations are provided in the separately bound addendum.

STATEMENT OF THE CASE

I. National Environmental Policy Act

NEPA mandates that a federal agency take a "hard look" at the environmental impacts of any major federal action. This requires assembling an environmental impact statement ("EIS") or preparing an environmental assessment ("EA") concluding with a finding of no significant impact. In the instant matter, NRC developed an EIS pursuant to its NEPA obligations. This EIS ensures that the agency, in reaching its licensing decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts. It also guarantees that relevant information will be disclosed to the public and that public input will be considered in both the decision-making process and the implementation

of the decision. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA is procedural at its heart; it does not dictate specific licensing decisions or outcomes. *Id.* at 353.

NRC regulations in 10 C.F.R. Part 51 provide opportunities for public input in the environmental review process that comply with NEPA. This Court has confirmed that NEPA does not provide for a hearing opportunity or dictate any additional procedures beyond those in Part 51 (*e.g.*, a public scoping process, opportunity to comment on certain draft documents). *See Union of Concerned Scientists v. NRC*, 920 F.2d 50, 56 (D.C. Cir. 1990) ("While NEPA clearly mandates that an agency fully consider environmental issues, it does not itself provide for a hearing on those issues.").

II. NRC Hearing Process

A. Scope Of NRC Hearings

In accordance with section 189a. of the AEA, 42 U.S.C. § 2239, NRC provides the public with notice of a proposed licensing action. In addition, NRC grants interested members of the public a hearing on a license or amendment application, so long as the party seeking a hearing has standing and has proffered at least one contention that meets NRC's requirements for an admissible contention. NRC regulations dictate the criteria that a party's contention must meet in order to initiate a contested hearing. *See* 10 C.F.R. § 2.309(f)(1).

Under the AEA the scope of the required hearing opportunity is limited to matters of radiological safety and security. Passage of NEPA did not expand the scope of the AEA-mandated hearing process to encompass environmental issues. *Gage v. AEC*, 479 F.2d 1214, 1221 n.19 (D.C. Cir. 1973) (noting that the Commission lacks the authority to mandate that an applicant take certain actions that are unrelated to radiological considerations). Nevertheless, NRC has elected to allow public stakeholders to raise environmental issues in its hearing process. By allowing stakeholders to raise NEPA issues as part of the AEA-mandated hearing, NRC permits public participation that exceeds what is required by NEPA. *Nat. Res. Def. Council v. NRC*, 823 F.3d 641, 642 (D.C. Cir. 2016) ("NEPA does not mandate particular hearing procedures and does not require hearings."). This Court has held that NRC's approach satisfies both the AEA and NEPA. *See Union of Concerned Scientists*, 920 F.2d at 56-57 (holding that NRC's "procedural rules [under 10 C.F.R. § 2.309(f)] do not facially violate the Atomic Energy Act or the Administrative Procedure Act [and] they are also consistent with NEPA").

B. Timing Of NRC Hearings

The vast majority of NRC hearings involve one of three types of licensing matters: new materials licenses and amendments as in the instant case, new reactor

licenses, and reactor license amendments.[3] For all three types of licensing decisions, NRC does not proceed to hearing on environmental issues until after NRC staff has completed its NEPA reviews, including public comment opportunities. 10 C.F.R. § 51.101.

1. Materials Licenses And Amendments

For initial materials licenses and amendments, interested parties are given the opportunity to contest the sufficiency of the application, including by raising environmental issues. NRC will consider hearing requests from interested parties in accordance with the criteria in 10 C.F.R. § 2.309. Notwithstanding a pending hearing, NRC regulations authorize NRC staff to issue the approval, immediately effective, once it has completed its safety and environmental reviews, regardless of a pending hearing. 10 C.F.R. §§ 2.1202(a), 2.103(a). A party in a hearing would then have an opportunity to request a stay of the effectiveness of the approval, pending completion of the hearing or pending review of an initial decision. 10 C.F.R. § 2.1213.[4] If NRC does not grant a stay, the licensee may immediately

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[3] NRC does offer hearing opportunities for other types of decisions, such as license transfers and certain enforcement actions. These decisions typically do not implicate environmental issues.

[4] To obtain a stay of the effectiveness of a license or amendment, a party must meet four familiar standards: likelihood of success on the merits; irreparable harm; absence of harm to others; and the public interest. 10 C.F.R. § 2.1213(d). Petitioners did not seek that relief in the present case.

begin activities authorized by the license or amendment. These procedures for noticing proposed materials licenses and amendments, and allowing evidentiary hearings on an action after issuance of the license or amendment, are consistent with section 189a.(1) of the AEA and longstanding precedent. *See City of West Chicago v. NRC*, 701 F.2d 632, 642-43 (7th Cir. 1983) (finding that NRC procedures governing hearings for materials licenses and amendments pass muster under the AEA).

Where a hearing is requested and granted on an environmental issue, NRC's Atomic Safety and Licensing Board ("Board") or presiding officer is empowered to make "findings of fact and conclusions of law on the matters put into controversy by the parties." 10 C.F.R § 2.340(e)(1); *see also id*. § 2.321(a). After the issuance of an initial decision on contested matters, including environmental issues, the regulations specify that NRC "shall issue, deny, or appropriately condition the permit, license, or license amendment in accordance with the presiding officer's initial decision." *Id*. at § 2.340(e)(2). Therefore, although NRC's regulations allow NRC staff to issue a license before an adjudicatory proceeding is concluded, NRC must thereafter deny, or insert appropriate conditions, if any, in the license based on the determinations in the adjudicatory proceeding. *Id*. at §§ 2.340(e)(2)(ii), 2.1202(a), 2.1210(c)(2)-(3); *see also id*. at § 40.41(e).

2. Initial Power Reactor Licenses

For initial or renewed reactor license applications, interested parties also are given the opportunity to contest the sufficiency of the application, including by raising environmental issues. Where a hearing is requested and granted on an environmental issue, the hearing is not held until after the final EIS has been issued. *See* 10 C.F.R § 2.332(d) ("Where an [EIS] is involved, hearings on environmental issues addressed in the EIS may not commence before the issuance of the final EIS."). A license may not be issued until the hearing process has run its course, regardless of whether the issues accepted for hearing are safety issues or environmental issues. *See* 10 C.F.R §§ 51.107, 2.1202(a)(1).

3. Reactor License Amendments

NRC also offers a hearing opportunity for reactor license amendments. NRC may issue the amendment based upon NRC staff safety and environmental reviews notwithstanding a pending hearing. *See* 10 C.F.R. § 2.1202(a); 10 C.F.R. § 50.58(b)(6); 10 C.F.R. § 50.92. NRC staff action on the amendment is "effective upon issuance," except in the case of an amendment where there are "significant hazards considerations." 10 C.F.R. § 2.1202(a)(6). NRC therefore follows a process that is similar to that for materials licenses—where it determines that the amendment involves "no significant hazards consideration."

This regulatory framework for reactor license amendments was specifically established by an amendment to the AEA adopting section 189a.(2), 42 U.S.C.

§ 2239(a)(2).[5] That provision authorizes NRC to grant amendments, and to make them immediately effective, "in advance of the holding and completion of any required hearing," so long as NRC determines that the amendment involves "no significant hazards consideration." 42 U.S.C. § 2239(a)(2)(A). Those amendments were enacted to reverse the impact of the decision in *Sholly v. NRC*, 651 F.2d 780 (D.C. Cir. 1980), and mitigate the potential for licensing delays if licenses could not be issued and made effective because of pending hearings.

C. Agency Decisions Following Hearings

NRC regulations provide that "[a] Commission decision on any action for which a [final EIS] has been prepared shall be accompanied by or include a concise public record of decision." 10 C.F.R. § 51.102(a). The record of decision on environmental issues is typically prepared by NRC staff, but if hearings are held the "final decision of the [Board or the Commissioners] … will constitute the record of decision." 10 C.F.R. § 51.102(b), (c).

NRC regulations and longstanding precedent confirm that the adjudicatory record supplements the final EIS.[6] 10 C.F.R. § 51.103(c) describes the contents of

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5 Pub. L. No. 97-415, 96 Stat. 2067 (1983), Section 12.(A).

6 NRC Commissioner Baran has expressed concern over this practice in this case and in others. *Strata Energy, Inc.* (Ross *In Situ* Uranium Recovery Project), CLI-16-13, 83 NRC 566 (June 29, 2016) (Commission Baran dissenting); *Powertech (USA), Inc.* (Dewey-Burdock *In Situ* Uranium Recovery Facility), CLI-16-15, __ NRC __ (slip op. Dec. 23, 2016)

the required record of the decision and states that, among other things, the environmental "record of decision may incorporate by reference material contained in a [final EIS]." And, 10 C.F.R. § 51.102 "merges the [final EIS] with any relevant licensing board decision to form the complete environmental record of decision." *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 706 (1985); 45 Fed. Reg. 13,739, 13,741 (March 3, 1980). This "closes the loop" on the Commission's NEPA obligations by making the final NEPA record of decision for the licensing action—as modified or supplemented by a hearing record, including a Board or Commission decision—"complete." NRC follows this process for both reactor and materials licenses and amendments.[7]

In a materials license case or a reactor license amendment case involving "no significant hazards consideration," the license or amendment may be in effect at the time of the hearing decision. If additional issues are identified in the hearing that were not addressed in the NEPA document, NRC would evaluate how to proceed on

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(Commission Baran dissenting) (ADAMS Accession No. ML16279A077); *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 3 and 4), CLI-16-18, __ NRC __ (slip op. Dec. 15, 2016) (Commission Baran dissenting) (ADAMS Accession No. ML16350A069).

[7] *See, e.g.*, *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-15-6, 81 NRC 340, 388 (2015) (reactor license renewal); *Turkey Point*, CLI-16-18, __ NRC at __ (slip op. at 6) (reactor license amendment); *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-04, 53 NRC 31, 53 (2001) (initial materials license).

a case-by-case basis—including deciding whether the license or amendment should be suspended or vacated. As reflected in the present case, the hearing can provide supplemental disclosure, and the Board or Commission decision can supplement the NEPA analysis, without any need to remand the matter to NRC staff for further process or to suspend or vacate the license. Information presented in the hearing can be incorporated into NRC's record of decision to support satisfaction of its NEPA obligation. *See Louisiana Energy Servs., L.P.* (National Enrichment Facility), LBP-06-8, 63 NRC 241, 285-286 (2006) (noting that a board may consider the full record before it, including hearing testimony, to conclude that "the aggregate is sufficient to satisfy the agency's obligation under NEPA" to take a "hard look" at the environmental consequences of issuing a COL."); *Louisiana Energy Servs., L.P.* (National Enrichment Facility), CLI-06-15, 63 NRC 687, 707 n. 91 (2006) ("Adjudicatory findings on NEPA issues, including our own in this decision, become part of the environmental 'record of decision' and in effect supplement the [final EIS]."). Alternatively, the Board or Commission could remand an environmental issue to NRC staff for further consideration and disclosure. In that case, the license is not automatically vacated or its effectiveness stayed. This is the same approach used by Courts where an agency fails to satisfy procedural statutes such as NEPA. *See, e.g., Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010) (explaining that an injunction is not always the proper remedy for a NEPA violation).

For an initial or renewed reactor license, if additional issues are identified in the hearing and were not addressed in a NEPA document, the Board or Commission can decide how to proceed based on the particular facts of a case, as well as a balancing of the equities. As in a material licensing case, the Board or Commission could remand to NRC staff for further evaluation and consideration of whether the issue affects the final decision. If the Board or Commission remand the issue to NRC staff, staff would consider the adjudicatory record and then take appropriate action (*e.g.*, seek additional public input or prepare a supplemental NEPA document).[8] Or, the hearing record itself could support a determination that the additional disclosure does not materially impact the licensing decision. In that case, NRC staff would incorporate the decision into the NEPA record of decision and then issue the license with minimal delay. *New England Coalition on Nuclear Pollution v. NRC*, 582 F.2d 87, 93-94 (1st Cir. 1978); *Citizens for Safe Power, Inc. v. NRC*, 524 F.2d 1291, 1294 n.5 (D.C. Cir. 1975); *Ecology Action v. AEC*, 492 F.2d 998, 1001-02 (2nd Cir. 1974).

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[8] *See, e.g.*, *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-16-07, __ NRC __ (slip op. May 4, 2016) (ADAMS Accession No. ML16125A150) (directing NRC staff to supplement the previously-issued EIS to incorporate sensitivity analyses on severe accident impacts). When NRC staff supplements a NEPA document, NRC regulations provide an opportunity for parties to seek to raise new or amended contentions in the hearing process on the new information revisions to the NEPA documents. *See* 10 C.F.R. § 2.309(f)(2).

STANDARD OF REVIEW

This court will set aside an agency rule or licensing decision only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also, e.g.*, *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1144 (D.C. Cir. 2005). For questions arising under NEPA, the Court's role is to ensure that the agency has taken a "hard look" at the environmental effects of a proposed action and may set aside such action only if it finds that NRC committed "a clear error of judgment." *Marsh v. Ore. Nat. Res. Council*, 490 U.S. 360, 385 (1989).

SUMMARY OF THE ARGUMENT

There is no statutory or regulatory basis for automatically requiring NRC to vacate or delay a licensing decision when new environmental information is developed as part of NRC's hearing process and is captured in the evidentiary record and the record of decision. NRC's current process for handling adjudicatory decisions on environmental issues is consistent with the AEA, NEPA, and sound regulatory practice. It is also in accord with precedent at the agency and in this Court.

NRC completes its required NEPA process before issuing a license or amendment, whether for construction and operation of a power reactor or for possession and use of radiological materials. NRC conducts its hearing process in accordance with the AEA and permits public participation beyond the process

required by NEPA. Requiring that the agency re-open its NEPA process based on a subsequent adjudicatory decision would create a new hearing right under NEPA that does not exist. It also would deny the agency the flexibility to determine how best to proceed when supplementing the NEPA record of decision following an evidentiary hearing. Petitioners' approach is contrary to the AEA, NEPA, longstanding regulatory practice, and sound public policy.

ARGUMENT

I. NEPA Does Not Require NRC Hearings Or Mandate Additional Hearing Procedures

NRC provides opportunities for public input on NEPA issues in accordance with 10 C.F.R. Part 51. NRC's NEPA-implementing regulations direct the agency to conduct a scoping process, whereby the agency receives input from stakeholders about the significant issues on which the NEPA analysis should focus. NRC's NEPA process is led by NRC staff and is separate from the hearing process. In appropriate cases, the NEPA process concludes with an EA and finding of no significant impact. For cases where the agency is preparing an EIS, the agency offers the public an opportunity to comment on a draft EIS and then issues a final EIS.[9] This NEPA-mandated process is completed prior to a licensing decision.

[9] A limited set of licensing decisions are "categorically excluded" from the NEPA review. 10 C.F.R. § 51.22.

NRC also allows the public to raise NEPA issues in the AEA hearing process notwithstanding that the AEA does not mandate hearings on environmental issues, *Union of Concerned Scientists v. NRC*, 920 F.2d at 56, and that NEPA does not require, or even contemplate, hearings. *Id*. The hearing on environmental issues is therefore an additional, discretionary administrative process that allows the public to seek additional consideration and disclosures related to environmental issues.

Accordingly, the premise for Petitioners' argument is faulty—NEPA cannot require nor does it dictate any particular procedural remedy related to NRC's hearing process. The Board or the Commission can decide how to proceed based on the particular facts of a case, as well as a balancing of the equities, including the seriousness of the matter. *Consumers Power Co.* (Midland Plant, Units 1 & 2), ALAB-395, 5 NRC 772, 784-85 (1977); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 & 2), CLI-77-8, 5 NRC 503, 521 (1977). NRC can supplement its NEPA record of decision in accordance with its internal procedures, as it has done in this case, or it can conduct additional analysis and complete additional NEPA processes should it deem those to be necessary.

The Supreme Court has held that courts are not free to impose upon NRC specific procedural requirements that have no basis in the Administrative Procedure Act or the agencies' governing statute (in this case, the AEA). *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519

(1978). This Court therefore should not impose additional procedural requirements on NRC's licensing processes.

II. NRC Addresses Environmental Information Developed In Hearings In Accordance With Its NEPA Obligations

Petitioners' proposed approach is unnecessary to satisfy NEPA. It would elevate form over substance and it is contrary to established law in this Court.

A. NEPA Does Not Require NRC To Automatically Vacate Or Delay A Licensing Decision

Petitioners argue that NEPA does not allow the Board or Commission to "supplement" NRC's NEPA review after a staff decision to issue a license has been made. Pet. Br. at 32, citing *Calvert Cliffs' Coord. Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1117-18 (D.C. Cir. 1971). But requiring the Board or Commission to automatically vacate or delay a license or amendment following a hearing decision and remand to NRC staff to simply reference and incorporate the evidentiary record would serve no useful purpose. It is not necessary to meet NEPA obligations.

In the instant case, NRC ultimately considered both its NEPA document and the findings of the Board, as reflected in an updated record of decision accounting for the staff's final EIS, the Board's decision, and the Commission's ruling on administrative review.[10] Accordingly, no remand in this case or in similar

[10] U.S. Nuclear Regulatory Commission, "Record of Decision for the Ross Uranium In-Situ Recovery Project in Crook County, Wyoming," dated September 28, 2016 (ADAMS Accession No. ML16230A021). In the

circumstances is necessary to "aid in the agencies' own [environmental] decision making process."[11] *Calvert Cliffs*, 449 F.2d at 1114. It would elevate form over substance to require NRC staff to reconsider the very information already considered by the Board or the Commission itself in the hearing.[12] *See North Slope Borough v. Andrus*, 642 F.2d 589, 599-600 (D.C. Cir. 1980) ("The [NEPA document] ... is not an end in itself, but rather a means toward the goal of better decisionmaking.").

This Court made a similar assessment in *Swinomish Tribal Community v. FERC*, 627 F.2d 499, 511-512 (D.C. Cir. 1980). The Court acknowledged that new environmental information had been developed in an evidentiary hearing following publication of the final EIS. But the Court found that both the administrative law judge and the Federal Energy Regulatory Commission itself gave careful consideration to effects of an increase in dam height and took a "hard look" at those

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decision below, the Commission explained that the *Strata* Board's modification of the record of decision "did not change, in any material aspect, the Staff's ultimate determination" that impacts to groundwater would be small. *Strata*, CLI-16-13, slip op. at 39.

11 Remand is also not necessary to aid judicial review. The Court would have before it the totality of the bases for the agency's decision, embodied in the NEPA document, the adjudicatory record, and the overall record of decision. It therefore would not have to rely on *post hoc* rationalizations. *See Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 50 (1983).

12 Despite Petitioners' attempt to separate NRC staff from the Board and the Commission, all three are part of the same agency, and share responsibility for ensuing that the agency, as a whole, complies with NEPA.

consequences as required by NEPA. For this reason, this Court found it unnecessary to remand to the agency for it to revise and reconsider the EIS. *See id*. at 511 ("To insist that the EIS must be prepared and considered in vacuo is to exalt procedural form over substance."); *see also Friends of the River v. FERC*, 720 F.2d 93, 106-107 (D.C. Cir. 1983) (declining to vacate a license and remand a matter to the agency where agency had supplemented its environmental analysis in in its final order granting the license, rather than in the EIS itself). Similarly, requiring NRC to vacate a license or amendment and remand to NRC staff as a matter of course would treat the EIS as "an end in itself" and would not meaningfully serve NEPA's goals.[13] An EIS has no talismanic significance so long as the agency has disclosed and considered environmental concerns.

[13] NRC's approach is fully consistent with the "twin aims" of NEPA: (1) to ensure that the agency takes a "hard look" at the environmental consequences of a proposed action; and (2) to make information on those consequences available to the public. *See Methow Valley*, 490 U.S. at 350, 356. Through its hearing process, NRC offers members of the public an opportunity to present evidence and testimony to challenge the adequacy of NRC's environmental evaluations. This is a far more rigorous inquiry—a "harder" look—than the scoping and comment process required by NEPA. The disclosure purpose of NEPA is satisfied through the public vetting of environmental issues in an evidentiary hearing and issuance of a public decision with any necessary supplementation of the record of decision.

B. Options Available To NRC Following Adjudicatory Hearings Mirror Judicial Remedies In NEPA Cases

Where NEPA concerns are implicated, there are clear parallels between remedies available to the agency on administrative review and those available on judicial review. In the courts, a violation of NEPA, by itself, is not sufficient to justify suspending or revoking a licensing action. *See Monsanto*, 561 U.S. at 157-58 (injunction not automatic or default remedy to cure NEPA violation). Specifically in the context of environmental litigation, the Supreme Court has explained that injunctive relief is an "extraordinary" equitable remedy that "does not issue as of course," but instead requires a finding of "irreparable injury and inadequacy of legal remedies. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987). Stated differently, NEPA does not provide a specific remedial standard that supplants a court's—or, in this case, the Board's or Commission's—equitable powers. The requirements of NEPA are the same for a reviewing body, whether at the administrative or the judicial level. If a court need not order vacatur where a license has already issued, the agency should not be required to either. In either case, a decision on an action has been made—all that remains is supplementation of the record. That supplementation can be accomplished by the agency in the case of a court decision and by the staff in the case of an administrative review decision.

This Court has considered these facts before and has found that they satisfy NEPA. In *Friends of the River*, this Court declined to order a remand to the agency

for an inadequate NEPA document where the remand was not necessary to aid the decision-making process. 720 F.2d at 106-107. This Court cited *Scenic Hudson Preservation Conference*, 453 F.2d 463 (2d Cir. 1971), wherein the court "saw no purpose in a remand so that the agency's discussion could be circulated for comment under a corrected label." NRC makes a similar assessment. If new environmental information identified in a hearing is addressed in the evidentiary record, the final NEPA record of decision is amended to reflect that record—regardless whether the adjudicatory decision occurs before or after issuance of a license or amendment.

The Board or Commission also has the option to remand to NRC staff for further consideration, including, in appropriate cases, taking action that would require the licensee to stop previously-authorized activities or unwind the license or amendment pending completion of any necessary process on remand. Until completion of the hearing process, NRC retains authority to modify its licensing decision as appropriate based on the hearing record. 10 C.F.R. §§ 2.340(a)(2)(ii), 2.340(e)(2)(ii). Either approach is permissible and consistent with the Commission's equitable powers when acting in an adjudicatory capacity.

III. NRC's Process Is Consistent With Its AEA Authorities, Effective And Efficient Regulatory Decision-Making, And Sound Public Policy

Petitioners' proposed response to new environmental information developed in the hearing process would disrupt long-settled agency practice without any corresponding improvement in quality or timing of decisions. Petitioners' approach

would undermine the AEA authority granted to NRC, create unnecessary delay in NRC decision-making, and impose potentially substantial costs on licensees.

The AEA does not require NRC to complete an evidentiary hearing prior to certain licensing decisions, including materials licenses, materials license amendments, and most reactor license amendments. Section 189a.(2), 42 U.S.C. § 2239(a)(2), *expressly authorizes* NRC to make an amendment immediately effective, prior to the completion of any hearing required under the AEA, so long as the Commission determines that there are no significant hazards considerations. *See also* 10 C.F.R. § 50.92(c). Petitioners' logic would frustrate NRC's exercise of that authority, which was granted to it by Congress precisely to prevent licensing delays caused by the hearing process.

Under Petitioners' approach, a license or amendment would be vacated or suspended even after NRC had issued the licensee or amendment which permitted the licensee to take potentially irreversible actions or make plant modifications. For example, a reactor operator may need an amendment to modify equipment. In that case, the operator must submit an amendment application to NRC. NRC would review the application, complete the NEPA process, and issue an immediately effective amendment (upon a finding of no significant hazards consideration) using the specific authority granted in the AEA. The operator would then be authorized to make the modification. Any hearing on environmental issues would not

commence until after the amendment had been issued. In the absence of a stay of effectiveness of the licensing action, the hearing could proceed in parallel with (or following) the equipment modification. Should the hearing process reveal new environmental information that is subsequently incorporated into the NEPA record of decision, there would be no effect on reactor operations. If, however, the Board were required to vacate the amendment—without any showing that the traditional stay factors are satisfied—and remand the issue to NRC staff, as sought by Petitioners, the operator would no longer be authorized to operate the as-modified reactor, forcing it to shut down (potentially for a lengthy period of time).

Under the circumstances, rigidly requiring NRC to vacate the amendment and repeat the NEPA process would not improve the quality of agency decisions. Instead, untethered to any requirement of NEPA or the AEA, it would create a new barrier to timely and efficient agency decisions. Licensees would not risk acting on an amendment that has been granted by NRC if a hearing request was outstanding—even in cases where a modification would improve plant safety. NRC might even need to consider new proposed contentions for hearing and further litigation of any revised NEPA documents, creating a potentially repetitive and unending cycle of reviews and hearings. Petitioners' approach therefore would not serve the purpose of either statute and is not sound public policy.

CONCLUSION

NRC's current process for handling adjudicatory decisions on environmental issues is consistent with the AEA, NEPA, longstanding regulatory practice, and sound public policy. It is also consistent with precedent in this Court and at the agency. The Court should reject the Petition for Review.

Respectfully submitted,

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Dated: January 25, 2017

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,606 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Circuit R. 32(a)(1). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013, in 14-point Times New Roman font.

Respectfully submitted,

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Dated: January 25, 2017

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "BRIEF FOR AMICUS CURIAE NUCLEAR ENERGY INSTITUTE, INC. IN SUPPORT OF RESPONDENTS AND AFFIRMANCE" was deposited by me this 25th day of January, 2017 with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system. Counsel for all parties are registered with the CM/ECF system and received service through that method.

Respectfully submitted,

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Dated: January 25, 2017

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

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Case Caption: Nat. Res. Def. Council et al

v.

U.S. Nuclear Regulatory Commission

Case No: 16-1298

ENTRY OF APPEARANCE

Party Information

The Clerk shall enter my appearance as counsel for the following parties:
(List each party represented individually. Use an additional blank sheet as necessary)

○ Appellant(s)/Petitioner(s) ○ Appellee(s)/Respondent(s) ○ Intervenor(s) ◉ Amicus Curiae

Nuclear Energy Institute, Inc.

Names of Parties

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, INC. AND POWDER RIVER BASIN RESOURCE COUNCIL, Petitioners, v. UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, Respondents, STRATA ENERGY, INC., Intervenor-Respondent.	No. 16-1298

CERTIFICATE OF SERVICE

I hereby certify that on this day, copies of "Entry of Appearance" in the captioned proceeding have been served by Electronic Case Filing ("ECF").

Respectfully submitted,

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