

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
BEFORE THE COMMISSION

In the Matter of	)	
Duke Energy Carolinas, LLC	)	Docket Nos. 50-269/270/287 SLR
Oconee Nuclear Station,	)	
Units 1, 2 & 3	)	

**NOTICE OF APPEAL OF LBP-25-01 OF PETITIONERS  
BEYOND NUCLEAR AND THE SIERRA CLUB**

Pursuant to 10 C.F.R. § 2.311, and the Commission’s Order of February 13, 2025,  
Beyond Nuclear, Inc. and the Sierra Club, Inc. (hereinafter “Appellants”) hereby notify the  
Commission of their appeal of LBP-25-01, Memorandum and Order (Ruling on Intervention  
Petition).<sup>1</sup>

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February 24, 2025

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<sup>1</sup> *Duke Energy Carolinas, LLC* (Oconee Nuclear Station, Units 1, 2, and 3), LBP-25-01, \_\_  
N.R.C. \_\_ (Jan. 17, 2025) (“LBP-25-01”).

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**BRIEF ON APPEAL OF LBP-25-01 OF PETITIONERS  
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## I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.311 and the Commission’s Order of February 13, 2025, Beyond Nuclear, Inc. and the Sierra Club, Inc. (hereinafter “Appellants”) hereby brief their appeal of LBP-25-01, Memorandum and Order (Ruling on Intervention Petition).<sup>1</sup> LBP-25-01 terminated the adjudicatory portion of this proceeding for consideration of Duke Energy Carolinas, LLC’s (“Duke’s”) application to extend operating licenses for Oconee Nuclear Station, Units 1, 2, and 3 (“Oconee” or “ONS”) for a twenty-year subsequent license renewal (“SLR”) term.

In LBP-25-01, the Atomic Safety and Licensing Board (“ASLB” or “Board”) denied the admission of three contentions challenging the adequacy of the NRC Staff’s Draft Environmental Impact Statement (“Draft EIS”) to support the proposed license extension for Oconee.<sup>2</sup> With support by the expert declarations of nuclear engineer and risk analyst Jeffrey Mitman, Appellants’ contentions charged that the Draft EIS is inadequate because it provides erroneous, incomplete and misleading information regarding whether Duke has provided the Oconee reactors with “adequate protection” from failure of the upstream Jocassee dam; provides incomplete, inadequate, incorrect or misleading data and analyses in support of its general conclusion that severe accident impacts are small; and fails to address the effects of climate

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<sup>1</sup> *Duke Energy Carolinas, LLC* (Oconee Nuclear Station, Units 1, 2, and 3), LBP-25-01, \_\_ N.R.C. \_\_ (Jan. 17, 2025) (“LBP-25-01”).

<sup>2</sup> Site-Specific Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 2, Second Renewal Regarding Subsequent License Renewal for Oconee Nuclear Station, Units 1, 2, and 3, Draft Report for Comment (NUREG–1437, Supp. 2, Feb. 2024). Appellants note that recently, the NRC issued the Final Site-Specific EIS. *See* 90 Fed. Reg. 9171 (Feb. 7, 2025) (citing Site-Specific Environmental Impact Statement for License Renewal of Nuclear Plants, Second Renewal Regarding Subsequent License Renewal for Oconee Nuclear Station, Units 1 and 2, and 3, Final Report (NUREG–1437, Supp. 2, Feb. 2025) (“Final EIS”)).

change on accident risk.<sup>3</sup> Each of these categories of deficiencies is significant in its own right; and taken together, they show a level of inadequacy that is grossly unacceptable.

As required by NRC regulations in 10 C.F.R. § 2.309(f), Appellants stated their claims with basis and specificity, demonstrated that they fall within the scope of admissible issues, and showed they are material to the NRC’s licensing decision. Therefore, Appellants respectfully submit that the Board’s decision to deny admission of their contentions was erroneous and arbitrary and capricious and should be reversed.

## **II. LEGAL FRAMEWORK: ATOMIC ENERGY ACT AND NEPA**

The NRC’s regulation and licensing of reactors is governed primarily by two statutes: the Atomic Energy Act, 42 U.S.C. § 2011, et seq.; and NEPA, 42 U.S.C. §§ 4321-4370h. While the substantive concerns of these statutes overlap<sup>4</sup>, they impose independent procedural obligations.<sup>5</sup> Even where the NRC purports to have resolved safety issues through its Atomic Energy Act-

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<sup>3</sup> Hearing Request and Petition to Intervene by Beyond Nuclear and the Sierra Club (Apr. 29, 2024; corrected May 1, 2024) (“Hearing Request”); Declaration of Jeffrey T. Mitman in Support of Beyond Nuclear’s and Sierra Club’s Hearing Request (April 29, 2024) (“Mitman Declaration”); and Mr. Mitman’s Expert Report, *NRC Relicensing Crisis at Oconee Nuclear Station: Stop Duke From Sending Safety Over the Jocassee Dam: Updated Analysis of Neglected Safety, Environmental and Climate Change Risks* (April 2024; corrected May 15, 2024) (“Mitman Report” or “Expert Report”) (Exhibit 1 to Mitman Declaration). (Mr. Mitman’s expert report updates an expert report he filed on behalf of Appellants in the first SLR proceeding for the Oconee reactors in 2021. See Mitman Report at 1.)

Following Appellants’ submission of these documents, the NRC Staff removed them from the public record pending a determination of whether they contained nonpublic Sensitive Unclassified Non-Safeguards Information (“SUNSI”). LBP-25-1, slip op. at 2 n.2, Redacted versions were later posted on ADAMS. As provided in the Commission’s February 13, 2025, Order, Appellants will address the lawfulness of the Staff’s removal and redactions of those documents and other related documents in a separate pleading.

<sup>4</sup> *Citizens for Safe Power v. NRC*, 524 F.2d 1291, 1299 (D.C. Cir. 1975).

<sup>5</sup> *Limerick Ecology Action v. NRC*, 869 F.2d 719, 729-31 (3rd Cir. 1989).



based regulatory process, it must nevertheless comply with NEPA's procedural obligations for addressing those issues in its decision-making processes.<sup>6</sup>

### **A. Atomic Energy Act and NRC Safety Regulations**

Under § 103(d) of the Atomic Energy Act, the NRC may not issue an operating license for a nuclear plant if it would be “inimical to the common defense and security or to the health and safety of the public.”<sup>7</sup> Section 161 of the Atomic Energy Act also empowers the NRC to set standards “to protect health or to minimize danger to life or property,” *inter alia*.<sup>8</sup>

Among the many regulatory standards promulgated by the NRC for the safe construction and operation of nuclear power reactors, the General Design Criteria (“GDCs”) in Appendix A to 10 C.F.R. Part 50 are fundamentally important, because they establish “minimum requirements for the principal design criteria for water-cooled nuclear power plants.”<sup>9</sup> These principal design criteria, in turn, establish:

[T]he necessary design, fabrication, construction, testing, and performance requirements for structures, systems, and components important to safety; that is, structures, systems, and components that provide reasonable assurance that the facility can be operated without undue risk to the health and safety of the public.<sup>10</sup>

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<sup>6</sup> *Limerick Ecology Action*, 869 F.2d at 729-31. *See also State of New York v. NRC*, 681 F.3d 471, 478 (D.C. Cir. 2012) (“a finding that ‘reasonable assurance exists that sufficient mined geologic repository capacity will be available when necessary’ . . . does not describe a probability of failure so low as to dismiss the potential consequences of such a failure.”).

<sup>7</sup> 42 U.S.C. § 2133(d).

<sup>8</sup> 42 U.S.C. § 2201(b).

<sup>9</sup> *Id.*, Introduction.

<sup>10</sup> *Id.* While the Oconee reactors were designed before the promulgation of the General Design Criteria. But the reactors were required to meet a similar version of GDC 2, which provided that:

Those systems and components of reactor facilities which are essential to the prevention of accidents which could affect the public health and safety or to mitigation of their consequences shall be designed, fabricated, and erected to performance standards that will enable the facility to withstand, without loss of the capability to protect the public, the additional forces that might be imposed by natural phenomena such as earthquakes, tornadoes, flooding conditions, winds, ice, and other local site effects. The design bases

Pursuant to General Design Criterion (“GDC”) 2, “[s]tructures, systems, and components important to safety shall be designed to withstand the effects of natural phenomena such as earthquakes, tornadoes, hurricanes, floods, tsunamis, and seiches without loss of capability to perform their safety functions.”

## **B. NEPA General Requirements**

NEPA implements a “broad national commitment to protecting and promoting environmental quality.”<sup>11</sup> NEPA has two key purposes: to ensure that the agency “will have available, and will carefully consider, detailed information concerning significant environmental impacts” before it makes a decision; and to guarantee that “the relevant information will be made available to the larger audience that may also play a role in the decision-making process and implementation of that decision.”<sup>12</sup>

## **C. Requirement for “Hard Look” at Potential Environmental Impacts**

In fulfilling NEPA’s first purpose of evaluating the environmental impacts of its decisions, NEPA requires a federal agency to take a “hard look” at potential environmental consequences by preparing an EIS prior to any “major Federal action[] significantly affecting the

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so established shall reflect: (a) appropriate consideration of the most severe of these natural phenomena that have been recorded for the site and the surrounding areas and (b) an appropriate margin for withstanding forces greater than those recorded to reflect uncertainties about the historical data and their suitability as a basis for design.

Mitman Report at 5 (citing Oconee Nuclear Station Updated Final Safety Analysis Report at 3.1-8 (Dec. 21, 2021) (NRC ADAMS Accession No. ML22180A123)).

<sup>11</sup> *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-03, 47 N.R.C. 77, 87 (1998) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989) and citing 42 U.S.C. § 4331).

<sup>12</sup> *Robertson*, 490 U.S. at 349.

quality of the human environment.”<sup>13</sup> The “hallmarks of a ‘hard look’ are thorough investigation into environmental impacts and forthright acknowledgment of potential environmental harms.”<sup>14</sup> *Id.* (citing). Applying the “rule of reason,” the Court will determine whether the agency has taken “a hard look at the environmental consequences before taking a major action.” *Id.* (quoting *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983)). The “hard look” standard is satisfied if the agency’s EIS “contains sufficient discussion of the relevant issues and opposing viewpoints, and . . . the agency’s decision is fully informed and well-considered.” *Id.* (quoting *Nevada v. Dep’t of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006)).

The requirement to analyze environmental impacts in a draft EIS is codified in NRC regulation 10 C.F.R. § 51.71 (requiring that a draft EIS must “include a preliminary analysis that considers and weighs the environmental effects, including any cumulative effects, of the proposed action; the environmental impacts of alternatives to the proposed action; and alternatives available for reducing or avoiding adverse environmental effects.”).

In conducting its NEPA reviews, NRC also considers the guidance and regulations of the President’s Council on Environmental Quality (“CEQ”). Established in 1971 by an Executive Order, the CEQ provides non-binding guidance to federal agencies on NEPA compliance. While

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<sup>13</sup> *Robertson*, 490 U.S. at 349; 42 U.S.C. § 4332(C).

<sup>14</sup> *National Audubon Society v. Dep’t of Navy*, 422 F.3d 174, 185 (4th Cir. 2005). *See also N.J. Conservation Found. v. FERC*, 111 F.4th 42, 54 (D.C. Cir. 2024) (quoting *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1308 (D.C. Cir. 2015) (quoting *Am. Gas. Ass’n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010)) (An agency’s NEPA decision must be “reasoned, principled, and based upon the record.”). *See also id.* (quoting *FERC v. Elec. Power Supply Ass’n*, 577 U.S. 260, 292 (2016) (The agency must “fully spell out the basis for its decision” and “articulate a rational connection between its factual findings and its decision.”))

NRC has long treated CEQ guidance and regulations as non-binding,<sup>15</sup> it deems them “useful guides for determining what actions are reasonable under NEPA.”<sup>16</sup>

#### **D. Requirement to Consider Reasonably Foreseeable Harms, Including Climate Change**

A NEPA analysis must address harms that are “reasonably foreseeable,” even if they are indirect or unlikely.<sup>17</sup> The analysis must address “both the probabilities of potentially harmful events and the consequences if those events come to pass.”<sup>18</sup> The President’s Council on Environmental Quality (“CEQ”) has concluded that climate change is a “fundamental environmental issue, and its effects fall squarely within NEPA’s purview.”<sup>19</sup> Among the climate-related environmental impacts that CEQ advises agencies to consider are the “reasonably foreseeable effects” of climate change on “infrastructure investments.”<sup>20</sup> As stated by the CEQ:

The effects of climate change observed to date and projected to occur in the future include more frequent and intense heat waves, longer fire seasons and more severe wildfires, degraded air quality, increased drought, greater sea-level rise, an increase in the intensity and frequency of extreme weather events, harm to water resources, harm to agriculture, ocean acidification, and harm to wildlife and ecosystems. The IPCC [Intergovernmental Panel on Climate Change] Assessment Report reinforces these findings by providing scientific evidence of the impacts of climate change driven by human-induced GHG [greenhouse gas] emissions, on our ecosystems, *infrastructure*, human health, and socioeconomic makeup.<sup>21</sup>

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<sup>15</sup> *Pac. Gas and Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), 74 N.R.C. 427, 443-44 (2011).

<sup>16</sup> *Powertech (USA) Inc.* (Dewey-Burdock *In Situ* Uranium Recovery Facility), 92 N.R.C. 295, 299 (2022).

<sup>17</sup> *State of New York*, 681 F.3d at 476, 482. *See also* 42 U.S.C. § 4332(2)(C)(i).

<sup>18</sup> *Id.*, 681 F.3d at 482.

<sup>19</sup> Notice of Interim Guidance; request for comments, National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change,” 88 Fed. Reg. 1196, 1197 (Jan. 9, 2023) (“CEQ Guidance”).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 1200 (emphasis added).

Therefore, the CEQ advised all federal agencies that they should “consider increased risks associated with development in floodplains, avoiding such development wherever there is a practicable alternative,” and “the likelihood of increased temperatures and more frequent or severe storm events over the lifetime of the proposed action.”<sup>22</sup>

Focusing on the NRC, a recent report by the Government Accountability Office states:

Nuclear power plants can be affected by natural hazards -- including heat, drought, wildfires, flooding, hurricanes, sea level rise, and extreme cold weather events -- some of which are expected to be exacerbated by climate change . . .<sup>23</sup>

However, the GAO also found that:

NRC’s actions to address risks to nuclear power plants from natural hazards in its licensing, license renewal, and inspection processes do not fully consider the potential increased risks from natural hazards that may be exacerbated by Climate Change.<sup>24</sup>

### **III. STATEMENT OF THE CASE**

As recognized by the ASLB, this is the second round of litigation regarding Duke’s SLR application for the three Oconee nuclear reactors in northwestern South Carolina.<sup>25</sup> This history is described in the Background section of LBP-25-01 and therefore will not be repeated here.<sup>26</sup>

### **IV. ARGUMENT**

The Commission should reverse LBP-25-01 because it is based on legal errors and reflects an abuse of discretion. Indeed, with respect to numerous issues, the decision fails to “confront the facts and legal arguments presented by [Appellants] and articulate the reasons for

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<sup>22</sup> *Id.* at 1207.

<sup>23</sup> Government Accountability Office, NRC Should Take Actions to Fully Consider the Potential Effects of Climate Change at 1 (GAO-24-106326, April 2024) (“GAO Report”).

<sup>24</sup> *Id.* at 34.

<sup>25</sup> LBP-25-01, slip op. at 1, 3.

<sup>26</sup> LBP-25-01, slip op. at 3-13.

its conclusions on disputed issues,” *i.e.*, “take a hard look at the salient problems.”<sup>27</sup> Therefore, the Commission should admit Appellants’ contentions.

#### **A. Contention 1 is Admissible.**

Contention 1 asserts that the Draft EIS violates NEPA because it states that accident impacts of continuing to operate the Oconee reactors are insignificant, *i.e.*, “SMALL,” based on the incorrect assumption that Duke has provided the Oconee reactors with “adequate protection” from accident risks caused by “external events,” such as failure of the upstream Jocassee Dam.<sup>28</sup>

Appellants contend that the Draft EIS’ assertions that the Oconee reactors have been found to satisfy the “adequate protection” standard are based on erroneous, incomplete and misleading information. In particular, the Draft SEIS fails to satisfy NEPA because it omits any discussion of the environmental significance of an outstanding 2011 Safety Evaluation establishing a minimum flood height that flood mitigation equipment must be protected against and also prescribed measures for providing adequate protection against a flood caused by failure

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<sup>27</sup> *Union Elec. Co.* (Callaway Plant, Unit 1), ALAB-740, 18 N.R.C. 343, 366 (1983) (citing *Pub. Serv. Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-422, 6 N.R.C. 33, 41 (1977); *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-781, 20 N.R.C. 819, 836 (1984) (aff’g in part LBP-82-70, 16 N.R.C. 756 (1982)).

<sup>28</sup> Hearing Request at 5 (citing Draft EIS at F-5). Similarly, as further stated in the Draft EIS and cited by Appellants:

On November 17, 2020, the NRC staff completed its review for Oconee Station and concluded that *no further regulatory action (sic) were needed to ensure adequate protection* or compliance with regulatory requirements, including site-specific external hazards information, re-confirming the acceptability of Oconee Station’s design basis (NRC 2020-TN8995).

Hearing Request at 6 (citing Draft SEIS at F-3 – F-4 (citing letter from R.J. Bernardo, NRC to J.E. Burchfield, Jr., Duke re: Oconee Nuclear Station Units 1, 2, and 3 – Documentation of the Completion of Required Actions Taken in Response to the Lessons Learned from the Fukushima Dai-Ichi Accident (Nov. 17, 2020) (ML20304A369) (NRC 2020-TN8995)) (“NRC 11/17/20 Letter”).

of the Jocassee Dam.<sup>29</sup> The 2011 Safety Evaluation remains effective because the NRC has not repudiated the safety findings or requirements in the Safety Evaluation based on an evaluation of whether adequate protection of public health and safety can be provided without those safety findings or measures. While the NRC Staff claims to have “closed” the issues raised by the 2011 Safety Evaluation, the document relied on by the Staff for this purported closure does not use “adequate protection” language and therefore does not demonstrate that the NRC believes public health and safety is adequately protected in the absence of the requirements of the 2011 Safety Evaluation.<sup>30</sup> Because the Draft SEIS bases its conclusion of insignificant environmental impacts on an unsupported claim regarding adequate protection from flooding risks caused by failure of the Jocassee Dam, the Draft SEIS is inadequate to satisfy NEPA.

The question of whether Contention 1 is admissible boils down to a question of whether the phrase “adequate protection” has a particular meaning under the Atomic Energy Act that the NRC falsely and unlawfully traded on by using it in the Draft EIS -- without any support -- to assure the public that the environmental impacts of re-licensing the three Oconee reactors will be insignificant because the NRC has required that they must be adequately protected from flooding risks due to a breach of the upstream Jocassee Dam. This false assurance comes from the use of the phrase “adequate protection” in Section 182(a) of the Atomic Energy Act to signal a reasonable assurance that the NRC will “ensure that ‘the utilization or production of special

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<sup>29</sup> Hearing Request at 7 and Mitman Report, § 2.6.4 (quoting Letter from Eric J. Leeds, NRC, to Preston Gillespie, Duke, re: Staff Assessment of Duke’s Response to Confirmatory Action Letter Regarding Duke’s Commitments to Address External Flooding Concerns at the Oconee Nuclear Station, Units 1, 2, and 3 (ONS) (TAC Nos. ME3065, ME3066, and ME3067) and Enclosed Safety Evaluation (Jan. 28, 2011) (ML103490330) (“2011 Safety Evaluation”).

<sup>30</sup> Letter from Catherine Haney, NRC to Scott Batson, Duke re: Oconee Nuclear Station – Confirmatory Action Letter Followup Inspection Report 050000269/2016009, 050000270/2016009, 05000287/2016009 (June 16, 2016) (ADAMS Accession No. ML16168A176) (“Haney Letter”).

nuclear material will . . . provide adequate protection to the health and safety of the public.”<sup>31</sup> “Adequate protection” is the “primary statutory standard relating to the [NRC’s] mandate to ensure the safe operation of nuclear power plants.”<sup>32</sup> Thus, use of that phrase in the Draft EIS conveys a clear message that accident risks have been reduced to a level that is both acceptable under the Atomic Energy Act and insignificant or “SMALL” under NEPA.<sup>33</sup> The phrase also conveys the message that under the Atomic Energy Act, no further action to reduce that acceptable level of risk is required; and that under NEPA, the only required additional actions are disclosure of the impacts and consideration of alternatives to manage or avoid the residual risk of these “unlikely” accidents.<sup>34</sup>

Here, as contended by Appellants, the Draft SEIS’ claim that the adequate protection standard has been satisfied with respect to flooding protection from “external events” such as Jocassee Dam failure is erroneous because the Draft EIS does not cite any NRC safety analysis concluding that the “adequate protection” standard, as used in the 2011 Safety Evaluation, has been satisfied. Further, the Draft SEIS ignores the Staff’s own documents that have concluded that failure of the Jocassee Dam is a credible accident that must be addressed by safety measures

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<sup>31</sup> Hearing Request at 8 (citing *Union of Concerned Scientists v. NRC*, 824 F.2d 108, 109 (D.C. Cir. 1987) (quoting 42 U.S.C. § 2232(a)).

<sup>32</sup> *Id.* (citing *Union of Concerned Scientists*, 824 F.2d at 109).

<sup>33</sup> *Id.* (citing *Limerick Ecology Action*, 869 F.2d at 730 (noting “overlap” between concerns of Atomic Energy Act and NEPA); *Citizens for Safe Power*, 524 F.2d at 1292 (Atomic Energy Act requirements may not “be viewed separate and apart from NEPA considerations”); Final Rule, Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 78 Fed. Reg. 37,282, 37,289 (June 20, 2013) (noting that the License Renewal GEIS “is not the primary vehicle the NRC uses to address and regulate risks from severe accidents. The NRC’s regulations and regulatory practices employ safety standards in the design, construction, and operation of nuclear power plants as well as risk models to ensure the public is adequately protected on an ongoing basis.”)).

<sup>34</sup> *Id.* (citing 78 Fed. Reg. at 37,289).



in order to provide adequate protection to public health and safety. Finally, by claiming that continued operation of the Oconee reactors satisfies the adequate protection standard, without acknowledging that the documents it relies on provide no such conclusion, the NRC misleads other agencies, state and local governments, and the general public, lulling them into a false sense of security.<sup>35</sup>

In rejecting the admissibility of Contention 1, the ASLB combined legal and factual errors. First, and fundamentally, the Board erroneously minimized the significance of the “adequate protection” language as it is used in the Draft EIS.<sup>36</sup> As the Supreme Court has noted, “words are how the law constrains power.”<sup>37</sup> In passing the Atomic Energy Act, Congress created the expectation that use of the words “adequate protection” by the NRC would not only provide the public with a basis for confidence that their health and safety would be protected, but would also eliminate the need for a public hearing or debate about what should be done to achieve that level of protection. “If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them.” *Id.*

Second, having erroneously minimized the significance of the phrase “adequate protection,” the Board accused Appellants of “failing to engage” with documents demonstrating “the sufficiency of ONS flood protection measures.”<sup>38</sup> But the ASLB does not point to a single document that claims to resolve the “adequate protection” concerns raised in the 2011 Safety

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<sup>35</sup> Hearing Request at 8-9.

<sup>36</sup> LBP-25-01, slip op. at 23-24 (citing the ASLB’s previous decision in LBP-22-1, 95 N.R.C. 49, 91 (2022) for the proposition that Appellants make too much of the distinction between the phrase “adequate protection” and other phrases used in NRC documents regarding flooding risk).

<sup>37</sup> *Niz-Chavez v. Garland*, 593 U.S. 155, 172 (2021).

<sup>38</sup> LBP-25-01, slip op. at 24.

Evaluation. For instance, the ASLB points to “two separate documents that were central to the NRC Staff’s post-Fukushima analysis and conclusions regarding the sufficiency of the ONS flood protection measures.”<sup>39</sup> But neither of those documents used the phrase “adequate protection to describe the Staff’s alleged resolution of flooding issues at Oconee. Instead, as quoted by the ASLB in LBP-22-1, they used words and phrases such as “reasonable,” “capability of flood protection,” “necessary compensatory measures to mitigate a possible Jocassee Dam failure,” and “focused evaluation requirement was fulfilled.”<sup>40</sup> The phrase “adequate protection” simply does not appear. And the problem is not resolved by citing the NRC’s original intention to apply an “adequate protection” standard when it commenced the post-Fukushima review,<sup>41</sup> when the record completely fails to show that the NRC actually followed through with an adequate protection review. The ASLB’s analysis is therefore both legally and factually erroneous.

Finally, the ASLB erred by applying a merits standard of review to Contention 1. Under the NRC’s admissibility standard, Appellants were required to provide sufficient information to demonstrate a disputed legal or factual issue. 10 C.F.R. § 2.309(f)(vi). Appellants more than satisfied this standard, and therefore Contention 1 should have been admitted.

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<sup>39</sup> *Id.* (citing LBP-22-1, 95 N.R.C. at 88).

<sup>40</sup> LBP-22-1, 95 N.R.C. at 88.

<sup>41</sup> *See id.*, 95 N.R.C. at 90.

## **B. Contention 2 is Admissible.**

Appellants respectfully submit that the ASLB erred in denying admission of Contention 2 with respect to Appellants' claim that the Draft EIS understates the risk posed by external events with respect to the all-hazards analysis.<sup>42</sup> In the Draft EIS, the NRC Staff asserted that the CDF for internal events encompasses the CDF for external events. Mr. Mitman criticized this analysis in detail, showing that it underestimates the risk posed by external events. The Board, however, characterized Mr. Mitman's expert analysis as simply offering an "alternative," but not necessarily essential, way of conducting the analysis; and therefore, not raising a material dispute.<sup>43</sup> The Board mischaracterized Mr. Mitman's Report, which explicitly stated that by failing to use the latest available information, the Draft EIS "significantly understates accident risks." Mitman Report at 34. Thus, the Board's ruling does not support denial of the contention.

## **C. Contention 3 is Admissible.**

### **1. Description of Contention 3**

Contention 3 asserts:

The Draft SEIS fails to satisfy NEPA or NRC implementing regulation 10 C.F.R. § 51.71 because it does not address the effects of climate change on accident risk. As set forth in Section 3.4 of Mr. Mitman's expert report, increased frequency and severity of extreme weather events is inevitable, as agreed by multiple federal agencies. And therefore, climate change will inevitably affect the likelihood and severity of reactor accidents.

Consideration of climate change effects is particularly important for Oconee, which was never designed to withstand a significant flood from failure or overtopping of the Jocassee Dam. Because climate change effects are reasonably foreseeable and potentially significant, they must be considered. *State of New York, State of New York*, 681 F.3d at 476. While the NRC asserts that it plans to address climate change risks in the future (Draft SEIS at 3-35 – 3-36), this does not excuse the agency from addressing the risks of

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<sup>42</sup> LBP-25-1, slip op. at 33.

By focusing on this issue, Appellants do not concede the lawfulness or reasonableness of LBP-25-1 with respect to other aspects of Contention 2.

<sup>43</sup> LBP-25-1, slip op. at 33.

climate change in *this licensing decision* as they are understood at this time. Only if the NRC can say that the effects of climate change are so small as to be “remote and speculative” can it avoid addressing those effects in its environmental review.<sup>44</sup>

In his supporting Expert Report, Mr. Mitman asserted that the Draft EIS’ discussion of accident risk due to flooding risk was based on “past assumptions regarding external hazards.”<sup>45</sup>

As he explained:

All of the above discussion on risk, including flooding risks, are based on past assumptions regarding external hazards. The authors [of those studies] were unaware of the significant changes in the likelihood and severity of extreme weather events that are occurring today and will inevitably increase as a result of Climate Change. Consistent with GDC 2, the discussion of risk in these documents are based on natural phenomena which are “historically reported” for sites and their surrounding areas. While GDC 2 required the consideration of “sufficient margin,” there was never any consideration that future hazards could be worse than anticipated from the past ones.

However, the NRC knows that Climate Change is inevitable and that it will substantially impact both the frequency and severity of weather-related hazards including Local intense precipitation (LIP), probably maximum precipitation (PMP) and other severe weather effects.<sup>46</sup>

Mr. Mitman also discussed the specific flood hazard analyses that the NRC had conducted for Oconee and noted that none had evaluated the effects of climate change.<sup>47</sup> He noted that:

The assumption in all past FERC and NRC required studies, assumes that neither the Jocassee or Keowee Dams will be overtopped by a PMP event on their respective

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<sup>44</sup> Hearing Request at 18.

<sup>45</sup> Mitman Report at 39 (citing 1983 hydrological analysis performed by Duke at FERC’s request; NSAC-60, a probabilistic risk assessment (“PRA”) prepared for Duke in the late 1970s and early 1980s by the Nuclear Safety Analysis Center; and Duke’s IPEE/IPEEE studies). *See also* Mitman Report at 6-7 and citations therein.

Appellants note that some of the documents referenced in Mr. Mitman’s expert report have been removed from public ADAMS. The lawfulness of these removals will be addressed by Appellants in their brief on public disclosure-related questions referred to the Commission by the ASLB. *See* the Secretary’s Feb. 13, 2025, Order.

<sup>46</sup> *Id.* at 41-42.

<sup>47</sup> *Id.* at 41.

watershed. Climate change has the potential to significantly increase the amount of precipitation falling on watersheds above the dams. But with Climate Change will the respective reservoirs have sufficient capacity to handle a Climate Change exacerbate PMP? The NRC seems uninterested.<sup>48</sup>

He also described specific characteristics of climate change effects and scenarios in which climate change could cause significant accident impacts at the Oconee reactors, including the “cliff edge” effect in which “a small increase in the hazard can cause a dramatic and often overwhelming impact on a structure:” for example, “a small increase in wave height could raise the flood height sufficiently to overtop a floodwall inundating the equipment the floodwall is designed to protect.”<sup>49</sup>

Mr. Mitman also asserted that the NRC’s failure to discuss climate change was inconsistent with guidance from the President’s Council on Environmental Quality and a recent report by the General Accountability Office (“GAO”), both of which urged federal agencies to consider the effects of climate change on infrastructure and develop mitigation measures.<sup>50</sup> The GAO had focused in particular on the NRC, concluding that:

NRC’s actions to address risks to nuclear power plants from natural hazards in its licensing, license renewal, and inspection processes do not fully consider the potential increased risks from natural hazards that may be exacerbated by Climate Change.<sup>51</sup>

However, as Mr. Mitman observed, instead of discussing climate change effects on Oconee, the NRC has arbitrarily decided that: “The impacts of natural phenomena, including

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* (citing CEQ Guidance and GAO Report).

<sup>51</sup> *Id.* (citing GAO Report at 34).

seismic hazards, on nuclear power plant systems, structures, and components are outside the scope of the NRC's license renewal environmental review.<sup>52</sup>

Mr. Mitman stated his expert opinion that the NRC's failure to discuss the effects of climate change on accident risk "constitutes a significant deficiency in the Draft SEIS because Climate Change demonstrably affects the frequency and intensity of some external events and therefore has the potential to significantly increase accident risks."<sup>53</sup> Moreover, he noted that "the frequency and intensity of Climate Change effects are increasing over time."<sup>54</sup> And "[g]iven that the NRC is proposing to rely on the Draft SEIS for decisions that could affect reactor safety decades from now," he concluded that "the Draft SEIS must address these changing effects over the entire licensed lifetime of reactors, which may end 4 decades from now."<sup>55</sup>

The ASLB denied admission of Contention 3 on the ground that Appellants' claims were similar to claims rejected in two other recent ASLB decisions, LBP-24-3 (Turkey Point) and LBP-24-7 (North Anna), and therefore "lacked sufficient support because they were either too speculative or lacked insufficient (sic) information to establish a genuine, material factual dispute" with the Draft EIS.<sup>56</sup> Appellants respectfully submit that the ASLB's ruling is legally erroneous and arbitrary and capricious.<sup>57</sup>

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<sup>52</sup> *Id.* at 40 (citing Draft EIS at 3-30).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 42.

<sup>55</sup> *Id.* at 42.

<sup>56</sup> *Id.*, slip op. at 51 (citing *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Units 3 and 4), LBP-24-3, 99 N.R.C. 39, 68-69 (2024) (appeal pending) ("LBP-24-3"); *Va. Elec. and Power Co.* (North Anna Power Station, Units 1 and 2), LBP-24-7, 100 N.R.C. 52, 71-72 (2024) (appeal pending) ("LBP-24-7"). *See also id.* at 55. Appellants note that the ASLB provides no details about how it applied the rulings in LBP-24-3 and LBP-24-7 to Appellants' Contention 3.

<sup>57</sup> As the ASLB recognized in LBP-25-1 at 54-55 n.86, the NRC's recently-issued Generic Environmental Impact Statement for License Renewal of Nuclear Plants (NUREG-1437, Rev. 2,

## 2. Contention 3 is an admissible contention of omission.

Based on LBP-24-3 and LBP-24-7, the Board appears to consider that Contention 3 is inadmissible because Appellants failed to identify specific deficiencies in the accident analysis and/or climate change analysis in the Draft EIS.<sup>58</sup> Setting aside the lawfulness of LBP-24-3 and LBP-24-7 as applied to those cases, their rulings are both legally erroneous and arbitrary and capricious as applied in this case. As Judge Gibson recognized in his dissent from the ASLB's denial of a similar contention (also enumerated as "Contention 3") in the North Anna SLR proceeding, a contention criticizing a Draft EIS for its complete failure to consider the effects of climate change on accident risk is a "contention of omission, for which the NRC's pleading requirements are "inapplicable . . . beyond identifying the regulatively required missing information."<sup>59</sup> As required for an admissible contention of omission,<sup>60</sup> Mr. Mitman discussed specific portions of the Draft EIS that addressed either accident risks or climate change effects and explained what information was missing and why it should have been provided.<sup>61</sup> Thus,

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2014) ("2024 License Renewal GEIS") takes the position that the effects of climate change on nuclear reactor accident risks are outside the scope of the 2024 GEIS and its accompanying regulations. Appellants have challenged the lawfulness of that position before the U.S. Court of Appeals for the D.C. Circuit. *See* Appellants' Initial Opening Brief, filed Feb. 20, 2025 in *Beyond Nuclear and the Sierra Club v. NRC* (D.C. Cir., No. 24-1338).

<sup>58</sup> *See* LBP-24-3, 99 N.R.C. at 69 (finding that the petitioners had provided "only a passing reference to a portion of the Staff's analysis"); LBP-24-7, 100 N.R.C. at 71 (failing to "engage with climate change projections" in the Draft EIS).

<sup>59</sup> LBP-24-7, 100 N.R.C. at 92 n.72 (Gibson, A.J., Concurring in Part, and Dissenting in Part) (hereinafter "Gibson") (quoting *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-09-16, 70 N.R.C. 227, 244 (2009)).

<sup>60</sup> *See, e.g., Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant Units 1 and 2), LBP-10-15, 72 N.R.C. 257, 289-90) (2010), *aff'd*, CLI-11-11, 74 N.R.C. 427 (2011).

<sup>61</sup> Mr. Mitman specifically identified and discussed the Draft EIS' discussions of accident risk, including flooding risk in Appendix F, Mitman Report at 21-24, as well as the Environmental Report on which the Draft EIS is based. *See id.* at 25-34. He asserted that a fundamental deficiency in these discussions of accident risk is that they address "past assumptions regarding external hazards" rather than "the likelihood and severity of extreme weather events that are

“[p]lainly and simply,” Contention 3 is an admissible “contention of omission that demonstrates a genuine dispute on a material issue of law or fact that includes specific references to portions of the application.”<sup>62</sup>

**3. Contention 3 is admissible because it identifies and supports a reasonable potential for significant adverse environmental impacts.**

In LBP-24-3, the Board asserted that Appellants’ contention was “speculative” because Appellants and Mr. Mitman did not assert unreservedly that the environmental impacts of climate change would be significant.<sup>63</sup> Similarly, in LBP-24-7, the Board rejected the contention because Appellants had failed to state conclusively that “climate change effects *will* affect accident risk at North Anna in a way that provides the requisite ‘seriously different picture’ of environmental impacts.”<sup>64</sup> In this proceeding, Mr. Mitman has stated that the NRC Staff’s omission of climate change effects from its analysis of accident risks at Oconee “constitutes a significant deficiency” in the Draft EIS “because Climate Change demonstrably affects the

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occurring today and will inevitably increase as a result of Climate Change.” *Id.* at 39. And he disputed the Draft EIS’ assertion that the NRC’s safety regulations and oversight are adequate to address climate change effects on accident risk. Mitman Report at 39-40 (citing Draft EIS at 3-35 – 3-36). Finally, Mr. Mitman provided a specific and detailed illustration of how climate change could affect accident risks at Oconee. *Id.* at 44-45.

<sup>62</sup> LPB-24-7, 100 N.R.C. at 79 (“Gibson”). Judge Gibson also observed that the Draft EIS for North Anna contained a “notable section” explicitly refusing to consider climate change effects “on the plant itself.” LBP-24-7, 100 N.R.C. at 77-78 (citing Section 3.14.3.2 of the North Anna Draft EIS). The Draft EIS for Oconee contains similar language at pages 3-35 – 3-36 (cited by Mr. Mitman at page 39 of his Report). And the same language appears again in the Final EIS at 3-35 – 3-36. *See also id.* at 3-207 – 3-208. This language further demonstrates the admissibility of Contention 3 by showing an intentional omission of relevant information from the Draft EIS, not an inadvertent oversight or unclear drafting.

<sup>63</sup> LBP-24-3, 99 N.R.C. at 69.

<sup>64</sup> LBP-24-7, 100 N.R.C. at 72 (citing *Hydro Resources, Inc.* (P.O. Box 777, Crownpoint, NM 87313), CLI-06-29, 64 N.R.C. 417, 419 (2006)).



frequency and intensity of some external events and therefore has the potential to significantly increase accident risks.”<sup>65</sup>

As the Supreme Court has held, the “rule of reason” requires an agency to take a “hard look” at environmental impacts and consider information that is “sufficient to show that the . . . action will affect the quality of the human environment in a significant manner or to a significant extent not already considered.”<sup>66</sup> Here, as in *City of Port Isabel*, climate change is painting “a seriously different picture of the environmental landscape,” by accelerating and intensifying the effects of storms, floods, and other events on critical infrastructure such as nuclear reactors. Mr. Mitman has provided examples of both how extreme weather effects have put other nuclear reactors at risk, and how they could put the Oconee reactors at risk.<sup>67</sup> Moreover, the NRC itself, by claiming to consider climate change effects under its safety regulations, and by estimating the effects of climate change on “environmental resources” other than the Oconee reactors themselves, demonstrates unequivocally that it considers climate change effects on reactors to be both reasonably foreseeable and significant.<sup>68</sup>

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<sup>65</sup>Mitman Report at 41.

<sup>66</sup> *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989). *See also City of Port Isabel v. FERC*, 111 F.4th 1198, 1207 (D.C. Cir. 2024) (requiring supplementation of EIS where updated demographic and environmental data provided a “seriously different picture of the environmental landscape.”)

<sup>67</sup> *See* note 61 above.

<sup>68</sup> Draft EIS at 3-35 - 3-36, G-7. *See also N.J. Conservation Found.* 111 F.4th at 54 (“Reasonably foreseeable” environmental impacts include climate change.) *See also* LBP-24-7, 100 N.R.C. at 88-89 (“(1) [B]ecause the NRC’s rules require a draft EIS to ‘include a preliminary analysis that considers and weighs the environmental effects, including any cumulative effects, of the proposed action,’ and (2) because climate change must be evaluated (either under the 2013 GEIS or under the forthcoming 2024 Rule and GEIS), then (3) it necessarily follows that a draft EIS must evaluate the environmental impacts of climate change on the plant itself, during the period of subsequent license renewal.”).

Finally, as the U.S. Court of Appeals for the D.C. Circuit has held, potentially significant environmental impacts need not be certain to be cognizable under NEPA. NEPA requires consideration of environmental risks as well as direct and inevitable impacts.<sup>69</sup> An agency may avoid discussing an environmental risk only if the probability of an environmental effect is “so low as to be ‘remote and speculative,’ or if the combination of probability and harm is sufficiently minimal.”<sup>70</sup> In addition, like the petitioners in the North Anna SLR proceeding, Appellants identified a “specific climate change-induced accident risk” at Oconee that is undisputedly not addressed in the Draft EIS.<sup>71</sup> Thus, consistent with NEPA and governing judicial precedents, the NRC must discuss climate change effects on accident risk at Oconee because those risks are both reasonably foreseeable and potentially significant.<sup>72</sup>

#### **4. The ASLB erred in relying on the 2013 GEIS to deny admission of Contention 3.**

According to the ASLB, Contention 3 is inadmissible because Appellants failed to demonstrate that the Draft EIS is in “noncompliance” with the conclusion of the 2013 Generic

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<sup>69</sup> *State of New York*, 681 F.3d at 478-79 (quoting *City of New York v. Dep’t of Transp.*, 715 F.2d 732, 738 (2d Cir. 1983)).

<sup>70</sup> *Id.*, 681 F.3d at 478-79. *See also Standing Rock Sioux Tribe v. U.S. Army Corps. of Engineers*, 985 F.3d 1032, 1050 (D.C. Cir. 2021) (quoting *Sierra Club v. FERC*, 827 F.3d 36, 47 (D.C. Cir. 2016) (Even where an environmental risk “may be low,” NEPA requires consideration if “the risk is sufficient ‘that a person of ordinary prudence would take it into account in reaching a decision.’”)).

<sup>71</sup> LBP-24-7, 100 N.R.C. at 91-92.

<sup>72</sup> *See also* LBP-24-7, 100 N.R.C. at 80 and notes 25, 26, and 27 (Gibson) (noting with approval Appellants’ reliance on *State of New York*, 681 F.3d at 471, 482, 478). *See also id.*, 100 N.R.C. at 88-89 (“(1) [B]ecause the NRC’s rules require a draft EIS to ‘include a preliminary analysis that considers and weighs the environmental effects, including any cumulative effects, of the proposed action,’ and (2) because climate change must be evaluated (either under the 2013 GEIS or under the forthcoming 2024 Rule and GEIS), then (3) it necessarily follows that a draft EIS must evaluate the environmental impacts of climate change on the plant itself, during the period of subsequent license renewal.”).

Environmental Impact Statement for License Renewal of Nuclear Plants (NUREG-1437, Rev. 1, 2013) (“2013 License Renewal GEIS”) and a new revised draft of the 2013 License Renewal GEIS that “the impacts of external events are comparable to those from internal events.”<sup>73</sup> But the Board errs on two counts. First, the 2013 GEIS does not govern this proceeding, because Duke elected a site-specific environmental analysis.<sup>74</sup> Thus, Appellants were free to challenge the assumptions and conclusions of the 2013 GEIS. And second, Appellants *did* challenge the 2013 GEIS’ assumption and conclusion that the impacts of external and internal events are comparable.<sup>75</sup> Mr. Mitman also supported this assertion with an extensive and detailed analysis.<sup>76</sup> Appellants therefore asserted, with adequate specificity and support, their challenge to the Draft EIS’ equation of internal event impacts with external event impacts related to climate change.

**5. The ASLB’s determinations that the CEQ Guidance and GAO Report provided insufficient support for Contention 3 was arbitrary and capricious.**

The ASLB’s rulings rejecting the adequacy of the CEQ Guidance and GAO Report to support Contention 3 were arbitrary and capricious because they were not “based upon the record.”<sup>77</sup> The ASLB faulted Appellants for failing to “make any link” between the reports and

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<sup>73</sup> LBP-25-1, slip op. at 52 and n.82.

<sup>74</sup> See LBP-25-1, slip op. at 5-6.

<sup>75</sup> See Mitman Report at 42 (asserting that climate change “has already started to increase the frequency and intensity” of external events and that the Draft EIS “is already inadequate as a general matter for making broad generalizations about external event CDF based on extrapolations from internal event CDF values and limited actual plant-specific values for external event impact on population dose.”)

<sup>76</sup> Mitman Report at 44-45.

<sup>77</sup> *N.J. Conservation Found.*, 111 F.4th at 54.

“purported gaps in the NRC Staff’s environmental analysis.”<sup>78</sup> The Board, however, fails to recognize the legitimate purpose of these citations: to demonstrate that in refusing to consider the effects of climate change on reactors themselves, the NRC is ignoring the reasonable guidance and practices of authoritative and knowledgeable federal agencies.<sup>79</sup> Further, Appellants provide specific quotations from these authorities to support their applicability to this proceeding.<sup>80</sup>

Accordingly, the ASLB’s decision to deny the admission of Contention 3 was legally erroneous and arbitrary and capricious. Appellants respectfully submit that the Commission should apply the reasoning of Judge Gibson in his dissenting opinion and admit the contention.<sup>81</sup>

## V. CONCLUSION

For the foregoing reasons, the Commission should reverse LBP-25-1 and admit Appellants’ Contentions 1 and 3 and a portion of Contention 2.

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<sup>78</sup> *Id.*, slip op. at 53 (citing *Fla. Power & Light Co.* (Turkey Point Nuclear Generating, Units 3 and 4), LBP-24-8, 100 N.R.C. 95, 128-29 (2024) (appeal pending)).

<sup>79</sup> *See Pac. Gas and Elec. Co.*, 74 N.R.C. at 443-44; *Powertech (USA)*, 92 N.R.C. at 299. *See also* LBP-24-7, 100 N.R.C. at 91 (Gibson) (in the North Anna SLR proceeding, the GAO Report “dovetails both with Appellants’ pleadings and with the Mitman Declaration as further support for admitting Contention 3.”).

<sup>80</sup> *See* Mitman Report at 40 (citing CEQ guidance that agencies “should consider the likelihood of increased temperatures and more frequent or severe storm events over the lifetime of the proposed action”); *id.* at 41 (citing GAO Report’s assertion that “[w]ithout incorporating the best available information into its licensing and oversight processes, it is unclear whether the safety margins for nuclear power plants established during the licensing period – in most cases over 40 years ago – are adequate to address the risks that Climate Change poses to plants.”).

<sup>81</sup> In the Turkey Point SLR proceeding, the ASLB also found that the petitioners had unlawfully demanded a delay in the North Anna licensing decision until the NRC had more information on climate change impacts. LBP-24-3, 99 N.R.C. at 69. Setting aside the question of whether the Board correctly characterized the petitioners’ position in that proceeding, this ruling is completely inapplicable here. Appellants have not asked for any delay of the SLR decision for Oconee. They simply seek consideration of the best available information that is currently available. *See* Mitman Report at 45 (asserting that the Draft EIS is deficient because it does not address the reasonably foreseeable effects of Climate Change on the risks of accidents at Oconee.”).

Respectfully submitted,

/signed electronically by/

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February 24, 2025

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
BEFORE THE COMMISSION

In the Matter of	)	
Duke Energy Carolinas, LLC	)	Docket Nos. 50-269/270/287 SLR
Oconee Nuclear Station,	)	
Units 1, 2 & 3	)	

**CERTIFICATE OF SERVICE**

I certify that on February 24, 2025, I posted NOTICE OF APPEAL OF LBP-25-01 BY BEYOND NUCLEAR AND THE SIERRA CLUB and BRIEF BY BEYOND NUCLEAR AND THE SIERRA CLUB ON APPEAL OF LBP-25-01 on the NRC's Electronic Information Exchange.

/signed electronically by/  
Diane Curran