

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before the Licensing Board:

E. Roy Hawkens, Chair
Dr. Michael F. Kennedy
Dr. William C. Burnett

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| In the Matter of |) | |
| |) | |
| Florida Power & Light Company |) | Docket Nos. 52-040 and 52-041 |
| |) | |
| Turkey Point, |) | ASLBP No. 10-903-02-COL-BD01 |
| Units 6 and 7 |) | |
| _____ |) | |

**JOINT INTERVENORS' REQUEST FOR LEAVE TO RESPOND TO NRC
STAFF'S ANSWER TO FPL'S MOTION FOR SUMMARY DISPOSITION AND
ALTERNATIVELY, JOINT INTERVENORS' CONDITIONAL MOTION TO
ADMIT SECOND AMENDED CONTENTION NEPA 2.1**

SOUTHERN ALLIANCE FOR CLEAN ENERGY, NATIONAL PARKS
CONSERVATION ASSOCIATION, DAN KIPNIS, and MARK ONCAVAGE
(collectively "Joint Intervenors"), respectfully request the Board's permission to respond
to the NRC Staff's Answer to FPL's Motion for Summary Disposition of Amended
Contention NEPA 2.1, dated August 8, 2012 (the "NRC Staff Answer").

Joint Intervenors submit that an opportunity to respond to the NRC Staff Answer
is warranted in order to ensure both that Joint Intervenors have a meaningful opportunity
to defend Amended Contention 2.1 against summary disposition and that the Board has a
complete record on which to base its ruling. *See Southern Nuclear Operating Co.* (Early

Site Permit for Vogtle ESP Site), LBP-08-02, 67 NRC 54, 67 n.8 (2008) (observing that a motion for leave to respond to new factual information submitted in response to summary disposition motions “would seem to be a reasonable candidate for a favorable Board discretionary decision permitting the filing”); *Statement of Policy*, CLI-98-12, 48 NRC 18, 19 (1998) (stating that the Commission’s objectives in conducting adjudicatory proceedings include providing a “fair hearing process” and producing “an informed adjudicatory record”). Although 10 C.F.R. § 2.1205 does not expressly allow for such responses in informal proceedings, the Commission has specifically provided for such responses in formal proceedings pursuant to 10 C.F.R. § 2.710 (a).¹ Further, 10 C.F.R. § 2.710 states that the summary disposition standard is the same for formal proceedings as it is for informal proceedings. While the Commission revised its rules in 2004 to provide a “simplified procedure” for summary disposition in Subpart L proceedings, neither the regulations nor the preamble to the regulations suggest that the Commission intended to completely prohibit responses to new facts and arguments presented in answers to summary disposition motions. *See* 69 Fed. Reg. 2,182, 2,229 (Jan. 14, 2004).

In this instance, the NRC Staff has made two assertions that warrant a response from Joint Intervenors: (1) summary disposition is appropriate simply because Florida Power & Light (“FPL”) has identified the source data for the four constituents listed in Environmental Report Revision 3 (“ER”), Table 3.6-2 and (2) that in any event, while the NRC Staff “will consider impacts from proposed deep injection wells in the EIS”, “the Staff does not now plan to rely on the Applicant’s method of evaluation set forth in the

¹ 10 C.F.R. § 2.710(a) provides in pertinent part that “[t]he opposing party [of a motion for summary disposition] may, within ten (10) days after service, respond in writing to new facts and arguments presented in any statement filed in support of the motion.”

Motion [for Summary Disposition].” The first assertion warrants a response because this is not an argument raised by FPL in its Motion for Summary Disposition, and thus Joint Intervenors have not had a chance to address the NRC Staff’s novel and very narrow reading of the contention.² The second assertion warrants a response because the NRC Staff’s position – that it does not intend to rely on FPL’s analysis as it prepares the Environmental Impact Statement (“EIS”) for this project – demonstrates that summary disposition is entirely inappropriate at this juncture. It is nonsensical for the NRC Staff to assert on one hand that the data provided by FPL is sufficient to satisfy Joint Intervenors’ concerns, and on the other assert that the same data is not sufficient enough to be relied upon by the Staff in its preparation of the EIS. Such an argument effectively removes Joint Intervenors from the very dispute they raised in their contention.

Joint Intervenors should be given the opportunity to respond to these arguments. Accordingly, Joint Intervenors’ response is set forth below, and it has been made within ten (10) days of the NRC Staff Answer, consistent with 10 C.F.R. § 2.710(a). *See Tennessee Valley Authority (Watts Bar Unit 2), Order Granting SACE’s Unopposed Motion for Extension of Time to Respond to TVA’s Motion for the Summary Disposition of Contention 7, ASLBP No. 09-893-01-OL-BD01, December 1, 2011.*³

² If the Board nevertheless grants summary disposition based on the NRC Staff’s reading of Amended Contention 2.1, Joint Intervenors move to amend their contention to reflect the genuine dispute of material fact remaining regarding the accuracy and reliability of FPL’s data. This is discussed further in Section II of this motion.

³ In addition to granting intervenors’ motion for an extension of time to respond to a motion for summary disposition, the Board in that case indicated that while 10 C.F.R. § 2.1205 did not contemplate further pleadings in such informal proceedings, the Board noted that 10 C.F.R. § 2.710(a) states that a party opposing a motion for summary disposition may respond in writing to new facts or arguments presented in any statement filed in support of the motion. In accordance with that rule, the Board granted

In addition to Joint Intervenors' Response to NRC Staff's Answer to FPL's Motion for Summary Disposition, Joint Intervenors also submit a Conditional Motion to Admit Second Amended Contention NEPA 2.1 in the event this Board finds that FPL is entitled to summary disposition simply because it has now identified the source of the data for the chemical concentrations listed in Table 3.6-2. Joint Intervenors strenuously maintain that summary disposition is inappropriate (as argued in their Answer to FPL's Motion for Summary Disposition) but are submitting this Conditional Motion out of an abundance of caution and in response to the new information set forth in FPL's Motion for Summary Disposition and the "Wagner Declaration."

I. JOINT INTERVENORS' RESPONSE TO NRC STAFF'S ANSWER TO FPL'S MOTION FOR SUMMARY DISPOSITION.

A. Amended Contention 2.1 Challenges Both the Accuracy and Reliability of the Concentrations Listed in ER Table 3.6-2 and FPL's Conclusion that the Resulting Impacts to the Groundwater Will Be "SMALL."

The NRC Staff contends that summary disposition is appropriate simply because FPL has identified the source of the data for the chemical concentrations in the applicant's ER Rev. 3 Table 3.6-2 for ethylbenzene, heptachlor, tetrachloroethylene, and toluene. NRC Staff Answer at 5-6. In the NRC Staff's view, this is the only fact material to Amended Contention 2.1, and thus FPL is entitled to judgment as a matter of law. *Id.* at 6.

intervenors the opportunity to file a response in the event NRC Staff filed a statement that presented new facts or arguments in support of the applicant's motion for summary disposition.

The NRC Staff's position, however, is based on a very narrow reading of Amended Contention 2.1 and ignores the second sentence of this contention altogether. As framed by this Board in its May 2, 2012 Order, Amended Contention 2.1 reads in full:

The ER is deficient in concluding that the environmental impacts from FPL's proposed deep injection wells will be "small" because the ER fails to identify the source data of the chemical concentrations in ER Rev. 3 Table 3.6-2 for ethylbenzene, heptachlor, tetrachloroethylene, and toluene. *Such information is necessary to ensure the accuracy and reliability of those concentrations*, so it might reasonably be concluded that those chemicals will not adversely impact the groundwater by migrating from the Boulder Zone to the Upper Floridan Aquifer.

Florida Power and Light Co. (Turkey Point Units 6 and & 7), Memorandum and Order (Granting, In Part, Joint Intervenors' Motion to Admit Amended Contention NEPA 2.1) LBP-12-09, 75 NRC _ (May 2, 2012) (slip op. 16, n. 23) (emphasis added).

Thus, in accordance with the plain language of the contention, the issues in dispute encompass both (1) whether the ER is deficient because it fails to identify the source data of the chemical concentrations, and (2) whether such information is necessary to ensure the accuracy and reliability of those concentrations.

Further, while the NRC Staff points to the Board's characterization of Amended Contention 2.1 as a contention of omission to support its argument that the summary disposition is appropriate (NRC Staff Answer at 5), the NRC Staff ignores the Board's comments regarding the importance of this information. *Turkey Point Units 6 & 7*. LBP-12-09, 75 NRC _ (May 2, 2012) (slip op. 16, n. 23). The Board, in reserving judgment as to whether the "migration component" of the contention would continue to support a litigable issue if FPL cured the omission of the source data, noted that – in order to provide such a cure – FPL must be "*able to reasonably demonstrate* that the disputed chemical concentrations listed in ER Table 3.6-2 (1) were accurate and reliable, *and* (2)

resulted in “small environmental impacts when discharged through the injection wells.” *Id.* (emphasis added). The Board’s statements indicate that there is much more to Amended Contention 2.1 than just simply identifying the source data. As Joint Intervenors’ Answer to FPL’s Motion for Summary Disposition and the supporting Declaration of Mark Quarles explains, FPL has failed to demonstrate at this time that the chemical concentrations are accurate and reliable and that the environmental impacts will be small. These issues remain in dispute and therefore the Board should not grant summary disposition of Amended Contention 2.1.

Moreover, the NRC Staff’s ultimate position that regardless, it “does not now plan to rely on the Applicant’s method of evaluation set forth in the Motion,” provides additional and significant support for a ruling that summary disposition is improper. While the NRC Staff asserts that the data provided by FPL is sufficient to satisfy Joint Intervenors’ concerns, it concedes that the same data is not sufficient enough to be relied upon by the Staff itself. Instead of recognizing that a dispute exists, the NRC Staff adopts an exceptionally narrow and flawed reading of Amended Contention 2.1 to remove Joint Intervenors from the very dispute they raised in their contention. Joint Intervenors deserve a fair hearing on the issue.⁴

Should this Board, however, determine that Amended Contention 2.1 only requires FPL to disclose the source data of the chemical concentrations, Joint Intervenors alternatively move to admit Second Amended Contention NEPA 2.1 as set forth below.

⁴ Joint Intervenors note that this is the second motion filed by FPL to dismiss Amended Contention 2.1. Joint Intervenors have been forced to hire an expert to refute both, resulting in an unnecessary expenditure of Joint Intervenors’ time and resources. Indeed, FPL did not even hire its own expert to support the first motion. The second, as conceded by NRC Staff, did little more than provide the source of the data at issue.

II. JOINT INTERVENORS' CONDITIONAL MOTION TO ADMIT SECOND AMENDED CONTENTION NEPA 2.1

Joint Intervenors strenuously maintain that the Board should not summarily dispose of Amended Contention 2.1 simply because FPL has identified the source data. Joint Intervenors further submit that Amended Contention 2.1 remains litigable and should not be modified, amended, or replaced with a new contention at this time. To the extent, however, that the Board summarily disposes of Amended Contention 2.1 on the grounds that FPL has identified the source data, Joint Intervenors hereby move to further amend the contention to read as follows:

The ER is deficient in concluding that the environmental impacts from FPL's proposed deep injection wells will be "small" because the chemical concentrations listed in ER Rev. 3 Table 3.6-2 for ethylbenzene, heptachlor, tetrachloroethylene, and toluene are inaccurate and unreliable. An accurate and reliable calculation of the concentrations of these chemicals in the wastewater stream is necessary so it might reasonably be concluded that those chemicals will not adversely impact the groundwater by migrating from the Boulder Zone to the Upper Floridan Aquifer.

For the reasons explained below, Joint Intervenors' second amended contention satisfies the requirements of 10 C.F.R. § 2.309(f)(1) and (2) and should be admitted. *See Florida Power & Light Co.*, Memorandum and Order (Initial Scheduling Order and Administrative Directives) (March 2, 2011) (the "Scheduling Order"); *see also Exelon Generation Co.* (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 160-61 (2005).

A. Joint Intervenors' Second Amended Contention 2.1 Satisfies the Requirements of 10 C.F.R. § 2.309(f)(1).

First, the contention presents "a specific statement of the issue of law or fact to be raised or controverted" (10 C.F.R. § 2.309(f)(1)(i)) as it takes issue with the accuracy and

reliability of the concentrations of ethylbenzene, heptachlor, tetrachloroethylene, and toluene provided in ER Rev. 3 Table 3.6-2, and FPL's analysis of the four constituents' impacts to the environment.

Second, the contention includes a "brief explanation of its basis" (10 C.F.R. § 2.309(f)(1)(ii)) insofar as Joint Intervenors challenge the accuracy and reliability of the chemical concentrations listed in ER Table 3.6-2 for the four constituents found in the wastewater stream, continue to assert that there has been migration of fluid between the Boulder Zone and the Upper Floridan Aquifer, and have maintained throughout this proceeding that the ER fails to adequately discuss the impact of the four chemical constituents on the Upper Floridan Aquifer.

Third, the contention remains within the scope of this proceeding (10 C.F.R. § 2.309(f)(1)(iii)) as it concerns FPL's COL Application for Turkey Point Units 6 and 7 and challenges FPL's revised ER.

Fourth, the contention satisfies the materiality requirement (10 C.F.R. § 2.309(f)(1)(iv)) as it contests statements and conclusions made in FPL's Motion for Summary Disposition and supporting "Wagner Declaration." These filings by FPL defend the accuracy and reliability of the concentrations listed in Table 3.6-2 based on the origin of the data, set forth several assumptions made by Mr. Wagner as to how the plant's operations will influence the concentration levels of the four chemicals, and provide a subsequent "bounding analysis" performed by Mr. Wagner in support of FPL's position that the resulting environmental impacts would be "small."

Fifth, the contention provides alleged facts or expert opinions (10 C.F.R. § 2.309(f)(1)(v)) as it is supported by the Declaration of Mark Quarles which was filed as

an attachment to Joint Intervenors' Answer to FPL's Motion for Summary Disposition, and is incorporated herein by reference.

Finally, a genuine dispute exists (10 C.F.R. § 2.309(f)(1)(vi)) as to (1) whether the wastewater used by FPL will contain heptachlor, ethylbenzene, toluene, and tetrachloroethylene in the concentrations reflected on Table 3.6-2 of the ER, and (2) whether the wastewater discharged via deep well injection will, along with these particular contaminants, migrate from the Boulder Zone to the Upper Floridan Aquifer.

Accordingly, Joint Intervenors' Second Amended Contention satisfies the requirements of 10 C.F.R. § 2.309(f)(1).

B. Joint Intervenors' Second Amended Contention 2.1 Satisfies the Requirements of 10 C.F.R. § 2.309(f)(2).

Pursuant to 10 C.F.R. § 2.309(f)(2), contentions may be amended or new contentions filed after the initial filing only with leave of the presiding officer upon a showing that (1) the information upon which the amended or new contention is based was not previously available; (2) the information upon which the amended or new contention is based is materially different than information previously available; and (3) the amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

(1) *The Information Upon Which the Second Amended Contention is Based Was Not Previously Available.*

The contention is based upon the contents of FPL's Motion for Summary Disposition and its supporting Declaration of David M. Wagner, both of which contain information that was not previously available. This information includes FPL's newly identified source data and Mr. Wagner's "bounding analysis," which the applicant used to

determine the maximum estimated concentrations of the four constituents in the wastewater stream. These documents (and the information contained therein) were first made available to Joint Intervenors on July 19, 2012 – the date FPL filed its Motion for Summary Disposition.

- (2) *The Information Upon Which the Second Amended Contention is Based Is Materially Different than Information Previously Available.*

On July 19, 2012, FPL provided for the first time the source data for the estimated concentrations of the four constituents listed in Table 3.6-2 as well as an analysis of this data by Mr. Wagner. This information (as incomplete and unverifiable as it may be) differs significantly from the original ER, which wholly failed to list the source of these chemicals, much less contain any analysis to verify their accuracy and reliability.

- (3) *The Second Amended Contention Has Been Submitted In A Timely Fashion Based on the Availability of the Subsequent Information.*

FPL’s Motion for Summary Disposition and the supporting Wagner Declaration were filed on July 19, 2012. Joint Intervenors have filed this Second Amended Contention within thirty (30) days of the filing of these documents. Thus, the contention is timely. *See* Scheduling Order at 8 (providing that “a motion and proposed new or amended contention . . . shall be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if it is filed within thirty (30) days of the date when the new and material information on which it is based first becomes available.”)

CERTIFICATION

In accordance with 10 C.F.R. § 2.323(b), counsel for Joint Intervenors have contacted the other parties in this proceeding to resolve the issue raised in this motion. FPL opposed both Joint Intervenors’ Response to NRC Staff’s Answer to FPL’s Motion

for Summary Disposition and Joint Intervenors' Motion to Admit Second Amended Contention NEPA 2.1. The NRC Staff opposed Joint Intervenors' Response to NRC's Staff's Answer to FPL's Motion for Summary Disposition. While the NRC Staff did not object to the filing of a motion to amend the Joint Intervenors' admitted contention, it declined to take any position on whether any such proposed amended contention does nor does not satisfy the standards for contention admissibility in 10 CFR Part 2, and instead reserved the right to answer such a motion.

CONCLUSION

For all the aforementioned reasons, Joint Intervenors should be granted to leave to respond to the NRC Staff Answer, and FPL's Motion for Summary Disposition should be denied. Alternatively, if FPL's Motion for Summary Disposition is granted, the Board should admit Joint Intervenors' Second Amended Contention NEPA 2.1.

Respectfully submitted this 20th day of August, 2012.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

FLORIDA POWER & LIGHT COMPANY

(Turkey Point Units 6 and 7)

Docket Nos. 52-040-COL and 52-041-COL

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing “Joint Intervenors’ Request for Leave to Respond to NRC Staff’s Answer to FPL’s Motion for Summary Disposition and Alternatively, Joint Intervenors’ Conditional Motion to Admit Second Amended Contention NEPA 2.1” were served upon the following persons by Electronic Information Exchange and/or electronic mail.

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