

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

In the Matter of
FLORIDA POWER & LIGHT COMPANY
(Turkey Point Units 6 and 7)

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

ASLBP No. 10-903-02-COL-BD01

August 30, 2012

MEMORANDUM AND ORDER
(Granting in Part and Denying in Part Motion for
Summary Disposition of Amended Contention 2.1)

Before this Board is a motion for summary disposition of Amended Contention 2.1 filed by Florida Power & Light Company (FPL) on July 19, 2012.¹ For the reasons discussed below, we grant in part and deny in part FPL's motion.

I. BACKGROUND

This proceeding concerns a challenge to FPL's combined license (COL) application for two new nuclear power reactors, Turkey Point Units 6 and 7, to be constructed at FPL's facility near Homestead, Florida.² On August 17, 2010, Mark Oncavage, Dan Kipnis, Southern Alliance for Clean Energy, and National Parks Conservation Association (hereinafter "Joint Intervenors") filed a petition to intervene, putting forward a number of contentions challenging FPL's

¹ See [FPL's] Motion for Summary Disposition of Joint Intervenors' Amended Contention 2.1 (July 19, 2012) [hereinafter "FPL Motion"].

² See [FPL, COL] Application for the Turkey Point Units 6 & 7, Notice of Hearing, Opportunity to Petition for Leave to Intervene and Associated Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation, 75 Fed. Reg. 34,777 (June 18, 2010).

Environmental Report (ER).³ On February 18, 2011, this Board found that Joint Intervenors had standing to intervene in this proceeding, and had proffered one admissible contention, Contention 2.1, which, as admitted, was a contention of omission alleging that “the ER fails to analyze and discuss the potential impacts on groundwater quality of injecting into the Floridan Aquifer via underground injection wells heptachlor, ethylbenzene, toluene, selenium, thallium, and tetrachloroethylene, which have been found in injection wells in Florida but are not listed in FPL’s ER as wastewater constituent chemicals.” LBP-11-06, 73 NRC 149, 190 (2011).

On January 3, 2012, FPL moved to dismiss Contention 2.1 as moot on the grounds that its original ER had listed two of the six chemicals named in the contention, and that an amendment to its ER had provided information regarding the other four chemicals.⁴ In their answer, Joint Intervenors argued that the contention was not moot and, in the alternative, requested that the Board admit an amended version of Contention 2.1.⁵ On January 26, 2012, this Board granted FPL’s motion to dismiss Contention 2.1, but refrained from ruling on Joint Intervenors’ motion to amend Contention 2.1 pending receipt of responsive pleadings from FPL and the NRC Staff.⁶

On May 2, 2012, this Board granted Joint Intervenors’ request to admit an amended version of Contention 2.1, which, as admitted, alleges:

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

³ See [Joint Intervenors’] Petition for Intervention (Aug. 17, 2010).

⁴ [FPL’s] Motion to Dismiss Joint Intervenors’ Contention 2.1 as Moot (Jan. 3, 2012) at 4-5.

⁵ See Joint Intervenors’ Answer to FPL’s Motion to Dismiss Joint Intervenors’ Contention 2.1 as Moot, and Alternatively, Joint Intervenors’ Motion to Amend Contention NEPA 2.1 (Jan. 23, 2012) at 12.

⁶ Licensing Board Memorandum and Order (Granting FPL’s Motions to Dismiss Joint Intervenors’ Contention 2.1 and CASE’s Contention 6 as Moot) (Jan. 26, 2012) at 6-7 (unpublished).

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.

LBP-12-09, 75 NRC __, __ (slip op. at 16) (May 2, 2012).

Significantly, although we acknowledged that the amended contention was a “contention of omission” (LBP-12-09, 75 NRC at __ n.23 (slip op. at 16 n.23)), we also ruled that it contained an additional component -- which we characterized as Joint Intervenors’ migration argument -- that is embodied in the contention’s second sentence. The migration argument, we stated, evinced a “concern . . . regarding the accuracy and reliability of the concentration levels” of the four chemicals that will be discharged into the Boulder Zone. Id. at 15.

On July 19, 2012, FPL filed a motion for summary disposition of Amended Contention 2.1. See FPL Motion. Curiously, in describing the amended contention that “is the subject of FPL’s current [m]otion” (id. at 6), FPL refers only to the first sentence of the admitted contention (see id.), wholly ignoring the second sentence of the contention, which incorporates Joint Intervenors’ migration argument and which stresses the importance of ensuring the “accuracy and reliability” of the chemical concentrations. In its motion, FPL claims it cured the alleged omission in Amended Contention 2.1 by “identifying the source of the data on the four chemicals’ concentrations in ER Rev. 3 Table 3.6-2, and . . . providing a detailed description of how those concentrations were obtained.” Id. at 2. FPL also asserts that it “performed an extremely conservative ‘bounding’ analysis that demonstrates that the environmental impacts of injecting these chemicals into the aquifer are SMALL.” Id.

The NRC Staff agrees with FPL that “summary disposition of Amended Contention 2.1 is warranted” because FPL “has cured the omission cited in the contention by identifying the source of the data for the chemical concentrations in [its ER].”⁷ The Staff notes, however, that

⁷ NRC Staff’s Answer to Applicant’s Motion for Summary Disposition of Amended Contention 2.1 (Aug. 8, 2012) at 5 [hereinafter “NRC Staff Answer”]. Although the NRC Staff agrees that

the Board might determine that Amended Contention 2.1, in addition to containing an omission component, also “encompasses a genuine dispute regarding the ‘accuracy and reliability’ of the concentration data in [the ER]” (NRC Staff Answer at 7 n.2), and that such a determination “might be a basis for the Board to deny the [m]otion” in part. Id. More specifically, the Staff states that it “disagrees with [FPL’s] assertion regarding the concentration of tetrachloroethylene in the wastewater used in the facility” (id. at 6), and this disagreement “might be a basis for the Board to deny the [m]otion with respect to that chemical.” Id. at 7 n.2.

Joint Intervenors oppose the motion, claiming that “several significant disputes remain regarding the accuracy and reliability of the purported [chemical] concentrations set forth in FPL’s [ER].”⁸

II. APPLICABLE LEGAL STANDARD

Pursuant to NRC regulations, a motion for summary disposition may be granted if “there is no genuine issue as to any material fact and . . . the moving party is entitled to a decision as a matter of law.” 10 C.F.R. § 2.710(d)(2). Our standards governing summary disposition “are based upon those the federal courts apply to motions for summary judgment under Rule 56 of

FPL cured the omission cited in the contention, the Staff declines to take a position with respect to the other arguments advanced by FPL. See id. at 1.

On August 20, 2012, Joint Intervenors filed a motion seeking to respond to the NRC Staff’s Answer and, alternatively, to proffer a Second Amended Contention 2.1. See 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 (Aug. 20, 2012). We are able to resolve FPL’s motion for summary adjudication without any need to resort to the arguments advanced by Joint Intervenors in their August 20 motion. See infra Part III. Accordingly, as we advised the parties in an Order issued on August 23, 2012, Joint Intervenors’ August 20 motion is denied. See Licensing Board Order (Denying Joint Intervenors’ Motion for Leave to Respond and, Alternatively, to Admit Newly Amended Contention 2.1) (Aug. 23, 2012) (unpublished).

⁸ Joint Intervenors’ Answer to FPL’s Motion for Summary Disposition of Joint Intervenors’ Amended Contention 2.1 (Aug. 6, 2012) at 1-2 [hereinafter “Joint Intervenors’ Answer”].

the Federal Rules of Civil Procedure.”⁹ Hence, in ruling on a motion for summary disposition, a licensing board should not conduct a trial on the affidavits by weighing the evidence and endeavoring to determine the truth of the matter. Rather, a board’s role is to determine whether any genuine issue of fact exists; in making this determination, “[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.”¹⁰ “If ‘reasonable minds could differ as to the import of the evidence,’ summary disposition is not appropriate.”¹¹

III. ANALYSIS AND RULING

As discussed below (infra Part III.A), we conclude that Amended Contention 2.1, reasonably viewed in light of its language and underlying rationale, includes an omission component in its first sentence and an adequacy component in its second sentence.¹² We agree with FPL that its recent amendment to the ER cured the contention’s omission; however, the adequacy component of the contention has not been cured. See infra Part III.B.

A. Amended Contention 2.1 Contains an Omission Component and an Adequacy Component

Amended Contention 2.1 is a mixed contention, containing an omission component and an adequacy component. The omission component of the contention is embodied in its first sentence, which alleges that FPL’s ER improperly “fails to identify the source data of the chemical concentrations . . . for ethylbenzene, heptachlor, tetrachloroethylene, and toluene.” LBP-12-09, 75 NRC at __ (slip op. at 11); see also id. at 10 (the first sentence of Amended

⁹ Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 297 (2010).

¹⁰ Id. (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986)).

¹¹ Id. at 297-98 (quoting Liberty Lobby, 477 U.S. at 250-51).

¹² See AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), LBP-06-16, 63 NRC 737, 742 & n.7 (2006) (discussing distinction between a contention of omission and a contention of adequacy).

Contention 2.1, which by itself constitutes an admissible contention, identifies an “omission” in the ER).

The adequacy component of Amended Contention 2.1 is embodied in its second sentence, which we characterized in LBP-12-09 as the migration aspect of the contention. In our analysis admitting it, we repeatedly stressed that Joint Intervenors’ migration argument and its underlying admissibility criteria were distinct from -- although supportive of -- the omission component.¹³ In particular, the migration argument emphasizes that the source data for the four specified chemical concentrations must be reliable and accurate, because that data affects conclusions in the ER regarding the possible impact of these chemicals on groundwater if the wastewater migrates to the Upper Floridan Aquifer. As stated in the migration component of the contention, FPL is required to identify the source data of the four chemical concentrations “*to ensure the accuracy and reliability of those [chemical] 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.” LBP-12-09, 75 NRC at ___ (slip op. at 16) (emphasis added).¹⁴

In short, the language and underlying rationale of the second sentence of Amended Contention 2.1 supports the conclusion that this aspect of the contention contains an adequacy

¹³ Compare LBP-12-09, 75 NRC at ___-___ (slip op. at 9-11) (discussing admissibility criteria underlying the omission component) with *id.* at 14-19 (discussing admissibility criteria underlying the migration component).

¹⁴ See also LBP-12-09, 75 NRC at ___ (slip op. at 17) (citation omitted) (“[T]he amended contention, as supported by the migration argument, includes ‘a brief explanation of [its] basis.’ Joint Intervenors explain that, given the absence of source data for the four specified chemical concentrations, the accuracy and reliability of those concentrations are suspect, which, in turn, renders suspect any conclusion about the environmental impact on groundwater due to migration.”); *id.* (in the migration component of the amended contention, “Joint Intervenors challenge the accuracy and reliability of the concentrations of four chemicals listed in ER Table 3.6-2 that will be in the wastewater that is injected into the Boulder Zone”); *id.* at 18 (in the migration component of the amended contention, “Joint Intervenors have shown that a genuine dispute of fact exists as to . . . whether the [four specified] chemical concentrations listed in ER Table 3.6-2 are accurate”).

component challenging the accuracy and reliability of the four specified chemical concentrations.

B. FPL's Amendment to the ER Cures the Omission Component of Amended Contention 2.1, but It Does Not Cure the Contention's Adequacy Component

FPL is entitled to summary disposition of the omission component of Amended Contention 2.1. As relevant here, that component states the ER is deficient because it “fails to identify the source data of the chemical concentrations in ER Rev. 3 Table 3.6-2 for ethylbenzene, heptachlor, tetrachloroethylene, and toluene.” LBP-12-09, 75 NRC at ___ (slip op. at 16). FPL represents that it has taken the following steps to cure this deficiency:

The source data used to determine the estimated concentrations of [the four specified chemicals] in ER Rev. 2 Table 3.6-2 were provided in the Miami-Dade Water and Sewer Department (“MDWASD”), South District Wastewater Treatment Plant (“SDWWTP”) annual reports for the years 2007 through 2011. FPL selected as source data the highest concentrations of each of those constituents found in the reclaimed water from the SDWWTP during this most recent five-year period.

FPL Motion at 8 (citation omitted). FPL claims that, having identified “the sources of the data on the four chemicals’ concentrations,” and having provided “a detailed description of how those concentrations were obtained,” the omission identified in Amended Contention 2.1 has been cured. Id. at 2. The NRC Staff likewise states that FPL “has cured the omission cited in [Amended Contention 2.1]” and is, therefore, entitled to summary disposition of that aspect of the contention. NRC Staff Answer at 1. We agree.¹⁵

¹⁵ The NRC Staff states that although “it has verified [FPL’s] representations regarding the concentrations of ethylbenzene, heptachlor, and toluene, it disagrees with [FPL’s] assertion regarding the concentration of tetrachloroethylene in the wastewater used in the facility.” NRC Staff Answer at 6. This disagreement, however, “does not alter the Staff’s conclusion that [FPL] has demonstrated that the omission on which Amended Contention is based has been cured and that summary disposition is therefore appropriate.” Id. at 6-7. The Staff posits several procedural approaches that could provide Joint Intervenors with an opportunity to challenge the accuracy and reliability of tetrachloroethylene. See id. at 7 n.2. Our interpretation of Amended Contention 2.1, and our resolution of FPL’s motion, preserves this opportunity for Joint Intervenors. See infra note 20.

However, FPL's provision of the missing source data does *not* cure the concerns underlying the migration component of Amended Contention 2.1. More precisely, that FPL has provided the missing source data for the four chemical concentrations does *not*, in the words of Amended Contention 2.1, "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." LBP-12-09, 75 NRC at ___ (slip op. at 16).

FPL nevertheless asserts that no genuine dispute of material fact exists because, according to FPL, it has provided accurate and reliable source data for the four chemical concentrations, and it has performed a conservative "bounding analysis" to demonstrate that the environmental impact of any wastewater migrating to the Upper Floridan Aquifer would be "SMALL."¹⁶

But Joint Intervenors dispute a number of material facts that FPL alleges are not genuinely in dispute.¹⁷ Additionally, Joint Intervenors have put forward a number of additional allegedly material facts which they claim are in dispute. See Joint Intervenors' Statement of Facts at 4-8. These claims are supported by the declaration of Mark A. Quarles.¹⁸ For example, Joint Intervenors claim that FPL relies on data from wastewater samples that were

¹⁶ See FPL Motion at 8-12; see also id., Att. 2, Declaration of David M. Wagner in Support of [FPL's] Motion for Summary Disposition of Joint Intervenors' Amended Contention 2.1.

¹⁷ Compare FPL Motion, Att. 1, Statement of Material Facts as to Which No Genuine Dispute Exists, in Support of [FPL's] Motion for Summary Disposition of Joint Intervenors' Amended Contention 2.1 (July 19, 2012) with Joint Intervenors' Answer, Att. 1, Joint Intervenors' Statement of Material Facts as to Which a Genuine Issue Exists, in Support of Joint Intervenors' Answer to FPL's Motion for Summary Disposition of Joint Intervenors' Amended Contention 2.1 (Aug. 6, 2012) [hereinafter "Joint Intervenors' Statement of Facts"].

¹⁸ See Joint Intervenors' Answer, Att. 2, Declaration of Mark A. Quarles in Support of Joint Intervenors' Answer to FPL's Motion for Summary Disposition of Joint Intervenors' Amended Contention 2.1 (Aug. 6, 2012) [hereinafter "Quarles Declaration"].

subjected to improper collection and analysis techniques, and that its bounding analysis relies on unreliable data as well as flawed assumptions.¹⁹

Although we make no judgment as to the validity of the claims advanced by Joint Intervenors, we conclude they have adequately demonstrated that a genuine dispute remains in this proceeding “regarding the accuracy and reliability of the concentration levels of ethylbenzene, heptachlor, tetrachloroethylene, and toluene that will be discharged into the Boulder Zone.” LBP-12-09, 75 NRC at ___ (slip op. at 15). As we previously have stated, this continuing uncertainty “renders suspect any conclusion about the environmental impact on groundwater due to migration.” *Id.* at 17.

We therefore deny FPL’s motion with regard to the adequacy component of Amended Contention 2.1 that contains Joint Intervenors’ migration argument.²⁰

IV. CONCLUSION

For the foregoing reasons, FPL’s motion for summary disposition of Amended Contention 2.1 is granted in part and denied in part. Because FPL has cured the omission regarding the source of data used to calculate concentrations of chemicals in its ER, its motion is granted insofar as Amended Contention 2.1 concerns that omission. Because a number of

¹⁹ See Joint Intervenors’ Answer at 6-14; Joint Intervenors’ Statement of Facts at 3-8; Quarles Declaration at 3-8. Notably, the NRC Staff itself identifies a material fact that is in genuine dispute; namely, the validity vel non of FPL’s data regarding the concentration of tetrachloroethylene in the wastewater. See NRC Staff Answer at 6; supra note 15.

²⁰ The NRC Staff suggests that, if we do not grant FPL’s motion in its entirety, the preferred procedural approach would be to require Joint Intervenors to file a motion to amend Amended Contention 2.1, because, according to the Staff, Joint Intervenors’ arguments “would appear to be based on new information” relating to the source data underlying the chemical concentrations in ER Rev. 3 Table 3.6-2. See NRC Staff Answer at 7 n.2. We disagree. In seeking summary disposition of Amended Contention 2.1, FPL had the burden of demonstrating that there is no genuine issue of material fact and that it is entitled to judgment in its favor as a matter of law. See 10 C.F.R. § 2.710(d)(2). As shown above in text, FPL failed fully to satisfy that burden insofar as it failed to eliminate all genuine disputes of material fact relevant to Joint Intervenors’ migration argument. Accordingly, Amended Contention 2.1, as we have narrowed and reformulated it to eliminate the omission component (see infra Part IV), remains in controversy, and Joint Intervenors need not assume the burden of seeking to amend Amended Contention 2.1.

material facts regarding the accuracy and reliability of that source data remain in dispute, and therefore the accuracy and reliability of FPL's claims regarding the environmental impacts to the Upper Floridan Aquifer remain in dispute, the motion is denied with regard to all other aspects of Amended Contention 2.1. We thus reformulate Amended Contention 2.1 to eliminate the moot issue,²¹ so the contention now reads 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 in ER Rev. 3 Table 3.6-2 for ethylbenzene, heptachlor, tetrachloroethylene, and toluene may be inaccurate and unreliable. Accurate and reliable calculations of the concentrations of those chemicals in the wastewater are necessary so it might reasonably be concluded that those chemicals will not adversely impact the groundwater should they migrate from the Boulder Zone to the Upper Floridan Aquifer.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

/RA/

E. Roy Hawkens, Chairman
ADMINISTRATIVE JUDGE

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Dr. Michael F. Kennedy
ADMINISTRATIVE JUDGE

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Dr. William C. Burnett
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 30, 2012

²¹ See Crow Butte Res., Inc. (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 552 (2009) ("Our boards may reformulate contentions to 'eliminate extraneous issues or to consolidate issues for a more efficient proceeding.'" (citations omitted)).

UNITED STATES OF AMERICA
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In the Matter of)
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Florida Power & Light Company) Docket Nos. 52-040 and 52-041-COL
(Juno Beach, Florida))
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MEMORANDUM and ORDER (Granting in Part and Denying in Part Motion for Summary Disposition of Amended Contention 2.1) have been served upon the following persons by Electronic Information Exchange.

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DOCKET NO. 52-040 and 52-041-COL
MEMORANDUM and ORDER (Granting in Part and Denying in Part Motion for Summary
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Dated at Rockville, Maryland
this 30th day of August 2012

Original signed by Christine M. Pierpoint]
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