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

In the Matter of	)	
	)	Docket Nos. 52-040 and 52-041
Florida Power & Light Company	)	ASLBP No. 10-903-02-COL-BD01
	)	
Turkey Point, Units 6 and 7	)	
	)	May 15, 2015
	)	

REPLY BY JOINT INTERVENORS TO OPPOSITIONS BY FPL AND NRC STAFF TO MOTION TO ADMIT NEW CONTENTION REGARDING NRC'S RELIANCE ON SPECULATIVE MITIGATION MEASURES AND FAILURE TO ADEQUATELY EXAMINE THE EFFECTIVENESS OF THESE PROPOSED MITIGATION MEASURES IN THE DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR TURKEY POINT UNITS 6 & 7

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.309(i)(2) and the Atomic Safety and Licensing Board Order dated January 26, 2012 (Florida Power & Light Co., (Turkey Point Units 6 & 7, ML 12026A438) (Jan. 26, 2012) (unpublished order) (slip op. at 7)), SOUTHERN ALLIANCE FOR CLEAN ENERGY ("SACE"), NATIONAL PARKS CONSERVATION ASSOCIATION ("NPCA"), DAN KIPNIS, and MARK ONCAVAGE (collectively "Joint Intervenors"), hereby file their Reply to Florida Power

& Light Company's ("FPL") and Nuclear Regulatory Commission Staff's ("NRC Staff") Answers to Joint Intervenors' Motion for Leave to File a New Contention Concerning the NRC's Reliance on Speculative Mitigation Measures and Failure to Adequately Examine the Effectiveness of these Proposed Mitigation Measures in the Draft Environmental Impact Statement for the Turkey Point Nuclear Power Plant Units 6 & 7.

As further discussed below, the Contention is timely and identifies a genuine dispute with the DEIS regarding the adequacy of its discussion of the effectiveness of the "possible" and "potential" mitigation measures for terrestrial and wetland impacts.

II. ARGUMENT

A. The New Contention is Timely

FPL contends that the new contention is not timely because it is not based on new information. FPL Answer at 15. Instead, FPL asserts that the Draft Environmental Impact Statement ("DEIS") is based on and consistent with previously available information in the Environmental Report ("ER"). *Id.*

While FPL points to portions of the DEIS that reference the ER and Mitigation Plan (Revision 2), and suggests that Joint Intervenors previously raised a similar contention that was not admitted by the Board (Contention 5),[1] FPL ignores the fact that the DEIS is materially different than the ER in that for the first time the DEIS states (1) that the proposed actions related to the FPL application include a United States Army Corps of Engineers ("Corps" or "USACE") decision to issue, deny, or issue with modifications a Department of Army permit to perform certain dredge and fill activities in waters of the United States and to construct structures in navigable waters of the

[1] *See* FPL Answer at 4 and 14.

United States related to the project (DEIS at iii, xxxii, 1-5), (2) that the Corps "participated in the preparation of the EIS as a cooperating agency and as a member of the review team" (DEIS at xxxi), (3) that the proposed mitigation measures have not been reviewed and approved by the Corps (DEIS at 4-69, 4-70, 4-73), and (4) that the Corps will not make a determination regarding the adequacy of the mitigation measures until *after* the FEIS is issued (DEIS at 4-2)(emphasis added). As a cooperating agency and member of the "review team," the Corps is a co-author of the DEIS;[2] yet, it is apparently the intention of the NRC to issue the FEIS without the benefit of the Corps' evaluation of the proposed mitigation.

As the DEIS currently reads and without the Corps' review of the applicant's avoidance, minimization, and mitigation of impacts to wetland resources, the "possible" and "potential" mitigation measures thus remain speculative and the analysis of their effectiveness to offset the project's environmental impacts remains incomplete. The Corps' review of the applicant's proffered avoidance, minimization, and mitigation measures, could have a direct bearing on the agencies' analysis of alternatives, impacts, and mitigation under NEPA.[3] By the time the Corps completes its review, however, the FEIS will have already been issued. That the Corps is part of the review team and has not completed its review of the mitigation measures and will not until after the FEIS has been issued, is significant new information and is material to the sufficiency of the FEIS for this project.

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[2] *See* DEIS at cover page, xxi, xxii, 1-5.

[3] The DEIS states that "impact determinations made in this EIS should…be attributed to…the NRC and USACE (also referred to as the review team)" (DEIS at xxxi) yet the USACE has not yet evaluated and made a determination regarding FPL's application for a permit to dredge and fill wetlands under section 404 of the Clean Water Act.

FPL further misapprehends the nature of Joint Intervenors' contention in arguing that Joint Intervenors are collaterally estopped or otherwise barred from raising this contention. FPL Answer at 23-24. The new contention is not challenging the specific mitigation measures proposed by FPL. Rather, the new contention challenges the adequacy of NRC's discussion and analysis under the National Environmental Policy Act of how these mitigation measures will offset the project's anticipated impacts. Accordingly, Joint Intervenors are in no way collaterally estopped from raising these issues before the NRC because an administrative law judge and the Florida Siting Board approved of FPL's mitigation plan under the Florida Power Plant Siting Act, a proceeding and determination entirely separate and distinct from the NRC's compliance with NEPA. Moreover, whether the mitigation plan has been approved by the State (FPL Answer at 4-7, 26) is also irrelevant to the central issue of whether the DEIS adequately discusses and evaluates the mitigation measures for this project.[4]

B. A Material Dispute Exists

Joint Intervenors have demonstrated that a material dispute exists regarding the Draft Environmental Impact Statement's discussion of the proposed mitigation measures and analysis of their effectiveness in offsetting the project's impacts to terrestrial and wetland resources. Indeed, Joint Intervenors cited several specific instances in the DEIS where the NRC identifies the project's impacts and the "proposed" or "possible" mitigation measures to offset those impacts but fails to make the necessary *connection* between those mitigation measures and the expected impacts. That the DEIS must

[4] The DEIS states that the "USACE will conduct an independent review of FPL's mitigation proposal only after avoidance and minimization have been achieved. The State of Florida's review is independent of the USACE review." DEIS at 4-44.

explain this connection is critically important given the agencies' uncertainty regarding the project's impacts to terrestrial and wetland resources[5] and consistent with the Supreme Court's decision in *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989).

The Fifth Circuit Court of Appeals' decision in *O'Reilly v. United States Army Corps of Engineers*, 477 F.3d 225 (5th Cir. 2007), which Joint Intervenors cited in their Motion, is particularly instructive. In *O'Reilly*, Plaintiffs' challenged an environmental assessment ("EA") prepared by the U.S. Army Corps of Engineers regarding the dredge and fill of wetlands to accommodate a planned residential subdivision. The EA identified several adverse effects including impacts to soils and flood capacity, increased non-point source pollution, loss of wildlife habitat, and loss of wetland functions. *Id.* at 232-34. The EA identified several mitigation measures intended to mitigate for these impacts. *Id.* To mitigate for impacts to soils and flood capacity, the EA stated that the drainage plan would rely on a 100-foot vegetated buffer zone, raise the elevation of the major road, and would meet local requirements. *Id.* at 232. The EA concluded the project as mitigated would have "minimal effect" on flooding. *Id.* To address water quality impacts the EA asserted that the 100-foot vegetated buffer would minimize the amount of sediment entering the river, that the project would comply with local ordinances, that "best management practices" would be incorporated into project construction and the project would comply with state environmental permits. *Id.* at 233. The EA further stated that the buffer zone would mitigate some of the impact to aquatic organisms, that "compensatory mitigation for wetland functionality losses will be required" and the

[5] *See* page 6 of Joint Intervenors' Motion.

permittee would purchase credits for 47.5 acres of pine flatwood/savannah wetlands, which would be acquired from an approved site within the watershed. *Id.*

The Court ruled that the EA failed to sufficiently demonstrate that the mitigation measures adequately addressed and remediated the adverse impacts so that they would not significantly affect the environment. *Id.* at 234. The Court found that while the EA listed the potentially significant impacts and described in broad terms the types of mitigation measures that would be employed, it impermissibly provided only cursory detail as to what those measures are and how they serve to reduce the impacts to a less-than-significant level.[6] *Id.*

A very similar situation has occurred here. In arguing that the DEIS adequately evaluates the effectiveness of the proposed mitigation and how it will offset the project's environmental impacts, FPL points to many of the very same types of general statements the court in *O'Reilly* found were insufficient under NEPA. *See e.g.* FPL Answer at 19-20. The "description" of measures FPL points to are little more than general examples of the types of measures FPL may employ: wetland restoration, enhancement preservation, purchasing mitigation credits, mitigation banking, exotic vegetation removal, using previously disturbed areas, backfilling ditches, planting native vegetation, and transferring lands to an (unidentified) "land trust". *Id.; see also* NRC Staff Answer at

[6] While *O'Reilly* involved an instance where the agency prepared an EA and relied on mitigation measures to support its issuance of a "finding of no significant impact" ("FONSI"), the court noted that the proffered mitigation analysis was lacking even if one were to assume an EA "is meant to be a 'rough-cut, low-budget,' preliminary look at the environmental impact of a proposed project.'" *O'Reilly* at 234 (citing *Spiller v. White*, 352 F.3d 235, 240 (5th Cir. 2003)). The Court further cited the Supreme Court's decision in *Robertson* in stating that "an EIS involving mitigation must include 'a serious and thorough evaluation of environmental mitigation options for [a] Project to allow its analysis to fulfill NEPA's process-oriented requirements[.]'" *Id.* at 231.

7. The DEIS also notes that "FPL would be required to comply with applicable laws, regulations, and permit requirements," that it "proposes" to use "standard industry construction practices," and that it "routinely uses standard industry construction practices, environmental Best Management Practices, and mitigation measures to ensure adverse environmental effects of construction are avoided, minimized, or mitigated." DEIS at 4-143. There is no explanation, however, of why these measures will sufficiently offset the project's environmental impacts other than to say that according to the applicant's use of the Uniform Mitigation and Assessment Method ("UMAM") all these potential mitigation measures will offset the project's impacts. There is no discussion of why each of these measures (independently and collectively) are appropriate to mitigate for the environmental impacts that are likely to occur and why the calculated number of "credits" under UMAM are sufficient to offset the project's impacts. Instead, FPL cites to Table 4-11 which merely lists the general area of impact (i.e. proposed units, associated facilities, roads, reclaimed water facility,[7] transmission line corridors), the form of mitigation (e.g. mitigation bank or restoration site), acreage of impact and mitigation, wetland functional change, and overall net mitigation ratio. The discussion does not adequately "connect" the proposed mitigation measures to the anticipated impacts and explain why these measures are adequate to offset the identified impacts. *O'Reilly* at 234 (citing *O'Reilly v. U.S. Army Corps of Eng*ineers, 2004 WL 1784531 at *5 (E.D.La. August 10, 2004)).

Moreover, FPL's reliance on *Hydro Resources*, CLI-06-29, 64 N.R.C. 417 (2006) to justify its position is misplaced, and that case is easily distinguishable from the facts

[7] It is worth noting that the mitigation calculated for the reclaimed water facility was based on the original proposed location. *See* DEIS, Table 4-11.

here. In *Hydro Resources*, Intervenors argued that the NRC was required to supplement its Final EIS over concerns that mitigation measures for a uranium mining project were insufficiently discussed. *Id*. at 419. The NRC found that "at bottom" Intervenors contention was based on the "fear" that the applicant may be unable to meet the mitigation criteria specified in its license condition. *Id.* at 427. The license, however, specifically stated that if the applicant was unable to meet certain requirements, it would not be able to begin mining. *Id.*

In this instance, Joint Intervenors are not requesting NRC to prepare a supplemental EIS, nor are they challenging the adequacy of specific mitigation requirements contained in a license, that if violated, would prohibit the applicant from constructing or operating the plant until those conditions are met. Rather, Joint Intervenors are contending that the mitigation measures identified in the DEIS remain speculative and have not been adequately evaluated – in fact, one of the document's authors (the Corps) will not engage in such a review until after the FEIS is issued. NEPA requires an adequate discussion of the mitigation measures *before* an FEIS is prepared and a license is issued. *See Kern v. United States Bureau of Land Mana*gement, 284 F.3d 1062, 1072 (9th Cir. 2002) ("NEPA is not designed to postpone analysis of an environmental consequence to the last possible moment. Rather it is designed to require such analysis as soon as it can reasonably be done."); *see also California v. Norton*, 311 F.3d 1162, 1175 (9th Cir. 2002) (holding that NEPA analysis must occur "early enough so that it can serve as an important contribution to the decision making process.").

Both the Council on Environmental Quality's ("CEQ") NEPA regulations and the NRC's NEPA regulations provide additional support for Joint Intervenors' position; these

regulations also refute the argument made by NRC Staff and FPL that it would be impossible to include the Corps' analysis of the mitigation measures before an FEIS is issued. *See* NRC Staff Answer at 10, footnote 5; FPL Answer at 30. The CEQ regulations governing cooperating agencies "emphasize agency cooperation early in the NEPA process." 40 C.F.R. § 1501.6.[8] Pursuant to the regulations, the lead agency must use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible. 40 C.F.R. § 1501.6(a)(2). In turn, each cooperating agency must assume on request of the lead agency responsibility for developing information and preparing environmental analyses including portions of the environmental impact statement concerning which the cooperating agency has special expertise. 40 C.F.R. §1501.6(b)(3). The NRC's NEPA regulations similarly require the NRC to the "fullest extent practicable" to prepare environmental impact statements concurrently or integrated with environmental impact analyses and related surveys and studies required by other Federal law. 10 C.F.R. § 51.70(a). The EIS must state how the alternatives considered in it and the decisions based on it will or will not achieve the requirements of sections 101 and 102(1) of NEPA and any other relevant and applicable environmental laws and policies. 10 C.F.R. § 51.91(c).

By failing to include the Corps' review of the mitigation measures in the DEIS, the NRC has failed to integrate this necessary analysis. As such, the limited discussions regarding the project's mitigation measures in the DEIS fail to satisfy the requirements of

[8] CEQ regulations further require agencies to "integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts." 40 C.F.R. § 1501.2.

NEPA. Neither the NRC Staff nor FPL provides a compelling reason why the NRC cannot include the Corps' analysis of the proposed mitigation prior to the issuance of a Final Environmental Impact Statement for this project.

Given the stated uncertainty of the project's impacts (DEIS at 7-21), coupled with FPL's failure at this point to demonstrate to the Corps that it has adequately avoided and minimized impacts to wetlands (DEIS at 4-69, 4-70, 4-73), the agencies appear unable to fully evaluate the proffered mitigation measures. As the Court in *Okanogan Highlands Alliance v. Williams,* 236 F.3d 468 (9th Cir. 2000) observed, the adequacy of an agency's discussion of mitigation is a matter of degree, and here the DEIS fails (as it did in *O'Reilly*) to "connect" the project's impacts to the associated mitigation measures. Joint Intervenors have more than adequately demonstrated that the adequacy of the DEIS's discussion of mitigation is in dispute and thus the new contention should be admitted.

C. The Standard for Contention Admission

Throughout its Answer, FPL argues that Joint Intervenors have not proven their case.[9] The standards governing the admissibility of amended contentions are set forth in the Commission's regulations, 10 C.F.R. §§ 2.309(f)(1) and (f)(2). These standards, while strict, do not require Joint Intervenors to prove the merits of their case at this time. As the NRC explained in *Carolina Power and Light Company and North Carolina Eastern Municipal Agency* (Shearon Harris Nuclear Power Plant), "it is well settled that in passing upon the admissibility of contentions it is not the function of a licensing board

[9] *See, e.g.,* FPL Answer at 21 ("Joint Intervenors do not offer any expert opinion, alleged facts, or references to specific sources or documents claiming any claim that these [mitigation] methods are inadequate"); FPL Answer at 22 ("Joint Intervenors do not provide any expert opinion, alleged facts, or references suggesting that a greater [mitigation] ratio is required").

to reach the merits of any contention. Whether the contention ultimately can be proven on the merits is not the appropriate inquiry at the contention-admission stage." *Carolina Power and Light Company and North Carolina Eastern Municipal Power Agency* (Shearon Harris Nuclear Power Plant) 23 N.R.C. 525, 541, (1986) (internal quotations and citations omitted). *See also In re Texas Utilities Elec. Co.,* 25 NRC at 931; *In re Houston Lighting and Power Co.,* 11 N.R.C. at 548–49. A stated rationale behind this limitation is to ensure that parties are not required to prove their contentions before they are admitted in the proceedings. *See In re Houston Lighting and Power Co.,* 11 N.R.C. at 548. The rule also ensures that the boards will not make rulings on the substantive merits of the parties' contentions until the record on those issues is complete.

Further, while the petitioner must present adequate support and demonstrate a genuine issue of material fact, the amount of support required to meet the contention admissibility threshold is less than is required at the summary disposition stage. And as with a summary disposition motion, a "board may appropriately view Petitioners' support for its contention in a light that is favorable to the Petitioner." *Northern States Power Company*, 68 N.R.C. 905, 916-18, (2008) (*quoting Arizona Public Service Company, et. al* (Palo Verde Nuclear Station, Units 1, 2 and 3) 34 N.R.C. 149, 155, (1991)).

As the NRC explained when these rules were promulgated, an "intervenor must provide a concise statement of the alleged facts or expert opinion which support the contention and on which, at the time of filing, the intervenor intends to rely in proving the contention at hearing, together with references to the specific sources and documents of which the intervenor is aware and on which the intervenor intends to rely in establishing the validity of its contention. This requirement does not call upon the intervenor to make

its case at this stage of the proceeding, but rather to indicate what facts or expert opinions, be it one fact or opinion or many, of which it is aware at that point in time which provide the basis for its contention." Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 FR 33168-01 (amending 10 C.F.R. § 2.714, now 10 C.F.R § 2.309).

Therefore, FPL's merit-based arguments are misplaced. Joint Intervenors were required only to show a material dispute exists and this is largely a dispute as to what NEPA (the law) requires. Joint Intervenors must show that the law prohibits reliance on speculative mitigation and requires an explanation of how the chosen mitigation measures will address the anticipated impacts. Joint Intervenors have ably met this burden.

D. Why the DEIS Must Evaluate the Mitigation Measures Now

"NEPA emphasizes the importance of coherent and comprehensive up-front environmental analysis to ensure informed decision making to the end that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989).

It is imperative that the DEIS contain an adequate evaluation of the mitigation measures that will be implemented to offset the project's impacts. This is particularly important given the uncertainty of the project's cumulative effects on terrestrial and wetland resources. As Joint Intervenors pointed out in their Motion, the DEIS concludes the overall cumulative impacts would be "MODERATE TO LARGE." This is because the review team (which includes the Corps) has "uncertainty about the possible effects from the complex interplay of habitat losses from building proposed Units 6 & 7

facilities, habitat loss and degradation from past, ongoing, and anticipated regional land development, the sensitivity of terrestrial habitats in the region to hydrological changes, the number and distribution of Federally-and State listed species present in the region, the presence of two national parks and numerous other conservation lands in the area, and the uncertainty with respect to success of CERP." DEIS at 7-21.

To wait until after the FEIS is issued before the Corps evaluates the appropriateness and effectiveness of these mitigation measures would violate NEPA's signal requirement that environmental impacts must be considered before licensing actions are taken and the "die is cast." *Robertson*, at 349. *See also Cady v. Morton*, 527 F.2d 786, 795 (9th Cir. 1975)(rejecting the federal government's argument that studies, surveys, and investigations conducted after the decision was made to proceed with a project could "cure" any defects in the original EA).

Moreover, contrary to FPL's position, the status of the Corps' review under section 404 of the Clean Water Act certainly is relevant. FPL contends that under *Robertson*, NEPA does not prevent an agency from acting until another agency has reached a final conclusion on what mitigating measures they consider necessary. FPL Answer at 30. But *Robertson* provides no support for the applicant here. In *Robertson*, the Court found that it would be incongruous to conclude that the federal agency (in that case the Forest Service) has no power to issue an EIS until the local agencies have reached a final conclusion on what mitigating measures they consider necessary. *Id*. at 352-53. Here, the federal agency (the NRC) will be issuing a Final EIS while another federal agency (the Corps)-which is subject to the same requirements of NEPA and is a co-author of the very same environmental impact statement- has not reviewed the

applicant's proposed mitigation measures because the applicant has yet demonstrated that impacts to wetlands have been avoided and minimized. Issuing a Final EIS without the benefit of the Corps' review of the applicant's plans to avoid, minimize, and mitigate the project's impacts renders the DEIS fundamentally deficient and incomplete.

III. CONCLUSION

For the reasons stated, Joint Intervenors respectfully request that the Atomic Safety and Licensing Board grant leave to file their contention.

Respectfully submitted this 15th day of May, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that **JOINT INTEVENORS' REPLY TO OPPOSITIONS BY FPL AND NRC STAFF TO MOTION TO ADMIT NEW CONTENTION REGARDING NRC'S RELIANCE ON SPECULATIVE MITIGATION MEASURES AND FAILURE TO ADEQUATELY EXAMINE THE EFFECTIVENESS OF THESE PROPOSED MITIGATION MEASURES IN THE DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR TURKEY POINT UNITS 6 & 7** has been filed through the Electronic Information Exchange system this 15th day of May, 2015.

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_____

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