

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

Before Administrative Judges:

Michael M. Gibson, Chairman
Dr. Michael F. Kennedy
Dr. William W. Sager

In the Matter of

FLORIDA POWER & LIGHT COMPANY

(Turkey Point Nuclear Generating, Units 3 and 4)

Docket Nos. 50-250-LA and 50-251-LA

ASLBP No. 15-935-02-LA-BD01

March 10, 2016

ORDER

(Clarifying Scope of Official Notice)

On February 26, 2016, we took official notice of a new recommended order in an administrative proceeding concerning state-mandated measures to reduce salinity levels in the Turkey Point cooling canal system (February 15 State Order).¹ Previous orders in this and related state administrative proceedings are part of the record and formed the basis for witness testimony at the evidentiary hearing in this license amendment proceeding.² The February 15 State Order challenges the legal validity of previously state-mandated mitigation measures.³

¹ Licensing Board Order (Taking Official Notice and Ordering Briefing) (Feb. 26, 2016) at 1 (unpublished).

² See Ex. INT-004, Florida Department of Environmental Protection, Administrative Order, OGC No. 14-0741 (Dec. 23, 2014); Ex. FPL-037, Tropical Audubon Society, Inc. v. Florida Power & Light Co. & S. Fla. Water Mgmt. District, Fla. Admin. Order No. 15-3845 (Fla. Div. of Admin. Hearings Dec. 31, 2015); see also Tr. at 369 (“The environmental assessment did take into account that we – that FPL was anticipating an administrative order . . . from the state to authorize additional withdrawals from the Floridan Aquifer.”); Tr. at 464 (“[Ex. INT-004] was issued in December 2014 but was subsequently challenged and has been the subject of an administrative law hearing.”); Tr. at 481 (“Going forward, the order that was [Ex.] FPL-037, is the order that grants [FPL] an L31 permit for 2016.”).

³ Atlantic Civil, Inc. v. Fla. Power & Light Co. & Dep’t of Env’tl. Prot., Fla. Admin. Orders Nos. 15-1746 & 15-1747 (Fla. Div. of Admin. Hearings Feb. 15, 2016) at 29 (“The [Administrative Order] is an unreasonable exercise of [the Florida Department of Environmental Protection’s]

Florida Power & Light Company (FPL) objects to taking official notice of the February 15 State Order “to the extent it is relied upon as a final order with independent legal significance and to the extent it reflects factual and legal conclusions.”⁴ Likewise, the NRC Staff requests us to clarify the scope of our order taking official notice of the February 15 State Order.⁵ Although the NRC Staff acknowledges that the existence of the February 15 State Order is beyond reasonable dispute, the NRC Staff argues that the Board may not “use the [February 15 State Order] for official notice of the truth of the facts recited therein.”⁶

To clarify our order taking official notice of the February 15 State Order, we are not accepting the truth of the facts set forth in the February 15 State Order, nor of the correctness of the order’s legal conclusions. However, the fact that a Florida administrative law judge reached the findings of fact and conclusions of law contained within the recommended order is beyond reasonable dispute and therefore subject to official notice.⁷ Stated differently, the Board “may

enforcement discretion because the success criteria are inadequate to accomplish DEP’s stated purposes as explained below.”).

⁴ Florida Power & Light Company’s Motion to Controvert Officially Noticed Recommended Order at 6–7 (Mar. 7, 2016).

⁵ NRC Staff’s Motion in Response to the Board’s Order Taking Official Notice and Ordering Briefing at 1 (Mar. 7, 2016).

⁶ Id. at 5.

⁷ Federal courts have often taken judicial notice of recommended orders from the Florida Division of Administrative Hearings. See, e.g., T Crenshaw v. City of Defuniak Springs, No. 3:13CV50/MCR/EMT, 2014 WL 667689, at *3 n.1 (N.D. Fla. Feb. 20, 2014) (taking judicial notice of information available on the database maintained by the State of Florida Division of Administrative Hearings); Jones v. Bridges, No. 4:15CV86-RH/CAS, 2015 WL 9165754, at *2 (N.D. Fla. Mar. 2, 2015) report and recommendation adopted, No. 4:15CV86-RH/CAS, 2015 WL 9093863 (N.D. Fla. Dec. 16, 2015) (“[J]udicial notice is taken that Administrative Law Judge James H. Peterson, III, issued a Recommended Order of Dismissal on January 19, 2011.”); Moss v. Capital Reg’l Med. Ctr., No. 4:12CV103-RH/CAS, 2012 WL 3264229, at *3 (N.D. Fla. July 12, 2012) report and recommendation adopted, No. 4:12CV103-RH/CAS, 2012 WL 3288738 (N.D. Fla. Aug. 10, 2012) (“Judicial notice is taken that [Division of Administrative Hearings] Case No: 11-3983 was initiated on August 9, 2011, and is currently pending.”); Sinni v. Scottsdale Ins. Co., 676 F. Supp. 2d 1319, 1326 n.10 (M.D. Fla. 2009), as amended (Jan. 4, 2010) (taking judicial notice of the plaintiff’s workers’ compensation case filings before the Florida Division of Administrative Hearings).

take judicial notice of a document filed in another court ‘not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.’”⁸ This notice extends to the legal outcome of the proceeding.⁹

The Board expects the parties to address the legal meaning and effect of the February 15 State Order with respect to the state-mandated mitigation measures that were discussed at the evidentiary hearing and in the Environmental Assessment.¹⁰ Insofar as a party’s proposed findings of fact address these state mitigation measures, the Board expects that party to explain

⁸ Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc., 969 F.2d 1384, 1388–89 (2d Cir. 1992) (quoting Kramer v. Time Warner Inc., 937 F.2d 767, 774 (2d Cir. 1991)); see United States v. Jones, 29 F.3d 1549, 1553 (11th Cir. 1994) (“[A] court may take notice of another court’s order only for the limited purpose of recognizing the ‘judicial act’ that the order represents or the subject matter of the litigation.”).

⁹ See Conecuh-Monroe Cmty. Action Agency v. Bowen, 852 F.2d 581, 583 (D.C. Cir. 1988) (“[W]e take judicial notice of a further administrative ruling in this case, which [the Department of Health and Human Services] issued subsequent to the trial judge’s decision. In that ruling, HHS found that federal law did not require the funding that Conecuh seeks.”); Horowitz v. CitiMortgage, Inc., 533 F. App’x 885, 888 (11th Cir. 2013) (“[P]ursuant to Federal Rule of Evidence 201 the district court properly took judicial notice of CitiMortgage’s regulatory filings with both the New York Department of State and the Securities and Exchange Commission, and those filings establish the fact of the merger.”); Spechler v. Tobin, 591 F. Supp.2d 1350, 1357 (S.D. Fla. 2008), aff’d, 327 F. App’x 870 (11th Cir. 2009) (“[T]he Court may also take judicial notice of the Administrative Order setting forth the work to be conducted at the satellite courthouses. . . . In light of this Administrative Order, the Court cannot find that Chief Judge Tobin exceeded his authority by reassigning [the Plaintiff] to a satellite office, even though no precise docket of cases was available to Plaintiff on the specific date of reassignment.”).

¹⁰ See Tr. at 406 (agreeing that the NRC Staff’s conclusion regarding no significant groundwater impacts relied on the implementation of mitigation measures imposed by the State of Florida); Ex. NRC-001, NRC Staff Testimony of Audrey L. Klett, Briana A. Grange, William Ford, and Nicholas P. Hobbs Concerning Contention 1, at 45 (Nov. 10, 2015) (“The Staff concluded that the LAR was not likely to significantly affect groundwater at Turkey Point because . . . the State was already directing the licensee to address the salinity within the CCS.”); Florida Power & Light Company; Turkey Point Nuclear Generating Unit Nos. 3 and 4, 79 Fed. Reg. 44464, 44468 (“FPL also anticipates the [Florida Department of Environmental Protection] to issue an Administrative Order requiring FPL to install up to six new wells that will pump approximately 14 MGD of water from the Floridan Aquifer into the CCS. Modeling performed by FPL consultants and the SFWMD indicates that in approximately 2 years, the withdrawals would reduce the salinity of the CCS to the equivalent of Biscayne Bay (about 34 parts per thousand [ppt]). Such withdrawals could also help moderate water temperatures.”); see also Ex. FPL-001, Initial Written Testimony of Florida Power & Light Company Witnesses Steve Scroggs, Jim Bolleter, and Pete Andersen on Contention 1, at 36–37 (Nov. 10, 2015).

in its legal analysis section whether these mitigation measures are actually mandated by the State of Florida. Any statements regarding the timing and effectiveness of the mitigation measures must explain the legal basis, if any, for concluding that those measures will occur. To the extent that a party concludes that the February 15 State Order does not change the legal assumptions underlying their testimony or the Environmental Assessment's conclusions regarding state mitigation measures, that party must explain why the legal assumptions remain valid in light of the February 15 State Order. By addressing these legal issues, the parties will satisfy the Board's briefing order with respect to the February 15 State Order.¹¹

The deadline for the parties' proposed findings of facts and conclusions of law remains March 28, 2016.¹²

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Michael M. Gibson, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 10, 2016

¹¹ Licensing Board Order (Taking Official Notice and Ordering Briefing) (Feb. 26, 2016) at 1–2 (unpublished).

¹² *Id.* at 2; see 10 C.F.R. § 2.1209.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **ORDER (Clarifying Scope of Official Notice)** have been served upon the following persons by Electronic Information Exchange.

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Turkey Point, Units 3 & 4, Docket Nos. 50-250 and 50-251-LA
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[Original signed by Herald M. Speiser ____]
Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 10th day of March, 2016