

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

March 15, 2017

MEMORANDUM AND ORDER

(Ruling on Motions to Strike or Exclude)

On March 8, 2017, the NRC Staff and Florida Power & Light Company (FPL) each filed a motion to strike or exclude as outside the scope of Contention 2.1 (1) the Affidavit of Dr. Jean-Pierre Bardet (Bardet Affidavit) filed by the City of Miami; and (2) those portions of Miami's statement of position that rely on the Bardet Affidavit.¹ Additionally, the NRC Staff filed a separate motion to strike or exclude portions of Joint Intervenors' exhibits that allegedly concern issues that have previously been resolved in this proceeding or otherwise are outside the scope of Contention 2.1.²

¹ NRC Staff Motion in Limine to Exclude Portions of the City of Miami Prefiled Testimony or in the Alternative Strike Portions Thereof at 1 (Mar. 8, 2017) [hereinafter NRC Staff Motion Concerning Miami]; [FPL's] Motion to Strike Portions of the City of Miami's Initial Statements of Position and Direct Testimony for Contention 2.1 at 1 (Mar. 8, 2017) [hereinafter FPL Motion]. Although Miami did not file an opposition, we are informed that it opposes the motions. See NRC Staff Motion Concerning Miami at 5 n.3; FPL Motion at 7. Joint Intervenors (i.e., Mark Oncavage, Dan Kipnis, Southern Alliance for Clean Energy, and National Parks Conservation Association) took no position on the motions. See id.

² NRC Staff Motion in Limine to Exclude Portions of the Joint Intervenor Exhibits or in the Alternative Strike Portions Thereof at 1 (Mar. 8, 2017) [hereinafter NRC Staff Motion Concerning

For the reasons stated below, we grant the motions to exclude the Bardet Affidavit from the evidentiary record, and we will disregard the arguments in Miami's statement of position that rely on that affidavit. We also grant the NRC Staff's motion to strike portions of Joint Intervenors' exhibits that exceed the scope of Contention 2.1.

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. In 2011, this Board granted Joint Petitioners' petition to intervene in this proceeding, finding that they established standing and proffered one admissible contention, Contention 2.1. See LBP-11-06, 73 NRC 149, 190, 251–52 (2011). In 2015, this Board denied Miami's petition to intervene, but granted its request to participate as an interested local governmental body pursuant to 10 C.F.R. § 2.315(c). See LBP-15-19, 81 NRC 815, 827 (2015).

Joint Intervenors' Contention 2.1, as subsequently reformulated and amended, is the sole contention pending before the Board and reads as follows:

The Final Environmental Impact Statement (FEIS) is deficient in concluding that the environmental impacts from FPL's proposed deep injection wells will be "small." The chemical concentrations of ethylbenzene, heptachlor, tetrachloroethylene, and toluene in the wastewater injections, see FEIS Table 3-5, may adversely impact the groundwater should they migrate from the Boulder Zone to the Upper Floridan Aquifer.³

Contention 2.1 thus challenges the FEIS's conclusion that the four specifically identified chemicals—ethylbenzene, heptachlor, tetrachloroethylene, and toluene—inserted into the

Joint Intervenors]. We are informed that FPL supports the motion and that Miami opposes the motion. See NRC Staff Motion Concerning Joint Intervenors at 4 n.2. Joint Intervenors filed an opposition to the motion. See Joint Intervenors' Opposition to NRC Staff's Motion to Exclude or Strike Portions of Joint Intervenors' Exhibits (Mar. 13, 2017).

³ Contention 2.1 previously was formulated as a challenge to the Draft EIS (DEIS). See LBP-16-03, 83 NRC 169, 186 (2016). When the NRC Staff issued the FEIS in October 2016, Contention 2.1 automatically converted to a challenge to the FEIS.

3,000-foot-deep Boulder Zone by the proposed injection wells, will not migrate upward to the 1,500-foot-deep Upper Floridan Aquifer and adversely affect the groundwater.

An evidentiary hearing on this contention is scheduled for the first week of May 2017. See Licensing Board Order (Amending Final Scheduling Order) (Nov. 22, 2016) (unpublished). On March 1, 2017, in preparation for that hearing, the parties and participants filed their Initial Statements of Position, direct testimony, and exhibits. On March 8, 2017, the NRC Staff and FPL filed the motions that we now consider.

II. Legal Standard

The scope of a licensing board proceeding is limited to the scope of the admitted contentions. See Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 308–09 (2010). Evidence that is outside the scope of an admitted contention will be excluded from the evidentiary record. See S. Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), CLI-10-5, 71 NRC 90, 100 (2010); see also 10 C.F.R. § 2.337(a) (“Only relevant, material, and reliable evidence which is not unduly repetitious will be admitted.”). The scope of a contention is limited by its plain terms as well as its stated bases. See Pilgrim Nuclear Power Station, CLI-10-11, 71 NRC at 308–09.

III. Analysis

A. Motions to Exclude Bardet Affidavit and Portions of Miami’s Statement of Position

The NRC Staff and FPL argue that the Bardet Affidavit and portions of Miami’s statement of position improperly address matters that are outside the scope of Contention 2.1. We agree.

In his affidavit, Dr. Bardet declares that FPL’s planned wastewater injection wells could induce earthquakes that, in turn, could cause local tidal waves impacting nuclear facilities. This issue, claims Dr. Bardet, has not been sufficiently examined in the FEIS. See Ex. COM-001, Affidavit of Dr. Jean-Pierre Bardet ¶¶ 8, 14, 15 (Feb. 28, 2017) [hereinafter Bardet Affidavit].

Miami cites the Bardet Affidavit in support of an argument that “the potential of fluid induced seismicity or earthquakes has the potential of causing cracks and faults in the confining layers allowing for the upward migration of radioactive wastewater.” See The City of Miami’s Initial Statement of Position and Direct Testimony for Contention 2.1 at 4 (Mar. 1, 2017) [hereinafter Miami’s Statement].

The issue of “fluid induced seismicity,” however, is plainly outside the scope of Contention 2.1.⁴ As initially proffered and admitted, Contention 2.1 asserted that insufficient evidence supports the conclusion that certain specified chemicals, inserted into the Boulder Zone by the proposed injection wells, will not migrate to the Upper Floridan Aquifer and adversely impact the drinking water. See Joint Petitioners’ Petition for Intervention at 26–27 (Aug. 17, 2010); see also LBP-11-06, 73 NRC at 190–94. Although Contention 2.1 has been amended and reformulated during the course of this proceeding,⁵ it has always focused on whether the hydrogeology at the Turkey Point site provides adequate confinement so as to prevent upward migration of the injected wastewater from the Boulder Zone into the Upper Floridan Aquifer. See, e.g., LBP-16-03, 83 NRC at 175, 181–85 (discussing the issues and the disputed facts embedded in Contention 2.1). Miami’s newly minted argument about the potential for FPL’s planned injection wells to induce earthquakes that might alter the hydrogeology at the Turkey Point site falls outside the contention’s scope.

As an interested government entity, Miami’s participation in this proceeding is limited to the admitted contention. 10 C.F.R. § 2.315(c) (“The participation of any State, local government body . . . shall be limited to unresolved issues and contentions.”). The Commission “do[es] not

⁴ References to “radioactive wastewater” in the Bardet Affidavit, see Bardet Affidavit ¶¶ 14, and Miami’s statement of position, see Miami’s Statement at 4, are similarly outside the scope of Contention 2.1, which concerns the potential environmental impacts of four chemicals—ethylbenzene, heptachlor, tetrachloroethylene, and toluene—none of which is radioactive.

⁵ See, e.g., LBP-16-03, 83 NRC at 172–73, 186; LBP-12-09, 75 NRC at 629; LBP-11-06, 73 NRC at 190–94.

allow distinctly new complaints to be added at will as litigation progresses, stretching the scope of admitted contentions beyond their reasonably inferred bounds.” Pilgrim, CLI-10-11, 71 NRC at 309. Accordingly, parties “may not freely change the focus of an admitted contention at will to add a host of new issues and objections that could have been raised at the outset.” Id. at 309. To permit Miami to use the Bardet Affidavit to expand Contention 2.1 at this late stage in the proceeding would not only violate NRC case law,⁶ but would also be fundamentally unfair to the other parties.⁷

Accordingly, the Bardet Affidavit will be excluded from admission to the record, and we will disregard Miami’s arguments that are based on that affidavit.

B. Motion to Strike or Exclude Portions of Joint Intervenors’ Exhibits

The NRC Staff asserts that the Board must strike or exclude (1) ¶¶ 8–9, 30–31, 27–28 of Ex. INT-002; (2) ¶¶ 6–10 of Ex. INT-003; (3) ¶¶ 23–33, 36–37, and 40–56 of Ex. INT-004; and (4) ¶¶ 48 and 50–53 of Ex. INT-005. See NRC Staff Motion Concerning Joint Intervenors at 3–4. According to the NRC Staff, the identified paragraphs in the exhibits are immaterial or irrelevant because they touch on issues that are outside the scope of Contention 2.1. See id. We address the NRC Staff’s arguments in turn.

First, the NRC Staff asserts that portions of Ex. INT-002, Ex. INT-003, and Ex. INT-004 are outside the scope of Contention 2.1 to the extent they challenge the accuracy and reliability

⁶ See AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 271–72 (2009) (“There simply would be no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements and add new contentions at their convenience during the course of a proceeding based on information that could have formed the basis for a timely contention at the outset of the proceeding.”) (footnotes and internal quotation marks omitted).

⁷ See S.C. Elec. & Gas Co. (Virgil C. Summer Nuclear Station Unit 1), ALAB-642, 13 NRC 881, 886 (1981) (“Simple fairness to [the parties]—to say nothing of the public interest requirement that NRC licensing proceedings be conducted in an orderly fashion—demand[] that the Board be very chary in allowing one who had slept on its rights to inject itself and new claims into the case as last-minute trial preparations were underway.”).

of the concentrations of ethylbenzene, heptachlor, tetrachloroethylene, and toluene in the wastewater. See NRC Staff Motion Concerning Joint Intervenors at 2–3. We agree. In LBP-16-03, we granted FPL’s motion for summary disposition as to the component of Contention 2.1 that disputed the accuracy and reliability of these four chemical concentrations listed in Table 3-5 of the DEIS, see LBP-16-03, 83 NRC at 178–79, 185–86, which are the same concentrations that appear in Table 3-5 of the FEIS.⁸ Moreover, in preparation for the upcoming evidentiary hearing, the parties submitted a Joint List of Undisputed Facts stipulating that “[t]he values listed in Table 3-5 of the FEIS for ethylbenzene, heptachlor, tetrachloroethylene, and toluene are conservative and reliable.” Joint List of Undisputed Facts at 5 (Mar. 1, 2017). We therefore grant the NRC Staff’s motion to strike those portions of Joint Intervenors’ exhibits that challenge the accuracy and reliability of the concentrations of the four challenged constituents in the wastewater.⁹

Second, the NRC Staff argues that portions of Ex. INT-002 should be struck to the extent they discuss thallium and selenium—two chemicals that are not part of Contention 2.1. We agree. Contention 2.1 as originally admitted by this Board in 2011 included the claim that FPL failed to adequately analyze the potential impacts of thallium and selenium on

⁸ Compare Division of New Reactor Licensing, Office of New Reactors, Environmental Impact Statement for [COLs] for Turkey Point Nuclear Plant Units 6 and 7 Draft Report for Comment, NUREG-2176, tbl. 3-5, at 3-38 to 3-39 (Feb. 2015) (ADAMS Accession Nos. ML15055A103, ML5055A109) with Division of New Reactor Licensing, Office of New Reactors, Environmental Impact Statement for Combined Licenses (COLs) for Turkey Point Nuclear Plant Units 6 and 7 Final Report, NUREG-2176, tbl. 3-5, at 3-38 to 3-39 (Oct. 2016) (ADAMS Accession Nos. ML16300A104, ML16300A137, ML16301A018, and ML16300A312).

⁹ The NRC Staff argues that Ex. INT-003, ¶ 6 should be struck because it discusses the reliability and accuracy of the listed chemical concentrations. We decline to strike this paragraph. In our view, Ex. INT-003, ¶ 6 is simply a restatement of Joint Intervenors’ position—i.e., that FPL and NRC Staff are wrong to conclude that the potential impact to groundwater in the Upper Floridan Aquifer from the injected wastewater will be small. Although the paragraph references FPL’s purported reliance on “incomplete, inaccurate, and unsupported data,” this reference is to FPL’s general conclusion that the impact will be small and not to the reliability of the chemical concentrations. Tellingly, the same paragraph appears nearly verbatim in Ex. INT-002, ¶ 6 and Ex. INT-004, ¶ 12, both of which the NRC Staff did not move to strike.

groundwater. See LBP-11-06, 73 NRC at 190. The following year, however, this Board dismissed that contention as moot due to FPL's revision of its Environmental Report. See Licensing Board Memorandum and Order (Granting in Part and Denying in Part for Summary Disposition of Amended Contention 2.1) at 10 (Aug. 30, 2012) (unpublished). Thereafter, we admitted an amended Contention 2.1 that (1) omitted any reference to thallium and selenium; and (2) limited the contention to ethylbenzene, heptachlor, tetrachloroethylene, and toluene. See LBP-12-09, 75 NRC 615, 629 (2012). Indeed, in LBP-12-09, we explicitly "excluded [thallium and selenium] from further consideration" regarding Contention 2.1. See id. at 624. Matters pertaining to thallium and selenium are thus outside the scope of Contention 2.1, and those portions of Joint Intervenors' exhibits that discuss these two chemicals must be struck.

Third, the NRC Staff argues that portions of Ex. INT-002 and Ex. INT-005 are outside the scope of the contention to the extent they discuss the following contaminants: heptachlor epoxide; trichloroethylene; vinyl chloride; 1, 4-dichlorobenzene; and chloroform. See NRC Staff Motion Concerning Joint Intervenors at 4. We agree. On its face, Contention 2.1 is limited to an inquiry of whether four specified contaminants—ethylbenzene, heptachlor, tetrachloroethylene, and toluene—will have an adverse impact on the groundwater should they migrate from the Boulder Zone to the Upper Floridan Aquifer. Notably, in LBP-12-09, this Board ruled that that an effort by Joint Intervenors to expand the scope of Contention 2.1 to include other contaminants such as "degradation products from heptachlor (i.e., heptachlor epoxide) and tetrachloroethylene (i.e., trichloroethene and vinyl chloride) . . . [was] inexcusably nontimely." LBP-12-09, 75 NRC at 627–28 n.19. Insofar as portions of Ex. INT-002 and Ex. INT-005 discuss contaminants other than these four named constituents, they are outside the scope of this proceeding and must be struck.¹⁰

¹⁰ The NRC Staff also argues that Ex. INT-005, ¶¶ 50–53 should be struck as outside the scope of Contention 2.1 because they discuss "other volatile organic compounds." NRC Staff Motion

Finally, the NRC Staff contends that portions of Ex. INT-005 are outside the scope of this proceeding to the extent they pertain to the potential contamination of the Biscayne Aquifer. See NRC Staff Motion Concerning Joint Intervenors at 4. We agree. As proffered, admitted, and litigated thus far, Contention 2.1 has been limited to a consideration of whether the injected wastewater would migrate from the Boulder Zone to the groundwater in the Upper Floridan Aquifer, and if it did, whether the environmental impact on the groundwater would be small.¹¹ Issues pertaining to the potential migration of constituents to the Biscayne Aquifer, including the alleged need for additional monitoring in the Biscayne Aquifer, are beyond the scope of Contention 2.1 and, accordingly, must be struck.

Concerning Joint Intervenors at 4. We agree that portions of Ex. INT-005, ¶ 50 specifically name certain chemicals that are not listed in the contention and, therefore, must be struck. However, we decline to strike ¶¶ 51–53 in their entirety because three of the four constituents listed in Contention 2.1—ethylbenzene, tetrachloroethylene, and toluene—are volatile organic compounds. Thus, the simple mention of “other volatile organic compounds” in these paragraphs does not render them outside the scope of Contention 2.1. Nonetheless, we stress that any argument made with reference to “other volatile organic compounds” in these paragraphs is limited to the chemicals listed in the contention.

¹¹ See, e.g., LBP-16-03, 83 NRC at 175 (noting that Joint Intervenors “dispute FPL’s assertion that adequate confining layers exist to prevent vertical migration of wastewater from the Boulder Zone to the Upper Floridan Aquifer,” and that they also “disagree[] with FPL’s assertion that the highly regulated design and testing of the injection wells will prevent leakage of wastewater that could contaminate the Upper Floridan Aquifer.”); LBP-11-06, 73 NRC at 190 (“Joint Petitioners assert that there has been migration of fluid between the Boulder Zone and the Upper Floridan Aquifer and FPL’s ER improperly fails to discuss the impact to the Upper Floridan Aquifer of the above-specified chemicals that have been typically found in Florida wastewater.”); Joint Petitioners’ Petition for Intervention at 26–27.

IV. Order

For the reasons discussed supra Part III.A, we grant the motions of the NRC Staff and FPL to exclude the Bardet Affidavit from admission to the evidentiary record. We will disregard those portions of Miami's statement of position that rely on the Bardet Affidavit, and we direct Miami not to advance any future arguments that are based on the Bardet Affidavit or that are otherwise outside the scope of Contention 2.1.

For the reasons discussed supra Part III.B, we grant the NRC Staff's motion to strike those portions of Ex. INT-002, Ex. INT-003, Ex. INT-004, and Ex. INT-005 that exceed the scope of Contention 2.1. To that end, we direct Joint Intervenors to refile those exhibits within 10 days with redline strike-outs of the material specified in Appendix A, which accompanies this Memorandum and Order. Each refiled document shall be marked with a new exhibit number indicating that the exhibit has been revised—i.e., Ex. INT-002-R, Ex. INT-003-R, etc.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

E. Roy Hawkens, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 15, 2017

APPENDIX A

The following portions are hereby stricken from the record of this proceeding:

Exhibit Number or Document Title	Page(s)	From	To
INT-002	2 (¶¶ 8–9)	“In Revision 3 of the ER...”	“...accuracy of those concentrations.”
INT-002	6 (¶ 27)	“A breakdown constituent of...”	“...heptachlor epoxide altogether.”
INT-002	6 (¶ 28)	“Tetrachloroethylene breaks down (or degrades)...”	“...vinyl chloride altogether.”
INT-002	6-7 (¶¶ 30–31)	Only those portions of the listed paragraphs that pertain to thallium and selenium*	
INT-003	2 (¶¶ 7–10)	“FP&L has not provided any documentation...”	“...Treatment Plant site.”
INT-004	4-5 (¶¶ 23–33)	“Although the data were collected over...”	“...reporting chemical concentrations.”
INT-004	6 (¶¶ 36–37)	“According to the Chain of Custody...”	“...EPA SOPQAM at 9-6.”
INT-004	6-8 (¶¶ 40–56)	“The bounding analysis relied on...”	...quality assurance protocol.”
INT-005	11 (¶ 48)	“The dual-zone monitoring well...”	“...would not be detected.”
INT-005	11 (¶ 50)	“Samples of treated effluent...”	“...ATSDR Tox FAQ at 1.”

* Specifically, paragraph 30 of Ex. INT-002 with the stricken portions removed, should read as follows: “The tetrachloroethylene concentration estimated by FP&L to be in the wastewater set forth in Table 3.6-2 (ER, Table 3.6-2) exceed the EPA MCL.” And, in the table following this text, all entries relating to thallium and selenium shall be stricken. In addition, “selenium, thallium” in the third line of paragraph 31, as well as the first two bullet points in paragraph 31, lines 4 through 6, shall be stricken.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
FLORIDA POWER & LIGHT COMPANY) Docket Nos. 52-040 and 52-041-COL
(Juno Beach, Florida))
)
(Turkey Point, Units 6 & 7))

CERTIFICATE OF SERVICE

I hereby certify that copies of the **MEMORANDUM AND ORDER (Ruling on Motions to Strike or Exclude)** have been served upon the following persons by Electronic Information Exchange.

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Turkey Point, Units 6 and 7, Docket Nos. 52-040 and 52-041-COL
MEMORANDUM AND ORDER (Ruling on Motions to Strike or Exclude)

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[Original signed by Brian Newell _____]
Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 15th day of March, 2017