

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
FLORIDA POWER & LIGHT COMPANY)	Docket Nos. 50-250-SLR
)	50-251-SLR
(Turkey Point Nuclear Generating Station,)	
Unit Nos. 3 and 4))	June 10, 2019
)	
)	

**JOINT PETITIONERS’ ANSWER OPPOSING
FPL’S MOTION TO DISMISS JOINT PETITIONERS’
CONTENTION 1-E AS MOOT**

I. Introduction

Pursuant to 10 C.F.R. § 2.323 and the Atomic Safety and Licensing Board’s (“Board”) Revised Scheduling Order,¹ Natural Resources Defense Council, Friends of the Earth, and Miami Waterkeeper (together, “Joint Petitioners”) hereby file this timely Answer Opposing Florida Power & Light Company’s (“Applicant”) Motion to Dismiss Joint Petitioners’ Contention 1-E as Moot. The Board admitted Contention 1-E as a contention of omission.² As the information omitted from Applicant’s Environmental Report (“ER”) continues to be omitted from the U.S. Nuclear Regulatory Commission (“NRC”) Staff’s Draft Supplemental

¹ Order (Granting in Part Intervenor’s Joint Motion for Partial Reconsideration of Initial Scheduling Order) (Apr. 2, 2019) (ML19092A386) (providing that the deadline for answer opposing a dispositive motion is 30 days after May 10, 2019) (hereinafter “Order”).

² *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Units 3 & 4), LBP-19-3, 89 NRC ___, ___ (Mar. 7, 2019) (slip op. at 40, 43 n.62) (the “admissible portion of Contention 1-E is identical to the portion of SACE Contention 2,” which “is an admissible contention of omission”).

Environmental Impact Statement (“DSEIS”),³ Joint Petitioners’ Contention 1-E is not moot, and the Board should not dismiss the Contention.

II. Legal Standard

As the moving party, Applicant bears the burden of persuasion on whether an admitted contention has been rendered moot.⁴ A contention of omission⁵ becomes moot if a superseding environmental impact statement “actually address[es] in some way *all* of the issues encompassed within the admitted contention.”⁶ “If, on the other hand, not all matters at issue in such a contention are addressed in information submitted by Applicant, then Intervenors retain a legal interest in having any unaddressed matter(s) appropriately resolved,” and the contention is not moot.⁷ Mere “[p]assing references” to omitted information are not sufficient to cure a defective environmental report.⁸ To cure the error, the information encompassed by the scope of the contention must be “specifically considered or evaluated.”⁹ To determine the scope of issues encompassed by the admitted contention, the Board first analyzes the language of the contention, and, if the scope is not clear on the contention’s face, the Board considers the statement of basis accompanying the contention.¹⁰

³ NUREG-1437, Supp. 5, Second Renewal, “Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 5, Second Renewal, Regarding Subsequent License Renewal for Turkey Point Nuclear Generating Unit Nos. 3 and 4, Draft Report for Comment” (Mar. 2019) (ML19078A330).

⁴ *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 & 4), LBP-10-10, 71 NRC 529, 541 (Jun. 25, 2010).

⁵ Contentions may allege (1) an omission of information, (2) an inadequate analysis of information, or (3) some combination of the two. *Private Fuel Storage, LLC (Indep. Spent Fuel Storage Installation)*, LBP-01-23, 54 NRC 163, 171 (Aug. 1, 2001).

⁶ *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 & 4), LBP-11-4, 73 NRC 91, 127 (Feb. 24, 2011) (emphasis in original).

⁷ *Id.*

⁸ *Private Fuel Storage*, LBP-01-23, 54 NRC at 171.

⁹ *Comanche Peak*, LBP-10-10, 71 NRC at 545.

¹⁰ *Private Fuel Storage*, LBP-01-23, 54 NRC at 171.

III. Argument

Contention 1-E is not moot because the DSEIS fails to analyze mechanical draft cooling towers as an alternative *to mitigate impacts of the cooling canal system (“CCS”) on the American crocodile and habitat*. The Board admitted Contention 1-E as a contention of omission¹¹ as follows:

In light of the adverse impact of continued CCS operations on the threatened American crocodile and its critical seagrass habitat, the ER is deficient for failing to consider mechanical draft cooling towers as a reasonable alternative to the CCS in connection with the license renewal of Turkey Point Units 3 and 4.¹²

Applicant’s argument that Contention 1-E is moot rests on an incorrect understanding of the scope of the Contention. The language of the Contention and the basis statement make clear that the scope of Contention 1-E emphasizes the omission of a particular analysis—cooling towers as an alternative *to mitigate impacts of CCS on the American crocodile and habitat*—and is not a general contention that the DSEIS failed to consider a mechanical draft cooling towers alternative, as Applicant argues.¹³ Contention 1-E is thus not moot because the DSEIS continues to omit the specific analysis of cooling towers as an alternative to mitigate impacts of CCS on the American crocodile and habitat.¹⁴

In determining the scope of a contention, the Board “look[s] first to the language of the contention.”¹⁵ As admitted, Contention 1-E on its face is not a general claim that the ER failed to

¹¹ *Turkey Point*, LBP-19-3, 89 NRC __ (slip op. at 40, 43 n.62) (the “admissible portion of Contention 1-E is identical to the portion of SACE Contention 2,” which “is an admissible contention of omission”).

¹² *Turkey Point*, LBP-19-3, 89 NRC __ (slip op. at 44). Per the Commission’s migration tenet, Contention 1-E, which originally challenged Applicant’s ER, is now deemed a challenge to the DSEIS. *Crow Butte Res., Inc.* (In Situ Leach Facility, Crawford, Neb.), CLI-15-17, 82 NRC 33, 42 n. 58 (2015).

¹³ FPL’s Motion to Dismiss Joint Petitioners’ Contention 1-E as Moot, at 3 (May 20, 2019) (hereinafter “Motion to Dismiss”).

¹⁴ See e.g., Biological Assessment for the Turkey Point Nuclear Generating Unit Nos. 3 and 4 Proposed Subsequent License Renewal, at 68 (Dec. 2018) (discussing the CCS adverse impacts on American crocodiles without discussing cooling towers as an alternative).

¹⁵ *Private Fuel Storage*, LBP-01-23, 54 NRC at 171.

consider a cooling tower alternative, but a claim that the ER omitted analysis of cooling towers as an alternative that could mitigate adverse impacts of CCS specifically on the American crocodile and its critical seagrass habitat. The Board’s order concluded that Contention 1-E “raises a genuine dispute on a material fact to the extent it alleges that [Applicant’s] ER improperly fails to consider mechanical draft cooling towers as a reasonable alternative *for reducing or avoiding adverse impacts on the threatened American Crocodile and its critical seagrass habitat.*”¹⁶ The Board could have admitted the Contention without the phrase “in light of the adverse impact of continued CCS operations on the threatened American crocodile and its critical seagrass habitat.” And, in fact, Applicant in making its argument that the Contention is moot does just that.¹⁷ However, the Board included this qualifying phrase in defining Contention 1-E and therefore focused the scope of the Contention on the lack of discussion of CCS impacts specifically on the American crocodile and its habitat. The scope of Contention 1-E on its face is therefore more specific than Applicant suggests.

The Contention’s basis statement also supports the scope of Contention 1-E as being more specific than the general failure to consider the mechanical draft cooling towers alternative. In defining the scope of a contention, Boards take into account the basis statement in order to ensure that it has “put the other parties on notice as to what issues they will have to defend against or oppose.”¹⁸ Throughout the basis statement, Contention 1-E focuses not just on the fact that the ER needed to consider the cooling tower alternative, but the fact that the ER needed to

¹⁶ *Turkey Point*, LBP-19-3, 89 NRC __ (slip op. at 40) (emphasis added). This statement appears in the Board’s analysis of another Intervenor Southern Alliance for Clean Energy’s (“SACE”) Contention 2, but the Board admitted Joint Petitioners’ Contention 1-E “subject to the same limitations” as its admission of SACE’s Contention 2. See LBP-19-3, 89 NRC __ (slip op. at 44).

¹⁷ Motion to Dismiss at 4 (“Contention 1-E alleges the omission of particular information—analysis of a cooling tower alternative—from the ER.”).

¹⁸ *Pub. Serv. Co. of New Hampshire, et al.* (Seabrook Station, Units 1 & 2), ALAB-899, 28 NRC 93, 97 (Aug. 23, 1988).

consider the benefits of this alternative *in reducing adverse impacts*.¹⁹ Further, the basis statement details the specific impacts that the cooling tower alternative could avoid, in part focusing almost exclusively on the benefits to the American crocodile and its habitat.²⁰ Thus, all parties were on notice that Contention 1-E focused on the specific omission of the failure to analyze the cooling tower alternative as mitigating adverse impacts of the CCS on the American crocodile and its habitat.

Thus, the DSEIS does not render Contention 1-E moot because the DSEIS fails to address the specific omission of cooling towers reducing adverse impacts to the American crocodile and its habitat. Applicant points to DSEIS Section 2.2.3, Table 2-2, and various subsections of Chapter 4 to argue that the DSEIS includes “analysis of a cooling tower alternative.”²¹ But while the DSEIS claims it “evaluates an alternative cooling water system to mitigate the potential impacts associated with the continued use of the existing cooling canal system,”²² the DSEIS does not explore the benefits of utilizing cooling towers as an alternative to CCS for the American crocodile and its habitat.²³ The DSEIS omits this analysis even though “the NRC staff concludes [in the DSEIS] that the proposed Turkey Point subsequent license renewal is likely to adversely affect the American crocodile ... and may result in adverse modification to designated critical habitat for the American crocodile.”²⁴

¹⁹ Request for Hearing and Petition to Intervene Submitted by [Joint Intervenors] at 17-19 (Aug. 1, 2018). For example, the basis statement relies on 10 C.F.R. § 51.45(c), which requires an ER “include an analysis that considers and balances the environmental effects of the proposed action, the environmental impacts of alternatives to the proposed action, and *alternatives available for reducing or avoiding adverse environmental effects*.” *Id.* at 18 (emphasis added).

²⁰ *Id.* at 23-24.

²¹ Motion to Dismiss at 4.

²² DSEIS at iii.

²³ See e.g., Biological Assessment for the Turkey Point Nuclear Generating Unit Nos. 3 and 4 Proposed Subsequent License Renewal, at 68 (Dec. 2018) (discussing select adverse impacts of CCS on American crocodiles without discussing cooling towers as an alternative).

²⁴ DSEIS at 4-23.

Indeed, the DSEIS fails to consider impacts of the cooling tower alternative to all special species and habitats by concluding that “the magnitude and significance of adverse impacts on special status species and habitats would depend on the location and layout of the cooling towers, the design of the cooling towers, operational parameters, and the special status species and habitats present in the area when the alternative is implemented.”²⁵ The DSEIS identifies what is required to analyze the impacts but stops short of actually conducting any analysis. This does not meet NEPA’s requirement that the “discussion of alternatives ... rigorously explore and objectively evaluate all reasonable alternatives,”²⁶ including “the environmental impacts of the alternatives.”²⁷ The NRC Staff only concludes that, for the cooling water system alternative, “the NRC staff cannot forecast a particular level of impact” to special status species and habitat.²⁸ This is not an analysis. It is a failure to analyze. It is an omission. Thus, Contention 1-E is not moot and should not be dismissed.

III. Conclusion

The NRC Staff’s DSEIS does not render Contention 1-E moot. Accordingly, Contention 1-E should not be dismissed.

²⁵ DSEIS 4-70.

²⁶ *Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564, 569 (D.C. Cir. 2016) (quoting 40 C.F.R. § 1502.14) (internal quotations omitted).

²⁷ 40 C.F.R. § 1502.16.

²⁸ DSEIS at 2-23.

Respectfully submitted,

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June 10, 2019

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CERTIFICATE OF SERVICE

I certify that on June 10, 2019, I posted copies of the foregoing JOINT PETITIONERS' ANSWER OPPOSING FPL'S MOTION TO DISMISS JOINT PETITIONERS' CONTENTION 1-E AS MOOT on NRC's Electronic Information Exchange System.

/signed electronically by/
Kenneth Rumelt