

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of:	)	
	)	
FLORIDA POWER & LIGHT COMPANY	)	Docket No. 50-250-SLR
	)	Docket No. 50-251-SLR
(Turkey Point Nuclear Generating Station, Unit Nos. 3	)	
and 4)	)	June 24, 2019
	)	

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**NATURAL RESOURCES DEFENSE COUNCIL’S, FRIENDS OF THE EARTH’S, AND  
MIAMI WATERKEEPER’S PETITION FOR WAIVER OF 10 C.F.R. §§ 51.53(C)(3)  
AND 51.71(D) AND 10 C.F.R. PART 51, SUBPART A, APPENDIX B**

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Pursuant to 10 C.F.R. § 2.335(b), Natural Resources Defense Council, Friends of the Earth, and Miami Waterkeeper (together “Intervenors”) hereby petition for a limited waiver of 10 C.F.R. §§ 51.53(c)(3) and 51.71(d) and 10 C.F.R. Part 51, Subpart A, Appendix B to the extent the Atomic Safety and Licensing Board (“Board”) interprets those regulations to preclude Intervenors from submitting new contentions 6E and 7E challenging the NRC Staff’s analysis in the Draft Supplemental Environmental Impact Statement for subsequent license renewal regarding Turkey Point, Units 3 and 4 (“DSEIS”)<sup>1</sup> regarding two issues: (1) groundwater quality degradation (plants with cooling ponds in salt marshes) and (2) water quality impacts on adjacent water bodies (plants with cooling ponds in salt marshes).<sup>2</sup> This waiver request is supported by

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<sup>1</sup> 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) (“DSEIS”).

<sup>2</sup> By this Petition, Intervenors seek a waiver of any other rules or regulations in addition to 10 C.F.R. § 51.53(c)(3) and 10 C.F.R. Part 51, Subpart A, Appendix B to the extent the Board interprets those regulations to preclude Intervenors from submitting new contentions challenging the analysis in the DSEIS regarding the issues described above.

the attached Declaration of Friends of the Earth's counsel, Kenneth Rumelt ("Rumelt Decl.").

## **I. INTRODUCTION AND BACKGROUND**

On August 1, 2018 and pursuant to 10 C.F.R. § 2.309 and the NRC's Federal Register notice published at 83 Fed. Reg. 19,304 (May 2, 2018), Intervenors submitted a Request for Hearing and Petition to Intervene<sup>3</sup> in the above-captioned matter. To safeguard our and our members' environmental, aesthetic, health-based and economic interests, Intervenors articulated five contentions in the Petition. These contentions addressed various deficiencies in Florida Power & Light Co.'s ("Applicant") Environmental Report, submitted as part of the subsequent renewal license application for Turkey Point Nuclear Generating Station, Units 3 and 4, in Miami-Dade County, Florida.

Following full briefing and a hearing on the admissibility of each contention, the Board on March 7, 2019 issued Memorandum and Order LBP-19-3 granting Intervenors' hearing request ("Order").<sup>4</sup> In that Order, the Board also found that Intervenors had established standing and admitted in part two of the five contentions. The Board then issued, and subsequently amended, a scheduling order that provided Intervenors the opportunity to review initial disclosures provided by the parties and then rely on them to file new and amended contentions.<sup>5</sup>

On April 1, 2019, Applicant filed an appeal of the Order,<sup>6</sup> and on April 26, 2019,

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<sup>3</sup> Request for Hearing and Petition to Intervene Submitted by Friends of the Earth, Natural Resources Defense Council, and Miami Waterkeeper (Aug. 1, 2018) (ML18212A418) ("Petition to Intervene").

<sup>4</sup> *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Station Units 3 & 4), LBP-19-3, 89 N.R.C. \_\_ (slip op.) (Mar. 7, 2019) ("Order").

<sup>5</sup> Initial Scheduling Order at 3 (establishing the deadline to file new and amended contentions as 45 days following the later of the issuance of the DSEIS or the Initial Disclosures) (Mar. 21, 2019); Order (Granting in Part Intervenors' Joint Motion for Partial Reconsideration of Initial Scheduling Order) (Apr. 2, 2019).

<sup>6</sup> Florida Power & Light Company's Appeal of LBP-19-3 (Apr. 1, 2019) (ML19091A302) ("Appeal"). FPL did not challenge Intervenors' standing before the Commission.

Intervenors opposed the appeal.<sup>7</sup> The NRC Staff agreed with Intervenors that the Board had correctly admitted the contentions.<sup>8</sup> This appeal is pending before the Commission.

In March 2019, NRC Staff issued the DSEIS. Based on the DSEIS, on May 20, 2019, Applicant filed two motions to dismiss Intervenors' contentions as moot.<sup>9</sup> On June 10, 2019, Intervenors opposed these motions,<sup>10</sup> and the NRC Staff supported them.<sup>11</sup> These motions are currently pending before the Board. Intervenors timely filed comments on the DSEIS on May 20, 2019.<sup>12</sup>

Today, Intervenors timely filed amended and new contentions based on the DSEIS. Among other issues, the new contentions concern the NRC Staff's analysis of "new and significant" information for one existing Category 1 issue (groundwater quality degradation (plants with cooling ponds in salt marshes)) and one "new issue" that is neither Category 1 nor 2 (water quality impacts on adjacent water bodies (plants with cooling ponds in salt marshes)).<sup>13</sup>

This Petition for Waiver requests a waiver of 10 C.F.R. §§ 51.53(c)(3) and 51.71(d) and 10 C.F.R. Part 51, Subpart A, Appendix B ("Appendix B") to the extent those the Board interprets those regulations to preclude Intervenors from submitting Contentions 6E and 7E

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<sup>7</sup> Opposition of Natural Resources Defense Council, Friends of the Earth, and Miami Waterkeeper to Florid Power & Light Company's Appeal of the Atomic Safety and Licensing Board's Ruling in LBP-19-3 (Apr. 26, 2019) (ML19116A229).

<sup>8</sup> NRC Staff's Brief in Response to Florida Power & Light Company's Appeal of LBO-19-3 (Apr. 26, 2019) (ML19116A272).

<sup>9</sup> FPL's Motion to Dismiss Joint Petitioners' Contention 1-E as Moot (May 20, 2019) (ML19140A355); FPL's Motion to Dismiss Joint Petitioners' Contention 5-E as Moot (May 20, 2019) (ML19140A356).

<sup>10</sup> Joint Petitioners' Answer Opposing FPL's Motion to Dismiss Joint Petitioners' Contention 1-E as Moot (June 10, 2019); Joint Petitioners' Answer Opposing FPL's Motion to Dismiss Joint Petitioners' Contention 5-E as Moot (June 10, 2019).

<sup>11</sup> NRC Staff's Answer to FPL's Motions to Dismiss (June 10, 2019).

<sup>12</sup> NRDC, FOE, and Miami Waterkeeper Comments on Draft Supplemental Environmental Impact Statement for Turkey Point Nuclear Generating Units Nos. 3 and 4 (May 20, 2019).

<sup>13</sup> See, e.g., DSEIS at 4-2, 4-27.

challenging the analysis in the DSEIS regarding (1) groundwater quality degradation (plants with cooling ponds in salt marshes) and (2) water quality impacts on adjacent water bodies (plants with cooling ponds in salt marshes).

## **II. STATUTORY AND REGULATORY FRAMEWORK**

### **a. The Scope of a License Renewal Proceeding**

A license renewal application review typically implicates issues that fall into one of two broad areas: safety/aging management issues, and public health/environmental impacts. Intervenors' new contentions focus on environmental and public health impacts. The scope of the environmental review is defined by 10 C.F.R. Part 51, the NRC's "Generic Environmental Impact Statement for License Renewal of Nuclear Plants," NUREG- 1437 (May 1996) (the "GEIS"), and the initial hearing notice and order.<sup>14</sup>

Some environmental issues that might otherwise be germane in an initial license renewal proceeding have been resolved generically for all plants and are normally, therefore, "beyond the scope of a license renewal hearing."<sup>15</sup> These "Category 1" issues are classified in 10 C.F.R. Part 51, Subpart A, Appendix B.

### **b. Standards for Waiver of Application of NRC Rule or Regulation**

Under 10 C.F.R. § 2.335(b), any "participant to an adjudicatory proceeding . . . may petition that the application of a specified Commission rule or regulation or any provision thereof . . . be waived or an exception be made for the particular proceeding." Section 2.335(b) further provides that "[t]he sole ground for petition of waiver or exception is that special circumstances

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<sup>14</sup> See, e.g., *Vermont Yankee*, 64 N.R.C. at 148–49.

<sup>15</sup> *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 15 (July 19, 2001); see 10 C.F.R. § 51.53(c)(3)(i). Intervenors explicitly reassert and do not waive their argument that 10 C.F.R. § 51.53(c)(3)'s provision exempting a license renewal applicant's environmental report from addressing Category 1 issues applies only to an initial license renewal, as made clear by the provision's plain terms, and does not apply to a subsequent license renewal proceeding.

with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted.”<sup>16</sup>

In interpreting § 2.335(b), the Commission has articulated a four-factor test, sometimes referred to as the *Millstone* factors, which a waiver petitioner must satisfy.<sup>17</sup> To set aside a Commission rule or regulation in an adjudicatory proceeding, a petitioner must demonstrate that:

- (i) the rule’s strict application would not serve the purposes for which it was adopted;
- (ii) special circumstances exist that were not considered, either explicitly or by necessary implication, in the rulemaking proceeding leading to the rule sought to be waived;
- (iii) those circumstances are unique to the facility rather than common to a large class of facilities; and
- (iv) waiver of the regulation is necessary to reach a significant safety [or environmental]<sup>18</sup> problem.<sup>19</sup>

All four *Millstone* factors must be met to justify a rule waiver.<sup>20</sup>

### **III. ARGUMENT**

#### **a. NRC Regulations Do Not Require a Waiver in Order to Challenge the DSEIS’s Analysis in This Instance**

For the reasons below, the requested waiver is not necessary in order for Intervenors to assert new contentions regarding groundwater quality degradation (plants with cooling ponds in

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<sup>16</sup> 10 C.F.R. § 2.335(b).

<sup>17</sup> *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559-60 & nn. 29-34 (2005).

<sup>18</sup> See *Exelon Generation Co., LLC* (Limerick Generation Station, Units 1 and 2), CLI-13-07, 2013 WL 5872241 (Oct. 31, 2013), at \*4 (“clarify[ing] . . . that the fourth *Millstone* factor also may apply to a significant environmental issue”).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

salt marshes) or water quality impacts on adjacent water bodies (plants with cooling ponds in salt marshes).

Groundwater quality degradation (plants with cooling ponds in salt marshes).<sup>21</sup> No NRC regulation prohibits Intervenor from challenging new information identified and evaluated by the NRC Staff in a DSEIS with respect to a Category 1 issue. A waiver, therefore, is not necessary to submit a contention challenging the adequacy of the DSEIS's analysis regarding this issue.<sup>22</sup>

Water quality impacts on adjacent water bodies (plants with cooling ponds in salt marshes).<sup>23</sup> As the NRC Staff recognized in the DSEIS, this issue is neither Category 1 nor Category 2.<sup>24</sup> No NRC regulation prohibits Intervenor from challenging new information identified and evaluated by the NRC Staff in a DSEIS with respect to an issue that is neither Category 1 nor Category 2. A waiver, therefore, is not necessary to submit a contention challenging the adequacy of the DSEIS's analysis regarding this issue.

In an abundance of caution, however, Intervenor submit this Petition requesting the Board to waive application of Sections 51.53(c)(3) and 51.71(d) and Appendix B and any other rules or regulations that the Board interprets to prohibit Intervenor from challenging the adequacy of the DSEIS's analysis (including analysis of new information) regarding these issues.

#### **b. Intervenor Satisfy the Criteria for a Waiver**

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<sup>21</sup> See DSEIS at 4-24 to 4-28.

<sup>22</sup> See Order at 27 (A DSEIS must "address any new and significant information of which it becomes aware, which might affect the applicability of the Commission's generic Category 1 determinations in the proceeding."); *id.* at n.102 (citing cases); *Deukmejian v. NRC*, 751 F.2d 1287, 1298 (D.C. Cir. 1984) (explaining that "The [NRC's] obligations under NEPA [include] a continuing duty to supplement EISs which have already become final whenever the discovery of significant new information renders the original EIS inadequate").

<sup>23</sup> See DSEIS at 4-21 to 4-23.

<sup>24</sup> DSEIS at 4-21 to 4-22.

Petitioners have satisfied the requirements of 10 C.F.R. § 2.335(b) and *Millstone*. Each of the four *Millstone* factors weighs in favor of issuing the requested waiver.

**i. Strict Application of the Regulations Would Not Serve the Purposes for Which They Were Adopted (*Millstone* Factor 1)**

Application of Sections 51.53(c)(3) and 51.71(d) and Appendix B in this case to preclude Intervenor from asserting Contentions 6E and 7E would unjustifiably prevent Intervenor from challenging the sufficiency of the DSEIS's analysis of new information. The DSEIS's analysis of the two issues referenced above is the first analysis to address this new information in the subsequent license renewal proceeding. Intervenor (and more broadly, the public) have not yet had an opportunity to review or challenge the sufficiency of this information. Interpreting Sections 51.53(c)(3) and 51.71(d) and Appendix B to prevent challenges to analysis of new information would be contrary to NEPA's requirement that agencies "broad[ly] disseminat[e]" information to "permit[] the public and other government agencies to react to the effects of a proposed action at a meaningful time."<sup>25</sup>

Interpreting sections 51.53(c)(3) and 51.71(d) and Appendix B to prevent challenges to analysis of new information would not serve the purposes of the NRC's regulatory scheme providing for generic resolution of certain issues (Category 1) and site-specific resolution of others (Category 2). The requirement to prepare a supplement to a GEIS is intended to ensure that "[w]hen the GEIS and SEIS are combined, they cover all issues that NEPA requires be addressed in an EIS for a nuclear power plant license renewal proceeding."<sup>26</sup> Allowing a petitioner to challenge the adequacy of analysis pertaining to new information regarding a Category 2 issue while preventing such a challenge with respect to new information regarding a

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<sup>25</sup> *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989).

<sup>26</sup> *Massachusetts v. United States*, 522 F.3d 115, 120 (1st Cir. 2008).

Category 1 issue (or, in the case of water quality impacts to adjacent water bodies, an entirely new issue that is neither Category 1 nor 2) would not serve the purposes for which sections 51.53(c)(3) and 51.71(d) and Appendix B were adopted.

**ii. Special Circumstances Exist That are Unique to Turkey Point and That Were Not Considered in the Rulemaking Proceeding Limiting the Scope of SEISs Regarding Subsequent License Renewal (*Millstone* Factors 3 and 4)**

Turkey Point Units 3 and 4 have a long and well-documented history of impacts to groundwater and surface water caused by the Units' cooling canal system and the hypersaline plume that has resulted from operation of the system.<sup>27</sup> These impacts have resulted in numerous enforcement actions by state and county regulators and the requirement that the Applicant engage in extraordinary measures to mitigate those harms. Turkey Point is the only nuclear generating unit that uses a cooling canal system. No other nuclear generating unit's cooling system has resulted in a hypersaline plume that has migrated through groundwater, threatening local drinking supplies. These impacts are undoubtedly "special circumstances" meriting the requested waiver.

It is beyond dispute that, in either the rulemaking proceeding concerning the scope of environmental review required for a subsequent license renewal or the GEIS prepared for subsequent license renewal proceedings, the NRC did not consider issues of salinity in cooling canals or the possibility that operation of a cooling canal system might result in a hypersaline plume migrating through surrounding groundwater. The DSEIS itself recognized that the GEIS "did not consider how a nuclear power plant with a cooling pond in a salt marsh may indirectly impact the water quality of adjacent surface water bodies via a groundwater pathway" and that

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<sup>27</sup> See DSEIS at 3-46 to 3-49, 3-56 to 3-73.



the issue “constitutes a new, site-specific issue with respect to Turkey Point.”<sup>28</sup> Special circumstances exist that are unique to Turkey Point and that were not considered in either the rulemaking proceeding limiting the scope of an environmental review for subsequent license renewal proceedings or the GEIS issued for subsequent license renewal proceedings.

**iii. Waiver is Necessary to Reach a Significant Environmental Issue  
(Millstone Factor 4)**

Waiver is necessary to permit Intervenor to raise new information regarding the environmental impacts of the hypersaline plume on groundwater and adjacent surface water—undoubtedly a significant environmental issue.<sup>29</sup> The hypersaline plume poses a significant threat to surrounding natural resources. The DSEIS recognizes that the saltwater interface has advanced inland west and north from Turkey Point at an average rate of 460 feet per year, threatening the drinking water source for a large portion of South Florida.<sup>30</sup> To mitigate these impacts, Applicant has been forced to take extensive (but largely unsuccessful) measures to halt the advance of the hypersaline plume. Waiver of these regulations is necessary to reach this significant environmental issue because Intervenor has no other avenue by which it can assert that the DSEIS’s analysis of new information is insufficient.

**IV. CONCLUSION**

For these reasons, Intervenor respectfully request a waiver of 10 C.F.R. §§ 51.53(c)(3) and 51.71(d) and 10 C.F.R. Part 51, Subpart A, Appendix B to the extent the Board interprets those regulations to preclude Intervenor from submitting new contentions challenging the analysis in the DSEIS regarding two issues: (1) groundwater quality degradation (plants with

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<sup>28</sup> DSEIS at 4-21.

<sup>29</sup> As stated *supra* at Section III.a, Intervenor contend that a waiver is not necessary to raise these issues.

<sup>30</sup> DSEIS at 3-58 to 3-59.

cooling ponds in salt marshes) and (2) water quality impacts on adjacent water bodies (plants with cooling ponds in salt marshes).

Respectfully submitted,

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June 24, 2019

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of:	)	
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FLORIDA POWER & LIGHT COMPANY	)	Docket No. 50-250-SLR
	)	Docket No. 50-251-SLR
(Turkey Point Nuclear Generating Station, Unit Nos. 3	)	
and 4)	)	June 24, 2019
	)	
(Subsequent License Renewal Application)		

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**CERTIFICATE OF SERVICE**

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Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, a copy of the foregoing  
*“Natural Resources Defense Council’s, Friends of the Earth’s, and Miami Waterkeeper’s  
Petition for Waiver of 10 C.F.R. §§ 51.53(c)(3) and 51.71(d) and 10 C.F.R. Part 51, Subpart  
A, Appendix B”* was served upon the Electronic Information Exchange (“EIE,” the NRC’s E-  
Filing System), in the above-captioned docket, which to the best of my knowledge resulted in  
transmittal of same to those on the EIE Service List for the captioned proceeding.

/Signed (electronically) by/

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