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)	)	
	)	July 26, 2019
	)	

REPLY OF NATURAL RESOURCES DEFENSE COUNCIL, FRIENDS OF THE EARTH, AND MIAMI WATERKEEPER IN SUPPORT OF 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 AS APPLIED TO APPLICATION FOR RENEWAL OF LICENSES FOR TURKEY POINT UNITS 3 AND 4

Pursuant to 10 C.F.R. § 2.335(b), Natural Resources Defense Council, Friends of the Earth, and Miami Waterkeeper (together "Intervenors") filed a 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 whatever extent the Atomic Safety and Licensing Board ("Board") might interpret those regulations to preclude Intervenors from submitting new contentions 6-E and 7-E. These contentions challenge the NRC Staff's analysis 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) in the Draft Supplemental Environmental Impact Statement for subsequent license renewal regarding Turkey Point, Units 3 and 4 ("DSEIS").

I. Contentions 6-E and 7-E Do Not Challenge a Category 1 Issue.

Both the NRC Staff and Applicant agree with Petitioners that a waiver is unnecessary

with respect to Contention 6-E.[1] The NRC Staff explains that "a waiver is not required to litigate the issue of water quality impacts on adjacent water bodies (plants with cooling ponds in salt marshes)."[2] The Staff explains that it "analyzed this *site-specific issue* for the first time in the DSEIS. *The issue was not analyzed in the GEIS*. Thus, no Commission regulation codifies the NRC Staff's environmental determinations with respect to this issue, and no waiver of any Commission rule is required to litigate it."[3]

But with respect to Contention 7-E, both the NRC Staff and Applicant take a different position, despite the fact that the contention is based on the same underlying problem—the hypersaline plume emanating from Applicant's cooling canal system. The only difference is that Contention 6-E ***extends*** the analysis of groundwater quality impacts associated with Applicant's operation of its cooling canal system one step ***further***—to how those same groundwater quality impacts affect surface water. No logic can be discerned for the NRC Staff's view that no waiver is required for Intervenors to litigate contentions related to effects of Applicant's hypersaline plume on nearby *surface water through a groundwater pathway* but that a waiver petition is required for contentions—based on the same ***site-specific*** hypersaline plume—related to effects on *groundwater*.

The NRC Staff should have identified another new issue that is neither Category 1 or 2, as it did for water quality impacts on adjacent water bodies (plants with cooling ponds in salt marshes). The Staff's reasoning underpinning "new category" treatment for Contention 6-E

[1] Florida Power & Light Company's Answer to Intervenors' Petition for Waiver of Certain 10 C.F.R. Part 51 Regulations (July 19, 2019) (hereinafter, "Applicant's Answer") at 3; NRC Staff's Answer to Joint Intervenors' (1) Amended Motion to Migrate or Amend Contentions 1-E and 5-E and to Admit Four New Contentions, and (2) Petition for Waiver (July 19, 2019) (hereinafter, "NRC Staff's Answer") at 55.

[2] NRC Staff Ans. at 55.

[3] *Id*. (emphasis added).

applies equally to Contention 7-E. In both cases, the NRC Staff "analyzed [a] site-specific issue for the first time in the DSEIS."[4] As the DSEIS plainly states, the hypersaline plume and its impacts on groundwater quality are site-specific and were analyzed for the first time in the DSEIS.

> These aspects of the cooling pond[5] operations and their effects on groundwater quality ***were not considered*** in the GEIS as part of the technical basis for the Category 1 issue, "Groundwater quality degradation (plants with cooling ponds in salt marshes)." The NRC Staff has determined that this information is both new and significant.[6]

Thus, as for the hypersaline plume's impacts on nearby surface water quality, "no Commission regulation codifies the NRC Staff's environmental determinations with respect to this issue, and no waiver of any Commission rule is required to litigate it."[7] Here again, the Staff can provide no logic for distinguishing its treatment of two related water quality impacts that result from the same <u>*site-specific*</u> hypersaline plume at Turkey Point.

Applicant's objection is based on invented facts. Intervenors are not attempting to "circumvent the regulatory bar against challenging a Category 1 issue by *alleging the existence of new and significant information*."[8] Contentions 6-E and 7-E contain no such allegation, especially as relates to the GEIS. Rather, Intervenors are challenging the NRC Staff's analysis

---

[4] NRC Staff Ans. at 55.

[5] This is the only example in the 429-page DSEIS where the NRC Staff refer to Applicant's cooling canal system as "cooling pond operations."

[6] DEIS at 4-27. The NRC Staff try to walk back their finding that this information is both new and significant for the purposes of this challenge. It now claims that the site-specific issues are based on information that it is only "purportedly" new and significant in what appears to be an unsuccessful attempt bring the DSEIS into line with *Vermont Yankee/Pilgrim*. *See* NRC Staff. Ans. at 56 (stating that the Commission held in *Vermont Yankee/Pilgrim* that a "waiver is required to litigate purportedly new and significant information") and 58 (describing the site-specific hypersaline plume issues as "purportedly new and significant information.").

[7] NRC Staff Ans. at 55.

[8] Applicant's Ans. at 7 (citing *Turkey Point*, LBP-19-3, slip. Op. at 53 n.73) (emphasis added).

of "site-specific issues" that were analyzed "for the first time in the DSEIS"[9] and which "were not considered in the GEIS as part of the technical basis for [a] Category 1 issue. . . ."[10] Thus, intervenors are not challenging the GEIS.

The NRC Staff mistakenly seeks support for its view in cases where the NRC has rejected attempts to question the GEIS based on "new and significant information." But as shown above, Intervenors are challenging new findings in the DSEIS that are wholly distinct from conclusions in the GEIS. [11] *Vermont Yankee/Pilgrim* and *Turkey Point* state the principle that "any contention on a 'category one' issue amounts to a challenge to our regulation that bars challenges to *generic environmental findings*,"[12] but they are silent with regard to site-specific environmental findings. Intervenors challenge the latter. Compare the NRC's determination that:

> the site-specific impacts from the hypersaline plume on groundwater resources "at the Turkey Point site are MODERATE for current operations, but *will be* SMALL during the subsequent license renewal term as a result of ongoing remediation measures and State and county oversight, now in place at Turkey Point,"[13]

with the NRC's generic findings on the Category 1 issue that:

> "Groundwater quality degradation (plants with cooling ponds in salt marshes) are SMALL. Sites with closed-cycle cooling ponds could degrade groundwater quality. However, groundwater in salt marshes is naturally brackish and thus, not potable. Consequently, the human use of

[9] NRC Staff Ans. at 55.

[10] DSEIS at 4-27.

[11] *Entergy Nuclear Vt. Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-07-3, 65 NRC 13, 20, *slip op.* at 7 (2007) (Vermont Yankee/Pilgrim) (emphasis added). There, the Massachusetts Attorney General argued that "new information contradicts assumptions underlying the entire generic analysis for *all* spent fuel pools at reactors, whether in a license renewal proceeding or not." *Id.* (emphasis added).

[12] *Id*. (emphasis added).

[13] DSEIS at 4-27 (emphasis added).

such groundwater is limited to industrial purposes."[14]

The NRC Staff's findings in the DSEIS are different than the generic ones. Contention 7-E simply does not challenge any *generic finding*; rather, it challenges the Staff's non-generic, site-specific findings expressed in the DSEIS. As Intervenors expressed in their opening papers, there is no regulation that bars intervenors from challenging new, non-generic, site-specific findings.

II. Even if Contentions 6-E and 7-E Challenged a Category 1 Issue, the Commission Should Grant Intervenors' Petition.

Assuming *arguendo* that the Commission determines that Contentions 6-E and 7-E challenge Category 1 issues, it should grant Intervenors' waiver petition. Intervenors have established each of the four *Millstone* factors.

A. Strict compliance would not serve the purpose for which the rule was adopted

The NRC Staff provide that the purpose of the rule for which Intervenors seek a waiver "is to codify the generic environmental impact findings from the GEIS where the impacts were determined to be the same or similar for all plants to avoid repetitive NEPA reviews."[15] Strict compliance with this rule for Contentions 6-E and 7-E would not serve this purpose. The impacts at issue here are unquestionably unique to Turkey Point. Neither the NRC Staff nor Applicant claim otherwise. Therefore, addressing this issue in a generic proceeding would not "avoid repetitive NEPA reviews" as this is the only plant where there is a hypersaline plume placing groundwater quality at risk.

Similarly, strict application here does not "promote efficiency in handling license renewal

[14] 10 C.F.R., Pt 51, Subpt. A, App. B.

[15] NRC Staff Ans. at 57.

decisions" as Applicant suggests.[16] Once again, strict application would simply move resolution of issues unique to Turkey Point to a generic proceeding where the issues would be irrelevant to every other nuclear power plant in the country. This does not promote efficiency in license renewal decisions; it merely shifts them to an alternative and more complex proceeding. Any so-called "generic" findings would only apply to Turkey Point, so there would be no long-term efficiency gains either.

B. <u>Special circumstances exist that were not considered in the rulemaking proceeding leading to the rule sought to be waived</u>

While Applicant contests the waiver on these grounds, it is notable that the NRC Staff do not. The Staff's silence is instructive and reflects its prior statements on this issue in the DSEIS. There, as noted above and repeated here, neither impacts on nearby surface waters nor groundwater quality from the hypersaline plume were considered in the GEIS. Again, the Staff explains that it "analyzed this *site-specific issue* for the first time in the DSEIS. *The issue was not analyzed in the GEIS.* As such, no Commission regulation codifies the NRC Staff's environmental determinations with respect to this issue, and no waiver of any Commission rule is required to litigate it."[17] With respect to groundwater quality impacts, the Staff explained:

> These aspects of the cooling pond[18] operations and their effects on groundwater quality ***were not considered*** in the GEIS as part of the technical basis for the Category 1 issue, "Groundwater quality degradation (plants with cooling ponds in salt marshes)."[19]

Applicant takes a different tack. It argues that the circumstances at Turkey Point are not

[16] Applicant's Ans. at 12 (quoting *Massachusetts v. NRC*, 522 F.3d 115, 120 (1st Cir. 2008).

[17] *Id*. (emphasis added).

[18] Again, this is the only example in the 429-page DSEIS where the NRC Staff refer to Applicant's cooling canal system as "cooling pond operations."

[19] DEIS at 4-27.

"special."[20] Its claims are meritless. Applicant argues that the enforcement actions by state and county regulators to address the hypersaline plume were not "numerous" and that they do not "threaten[] local drinking water supplies."[21] Applicant contends it is in "full compliance" with its permits and the measures approved by regulators required in a Consent Agreement and Consent Order.[22] But this is precisely the point. These issues exist nowhere else; they are "special" to Turkey Point.

Applicant next argues these circumstances are not "special" by referring to analysis in the DSEIS about the environmental impacts from the hypersaline plume.[23] But again, this proves Intervenors' point. First, that Applicant references the DSEIS instead of the GSEIS is telling. The GEIS clearly did not address these issues. Second, Applicant is attempting to argue the site-specific merits of the DSEIS, which is precisely what Intervenors seek to do in the proceeding below. In fact, Contentions 6-E and 7-E address the very findings that Applicant quotes from the DSEIS because they form basis of the NRC Staff's conclusions *in the DSEIS*. Thus, the issues raised in this Petition are "special" to Turkey Point.

C. <u>The Circumstances at issue in the waiver petition are unique to Turkey Point rather than to a large class of facilities</u>

Once again, Applicant stands alone arguing that the issues presented here are not "unique" to Turkey Point. It argues that the NRC considered salinity impacts in the GEIS and therefore this issue is not unique. But this misses the point—Turkey Point is the only plant in the country where the operation of a cooling canal system has resulted in a "hypersaline plume

[20] Applicant's Ans. at 13.

[21] Applicant's Ans. at 13.

[22] *Id.* at 14.

[23] *Id.*

migrating through surrounding groundwater."[24] Moreover, the DSEIS came to conclusions that are *different* from those presented in the GEIS. While the GSEIS found that there might be SMALL impacts,[25] after evaluating the site-specific hypersaline plume issues at Turkey Point, the NRC Staff concluded that current impacts are MODERATE and that impacts will only be SMALL based on *site-specific* actions by regulators.[26] This is plainly not a generic issue.

Applicant attempt to create generic issue out of Intervenors' contentions falls flat. Once again, it attempts to litigate the merits of Intervenors' contentions here rather than before the Board. Its claim that the Staff's reliance on "ongoing remediation measures and State and county oversight" is "not unique to Turkey Point"[27] misses the point. That a legal precedent *might* be applied to other facilities—based on the unique circumstances of that facility—does not make the site-specific issues presented in Contentions 6-E and 7-E any less unique. There is no regulation or generic determination that it is appropriate to rely *entirely* on "ongoing remediation measures" to assume that those measures will result in "small" impacts. Rather, Applicant points to "NRC case law" holding that the NRC must give "substantial weight" to state and local authorities that an applicant "will comply with its legal obligations."[28] Applicant further recognizes that NRC case law precedent provides Intervenors an opportunity to provide "evidence to the contrary."[29] If this were a generic rule, there would be no opportunity to provide "evidence to the contrary" in a hearing.

---

[24] Waiver Pet. at 8.

[25] GEIS at 4-50.

[26] DSEIS at 4-27 (emphasis added).

[27] Applicant's Ans. at 16.

[28] *Id*.

[29] *Id*. (quoting *Turkey Point*, LBP-19-3, slip op. at 38).

D. A significant environmental problem warrants a waiver in this case

Once again, Applicant stands alone in arguing that Contentions 6-E and 7-E do not raise a significant environmental problem warranting a waiver in this case. Yet again, it attempts to litigate the merits of this case here instead of before the Board.[30] It again relies on the very DSEIS conclusions that Intervenors are seeking to challenge.[31]

Applicant absurdly suggests that a waiver is unnecessary here because Intervenors can and did submit comments on the DSEIS outside the adjudicatory process (comments that provide no avenue for judicial review, as opposed to contentions filed in licensing proceeding). If that were the case, then no waivers need ever be granted since comments on a DSEIS may always be filed. Applicant further contends that Intervenors failed to show that the NRC will not take a hard look at groundwater quality degradation—essentially that the waiver petition is not ripe because Intervenors' cannot prove a negative.[32] But if Intervenors were required to wait until the NRC's environmental review is final to file a waiver petition, then there would be nothing left to contest. Based on all existing evidence, there is no indication that the NRC will address the issues raised in Contentions 6-E and 7-E.

II. CONCLUSION

For the foregoing reasons, Intervenors have demonstrated that their 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 is admissible, and they are entitled to a hearing on these contentions.

---

[30] Applicant's Ans. at 17.

[31] Applicant's Ans. at 17 ("In fact, the Staff's robust discussion of such issues in the DSEIS—which concludes that the impacts on groundwater quality from operations during the SLR term would be SMALL—disproves [Intervenors' claim] and the notion that a 'significant environmental problem' has gone unaddressed.").

[32] Applicant's Ans. at 17.

Respectfully submitted,

/s/ Ken Rumelt
Kenneth J. Rumelt
Environmental & Natural Resources Law Clinic
Vermont Law School
164 Chelsea Street, PO Box 96
South Royalton, VT 05068
802-831-1031
krumelt@vermontlaw.edu
Counsel for Friends of the Earth

/s/ Geoffrey Fettus
Geoffrey Fettus
/s/ Caroline Reiser
Caroline Reiser
Natural Resources Defense Council
1152 15th Street, NW, Suite 300
Washington, DC 20005
202-289-2371
gfettus@nrdc.org
creiser@nrdc.org
Counsel for Natural Resources Defense Council

/s/ Richard Ayres
Richard E. Ayres
Ayres Law Group
2923 Foxhall Road, N.W.
Washington, D.C. 20016
202-722-6930
ayresr@ayreslawgroup.com
Counsel for Friends of the Earth

/s/ Kelly Cox
Kelly Cox
Miami Waterkeeper
2103 Coral Way 2nd Floor
Miami, FL 33145
305-905-0856
kelly@miamiwaterkeeper.org
Counsel for Miami Waterkeeper

July 26, 2019