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1 UNITED STATES OF AMERICA

2 NUCLEAR REGULATORY COMMISSION

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4 ATOMIC SAFETY AND LICENSING BOARD PANEL

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6 HEARING

7 -----x

8 In the Matter of: : Docket Nos.

9 FLORIDA POWER : 50-250-SLR

10 & LIGHT COMPANY : 50-251-SLR

11 : ASLBP No.

12 (Turkey Point Nuclear : 18-957-01-SLR-BD01

13 Generating Units 3 and 4) :

14 -----x

15 Monday, September 9, 2019

16
17 Nuclear Regulatory Commission

18 Hearing Room T3-D50

19 11555 Rockville Pike

20 Rockville, Maryland

21
22 BEFORE:

23 E. ROY HAWKENS, Chair

24 DR. SUE H. ABREU, Administrative Judge

25 DR. MICHAEL F. KENNEDY, Administrative Judge

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P R O C E E D I N G S

9:02 a.m.

JUDGE HAWKENS: Good morning. Today's case is entitled, Florida Power & Light Company, Turkey Point Nuclear Generating Units 3 and 4, Docket Nos. 50-250-SLR and 50-251-SLR.

My name is Roy Hawkens. I'm joined on this Licensing Board by Judge Sue Abreu, who has her medical doctorate with an expertise in nuclear medicine, and also by Judge Michael Kennedy, who has his PhD in nuclear engineering.

This case involves challenges to Florida Power & Light's request for a subsequent license renewal to operate Turkey Point Units 3 and 4, which are located in Homestead, Florida.

The parties participating today are the Applicant, FPL; the NRC staff, and Joint Intervenors who are comprised of three organizations: Friends of the Earth, Natural Resources Defense Council, and Miami Waterkeeper.

Would counsel for the parties please introduce themselves for the record, starting with Joint Intervenors, then FPL, and then, the NRC staff?

MR. RUMELT: Good morning, Your Honors. My name is Ken Rumelt. I am an attorney for Friends

1 of the Earth. With me at counsel table is Geoff
2 Fettus of NRDC and Caroline Reiser of NRDC as well.
3 Seated behind me is Kelly Cox of Miami Waterkeeper;
4 Dick Ayres of Friends of the Earth, representing
5 Friends of the Earth; Kristen Rogers, a Legal Fellow
6 for Miami Waterkeeper, and one of our law students at
7 Vermont Law School will be, hopefully, arguing one of
8 the issues today, Dayna Smith.

9 JUDGE HAWKENS: Let's address that
10 particular point right now. Would Ms. Smith please
11 stand up, just so I know?

12 Good morning.

13 MS. SMITH: Good morning, Your Honor.

14 JUDGE HAWKENS: Mr. Rumelt had made a
15 request to FPL and to the NRC staff asking if they had
16 any objection to Ms. Smith presenting oral argument on
17 the first bullet for Contention 8E, I believe.

18 MR. RUMELT: That's correct.

19 JUDGE HAWKENS: She's a third year law
20 student at Vermont Law School in one of Professor
21 Rumelt's clinics, and he is her attorney-supervisor
22 for this case.

23 FPL, do you have any objection?

24 MR. BESSETTE: No objection, Your Honor.

25 JUDGE HAWKENS: NRC staff?

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1 MR. TURK: No, Your Honor.

2 JUDGE HAWKENS: Your request is granted,
3 and we look forward to hearing from you, Ms. Smith.

4 MS. SMITH: Thank you, Your Honor.

5 JUDGE HAWKENS: All right. Thank you.

6 I interrupted. Did you finish making the
7 introductions for --

8 MR. RUMELT: I think we've hit everybody,
9 yes, Your Honor.

10 JUDGE HAWKENS: All right. Thank you.

11 FPL?

12 MR. BESSETTE: Good morning, Your Honor.
13 My name is Paul Bessette. I'm representing the
14 Applicant, Florida Power & Light. With me is my
15 colleague, Martin O'Neill, who will be doing the
16 majority of the discussions today, has the pleasure of
17 doing so. And to my right is Steve Hamrick, counsel
18 for Florida Power & Light.

19 JUDGE HAWKENS: Thank you, Mr. O'Neill.

20 NRC staff?

21 MR. TURK: Good morning, Your Honors.

22 JUDGE HAWKENS: Good morning.

23 MR. TURK: My name is Sherwin Turk. I'll
24 be conducting part of the argument today for the NRC
25 staff. To my right is Mr. Jeremy Wachutka, and to his

1 right is a member of the technical staff, Mr. Kevin
2 Folk. Also in the audience today we have one of our
3 attorneys, Mary Frances Woods, as well as Mr. William
4 Ford, another member of the technical staff.

5 JUDGE HAWKENS: All right. Thank you.

6 The parties have submitted extensive
7 pleadings in this case, and Licensing Board Judges are
8 familiar with those pleadings. The principal purpose
9 of today's argument is to ensure that we fully
10 understand the parties' position and the rationale
11 underlying those positions.

12 On August 9th, the Licensing Board issued
13 an order that identified topics for counsel to include
14 in today's presentations and, also, prescribed the
15 format for today's argument. Counsel will be
16 addressing seven issues. The first is whether a
17 waiver is warranted in this case. After they address
18 that, they will address the admissibility of six
19 newly-proffered contentions.

20 For each of the seven issues, we'll hear
21 first from FPL -- excuse me -- first from Joint
22 Intervenors, who have been allotted 15 minutes for
23 each issue. We'll then hear from the NRC staff and
24 FPL, who have, likewise, been allotted a total of 15
25 minutes to divide among themselves as they wish.

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1 At this point, let me introduce the
2 Licensing Board's law clerks. Ms. Taylor Mayhall and
3 Mr. Ian Curry.

4 Ms. Mayhall will be assisting counsel and
5 the Board with keeping track of the allotted time.
6 When two minutes are left in your presentation, she
7 will raise the amber light, and when the red light is
8 raised, the red sign, time will have expired and we
9 would ask counsel to wrap up their arguments, unless
10 they're being engaged in questions by the judges.

11 Counsel will be presenting argument from
12 counsel table. And once again, counsel are encouraged
13 to speak directly into the mic, for the benefit of the
14 court reporter, the audience here assembled, and also
15 members of the audience who are not with us, but who
16 are listening on a listen-only telephone dial-in line.

17 It's unlikely we'll finish before lunch.
18 And in the event that we don't, we will break at an
19 appropriate time and complete arguments thereafter.

20 During the course of the argument, if
21 anybody would like or needs to take a short break,
22 please don't hesitate to bring that to our attention
23 and we will accommodate you.

24 Do counsel have any questions before we
25 commence?

1 MR. RUMELT: No, Your Honor.

2 JUDGE HAWKENS: FPL?

3 MR. O'NEILL: No, Your Honor.

4 MR. TURK: No, Your Honor.

5 JUDGE HAWKENS: All right. Thank you.

6 Any further comments that you would like
7 to make?

8 Let's start, then, with the first issue,
9 which I believe Ms. Reiser will be addressing. And
10 this is whether a waiver is warranted. As I mentioned
11 earlier, you have 15 minutes for this. Do you wish to
12 reserve any time for rebuttal?

13 MS. REISER: Three minutes, please, Your
14 Honor.

15 JUDGE HAWKENS: All right. You may
16 proceed, Ms. Reiser. Thank you.

17 ARGUMENT ON BEHALF OF THE JOINT INTERVENORS

18 MS. REISER: Good morning, and may it
19 please the Board, Intervenor argue that we do not
20 need to submit a waiver request for Contention 6-E and
21 7-E to be admissible. However, if the Board fines
22 that these contentions do require a waiver, our waiver
23 request should be granted because we established the
24 necessary prima facie elements.

25 JUDGE HAWKENS: Let me interrupt you real

1 quickly. You may be able to avoid focusing on 6-E
2 and, instead, directing your arguments to 7-E.

3 FPL, do I understand you correctly that
4 you concede that a waiver is not required with regard
5 to Contention 6-E?

6 MR. O'NEILL: Yes, Your Honor, that's
7 correct insofar as the staff has identified the
8 underlying issue is a new site-specific issue that's
9 neither Category 1 nor 2. But we don't certainly
10 concede the admissibility of the contention --

11 JUDGE HAWKENS: I understand. Thank you.

12 And, NRC staff, you concede that waiver is
13 not required with regard to 6-E?

14 MR. TURK: That's correct, Your Honor.

15 JUDGE HAWKENS: Thank you.

16 Your time would be well spent focusing on
17 7-E.

18 MS. REISER: Thank you, Your Honor.

19 So, focusing on 7-E, similarly to 6-E, it
20 is site-specific impacts that we are addressing in
21 Contention 7-E that were never before discussed in a
22 Generic Environmental Impact Statement. The Draft
23 Environmental Impact Statement itself determined that
24 there was information that is both new and significant
25 regarding groundwater quality.

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1 The DSEIS, therefore, came to a different
2 conclusion regarding the impacts than the Generic
3 Environmental Impact Statement. Where the Generic
4 Environmental Impact Statement found that the impacts
5 would be small, the DSEIS that there would be moderate
6 impacts for the current operation, but small impacts
7 for the subsequent license renewal, only because of
8 site-specific measures. Thus, a waiver is unnecessary
9 to challenge this new conclusion that is contained in
10 the DSEIS.

11 JUDGE HAWKENS: What case law supports
12 that proposition that waiver is not required for this
13 allegedly Contention 1 issue?

14 MS. REISER: There is no case law that is
15 precisely on point to this case. All case law that
16 exists has a very different factual pattern.

17 JUDGE HAWKENS: That's correct, but
18 doesn't the Limerick Case and the Commission's
19 Decision CLI-12-19 state pretty clearly -- in fact,
20 I'm quoting them -- quote, "Any contention on a
21 Category 1 issue" -- any contention on a Category 1
22 issue -- "amounts to a challenge to our reg that bars
23 challenges to generic environmental findings."? And
24 also a quote, "A waiver is required to litigate any
25 new and significant information relating to a Category

1 1 issue."

2 MS. REISER: Respectfully, Your Honor, as
3 that says, the part that is required to have a waiver
4 is when you are challenging a regulation or the
5 Generic Environmental Impact Statement, which is
6 considered a regulation. Here, we are not challenging
7 any NRC regulation or the Generic Environmental Impact
8 Statement. We are only challenging information that
9 the NRC staff has already put in the DSEIS, as
10 acknowledges new and significant, and has the --

11 JUDGE HAWKENS: Again, that Limerick quote
12 says, "A waiver is required to litigate any new and
13 significant information relating to a Category 1
14 issue."

15 MS. REISER: Agreed.

16 JUDGE HAWKENS: And I don't want to cut
17 you off in this argument, but it seems to me that's an
18 argument that is more properly addressed to the
19 Commission, in light of that case law. And because of
20 that, you might be well advised to focus on the
21 Millstone factors.

22 MS. REISER: I will turn to the Millstone
23 factors then, Your Honor.

24 JUDGE HAWKENS: If you want to continue
25 arguing this point, I'm not going to stop you, but you

1 have an awfully high hurdle, in our view.

2 MS. REISER: Thank you, Your Honor.

3 I do just want to make clear again our
4 point is that all of the case law that is out there on
5 waivers address issues when the petitioners are
6 challenging the conclusions and the analysis that is
7 included in Generic Environmental Impact Statements.

8 JUDGE HAWKENS: Understand, and that
9 argument has been preserved for you.

10 MS. REISER: Great. Thank you, Your
11 Honor.

12 So, turning to the Millstone factors, you
13 specifically asked about the first and the fourth
14 Millstone factor. So, I will focus on those in my
15 discussion this morning.

16 And so, the first Millstone factor is
17 whether establishing the rule's strict application
18 would not serve the purpose for which it was adopted.
19 All the parties here seem to agree that the purpose of
20 which these regulations were adopted is to split the
21 NEPA proceeding into generic issues that are Category
22 1 issues and site-specific issues that are Category 2
23 issues.

24 And that is to efficiently address the
25 generic issues, so that we can only have to address

1 the site-specific issues in different repeated NEPA
2 reviews. But the generic approach here would not be
3 efficient because Turkey Point is unique. Turkey
4 Point is the only nuclear power plant that has a
5 cooling canal system and the only nuclear power plant
6 with a hypersaline plume. So, if these issues are
7 transferred to a generic proceeding, it won't create
8 any efficiencies, which is the purpose of splitting
9 the NEPA review into generic and site-specific issues
10 in the first place.

11 This is exactly the type of situation when
12 you want an adjudication and not a rulemaking because
13 the purpose of a rulemaking is to carve out from
14 adjudication those issues for generic resolution, as
15 the staff themselves explained, page 54, in their
16 Answer.

17 Currently, you have before you parties who
18 have established standing challenging this very site-
19 specific issue, and moving it to a generic proceeding
20 means that it would not be addressed for possibly
21 years. It will then not apply to any other power
22 plant, and it's very possible that this proceeding
23 will have to be reopened. So, again, transferring
24 this issue to a generic proceeding would not achieve
25 the efficiencies that the regulations were created

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1 for.

2 And unless Your Honors have any questions,
3 other questions regarding the first Millstone factor,
4 I'll turn to the fourth one.

5 And so, you asked what constitutes a
6 significant environmental issue under the fourth
7 Millstone factor. First, I would just like to point
8 out in the DSEIS, at page 427, staff already
9 acknowledges that this information is significant.
10 But, in terms of the actual Millstone factor, there
11 are no cases directly on point. And so, we have to
12 look at similar case law.

13 So, the Commission has interpreted a
14 separate regulation that also includes the idea of a
15 significant environmental impact, and has explained
16 that a significant environmental impact is if there is
17 new information that is sufficient to show that the
18 remaining action will affect the -- excuse me, Your
19 Honors.

20 (Pause.)

21 The Commission has explained that a
22 significant environmental impact is when an
23 Environmental Impact Statement is required to be
24 supplemented. So, that's when new information is
25 sufficient to show that the remaining action will

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1 affect the quality of the human environment in a
2 significant manner or to a significant extent not
3 already considered. Essentially, it will paint a
4 seriously different picture of the environmental
5 impact of the proposed project from what was
6 previously envisioned.

7 Here, the hypersaline plume was not
8 considered ever in any Generic Environmental Impact
9 Statement or previous Turkey Point Impact Statement.
10 Further, it is a significant impact because it
11 threatens the drinking water quality in South Florida.

12 JUDGE HAWKENS: Ms. Reiser, FPL in their
13 pleading appears to suggest it's not significant
14 because they say, although it's significant -- or it's
15 moderate impact now, it will be small during the
16 subsequent renewal period. And they suggest that, for
17 that reason, it should not be viewed as a significant
18 environmental issue. What would your response to that
19 be?

20 MS. REISER: I'm sorry, Your Honor, if we
21 could take a short break?

22 JUDGE HAWKENS: Yes, sure.

23 About how long? Are you talking about a
24 short recess or what are you talking about, Ms.
25 Reiser? We're happy to accommodate you.

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1 MR. FETTUS: Could we take five minutes,
2 Your Honor? Thank you.

3 JUDGE HAWKENS: All right. We'll take a
4 five-minute recess.

5 (Whereupon, the above-entitled matter went
6 off the record at 9:18 a.m. and resumed at 9:41 a.m.)

7 JUDGE HAWKENS: We are now assembled. It
8 appears we are ready to proceed.

9 MS. REISER: Yes, Your Honor.

10 JUDGE HAWKENS: Ms. Reiser, I believe you
11 have about five minutes remaining, taking into account
12 you still have three minutes for rebuttal afterwards.
13 But you may proceed.

14 MS. REISER: Wonderful. Thank you, Your
15 Honors.

16 I believe before our slight break we were
17 discussing the Millstone fourth factor, and we were
18 discussing what constitutes a significant
19 environmental impact. So, the Commission and the
20 Supreme Court have both said that, if new information
21 is sufficient to show that the remaining action will
22 affect the quality of the human environment in a
23 significant manner or in a significant extent not
24 already considered, it is significant, essentially,
25 that it will paint a seriously different picture of

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1 the environmental impact of the proposed project than
2 what was previously envisioned.

3 And as I believe I said, here we're
4 looking at the hypersaline plume, which has not been
5 considered in any other environmental review, and it
6 is spreading beyond the bounds of the Turkey Point
7 site into drinking water in South Florida.

8 JUDGE HAWKENS: Before the break, Ms.
9 Reiser, I had asked you a question which we didn't
10 have time to address before the recess. But the
11 question went to a portion of FPL's brief where they
12 said it conceivably could warrant a waiver if it were
13 not going to be small, if the impact were not going to
14 be small, upon commencement of a subsequent license
15 renewal term. And how do you respond to that?
16 Concededly, it's moderate now, according to the NRC
17 staff. But, as FPL says and as the NRC staff
18 anticipates, if it's going to be small in 2033 and
19 '34, is it really a significant environmental issue in
20 light of that?

21 MS. REISER: Yes, it is still a
22 significant environmental issue. As my co-counsel,
23 Mr. Rumelt, will explain later in discussing the
24 merits of the contention itself, there is not
25 sufficient evidence that, even with the consent order

1 and consent agreement, that the hypersaline plume will
2 be adequately addressed. And therefore, the evidence
3 that they're relying on to come to that small
4 conclusion is suspect.

5 And so, what we have here is a significant
6 environmental issue that is unique to Turkey Point
7 itself, and this is the exact type of case where we
8 would want a waiver, so that we could look at this
9 issue. The staff itself has acknowledged that it's
10 new and significant. They have done analysis
11 themselves and opened the door for a response to that
12 analysis. And respectfully, we request that this
13 waiver be granted, so that we can address this issue.

14 If Your Honors don't have any further
15 questions regarding this issue --

16 JUDGE HAWKENS: We'll add your remaining
17 time to your rebuttal time, Ms. Reiser.

18 MS. REISER: Thank you, Your Honors.

19 JUDGE HAWKENS: Thank you very much.

20 FPL and the NRC staff, how are you going
21 to split up your 15 minutes?

22 MR. TURK: Your Honor, for lack of a
23 better idea, we've agreed to split 50/50.

24 JUDGE HAWKENS: All right.

25 MR. TURK: But we're always open to

1 questions and however that takes us, Your Honor.

2 JUDGE HAWKENS: Thank you. Who will
3 start?

4 MR. TURK: Your Honor, I think since we
5 represent the staff, we should proceed first on the
6 waiver question.

7 ARGUMENT ON BEHALF OF NRC STAFF

8 MR. TURK: Let me begin by saying that Ms.
9 Reiser was wrong twice in what she told you. The NRC
10 staff did not say that the information is significant
11 for subsequent license renewal. So, let me make that
12 clear. We agree with FPL's position, which we
13 would --

14 JUDGE HAWKENS: What did you say in the --

15 MR. TURK: We said that, for subsequent
16 license renewal, the impact will be small on
17 groundwater quality degradation.

18 JUDGE HAWKENS: But you did say that the
19 information is new and significant?

20 MR. TURK: No, we did not. If we did,
21 that's --

22 JUDGE HAWKENS: I believe you did on DSEIS
23 4-27.

24 MR. TURK: I think the word should have
25 been "potentially significant". So, if that said

1 "significant" without the word "potentially," then
2 that was an error.

3 And the reason is the definition of
4 "significant" would require that the generic
5 determination in the GEIS would have to change in the
6 impact determination from small to moderate or small
7 to large. That would be the significant change, and
8 we did not find that. We found that the impact is
9 small.

10 JUDGE HAWKENS: For the extended --

11 MR. TURK: For the SLR period.

12 JUDGE HAWKENS: But it's new and
13 significant now because the impact is moderate.

14 MR. TURK: For current operations.

15 JUDGE HAWKENS: Correct?

16 MR. TURK: Yes.

17 JUDGE HAWKENS: All right.

18 MR. TURK: But that's not what is before
19 the Board and that is not part of the application for
20 subsequent license renewal. That's background. That
21 goes into the affected environment today. But because
22 of the freshening efforts, because of the state- and
23 county-enforced remediation, and because of the
24 groundwater modeling that we've seen and accept, we
25 believe that the impacts will be small for subsequent

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1 license renewal.

2 JUDGE ABREU: So, what you're saying is,
3 if we -- or correct me if this isn't what you're
4 saying -- if we find new and, we'll call it
5 interesting, information -- "we," I should say the
6 staff. If the staff finds new and interesting
7 information, and they do an analysis and, then, make
8 a determination that the environmental impact is
9 small, that's kind of a situation you're saying we
10 have?

11 MR. TURK: Yes.

12 JUDGE ABREU: Is that correct?

13 MR. TURK: Yes.

14 JUDGE ABREU: So, anytime they make the
15 determination that the impact is small, it takes it
16 out of play? There can be no discussion.

17 MR. TURK: Well, there definitely can be
18 discussion because we look at whether there is a site-
19 specific issue. For instance, the staff found a new
20 issue that had not been evaluated in the GEIS.

21 JUDGE ABREU: Okay.

22 MR. TURK: A new site-specific issue was
23 considered, and that is the impact of the groundwater
24 pathway allowing salinity to move towards the surface
25 waters, towards the Biscayne Bay.

1 JUDGE ABREU: But, then, you went on to
2 say, because the determination was that the impact was
3 small, that there's --

4 MR. TURK: No -- I'm sorry.

5 JUDGE ABREU: -- for the future. I mean
6 --

7 MR. TURK: No, for that resource, for the
8 surface water resources, we did a site-specific
9 evaluation of this groundwater pathway.

10 JUDGE ABREU: Uh-hum.

11 MR. TURK: And we said that is something
12 that could be the subject of a contention because it's
13 site-specific, and we said that the impact for that is
14 small. That doesn't take it out of litigation because
15 it's site-specific.

16 JUDGE ABREU: Okay. Right, for the site,
17 for the surface water --

18 MR. TURK: Yes.

19 JUDGE ABREU: For surface water via
20 groundwater? But, then, for groundwater quality,
21 where the staff did look at new and interesting
22 information and found the impact was small --

23 MR. TURK: For subsequent license renewal.

24 JUDGE ABREU: -- for subsequent license
25 renewal --

1 MR. TURK: Yes.

2 JUDGE ABREU: Therefore, there's now no
3 way for that to be challenged under your view?

4 MR. TURK: Unless an intervenor makes a
5 prima facie showing that the information is
6 significant for subsequent license renewal.

7 JUDGE ABREU: But you said your definition
8 of significance is that the impact is moderate or
9 large.

10 MR. TURK: Something other than what the
11 GEIS said, which is small.

12 JUDGE ABREU: Okay. Yes. That's what I
13 want to tease out. So, from what you're saying is,
14 the intervenor would have to specifically say it's
15 moderate or large, not just it's more than small or
16 there could be more of a problem here than currently
17 is being described?

18 MR. TURK: That would be in order to
19 succeed in obtaining a waiver.

20 JUDGE ABREU: Okay.

21 MR. TURK: But first --

22 JUDGE ABREU: That is the discussion, yes.

23 MR. TURK: Okay.

24 JUDGE ABREU: So, part of it may be the
25 term "significant" --

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1 MR. TURK: Okay.

2 JUDGE ABREU: -- because the staff even
3 used the term "we have new and significant
4 information" to look at. And that's the term used in
5 the -- it is the term used. So, could it be that that
6 term "significant" in the beginning, new and
7 significant information, refers to a significant
8 issue? Because until you've done the analysis, you
9 don't know the impact.

10 So, when you start, you're starting with
11 something that's new about something important. In
12 other words, significant because it's important.
13 That's why the staff is looking at it, because it's
14 important and it's something new from the GEIS, from
15 what was discussed in the GEIS. Then, once the
16 analysis is done, it comes out small. So, okay,
17 everything's all right.

18 Could it be that the term "significant" is
19 being used in a slightly different way in those two
20 situations?

21 MR. TURK: The proper way to use the term
22 would be to say, when we have new information, we look
23 to see, could it be significant? Is it potentially
24 significant? We, then, do the evaluation and make the
25 significance determination.

1 JUDGE ABREU: But that's not how it's
2 discussed. As the routine discussion goes, that's not
3 the phrasing that's being used throughout the
4 document.

5 MR. TURK: Well, Your Honor, as I recall
6 the Draft SEIS, in most instances that is how it's
7 used. I believe I saw one place where the word
8 "potentially" had been left out. But, in at least two
9 other places, we did specifically use the word
10 "potentially significant". And that's the proper way
11 to explain our use of the term "significance".

12 JUDGE ABREU: So, in the regulation where
13 it discusses new and significant information, it does
14 not use the term "potentially". Where it talks about
15 you can look at new and significant information, it
16 doesn't have that word "potentially". So, could it be
17 that the meaning is something, is about the
18 significance of the issue as opposed to the
19 significance of the impact?

20 MR. TURK: I'd have to think about that,
21 Your Honor.

22 JUDGE ABREU: Okay.

23 MR. TURK: Should I proceed?

24 JUDGE ABREU: Please do.

25 MR. TURK: Your Honor, the essence of our

1 argument on waiver is that, in order to introduce new
2 evidence that would upend the GEIS, that would cause
3 us to go beyond the GEIS in an adjudicatory hearing,
4 the Commission would have to grant a waiver. It would
5 have to find that, No. 1, the first factor, that the
6 purpose of the rule would not be served in this
7 particular proceeding. And the purpose of the rule is
8 to promote efficiency in the consideration of
9 environmental impacts. And we believe that the
10 Intervenors have not shown that because the GEIS which
11 made the generic determination continues to apply.
12 That finding still applies for subsequent license
13 renewal for Turkey Point groundwater quality
14 degradation.

15 Secondly, the fourth factor has not been
16 met. And that has to do with the significance of the
17 issue.

18 And Your Honors asked a question about
19 significance in terms of what does that mean. CEQ put
20 out regulations that define "significance" under NEPA
21 as involving both context and intensity. And that's
22 the proper way to look at what "significance" means
23 here.

24 So, with regard to intensity, it would be,
25 what is the impact? And that's where the staff found

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1 that the impact is small, just as in the GEIS. And
2 for that reason, the Intervenor's do not satisfy the
3 fourth factor.

4 JUDGE HAWKENS: Mr. Turk, let me go to
5 some definitional issues here. The GEIS, at 4-50,
6 when it talks about groundwater quality degradation
7 for Turkey Point, it says, "Plants like Turkey Point
8 relying on cooling ponds and salt marsh settings are
9 expected to have a small impact on groundwater
10 quality." But that's, concededly, not the case here
11 during current operations, is that correct?

12 MR. TURK: That's right, Your Honor.

13 JUDGE HAWKENS: And why doesn't that take
14 it out of the definition for this Category 1 issue?

15 MR. TURK: Because it --

16 JUDGE HAWKENS: Plants relying on cooling
17 water ponds and saltwater settings are expected to
18 have a small impact. This one doesn't. Why does that
19 not convert it to a Category 2 issue?

20 MR. TURK: Because the moderate finding in
21 the staff's Draft SEIS at Turkey Point took into
22 account current conditions, not subsequent license
23 renewal, when the DSEIS said impacts are moderate.
24 Looking at subsequent license renewal, we found,
25 because of the freshening efforts by Florida Power &

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1 Light, and because of the continued oversight of the
2 state and county, and based on the groundwater
3 modeling that has been done, we're satisfied that the
4 impacts will be small 13 years from now when the
5 subsequent license renewal period begins.

6 JUDGE HAWKENS: Only because of very
7 muscular mitigation measures that are being taken, is
8 that correct, during the next 15-20 years?

9 MR. TURK: The measures that are being
10 taken and the oversight and continued authority of
11 state and county to demand that FPL do whatever is
12 necessary to achieve their objectives.

13 JUDGE HAWKENS: Let me ask you, then,
14 this. It's a followup definitional issue. The GEIS,
15 at page 1-6, says Category 1 issues must satisfy three
16 criteria. And one of those criteria -- it's No. 3 --
17 it says, "Mitigation of adverse impacts associated
18 with the issue have been considered and it's been
19 determined that plant-specific mitigation measures are
20 not likely to be sufficiently beneficial to warrant
21 implementation." And it says, if this criteria is not
22 met, it's not a Category 1 issue; it's a Category 2
23 issue. So, how do you reconcile that aspect of the
24 definition which says you can't have remedial measures
25 being taken and still have it remain a Category 1

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1 issue?

2 MR. TURK: As I read that sentence in the
3 GEIS, it says that the staff will consider the
4 mitigation that has occurred -- and we've done that --
5 and it has been determined that additional plant-
6 specific mitigation measures are not likely to be
7 sufficiently beneficial to warrant implementation;
8 i.e., we have not said that the state and county need
9 to do anything more than what they are doing now.
10 We're looking at the current mitigation measures and
11 find that to be adequate to get the freshening efforts
12 to succeed.

13 JUDGE HAWKENS: But these are mitigation
14 measures. You're also relying on the oversight by the
15 state and local governments, and acknowledging that
16 these mitigation measures could well change, if
17 required to reduce the salinity of the CCS and to help
18 arrest and diminish the plume.

19 MR. TURK: We're not saying that that will
20 happen. That's a speculation. In response to the
21 Intervenors' assertion that the mitigation is not
22 working, we're saying, well, if we take that as a
23 hypothetically given, then we're still not concerned
24 because the state and county can demand more. But
25 we're not relying on that to say that the impacts are

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1 small. We've looked at what is being done and are
2 satisfied with the results.

3 And one thing I would note there, the
4 Intervenors claim that the freshening efforts are not
5 working. If you look at the salinity levels that
6 existed three years ago, they were up to 90 practical
7 salinity units, 90 PSU. Now the last year in 2017,
8 they were down to approximately 60. The information
9 is not before you now, but the final SEIS will look at
10 what the results in the most recent year. And I think
11 it wouldn't be right for me to introduce new evidence
12 here.

13 JUDGE HAWKENS: Correct.

14 MR. TURK: So, I will not say what those
15 results show.

16 JUDGE HAWKENS: Let me ask you another
17 definitional issue then. This is GEIS 4-50, and it's,
18 again, talking about the Turkey Point, this Category
19 1 issue. It says, "This issue concerns only the
20 potential for changing the groundwater use category of
21 the underlying shallow and brackish groundwater." It
22 appears to me, based on the DSEIS, that we're not
23 dealing with a hypersaline plume that's shallow or
24 that underlies the CCS. We're dealing with a plume
25 that extends over a mile beyond the CCS, and that it

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1 goes far beyond what my understanding of the term
2 "shallow" in its ordinary sense would be. Could you
3 address that?

4 MR. TURK: May I have just one moment,
5 Your Honor?

6 (Pause.)

7 Thank you, Your Honor.

8 First of all, my understanding of the site
9 hydrogeology is that there are two aquifers. The
10 Biscayne Aquifer overlies the Floridan Aquifer. The
11 plume is in the upper of the two aquifers, the
12 Biscayne Aquifer. As between the two, that's the
13 shallower of the two aquifers.

14 The groundwater plume was recognized to
15 exist at the time of initial license renewal, except
16 that the plume was still within the site boundaries.
17 It had not migrated beyond the site boundary. What's
18 new is that in recent years it's been discovered that
19 the plume has migrated beyond the site boundary.

20 I don't think you can get too particular
21 about the term "shallow". I understand to be a
22 relatively subjective term. It doesn't have specific
23 depths that go to that definition. But, as between
24 the two aquifers, as I said, it is the shallower of
25 the two, and the monitoring that's being done is in

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1 that shallower aquifer.

2 My time has expired.

3 JUDGE ABREU: But I still have a question.
4 So, you mentioned that the groundwater modeling was
5 part of the basis for the determination, if we look at
6 seven, that the impact is small in the future. So,
7 that modeling that's done, is that something that
8 anyone could access? Is there a way for an outside
9 entity to access that modeling? Because what I'm
10 thinking about is you said, well, they've got to show
11 that the impact is moderate or large for it to become
12 significant enough to get a waiver. Correct?

13 MR. TURK: Yes.

14 JUDGE ABREU: So, if the determination
15 that it was small was based on modeling, they would
16 have to be able to access that modeling to make the --
17 it might be one path for them to show that the impact
18 is moderate or large. Is that possible?

19 MR. TURK: May I have another moment, Your
20 Honor?

21 JUDGE ABREU: Uh-hum.

22 (Pause.)

23 MR. TURK: Your Honor, I'm informed by Mr.
24 Folk that the report of the groundwater modeling is
25 publicly available. If an Intervenor wanted to go

1 beyond the report and get the actual computer analyses
2 and the inputs, they would have to request that. And
3 to my knowledge, they have not done so.

4 JUDGE ABREU: And what would be their
5 pathway for doing that? Is that something the
6 staff -- I mean, does the staff hold the model?

7 MR. TURK: It's not our document. No.

8 JUDGE ABREU: I mean, I'm assuming it's
9 software that somebody buys. Is that correct?

10 MR. TURK: Your Honor, the model is
11 proprietary, I am sure, to the --

12 JUDGE ABREU: Right. So, if they wanted
13 to use that model and put in different assumptions,
14 they would have to purchase that software? Is that
15 what you're saying?

16 MR. TURK: I don't know, Your Honor.
17 That's a question that's best directed to FPL. It's
18 their contractor's model.

19 JUDGE ABREU: All right. FPL, how would
20 that work if someone wanted to question some of your
21 assumptions? When you did the modeling, how could
22 they go about doing that?

23 MR. O'NEILL: Well, I know fairly detailed
24 model descriptions are provided in reports that are
25 publicly accessible through the websites of the

1 relevant state agencies, including detailed model
2 descriptions.

3 I think the important point to keep in
4 mind here is that the models we're talking about --
5 for example, there's a water and salt balance model.
6 It's basically a stochastic spreadsheet model that
7 they use to kind of simulate the CCS salinity
8 conditions. That's one model. There's also a 3D
9 solute transport model that they use to model the
10 hydrogeological conditions. Those have been
11 thoroughly reviewed and approved by the relevant state
12 agencies, I mean multiple peer reviews involving --

13 JUDGE ABREU: Are these all Tetra Tech
14 models or are these different ones?

15 MR. O'NEILL: I think they're generally
16 Tetra Tech models, as far as my understanding.

17 JUDGE ABREU: Okay. Because it seems like
18 Tetra Tech for the models is often cited --

19 MR. O'NEILL: Yes, yes.

20 JUDGE ABREU: -- related to these issues.

21 MR. O'NEILL: In the USGS, I've been
22 informed, yes.

23 JUDGE ABREU: Okay.

24 MR. O'NEILL: But, I mean, our position
25 is, if entities really truly wanted to try to get

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1 access to those, I think it would actually have to be
2 through the regulators themselves. But, again, they
3 have conducted multiple peer reviews.

4 I know in the case of Intervenor's pending
5 contentions, I think Mr. Wexler purports to have
6 examined the models and tweaked different assumptions.
7 So, he must have some modicum of access to the models.

8 JUDGE ABREU: Right.

9 MR. O'NEILL: Yes.

10 JUDGE ABREU: But I'm just looking at
11 process here.

12 MR. O'NEILL: Yes. Yes, yes.

13 JUDGE ABREU: Okay. If the staff says you
14 have to show moderate or large, and your determination
15 of small is based on a model, in general, how
16 accessible is that?

17 MR. O'NEILL: Yes.

18 JUDGE ABREU: I mean, to what degree would
19 an Intervenor need to go to get through contention
20 admissibility based on having to request a waiver? It
21 sounds like you would have to be able to get to the
22 model that said small, since you have to prove -- it
23 might be one path to, then, showing moderate or large.
24 So, it sounds like you would have to go -- you're
25 saying the regulators, the state-county regulators

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1 have that model? Or is it just something -- because
2 you mentioned them or you mentioned USGS. Is that --

3 MR. O'NEILL: Well, they did conduct very,
4 very thorough reviews and peer reviews of the model.

5 JUDGE ABREU: So, they reviewed the
6 models?

7 MR. O'NEILL: So, they would necessarily
8 have to have, yes, access --

9 JUDGE ABREU: But if somebody needed to
10 try and check the output of the model by putting in
11 different assumptions, they would have to purchase the
12 rights to use that from Tetra Tech, I'm guessing.

13 MR. O'NEILL: I don't know definitely,
14 Your Honor.

15 JUDGE ABREU: Okay.

16 MR. O'NEILL: But, I mean, it would
17 definitely entail interactions with, you know, FPL,
18 Tetra Tech, and the state regulator.

19 JUDGE ABREU: Okay.

20 MR. O'NEILL: But I guess just one other
21 point I want to clarify is the models certainly are
22 important and they have their role. They're used by
23 FPL and the regulators to determine what the
24 appropriate mitigation measures are. But, ultimately,
25 it's the mitigation measures themselves, you know, in

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1 practice that are important.

2 As Mr. Turk noted, with the freshening
3 well system, we've already seen substantial reduction
4 in salinities from several years ago. And again, I
5 can't introduce too much or any new information, I
6 suppose, but the recovery well system is operating now
7 in full force. And so, the proof is kind of in the
8 pudding. We're seeing positive results there.

9 So, I wouldn't get too hung up on the
10 models. Again, they have their role. They help the
11 company and the regulators understand the relative
12 systems, the CCS and the hydrogeology, but it's the
13 actual measures that are key here.

14 JUDGE HAWKENS: Mr. O'Neill, I'm going to
15 come back to you in a moment.

16 MR. O'NEILL: Yes.

17 JUDGE HAWKENS: I have another followup
18 question for Mr. Turk.

19 And please don't take this time against
20 Mr. O'Neill.

21 Mr. Turk, again, when we're talking about
22 what constitutes a Category 1 issue, I mentioned there
23 were three criteria. All three have to be satisfied.
24 The second is that a single significance level --
25 i.e., small, moderate, or large -- has been assigned

1 to the impacts. How does that second criteria
2 properly apply here when you have one significance
3 level for current operations and another significance
4 level for subsequent licensing term?

5 MR. TURK: It's consistent, Your Honor.
6 For many different resource areas, the staff may
7 occasionally say that the impacts are small to
8 moderate, even for a single license renewal term.
9 We're not restricted from putting in a range of
10 impacts, and we do that from time to time. We'll say
11 the impacts are small to moderate for one or another
12 resource.

13 JUDGE HAWKENS: But you didn't for this
14 one?

15 MR. TURK: For this one, we determined
16 small for the subsequent license renewal period.

17 JUDGE HAWKENS: You determined it was
18 small for the current, though? I mean, you determined
19 it was supposed to be small for the current, but it's
20 turned into moderate for the current.

21 MR. TURK: For the groundwater quality
22 degradation, yes.

23 JUDGE HAWKENS: Right. Correct. And how
24 is that consistent with just saying a single
25 significance level has been assigned to the impacts?

1 You have two significance levels.

2 MR. TURK: For different periods of time.

3 JUDGE HAWKENS: Correct.

4 MR. TURK: That's consistent with the
5 GEIS.

6 JUDGE HAWKENS: That's your understanding?
7 Okay.

8 MR. TURK: Yes.

9 JUDGE HAWKENS: And one final question
10 before turning it back to Mr. O'Neill.

11 Just process for waivers. If the
12 Licensing Board determines that Joint Intervenors have
13 not made a prima facie showing, what's the appropriate
14 course for the Licensing Board to take under 2.335?

15 MR. TURK: Well, you would make the
16 determination that they have not satisfied the prima
17 facie showing requirement, and you would deny the
18 waiver petition. The Intervenors could appeal that,
19 but they --

20 JUDGE HAWKENS: And then, presumably,
21 outside the scope then, because it would be a Category
22 1 issue?

23 MR. TURK: Yes.

24 JUDGE HAWKENS: Correct? All right. And
25 if we find that a prima facie showing has been made,

1 we don't get to the admissibility criteria, is that
2 correct? We certify it at that point?

3 MR. TURK: Yes.

4 JUDGE HAWKENS: To the Commission?

5 MR. TURK: Yes.

6 JUDGE HAWKENS: So, in either event, this
7 Licensing Board will not be getting to the 2.309F(1),
8 admissibility criteria, for Contention 7-E, is that
9 correct?

10 MR. TURK: That's my understanding, Your
11 Honor. I suppose, hypothetically, you could reach an
12 advisory opinion, where you would say, in the event
13 that the Commission finds that the waiver petition
14 should be granted, then we would admit or deny the
15 contention. But it's my understanding that boards are
16 loathe to make advisory opinions.

17 JUDGE HAWKENS: Okay. Thank you.

18 Back to you, Mr. O'Neill.

19 ARGUMENT ON BEHALF OF FPL

20 MR. O'NEILL: Thank you, Your Honor.

21 Just quickly back to Judge Abreu's
22 question, one thing is, I do understand that the
23 Intervenors' various experts, Mr. Wexler and Dr.
24 Nuttle and Dr. Fourqurean, if I'm pronouncing his
25 name, participated in the Federal District Court

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1 litigation on the Clean Water Act matter, and that the
2 models actually were produced through the discovery
3 process there. So, presumably, they would have access
4 to that. They can correct me if I'm wrong, but that's
5 my understanding.

6 And before I touch on the waiver issues,
7 I would just like to take one step back. I think it's
8 critical that the Board bear in mind -- and something
9 you've already recognized -- that the major federal
10 action here is subsequent license renewal for Units 3
11 and 4, for an additional 20 years of operation that
12 won't begin until 2032 and 2033.

13 In this case, FPL is not seeking, nor
14 could it, NRC review and approval of cooling canal
15 system, freshening activities, or hypersaline plume
16 remediation activities. Those activities fall
17 squarely within the purview of the relevant state
18 agencies or county agencies, Florida DEP and the
19 Miami-Dade County DERM.

20 And as this Board noted its presumption
21 that FDEP will enforce, and FPL will comply with these
22 legally-mandated measures, and the consent order is
23 fully consistent with binding Commission precedent.
24 So, we respectfully submit that that principle should
25 and must guide the Board's rulings here in terms of

1 what's required for a hard look under NEPA.

2 And we are genuinely concerned that
3 Intervenors in this case are seeking to use this
4 proceeding as an alternate forum to litigate the
5 adequacy of these state- and county-approved
6 mitigation measures, which, as I've mentioned, have
7 been subject to multiple reviews and peer reviews and
8 approved by those entities.

9 And on that point, I would note the
10 Commission in CLI-98-16, for example, has admonished
11 presiding officers to construe contentions narrowly,
12 so as to avoid admitting issues that would involve
13 litigating issues that are within the jurisdiction of
14 state agencies.

15 With that said, I'll turn back to the
16 waiver issue. And as you mentioned, we're focused on
17 Contention 7-E which goes to the issue groundwater
18 quality degradation. That issue is, without doubt, a
19 Category 1 issue.

20 And to touch on some of Mr. Turk's
21 comments, the GEIS here has ultimately -- or the staff
22 in the DSEIS has concluded in the GEIS that
23 operational impacts from cooling ponds located in salt
24 marshes would have a small impact on groundwater
25 quality, and that there's no new information that was

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1 identified that would alter this conclusion. So, that
2 is the key point here. Whether the information is
3 called new and significant or potentially new and
4 significant, the staff has ultimately determined that
5 the relevant impacts during the period of extended
6 operation, or the SLR term, will be small. And I
7 think that is the key point.

8 I'm going to take another step back. We
9 do agree --

10 JUDGE HAWKENS: Mr. O'Neill --

11 MR. O'NEILL: Yes?

12 JUDGE HAWKENS: Let's go back to the
13 initial license renewal application.

14 MR. O'NEILL: Uh-hum.

15 JUDGE HAWKENS: Had you known, or, yes,
16 when preparing the ER, had you been aware that during
17 the initial renewal term groundwater impacts would be
18 moderate, would that have taken it outside the
19 Category 1 issue?

20 MR. O'NEILL: Yes, I was not directly
21 involved in that proceeding. But I'm trying to --

22 JUDGE HAWKENS: Right, and I'm keeping in
23 mind the statement you had in your brief that, had
24 some evidence been shown that it would be moderate
25 during the subsequent renewal term, it would be a

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1 whole different waiver issue, and suggesting that it
2 would be subject to waiver. So, I'm wondering if that
3 would have been the case, had you known during your
4 initial license renewal it would have been moderate.

5 MR. O'NEILL: Well, they certainly would
6 have had to have considered that as new and
7 significant information and done the appropriate
8 analysis. And I guess if they would have concluded it
9 was a moderate impact at that time, but it wasn't, it
10 could have been potentially subject to a waiver
11 request at that time.

12 JUDGE KENNEDY: Mr. O'Neill?

13 MR. O'NEILL: Yes?

14 JUDGE KENNEDY: It wasn't determined or
15 wasn't considered?

16 MR. O'NEILL: Again, I wasn't involved in
17 that, in the initial licensing renewal proceeding.
18 You're actually going back to 2001, 2000-2001
19 timeframe. But I am fairly confident that they would
20 have considered the issues, and that the issues we're
21 now seeing relative to hypersaline groundwater plume
22 didn't exist at that time, or at least to the extent
23 that they exist now.

24 JUDGE KENNEDY: Yes. Thank you.

25 MR. O'NEILL: And as I was saying, FPL

1 does concur with the Board's observation that
2 Limerick, the Commission's Limerick decision,
3 CLI-12-19, is controlling; that a waiver is required
4 to litigate any new and significant information
5 relating to a Category 1 issue. So, the existence of
6 new and significant information does not per se
7 automatically trigger a waiver or provide grounds for
8 a waiver. An intervenor simply doesn't get a free
9 pass, if you will. They still have to satisfy the
10 Commission's four-part test in Millstone.

11 We recognize that this is a high burden,
12 but, in CLI-12-19, so did the Commission. It said the
13 standard is stringent by design and imposes a
14 substantial, but not impossible, burden on
15 petitioners. So, it is, by design, a very high bar.

16 I'd like to turn to the Millstone factors,
17 and as we explained in our Answer, we don't believe
18 that the Intervenors have satisfied any of the four
19 criteria. In the case of the first Millstone factor,
20 it essentially parrots the language of Section 2.335
21 requiring a petitioner to show that the rule's strict
22 application would not serve the purpose for which it
23 was adopted. In CLI-88-10, the Commission stated that
24 this means that the alleged special circumstances must
25 be such to undercut the rationale for the rule sought

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1 to be waived.

2 And as the Board recognized in LBP-19-3,
3 a singular and explicitly-stated purpose of the
4 regulations is to promote efficiency in the
5 environmental review process, so as to avoid site-
6 specific adjudication --

7 JUDGE HAWKENS: Which is already -- well,
8 yes, it's also to avoid site-specific analysis by the
9 staff when it's not deemed to be necessary. Staff has
10 already conducted a site-specific analysis.

11 MR. O'NEILL: Yes, they have, but, as a
12 result of that analysis, have concluded that the
13 impacts during the SLR term will be small.

14 But we do agree that in this case -- and
15 agree with the staff's take on this issue -- that to
16 satisfy the first criterion, the Intervenor would
17 need to show that the GEIS finding of small impacts
18 for this issue does not apply to Turkey Point
19 subsequent license renewal, such that the DSEIS
20 clearly would be deficient on its face. And we
21 respectfully submit that they have not made that
22 showing in their waiver petition. They merely assert
23 that, by applying the regulations in question, they
24 are prevented from challenging the analysis of new
25 information in the DSEIS, and that this somehow

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1 undermines meaningful dissemination of information
2 under NEPA. We think those arguments are without
3 merit. Again, if a petitioner can meet the waiver
4 criteria, then it can, in fact, seek to challenge new
5 information, but it still has to satisfy the
6 contention admissibility and timeliness requirements.

7 And then, it's important to note that the
8 NRC in the Final SEIS adopts all applicable Category
9 1 findings, and they also must take into account
10 public comments, including plant-specific claims and
11 new information on generic findings. And the
12 Intervenor here have submitted comments on the Draft
13 SEIS. So, from our perspective, there's been no
14 clear-cut denial of the ability to participate
15 meaningfully in the proceeding, either for Intervenor
16 or members of the public. And the staff, certainly
17 through the DSEIS and, ultimately, the Final SEIS,
18 will be disclosing all relevant information to the
19 public.

20 I'd like to turn quickly to the fourth
21 Millstone factor, which the Board inquired about, the
22 meaning of significant environmental issue.
23 Commission case law on this is pretty instructive.
24 Based on the Limerick decision -- I think it's
25 CLI-13-7 -- the Commission has essentially equated the

1 significant environmental issue standard with the test
2 that's kind of used to determine whether an FSEIS need
3 to be, or an SEIS needs to be supplemented or the
4 adjudicatory record reopened. And the Commission has
5 held that there must be a seriously different picture
6 of the environmental impact of the proposed action.
7 CLI-11-5 is an example, CLI-99-22.

8 And then, in the private fuel storage
9 proceeding, CLI-06-3, the Commission elaborated on
10 this further and said, basically, there must be a new
11 or previously unknown environmental concern that
12 raises concerns of sufficient gravity that a
13 reexamination of the issues would be warranted. So,
14 you would need a very significant or serious change in
15 the relevant impact findings, as documented in the
16 GEIS and, then, the Draft SEIS here.

17 And again, we believe the Intervenors have
18 not made that type of showing or provided sufficient
19 information in their petition. They just allege that
20 drinking water supplies are threatened from the
21 hypersaline plume. There is no such imminent threat.
22 That's factually incorrect. And they also claim that
23 the mitigation measures have been largely successful
24 and, also, factually groundless -- largely
25 unsuccessful, a factually groundless claim from our

1 perspective. And again, they've been given the
2 opportunity to participate in the proceeding and
3 submit comments on the DSEIS as well.

4 JUDGE HAWKENS: All right. Thank you, Mr.
5 O'Neill.

6 How much rebuttal time remains? Five
7 minutes and 30 seconds, and you need not take all of
8 that time.

9 MS. REISER: Thank you, Your Honor.

10 JUDGE HAWKENS: But you may.

11 REBUTTAL ON BEHALF OF THE JOINT INTERVENORS

12 MS. REISER: I do want to make clear that
13 one of the arguments against this waiver being granted
14 is that we didn't argue that the impacts would be
15 moderate or large, when, in fact, we are arguing that,
16 even with the mitigation measures that are currently
17 planned to be in place, there is a significant
18 probability that those impacts will be moderate or
19 large. Because if the impacts are moderate during the
20 current operations and the mitigation measures do not
21 work as expected, those impacts are only going to get
22 larger or stay the same.

23 Moving on to the comparison of the
24 information in the Generic Environmental Impact
25 Statement as compared to what is included in the Draft

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1 Environmental Impact Statement, as Your Honor has made
2 clear, there is new analysis that the staff has done.
3 And they've only come to a new conclusion -- to the
4 same conclusion, as they say, because of their new
5 analysis. It is this information that we are
6 challenging. There's nothing in the Generic
7 Environmental Impact Statement itself that we are
8 challenging. The staff has opened the door to this
9 challenge by including the new analysis and having
10 already done this analysis.

11 Regarding what is a significant
12 environmental issue, for the fourth Millstone factor,
13 staff points to the CEQ regulation that defines
14 "significantly" and points to the fact that it
15 includes both context and intensity. Intensity does
16 not just mean the severity of the impacts, but it also
17 means looking at the unique characteristics of the
18 geographic area and the degree to which the possible
19 effects on the human environment are highly uncertain
20 or involve unique and unknown risks.

21 This is a unique situation. The impacts
22 could be very severe for South Florida's drinking
23 water and groundwater. This issue is highly intense
24 and deserves to be looked at. It is a significant
25 environmental issue, as Judge Abreu said. And

1 therefore, a waiver needs to be granted in this case.

2 JUDGE ABREU: When you talked about
3 intensity just now, it sounded like something that
4 might have been a quote. Was that a quote from part
5 of the CEQs or something or is that just an
6 interpretation?

7 MS. REISER: It is from part of the CEQs.
8 The specific location where I received it was the
9 Supreme Court case, Marsh v. Oregon, which is
10 490 US 360.

11 JUDGE ABREU: Thank you.

12 MS. REISER: And if Your Honors -- oh.

13 JUDGE KENNEDY: Ms. Reiser, you referenced
14 the staff's new analysis. To what are you referring?

15 MS. REISER: The analysis that is included
16 in the DSEIS.

17 JUDGE KENNEDY: Under new and significant
18 information, or where would that be?

19 MS. REISER: That would be in the DSEIS
20 between pages 427 and the pages that follow.

21 JUDGE KENNEDY: Okay.

22 MS. REISER: In their discussion of
23 groundwater.

24 JUDGE ABREU: Thank you.

25 MS. REISER: You're welcome.

1 And if Your Honors don't have any further
2 questions, I will finish there.

3 JUDGE HAWKENS: All right. Thank you.

4 MS. REISER: Thank you.

5 JUDGE HAWKENS: Let's move to Contention
6 1-E(b), which I believe, again, Ms. Reiser will handle
7 it on behalf of Joint Intervenors.

8 MS. REISER: Yes, Your Honors.

9 JUDGE HAWKENS: Please process.

10 Oh, let me ask you, do you reserve any
11 rebuttal time?

12 MS. REISER: Yes, three minutes again,
13 please, Your Honor.

14 JUDGE HAWKENS: All right.

15 ARGUMENT ON BEHALF OF JOINT INTERVENORS

16 MS. REISER: So, regarding Contention
17 1-E(b), Your Honors asked a single question, whether
18 the cooling towers as discussed in the DSEIS are
19 adequate. And the answer is no.

20 The DSEIS discusses minor side effects of
21 the cooling tower alternative, but it makes
22 essentially no meaningful analysis about any benefits
23 of cooling towers. They could reduce the
24 environmental impacts of the cooling of Turkey Point's
25 Units 3 and 4. These are the exact impacts, in fact,

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1 that are the subject of the remainder of our
2 contentions. This cannot possibly meet NEPA's hard-
3 look standard, and nothing staff summarizes in their
4 Answer fixes this inadequacy.

5 Consistent with Supreme Court precedent,
6 we are not asking for a full mitigation plan in this
7 instance to address the adverse environmental impacts
8 of Turkey Point's existing cooling system. We're
9 asking for a hard look at the full suite of impacts,
10 as required by NEPA and NRC regulations.

11 In its Answer to our Motion to Admit
12 Contentions, staff were playing a game. By picking
13 specific portions of the DSEIS, they attempt an
14 impermissible post hoc rationale which does not meet
15 NEPA's requirements for a hard look. If the
16 information they included in their Answer is what they
17 intended to include in the DSEIS, it needs to be in
18 the DSEIS. They need to clearly and succinctly
19 conduct a hard look at this issue.

20 So, staff pointed to some very specific
21 parts of the DSEIS to say that they made an adequate
22 analysis. And I can go through each one and explain
23 why it is not adequate.

24 So, first, they point to Table 2-2, and
25 this is just a list that lists the impacts of the

1 project itself and, then, each alternative. This does
2 not in any way show how the cooling tower alternative
3 could reduce impacts of the project. It only lists
4 the impacts of the alternative itself.

5 Further, a list alone is not enough for a
6 hard look. As the Supreme Court has explained in
7 Methow, which is 490 US 351, mitigation measures
8 require a detailed discussion. And further,
9 reasonable alternatives must be rigorously explored
10 and objectively evaluated. A list alone does not
11 achieve this.

12 Moving on to the staff's points regarding
13 impacts of the cooling towers to species and habitat,
14 first, they point to a completely unrelated section of
15 the DSEIS. They point to the no-action alternative,
16 not to the cooling tower alternative. This argument
17 offers no support for their position, as on its face
18 these two sections are completely unrelated,
19 addressing different facts and circumstances.

20 Next, regarding the impacts to species and
21 habitat, staff point to the consent order and
22 agreement. The fact of the consent order and
23 agreement, it's merely a fact that exists. It is not
24 an analysis of how ceasing use of the cooling canal
25 systems would, could reduce impacts to species.

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1 Further, if you build the cooling towers,
2 you can cure the problems that are impacting the
3 species. If you rely on the consent order and
4 agreement, even with compliance, there's insufficient
5 evidence to conclude the small impacts that the staff
6 have concluded, as my co-counsel will get into further
7 when discussing the consent order and agreement.

8 Finally, for the species impacts, staff
9 point to future changed conditions. Future changed
10 conditions always happen. NEPA always looks at the
11 future. But what NEPA requires is a reasonable
12 analysis of foreseeable impacts now, before they
13 occur. So, it is not an excuse to point to potential
14 changes to not look at those potential impacts and the
15 potential reductions in impacts that this alternative
16 could provide.

17 And the final point that the staff point
18 to is regarding the impacts to groundwater. Again,
19 they point to a completely unrelated part of the
20 DSEIS. They point to the no-action alternative
21 analysis. The same as with the species, this is a
22 completely unrelated part, and it's a completely
23 unrelated analysis because they are factually
24 distinct.

25 In fact, in our motion we point to the --

1 JUDGE HAWKENS: Does it have some
2 relevance, though? There's some similarities between
3 the two approaches, right, the no-action alternative
4 and the cooling tower alternative?

5 MS. REISER: There is some similarities,
6 yes, Your Honor, because both would stop using the
7 cooling canal system for Units 3 and 4. However, if
8 that analysis is what the staff was relying on, then
9 they needed to say so in the DSEIS. It does not say
10 so. And even if both of them would shut down using
11 the cooling canal system, they are still factually
12 distinct.

13 So, for example, for the no-action
14 alternative, it's described as the effects would
15 depend on the specific shutdown activities -- and
16 that's at DSEIS 4-68 -- versus, for the cooling water
17 alternative, the magnitude and significance of adverse
18 impacts on species would depend on the location and
19 layout of the cooling towers, which is at DSEIS 4-70.
20 So, while they have a similar component, they are
21 still very factually distinct.

22 And finally, in our motion we point to the
23 actual section in the DSEIS that discusses groundwater
24 and the cooling water alternative. And that's at, in
25 our motion at 16, we cite DSEIS 4-42. The analysis in

1 the DSEIS that we point to focuses on the freshening
2 of the cooling canals themselves. It does not talk
3 about how groundwater extraction activities would --
4 and the remediation of the hypersaline plume. So, it
5 only does a section of the analysis that is required.

6 That's everything in the DSEIS that could
7 potentially be looking at reduced impacts of the
8 cooling towers, and none of it is adequate to meet
9 NEPA's hard look.

10 If Your Honors don't have any questions,
11 I can stop there.

12 JUDGE ABREU: So, you bring up hard look.
13 How do you define a "hard look"?

14 MS. REISER: A hard look is taking, is
15 doing the detailed discussion that is required under
16 Methow.

17 JUDGE ABREU: Under what?

18 MS. REISER: Methow. Excuse me. Methow
19 Valley. It's 490 US 332. And this is a Supreme Court
20 case that explains that full mitigation is not
21 required, but that alternatives must be discussed in
22 sufficient detail to ensure that environmental
23 consequences have been fairly evaluated.

24 JUDGE ABREU: And when it comes to -- this
25 is straying a little bit off of Contention 1, but when

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1 we're talking about hard look with some of the other
2 contentions, what is enough to be a hard look? How
3 would I judge if a hard look has actually been taken?

4 MS. REISER: It's based on reasonableness,
5 Your Honor. And so, depending on how intense the
6 impact is, it requires more analysis. Here, we're
7 talking about a cooling canal system that is leaching
8 out into the groundwater and affecting the groundwater
9 itself and also the environment of species that live
10 in it. This is a significant impact, and therefore,
11 the potential mitigation for it, which staff has
12 partially put forward of the cooling towers, needs to
13 have a full in-depth review. But it completely fails
14 to look at the ways that the cooling towers could
15 reduce any of those impacts. It only looks at the
16 ways that the cooling towers could cause impacts
17 themselves.

18 JUDGE ABREU: And for the staff, how do
19 you define "hard look"?

20 MR. WACHUTKA: Your Honor, this is Jeremy
21 Wachutka for the NRC staff. I'll be arguing this
22 contention.

23 Basically, the staff looks at hard look,
24 it's that a fair reading of the DSEIS as a whole will
25 inform the public and informs the NRC about the

1 environmental impacts of the action. And we think
2 it's immaterial whether it's in that no-action
3 alternative section or cooling tower alternative
4 section. That's not material to the proceeding. It's
5 that, when you read this DSEIS, you will understand
6 all the impacts that are pertinent.

7 JUDGE ABREU: Okay. So, I made a list of
8 all the important topics and said, "Here are the
9 impacts," and I got all the important topics listed,
10 but all I did was put down the impacts, that would
11 meet what you just said. Would that be adequate?

12 MR. WACHUTKA: We list the impacts, but,
13 then, we also discuss them, Your Honor.

14 JUDGE ABREU: Okay. And what of that
15 discussion is necessary to consider it a hard look?
16 How much of a discussion?

17 MR. WACHUTKA: It's just so you understand
18 what the impacts are. So, for instance, when we read
19 the Intervenor's arguments, we knew exactly -- they
20 were opposing scenarios -- and we knew exactly where
21 in the DSEIS those scenarios were discussed. So, just
22 from a fair reading of the DSEIS, we knew these issues
23 had already been discussed.

24 JUDGE ABREU: So, you're saying I need to
25 be able to understand the impacts?

1 MR. WACHUTKA: Yes.

2 JUDGE ABREU: I think it was something
3 like that, was your phrasing. So, does that mean I
4 need -- that the EIS would need to say, here are the
5 factors we looked at or assumptions we made about the
6 future, since, by nature, this is a future-looking
7 document, and here's our reasoning; here's how we
8 thought? Would those be considered an essential part
9 of a hard look?

10 MR. WACHUTKA: Your Honor, the EIS looks
11 at the issues of what would happen if Units 3 and 4
12 stopped using the cooling canals. That's what it
13 says.

14 MS. REISER: Excuse me, Your Honor.

15 JUDGE ABREU: Okay.

16 MS. REISER: I just want to make sure that
17 this conversation is not being taken out of my time.

18 JUDGE HAWKENS: That's correct, it is not.

19 MS. REISER: Great. Thank you.

20 JUDGE ABREU: That wouldn't be good.

21 MS. REISER: Sorry for the interruption.

22 JUDGE ABREU: No, that's good.

23 MR. WACHUTKA: But I can get to this more
24 on my --

25 JUDGE ABREU: No, I'm just not talking

1 about specifically 1, Contention 1. I'm talking in
2 general, hard look.

3 JUDGE HAWKENS: You have three minutes
4 before you start running into your rebuttal time.

5 JUDGE ABREU: We'll come back to that.

6 MS. REISER: I do just want to point to
7 one more regulation, and then, I'll be done.
8 10 CFR 5171 requires an analysis of how alternatives
9 could reduce or avoid adverse environmental impacts of
10 the project, including both cost and benefits of the
11 alternatives. This is what we are asking to have been
12 done. This is what is lacking. And nothing that is
13 pointed to in the DSEIS cures that.

14 Thank you, Your Honors.

15 JUDGE KENNEDY: So, this is based on a
16 mitigation strategy? I mean, is it discussed in the
17 context of mitigating as opposed to alternative?

18 MS. REISER: It's discussed in terms of
19 reducing impacts.

20 JUDGE KENNEDY: But does that imply that
21 there needs to be some -- I don't want to use the word
22 "significant" -- but some level of impact that is
23 above small to even enter into this discussion?
24 Because we seem to be crossing back and forth between
25 alternatives and mitigation. You're postulating that

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1 there's an environmental issue that needs to be
2 mitigated. The staff is going to say, "We've looked
3 at it. It's small." And I know you're going to
4 counter and say, "We have reason to believe it won't
5 be small." But, I mean, when I look at the entry
6 here, I looked at this from a mitigation standpoint,
7 but I was looking for what needs to be mitigated.

8 MS. REISER: The impacts to the
9 crocodiles, for one, Your Honor. The DSEIS does
10 conclude there will be adverse impacts to the
11 crocodiles. And building the cooling towers could
12 reduce those impacts.

13 JUDGE KENNEDY: So could not granting the
14 license. I mean, I think there's numbers of pathways
15 to essentially a mitigation strategy.

16 MS. REISER: I agree, Your Honor, but the
17 regulations require that the reasonable mitigation
18 measures are discussed. That's what the statute
19 states.

20 JUDGE KENNEDY: All of them, you're
21 suggesting?

22 MS. REISER: No, not all.

23 JUDGE KENNEDY: Oh.

24 MS. REISER: Just the reasonable
25 mitigation measures for adverse impacts.

1 JUDGE KENNEDY: So, you're categorizing
2 building cooling towers as a reasonable mitigation
3 strategy?

4 MS. REISER: Yes, Your Honor, it is
5 included already as a mitigation strategy. What we're
6 saying is that the analysis that is included is
7 insufficient.

8 JUDGE KENNEDY: Okay. Thank you.

9 MS. REISER: Thank you.

10 JUDGE HAWKENS: How will FPL and the NRC
11 staff be?

12 MR. WACHUTKA: The same as before, Your
13 Honor, 50/50 --

14 JUDGE HAWKENS: 50/50.

15 MR. WACHUTKA: -- and the staff will go
16 first.

17 JUDGE HAWKENS: All right. You may
18 proceed, Mr. Wachutka, with half of 15 minutes.

19 And maybe you want to --

20 JUDGE ABREU: I can wait until later.

21 JUDGE HAWKENS: All right. At the outset,
22 I think FPL raises a timeliness argument on this
23 issue. I'm not sure whether the NRC staff did.

24 MR. WACHUTKA: The NRC staff did not, Your
25 Honor.

1 JUDGE HAWKENS: Does not? All right.
2 Thank you.

3 MR. WACHUTKA: All right.

4 ARGUMENT ON BEHALF OF NRC STAFF

5 MR. WACHUTKA: Your Honors, as an initial
6 matter before I get into the specifics, the issue
7 before the Board is whether Intervenor's original
8 filing satisfied the contention admissibility
9 requirements. Intervenor's original filing did not,
10 and Commission case law provides that such
11 deficiencies cannot be corrected through later
12 pleadings. And even their pleadings today do not
13 correct this.

14 In Contention 1-E(b), Your Honors,
15 Intervenor purport to challenge the DSEIS discussion
16 of the environmental impacts of using cooling towers
17 at Turkey Point instead of the existing cooling canal
18 system. In order to be admissible, such a contention
19 must have argued in the initial filing, among other
20 things, by referencing to specific portions of the
21 DSEIS that the Intervenor dispute. Intervenor,
22 however, failed to accurately do this for any of their
23 arguments.

24 First, they argue that the DSEIS fails to
25 analyze how the cooling towers compares to the

1 proposed action of subsequent licensing renewal. They
2 reference Section 2.4 of the DSEIS and they state that
3 it does not mention cooling towers. However, they
4 fail to recognize that, in the very same section,
5 Table 2-2 lists the environmental impacts by resource
6 area of each of the alternatives, including the
7 proposed action and the cooling tower alternative.

8 Second --

9 JUDGE HAWKENS: How do you respond to Ms.
10 Reiser's argument that that mere listing is not
11 consistent with the Supreme Court decision, Methow
12 Valley?

13 MR. WACHUTKA: Well, Your Honor, that
14 argument is just responding to what they said. As
15 you'll see, the listing refers to the rest of the
16 DSEIS, and the rest of DSEIS fills in what the listing
17 provides a summary of.

18 So, second, Intervenors argue that the
19 DSEIS fails to consider how threatened and endangered
20 species would be impacted by Units 3 and 4 no longer
21 using the CCS. Well, Intervenors do not reference
22 Section 4.8.2 of the DSEIS, which analyzes the exact
23 scenario that Intervenors posit without any support.
24 It's already discussed.

25 Third, Intervenors argue that the DSEIS

1 fails to consider how the cooling tower alternative
2 could benefit groundwater use impacts. Well, again,
3 they do not reference the Section 4.5.2.2 of the
4 DSEIS, which discusses the same scenario they posited,
5 which is, if Units 3 and 4 were no longer to use the
6 CCS, then this would reduce the generation of the
7 hypersaline water and, consequently, reduce the amount
8 of water needed to support the freshening of the CCS.
9 So, that's discussed in the DSEIS, not just in the
10 table; discussed in the narrative.

11 In sum, all of Intervenor's originally
12 pled Contention 1-E(b) arguments are styled as
13 arguments of omission. They all say, "failure to do
14 this, "failure to do that." However, the issues that
15 they assert to be omitted are, in fact, discussed in
16 the DSEIS. Therefore, Contention 1-E(b) does not
17 satisfy 10 CFR 2.309(f)(1)(vi).

18 So, they also argued, all right, this was
19 discussed in the wrong sections, right? To the extent
20 that Intervenor wants these discussed in a cooling
21 tower alternative section, as opposed to the no-action
22 alternative sections, their claim is not material to
23 this proceeding.

24 With respect to Intervenor's arguments,
25 the no-action alternative is the same as the cooling

1 tower alternative. That is, both involve Units 3 and
2 4 no longer using the CCS, and both occur at the same
3 time at the end of the current period of extended
4 operations. So, just because they're in different
5 sections, they do consider the same facts when we are
6 discussing these two arguments that Intervenor raise.

7 Having the staff simply repeat these
8 discussions in a different section of DSEIS would not
9 change the facts that the DSEIS accomplish the purpose
10 of informing the NRC and the public of the
11 environmental impacts of the proposed action. A fair
12 reading of the DSEIS as a whole, currently arranged,
13 would inform the reader of the issues that the
14 Intervenor raise right now. Therefore, Contention
15 1-E(b) is not material, contrary to Section
16 2.309(f)(1)(iv).

17 Moreover, even if Intervenor had properly
18 identified that their arguments are addressed in the
19 discussions in the no-action alternative section,
20 Contention 1-E(b) would still not be admissible
21 because it lacks sufficient support. Intervenor
22 repeatedly assert that the DSEIS is inadequate and
23 that more should be said, but they do not provide
24 sufficient support why it is inadequate or what more
25 should be said. They just state more should be said.

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1 The majority of the support that they do reference is
2 from the DSEIS, the very DSEIS that they claim to be
3 inadequate, and documents cited by the DSEIS.
4 Therefore, this also does not satisfy Section
5 2.309(f)(1)(v).

6 So, in conclusion, and in response to the
7 Board's question asking whether the discussions
8 regarding the benefits of cooling towers in the DSEIS
9 are adequate, the staff's position is, first, yes,
10 they are adequate, and second, the Intervenor did not
11 even identify these discussions, let alone provide
12 sufficient support for a challenge to them in their
13 initial filing. And as I stated previously, the
14 initial filing is where they have to meet the
15 contention admissibility requirements. And Commission
16 case law states that they cannot later have the
17 opportunity to reinvigorate their thinly-supported
18 original arguments.

19 So, for those three reasons, Your Honors,
20 the Contention 1-E(b) is not admissible.

21 JUDGE HAWKENS: Thank you.

22 MR. WACHUTKA: You're welcome.

23 JUDGE HAWKENS: Mr. O'Neill?

24 ARGUMENT ON BEHALF OF FPL

25 MR. O'NEILL: Thank you, Your Honor.

1 As you noted, we did raise one timeliness
2 objection in connection with this contention. The
3 contention really has two prongs to it. The first
4 prong alleges that the DSEIS does not adequately
5 consider potentially reduced adverse impacts to
6 Endangered Species Act listed species. And then, it
7 also claims that the DSEIS does not adequately address
8 potentially reduced groundwater use conflicts.

9 We objected on timeliness grounds with
10 respect to the second issue, in main part because we
11 could really not distinguish any material differences
12 between this contention and arguments that were made
13 in the original petition to intervene concerning
14 cooling towers and their alleged beneficial impacts
15 relative to groundwater use conflicts. In both cases,
16 the Intervenor basically argue that, first, the FPL,
17 and now the NRC, should analyze how ending the heat
18 contribution of Turkey Point Units 3 and 4 to the
19 cooling canals could freshen the water and reduce
20 groundwater impacts faster.

21 The Board, in LBP-19-03, basically
22 rejected this argument as inadequately pled and
23 unsupported.

24 JUDGE HAWKENS: Excuse me?

25 MR. O'NEILL: Yes.

1 JUDGE HAWKENS: Your timing this argument,
2 then, with regard to ground use/water conflict --

3 MR. O'NEILL: Yes.

4 JUDGE HAWKENS: -- is based principally on
5 the fact that you thought this topic was already
6 addressed in the ER, and they had the opportunity to
7 challenge it in the ER?

8 MR. O'NEILL: Yes. And, in fact, they
9 did, and the Board essentially rejected that challenge
10 in LBP-19-03 on the grounds that it was inadequately
11 pled and an unsupported challenge to the ER's
12 discussion of the environmental impacts of continued
13 CCS operation.

14 JUDGE HAWKENS: You would agree, though,
15 if they were challenging a new analysis in the DSEIS,
16 they wouldn't be barred in timeliness grounds?

17 MR. O'NEILL: Yes, if it was truly a new
18 analysis or new information that they were
19 challenging.

20 JUDGE HAWKENS: Okay.

21 MR. O'NEILL: I'll move on from that, Your
22 Honor.

23 As we outlined in our Answer, we also
24 believe the contention is basically inconsistent with
25 settled NEPA principles and it fails to establish a

1 genuine material dispute with the DSEIS. The DSEIS
2 does, in fact, discuss mechanical draft cooling towers
3 as a mitigation alternative in some detail and, from
4 our perspective, in a manner that complies with NEPA.
5 Intervenor's have identified no requirement in
6 regulation or statute that would require the staff
7 analyze, quote/unquote, "how the cooling tower
8 alternative compares to the proposed action". They
9 seem to conflate the concept of a mitigation
10 alternative, which is a way of reducing the impacts of
11 a proposed action, with project alternatives, which
12 are essentially alternative means of accomplishing a
13 proposed action. In this case, it would be
14 replacement power for Units 3 and 4 during the
15 subsequent license renewal term. Clearly, cooling
16 towers don't produce power and would be considered a
17 project alternative per se.

18 And that leads me to my next point.
19 NEPA's rule of reason, as applied by the Supreme Court
20 in In Methow Valley, basically holds that mitigation
21 measures need to be discussed in sufficient detail to
22 ensure that the environmental consequences have been
23 fairly evaluated. And so, under NEPA, it's
24 appropriate to tailor the degree of mitigation
25 analysis to the significance of the impact to be

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1 mitigated. And again, the staff has concluded that
2 impact is small, in light of the ongoing state- and
3 county-required mitigation measures that are being
4 implemented at Turkey Point.

5 Significantly, we're not aware of any
6 other SEIS for license renewal in which the staff has
7 discussed cooling towers as a mitigation alternative
8 unless the responsible state agencies have
9 specifically recommended that cooling towers be
10 considered as a best available technology. So,
11 staff's discussion in this SEIS is somewhat unusual,
12 and they explained why they opted to provide the
13 analysis that they did.

14 But, with that said, we do view the
15 analysis as adequate for present purposes. The staff
16 has evaluated cooling tower mitigation in a manner
17 that's commensurate with the underlying impacts. As
18 the Board noted in LBP-19-06, the DSEIS expressly
19 considers mechanical draft cooling towers as an
20 alternative to the cooling canal system, as well as
21 the capacity of the towers to reduce adverse impacts
22 on the American crocodile and its habitat. So, the
23 DSEIS includes a fairly detailed discussion of the
24 environmental consequences of cooling towers as an
25 mitigation alternative with respect to all the

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1 relevant resource areas, including ecological
2 resources and groundwater resources.

3 We also are of the view that the staff has
4 adequately discussed the environmental benefits of the
5 cooling tower usage. The DSEIS explains that
6 continuing the use of the CCS for Units 3 and 4 would
7 cause less heat to be discharged to the system,
8 potentially making conditions less saline and more
9 favorable to wildlife and certain ESA listed species.

10 I think it is key that the DSEIS does note
11 that, under any scenario, FPL still would be required
12 to take the restorative, remedial actions that are
13 required by the consent order and consent agreement.
14 So, that wouldn't change. So, they would have to
15 continue to take efforts to decrease salinity in the
16 CCS, implement their nutrient management plan, restore
17 seagrass.

18 So, overall, we don't view the contention
19 as relying on credible support and challenge to the
20 current mitigation measures. And again, I think in
21 the end Intervenor's ultimately assume that those
22 cooling towers will, as we put it, be an environmental
23 panacea of sorts, and they don't acknowledge the
24 potentially adverse effects of installing cooling
25 towers. They could have very significant impacts on

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1 the habitat there and its connectivity, and
2 potentially reduce flow and result in stagnant
3 conditions.

4 I think that's all I have for now, Your
5 Honor. Thank you.

6 JUDGE HAWKENS: All right. Thank you.

7 You have approximately four minutes of
8 rebuttal time, Ms. Reiser.

9 REBUTTAL ON BEHALF OF JOINT INTERVENORS

10 MS. REISER: Thank you, Your Honor.

11 First, I want to quickly go to the
12 timeliness argument. Our original contention
13 challenged that the ER did not consider the cooling
14 towers at all; it complete omitted that discussion.
15 And our current contention is an amended contention to
16 address the adequacy of the new analysis that is
17 included in the DSEIS. So, we are, in fact,
18 challenging new information in the DSEIS.

19 JUDGE HAWKENS: Including the groundwater
20 use conflicts aspect of Contention 1-E?

21 MS. REISER: Yes, Your Honor, because now
22 the DSEIS includes the fact that cooling towers could
23 be an alternative and could, therefore, impact
24 groundwater differently.

25 JUDGE HAWKENS: All right.

1 MS. REISER: And second, I just want to
2 quickly go to the fact that the Administrative
3 Procedure Act requires a rational basis for all
4 decisionmaking. So, if staff wanted to rely on the
5 no-action alternative analysis for the benefits of
6 reducing use of the cooling canal system, at the very
7 least they needed to point to that analysis and say,
8 "This is what we are relying on to show that there are
9 potential benefits to reducing use of the cooling
10 canal system." But, as it is, the DSEIS does not
11 explain that this is what is happening. So, it's
12 unclear to me that the NRC staff have even met their
13 definition of a hard look, that a person would read
14 this whole DSEIS together and, then, understand the
15 benefits of building the cooling towers, if they would
16 have to look to a completely separate section that is
17 not cross-referenced.

18 And unless Your Honors have questions, I
19 will finish there.

20 JUDGE HAWKENS: All right. Thank you.

21 Let's turn now to Contention 5-E(b). Ms.
22 Reiser, I believe you have the lead on this as well.

23 MS. REISER: Yes.

24 JUDGE HAWKENS: You may proceed.

25 Or three minutes again for rebuttal? Is

1 that correct?

2 MS. REISER: Yes, please, Your Honor.

3 JUDGE HAWKENS: All right.

4 ARGUMENT ON BEHALF OF JOINT INTERVENORS

5 MS. REISER: With Contention 5-E(b), we
6 have pointed to an obvious deficiency in the DSEIS
7 that staff could easily cure. We're just asking them
8 to look at the reasonably foreseeable impacts of
9 ammonia on threatened and endangered species.

10 The DSEIS discusses ammonia impacts on
11 water. It also discusses certain impacts on
12 endangered species. But it totally fails to discuss
13 impacts of ammonia on certain -- excuse me. But it
14 only discusses impacts of ammonia on certain species
15 while failing to explain its cherry-picking.

16 Your Honors, we are making a legal
17 argument in this contention. We are saying that the
18 APA requires a rational basis for its arguments and
19 that NEPA requires a hard look based on a rule of
20 reason for the decisions.

21 But the DSEIS fails to explain why it
22 analyzed impacts of ammonia on some species and not
23 others. The DSEIS acknowledges, first, that the
24 cooling canal system is a contributing factor to
25 levels of ammonia above regulatory limits in multiple

1 locations around the cooling canal system. And that's
2 at 3-52 in the DSEIS.

3 Second, that endangered species live in
4 and hunt around the cooling canal system, and that's
5 at 3-106 to 107 in the DSEIS.

6 And third, that ammonia toxicity depends
7 on multiple parameters, including a species-specific
8 physiobiology. And that's at 4-65 in the DSEIS.

9 Together, these rationally require an
10 analysis of ammonia impacts on individual species.
11 Yet, the DSEIS only analyzes ammonia on the manatee,
12 turtles, and a single fish species, without providing
13 any explanation for why it addresses these species and
14 not others. NEPA requires that staff include a full
15 discussion or rationally explain why it has not.

16 You asked why an evaluation is mandated
17 for specific species. And again, I will reiterate
18 that the APA and NEPA both require this -- the APA
19 because of a rational basis standard, and NEPA for the
20 hard look and rule of reason standard.

21 NEPA requires that --

22 JUDGE HAWKENS: If you look at that bullet
23 a little bit more fully, Ms. Reiser, it says, "Why is
24 it necessary to perform a species-specific analysis in
25 areas that don't have significantly elevated levels of

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1 ammonia?"

2 MS. REISER: So, to begin with, the
3 cooling canal systems are the source of ammonia.

4 JUDGE HAWKENS: Would it be fairer to say
5 it's a contributing source of ammonia? It's not the
6 exclusive source of ammonia.

7 MS. REISER: Yes, Your Honor, that would
8 be fair to say.

9 But DERM has found that it is a source of
10 ammonia, and it has also found statistically-
11 significant increasing trend of ammonia in the cooling
12 canal system, which suggests that the cooling canal
13 system's ammonia will be getting worse.

14 Further, if you look at the Biological
15 Assessment at page 28, Figure --

16 JUDGE HAWKENS: May I? Another quick
17 interruption.

18 MS. REISER: Yes.

19 JUDGE HAWKENS: Did the DSEIS actually say
20 it's an increasingly greater contributor to ammonia
21 and, if yes, what page was that?

22 MS. REISER: That would be from the
23 Mayorga letter, which the DSEIS cites as MDC-2018.

24 JUDGE HAWKENS: Okay.

25 MS. REISER: And, in fact, crocodile nests

1 have been found in exact locations where ammonia has
2 been measured above regulatory limits. In the
3 Biological Assessment at page 28, Figure 12, it is
4 titled, "Location of Crocodile Nests in the Turkey
5 Point Cooling Canal System". This figure includes
6 nests in a canal that's called the S20 getaway canal.
7 And it's specifically considered a crocodile nesting
8 area.

9 Comparing that to what the DSEIS cites as
10 FPL-2017C on PDF page 67, Table 8, you can see that
11 the crocodile nesting area has three readings of
12 ammonia that are above regulatory limits.

13 So, these two different figures show us
14 that ammonia has been registered as higher than
15 regulatory limits allow in the exact locations where
16 crocodiles are nesting.

17 In the alternative, the species that are
18 actually analyzed for this impact in the DSEIS are not
19 located where the ammonia is above regulatory limits.
20 So, the DSEIS needed to explain why it was looking at
21 one species and not the other, even though crocodiles
22 exist where the ammonia is higher.

23 So, just to reiterate my point, Your
24 Honors, NEPA and the information included in the
25 Biological Assessment require an evaluation of ammonia

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1 impacts on specific species. The cooling canal system
2 is a contributing source of ammonia and shows a
3 statistically-significant increasing trend.
4 Endangered species live and hunt in those elevated
5 ammonia locations. Specifically, the American
6 crocodile nests where elevated ammonia has been found.

7 And multiple parameters determine ammonia
8 toxicity. As the biological opinion at page 19 --
9 excuse me -- as the biological opinion at page 19
10 says, Potential toxicity of ammonia depends on several
11 parameters, including pH, temperature, and salinity,
12 the rate or duration of exposure, and species-specific
13 physiobiology."

14 The DSEIS does not explain why it analyzes
15 the impact of ammonia on some species, but not all,
16 regardless of all of this information that I have
17 provided to you. That is what we are asking them to
18 do.

19 JUDGE HAWKENS: Did you address the first
20 bullet in our list of topic areas, Ms. Reiser?

21 MS. REISER: Are you referring to the
22 question of, "Is a specific evaluation of ammonia's
23 impact on species-specific physiobiology an evaluation
24 mandated by the Biological Assessment or any statute?"

25 JUDGE HAWKENS: Correct.

1 MS. REISER: Yes. I believe I addressed
2 it, but I can say again. So, it's the APA, the
3 Administrative Procedure Act, requires a rational
4 basis for all decisions. NEPA requires a hard look
5 and a rule of reason. And the Biological Assessment
6 shows that ammonia impacts depend on species-specific
7 physiobiology. So, based on that fact, the rule of
8 reason would require --

9 JUDGE HAWKENS: All right. I understand.
10 Thank you.

11 MS. REISER: Thank you, Your Honors.

12 JUDGE HAWKENS: Thank you.

13 Mr. Wachutka, are you taking half of 15
14 minutes?

15 MR. WACHUTKA: Yes, Your Honor, the same
16 as last time.

17 JUDGE HAWKENS: You may proceed.

18 MR. WACHUTKA: Okay.

19 ARGUMENT ON BEHALF OF NRC STAFF

20 MR. WACHUTKA: May it please the Board, in
21 Contention 5-B, Intervenor's argue that the DSEIS
22 analysis of the potential impacts of ammonia on
23 threatened and endangered species is inadequate. In
24 order to be admissible, such a contention must, among
25 other things, provide sufficient alleged facts or

1 expert opinions to support it.

2 Intervenor, however, failed to provide
3 support for why, given the specific circumstances of
4 each species, in their original pleading that the
5 DSEIS's discussion of these species is inadequate.
6 Therefore, there is nothing for the staff to cure as
7 Intervenor argue today.

8 The alleged facts that Intervenor provide
9 in support of their contention are limited to: one,
10 Turkey Point is a source of ammonia; two, ammonia
11 travels from the CCS to nearby surface waters, and,
12 three, ammonia can have toxic effects in the aquatic
13 environment. Based on these alleged facts alone,
14 Intervenor demand a detailed species-by-species
15 analysis of the impacts of ammonia on all endangered
16 species potentially within the vicinity of Turkey
17 Point.

18 They point to the staff's analysis of the
19 impacts of ammonia on the West Indian manatee as
20 representing the level of detail with which the staff
21 should have evaluated the impacts of ammonia on all
22 listed species. Intervenor fail, however, to
23 understand the level of detail in the staff's analysis
24 is reasonably based on level of potential risk to each
25 species that ammonia may pose. And that is within

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1 NEPA's reasonableness principle.

2 As Intervenor point out, exceedances of
3 the water quality standard for ammonia have been
4 observed in excavation outside of, but close to the
5 CCS. This fact, combined with the fact that manatees
6 and other aquatic species within Biscayne Bay could be
7 exposed to these waters, is why the staff analyzed
8 those species to the extent that it did. It's not as
9 Intervenor point out, as if the staff just did this
10 randomly. They looked at the potential for ammonia to
11 affect the species and evaluated them in proportion to
12 that potential.

13 Other species have less potential for
14 exposure to ammonia. And accordingly, the staff
15 evaluated those species to a lesser extent. For
16 example, the water in the CCS has at all times been
17 below the water quality standard for ammonia. And
18 therefore, the staff did not consider ammonia
19 specifically for its impacts on the American
20 crocodile. Instead, they looked generally at the
21 condition, the water quality in the CCS, including
22 nutrients, which includes ammonia, for its impact on
23 the crocodiles.

24 Intervenor argue that --

25 JUDGE HAWKENS: Mr. Wachutka --

1 MR. WACHUTKA: Yes?

2 JUDGE HAWKENS: Can you respond to Ms.
3 Reiser's argument about the fact that there's several
4 crocodile nesting areas that are in the Biological
5 Assessment where the ammonia level is higher than the
6 specified limits?

7 MR. WACHUTKA: Yes. This is the first
8 time the Intervenors have argued this. The staff
9 looked -- these are canals that I think may be outside
10 the CCS. And we're looking at the population of the
11 crocodiles in total and whether the proposed action
12 will have a jeopardy impact on them. And just maybe
13 because a couple of nests are allegedly in an area of
14 higher ammonia, that doesn't change the analysis that
15 the crocodile population within the CCS is going to
16 have the impacts that we evaluated.

17 Similarly, since FPL's monitoring program
18 has not detected evidence in the surrounding marshland
19 and mangrove areas of any impacts of ammonia on soil
20 pore water quality, the staff did not need to consider
21 the effects of ammonia on any species that frequent
22 these areas. These determinations were all reasonable
23 and based on information available to the staff, and
24 no more is required.

25 Intervenors' statement that a specific

1 evaluation of ammonia's impacts must consider species-
2 specific physiobiology is a mischaracterization of the
3 staff's Biological Assessment. The Biological
4 Assessment, in fact, states that species-specific
5 physiobiology is but one of a number of factors that
6 affect the extent to which an organism experiences
7 toxicity from a given level of ammonia. So, if there
8 is no exposure to ammonia, there will be no toxicity
9 from ammonia.

10 Similarity, there is no requirement in the
11 Endangered Species Act that the staff must analyze
12 species-specific physiobiology. Rather, as provided
13 in 50 CFR, Section 402.14(d), the staff is only
14 required to use the best scientific and commercial
15 data available for an adequate review of the effects
16 that the action may have upon listed species. The
17 staff did that.

18 Also, under NEPA, the staff may limit its
19 discussion of environmental impacts when those impacts
20 are not significant. That is why, for certain species
21 where no ammonia was determined to exist, the staff
22 didn't look at it. This is consistent with the
23 staff's practice in this proceeding of analyzing the
24 impacts of ammonia on each species in proportion to
25 that species' potential exposure to ammonia.

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1 In conclusion, Intervenor provide support
2 for the presence of ammonia in surface waters. They
3 do not, however, provide support for how this could
4 affect any particular threatened or endangered
5 species. Instead, they simply assert that all
6 threatened and endangered species should be analyzed
7 with respect to ammonia to the same level that the
8 staff analyzed the West Indian manatee. This is not
9 a sufficient basis for admissible contention, and
10 therefore, the Board should deny Contention 5-E(b).

11 Thank you.

12 JUDGE HAWKENS: Thank you.

13 Mr. O'Neill?

14 MR. O'NEILL: Okay. Thank you, Your
15 Honor.

16 ARGUMENT ON BEHALF OF FPL

17 MR. O'NEILL: I think Intervenor's counsel
18 has made a few statements that are new to us, you
19 know, new arguments. We're unaware of the argument
20 regarding purported location of crocodile nests in
21 surface water areas with elevated ammonia levels. And
22 we believe that's also factually incorrect. It's
23 conceivable that she may have confused certain ammonia
24 readings, elevated ammonia readings, in groundwater
25 wells. As far as surface waters go, the elevated

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1 ammonia levels have been limited to bottom samples
2 taken from the deep remnant canals. So, not in a
3 surficial waters that would be in proximity to
4 crocodile nests.

5 But I think it's key to emphasize here
6 that, contrary to Intervenor's claims, the DSEIS does
7 not acknowledge that Miami-Dade County has,
8 quote/unquote, "offered evidence of Turkey Point as a
9 key source of ammonia," and is responsible for
10 violations of water quality standards. I mean, first
11 and foremost, the ammonia concentrations within the
12 cooling canal system are all below the Miami-Dade
13 water quality standard, which in this case is really
14 just a conservative benchmark. The canal system is
15 actually permitted as an industrial wastewater
16 outfall. It's not a surface water body per se.

17 But, in any event, the ammonia levels in
18 the canal are below the water quality standard that
19 the county has issued. So, it would be physically
20 impossible for the canal to be causing ammonia
21 exceedances in adjacent water bodies, when the canal
22 itself doesn't exceed the applicable limits. It's
23 just it's physically impossible.

24 We're also unaware of the alleged
25 increasing trend in ammonia levels. If anything, I

1 think there has been a decrease, as the company
2 implements the nutrient management plan and fills
3 canals. They are required by the consent order to
4 fill certain canals, and they're actually nearing
5 completion of that process with the Turtle Basin Canal
6 and the Turning Basin. So, again, those are going to
7 contribute to a reduction in the ammonia levels.

8 But, again, I wanted to emphasize that the
9 only place where we have seen elevated ammonia levels
10 has been in these remnant canals near the bottom. The
11 DSEIS describes these canals as "deep, stagnant,
12 anoxic water bodies" where organic matter accumulation
13 and decay is common. That decay can lead to ammonia
14 formation. And so, from FPL's perspective, that is
15 the likely source.

16 In our view, there simply is no evidence
17 that the CCS is a source of ammonia in concentrations
18 that have any adverse effects on wildlife, including
19 endangered and threatened species. As staff counsel
20 explained, the DSEIS does discuss the potential
21 impacts of ammonia on various species, with particular
22 focus on the manatee, and it explains why that was the
23 case, because the manatee potentially could inhabit
24 some of the canals where they've seen the elevated
25 ammonia levels. So, there is certainly is a reasoned

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1 explanation, a rational basis for why the staff
2 approached its analysis in the way it did.

3 And the DSEIS also is clear that FPL does
4 conduct extensive monitoring of the canal system,
5 Biscayne Bay, Card Sound, and other nearby water
6 bodies for ammonia and other nutrients, and conducts
7 ecological monitoring. And again, the conclusion is
8 we're not seeing any evidence in the surrounding marsh
9 and mangrove areas of any impacts of ammonia from the
10 CCS and no changes in Biscayne Bay water quality
11 trends that are related to CCS. The Intervenor's have
12 not explained why species inhabiting any of these
13 areas could be adversely impacted by ammonia, in light
14 of this water quality and ecological monitoring data.

15 And I'd like to turn to the Board's
16 question. I mean, Intervenor's are ultimately asking
17 the NRC staff to perform a species-specific analysis
18 for all species at all times and for all potential
19 contaminants, even when there's no evidence that
20 elevated ammonia levels are occurring in a given
21 environment and/or a given species is being exposed to
22 that ammonia. So, from our perspective, that's
23 contrary to NEPA's rule of reason. It's just it makes
24 no sense.

25 We did take the opportunity to review the

1 applicable regulations and guidance that inform the
2 contents of the Biological Assessment. And I'll be
3 clear at the outset; this is a NEPA contention, but
4 there are ESA regulations and guidance that inform the
5 contents of the BA. 50 CFR 4012.12(f) makes very
6 clear that the contents of the Biological Assessment
7 are at the discretion of the federal agency, will
8 depend on the nature of the federal action, and it
9 lists a number of factors that may be considered.

10 The staff's DSEIS also cites the 1998
11 Endangered Species Consultation Handbook issued by the
12 Fish and Wildlife Service and the National Marine
13 Fisheries Service, and as well as a 2014 guidance
14 document for preparing a Biological Assessment, issued
15 by the Fish and Wildlife Service. And again, they
16 reiterate that the assessment performed by the staff
17 is discretionary in terms of the contents, and it
18 should focus on the likely effects and likely
19 exposures to species.

20 There is no explicit requirement or
21 recommendation anywhere in the regulation or the
22 guidance for a species-specific physiobiological
23 evaluation. The requirement just simply does not
24 exist. And again, it would make no sense to perform
25 that kind of evaluation when there's no evidence that

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1 there are elevated ammonia levels that could adversely
2 affect the species in question.

3 I think that's all I have, Your Honor.
4 Thank you.

5 JUDGE HAWKENS: Thank you.

6 Ms. Reiser?

7 MS. REISER: Yes, Your Honor.

8 JUDGE HAWKENS: You have several minutes
9 of rebuttal left.

10 MS. REISER: Thank you.

11 REBUTTAL ON BEHALF OF JOINT INTERVENORS

12 MS. REISER: First, we are arguing that
13 different species require different treatment. That's
14 what we're asking for. We're not demanding a detailed
15 analysis on any species out there. We are asking for
16 an analysis on species that make sense, that is
17 rational, so that those that may be impacted by
18 ammonia are actually considered.

19 So, again, I want to turn to looking at
20 where the crocodile nests are located and where high
21 ammonia readings have been done. Again, the --

22 JUDGE HAWKENS: Initially, can I ask, is
23 this a point you made in any of your written
24 submissions?

25 MS. REISER: Your Honor, we did not

1 specifically point to these sections in our written
2 submissions, but we did argue that the crocodile lives
3 in the cooling canal system where the ammonia is.

4 JUDGE HAWKENS: It's problematic for the
5 NRC staff and FPL to respond to this specific argument
6 when you raise it for the first time at oral argument.
7 But, having said that, please proceed.

8 MS. REISER: Thank you, Your Honor.

9 In the document that is cited as
10 FPL-2017C, on page 67, Table 8 is titled, "Ammonia in
11 Surface Waters". Lines 99 through 110 are described
12 as the area as crocodile nesting area. Multiple of
13 these have notes that label them as high ammonia and
14 low dissolved oxygen.

15 If you look at the map included in --
16 excuse me -- those sample locations are specifically
17 TPS WC7 and TPS WC8. If you look at where those
18 samples were taken and compare them to the Biological
19 Assessment map of where crocodile nests are, which is
20 the Biological Assessment at 28, Figure 12, entitled,
21 "Locations of Crocodile Nests in the Turkey Point
22 Cooling Canal System," you will find that there are
23 nests in those exact locations that have high ammonia.

24 MR. BESSETTE: Your Honor, we do have to
25 echo the Board's statement here. We highly object to

1 this testimony. We've never heard of it. I don't
2 know what document she's referring to. This is not in
3 our testimony, and it is entirely prejudicial to the
4 staff and FPL to be going on about this.

5 JUDGE HAWKENS: Thank you.

6 Please proceed, Ms. Reiser.

7 MS. REISER: Your Honor, these are all
8 record documents.

9 JUDGE HAWKENS: I understand, but it, more
10 appropriately, should have been in your written
11 pleading.

12 MS. REISER: Yes, Your Honor, we're sorry
13 about not including that until now.

14 So, again, what we are asking for is an
15 analysis of impacts on species that could actually be
16 impacted and not just a random decision about, oh,
17 we'll look at the impacts on these species, but not
18 others. If the DSEIS is, in fact, analyzing ammonia
19 for species that may conceivably be impacted, then the
20 American crocodile needs to be looked at as one of
21 those species.

22 Thank you, Your Honors.

23 MR. WACHUTKA: Your Honor, the NRC staff
24 would just like to note that Commission case law, as
25 we said previously, states that intervenors aren't

1 able to reinvigorate thinly-supported original
2 arguments later in a proceeding.

3 JUDGE HAWKENS: Thank you.

4 Do counsel at this point want to take a
5 10-minute break or do you want to push through for the
6 next contention?

7 I'll start with Joint Intervenors.

8 MR. RUMELT: Your Honor, I think Joint
9 Intervenors will need to switch our counsel table.
10 So, it may make sense to take a short break.

11 JUDGE HAWKENS: All right. Let's take a
12 10-minute break. Let's reconvene at 11:30.

13 (Whereupon, the above-entitled matter went
14 off the record at 11:18 a.m. and resumed at 11:30
15 a.m.)

16 JUDGE HAWKENS: We're going to start now
17 with now with Contention 5-E(b). It's conceivable --
18 excuse me, with Contention 6-E, and it's conceivable
19 we could do both 6-E and 7-E before the lunch break.
20 But we'll finish 6-E and see how Counsel feel at that
21 point. 6-E, I believe, Mr. Rumelt?

22 MR. RUMELT: Rumelt, yes.

23 JUDGE HAWKENS: Is going to be -- how much
24 time would you like for rebuttal, sir?

25 MR. RUMELT: I would like three minutes

1 for rebuttal, please.

2 JUDGE HAWKENS: All right.

3 MR. RUMELT: Your Honors, Contention 6-E
4 relates to the surface water impacts by the
5 groundwater pathway from the cooling canal system.
6 And Your Honors' first question asked how is this
7 discussion in the DSEIS different from the
8 environmental report. And I think the simple answer,
9 there was no discussion of this issue in the
10 Environmental Report. And so everything is new.

11 Moving on to the second bullet point, the
12 Board asked can previously available information be
13 used to challenge a new discussion in the DSEIS.
14 Well, first, I think we do have here a new discussion
15 in the DSEIS. And I'll point the Board to the
16 preamble from the Board's promulgation of the rules
17 that are governing this proceeding. And this is at 77
18 Federal Register, and the specific page cite is 46566.

19 In there, the Commission said, and I
20 quote, An NRC document with a new conclusion based on
21 previously available information not contained in the
22 Applicant's environmental report, such as information
23 from a previously available but unreferenced study,
24 might be a proper subject for a contention.

25 So what's clear from the preamble is that

1 an Intervenor can raise new contentions based on
2 previously available information. So it doesn't
3 foreclose that possibility.

4 Now, we recognize that there's not any
5 case law directly on point here with the specific
6 facts here. But there is case law that recognizes
7 this principle that staff's discussion in analysis is
8 different. It needs to be treated separately as far
9 as information goes from information that may have
10 existed in the past. And I'd point Your Honors to
11 Powertech case for that proposition.

12 Specifically, the Board held there that
13 the Intervenor need not respond to new information
14 when the information's actually -- until, sorry, the
15 information is actually used by the NRC staff to form
16 its conclusions on impacts in the DSEIS, okay.

17 In addition, the Board wrote that there's
18 no way for Intervenor to know what use, if any, NRC
19 staff may make of a response to a request for
20 additional information or a study in the DSEIS.

21 And an Intervenor is entitled to see the
22 DSEIS and then file any new or amended contentions,
23 based on what appears in the DSEIS. To do otherwise
24 would place an impossible burden on the Intervenor and
25 an unreasonable requirement that the Intervenor divine

1 what use, if any, the NRC staff will make of that
2 information in the DSEIS.

3 And that's really the position that
4 Intervenorors were placed in here. If we look to the
5 environmental report -- well, going back a little bit.
6 We heard argument this morning about modeling studies
7 that were performed in order to determine how much
8 water to add to the cooling canal system to deal with
9 the salinity issue. This is the freshening effort.

10 And the model that was referenced was work
11 done by Tetra Tech. And if you look through the
12 reference list, in the environmental report, this is
13 not a single reference to any Tetra Tech study, let
14 alone the 2014 study that the staff pointed to in the
15 DSEIS.

16 In addition, we also heard argument kind
17 of one side pointing to the other, the other pointing
18 back about whether this information is available and
19 how Intervenorors would obtain it. We heard the NRC
20 staff say well, you have to go to FPL. FPL said,
21 well, you really have to go to the regulators.

22 And at the end of the day there was, you
23 know, a statement from Counsel for FPL that our
24 experts who were retained for this matter were able to
25 get a copy or obtain access to the report through

1 litigation, which at least my client certainly wasn't
2 involved in.

3 And if the standard is you have to go
4 through litigation in a separate proceeding in order
5 to obtain that information, that cannot be considered
6 available to anybody in the public. That's a
7 significant effort, obviously, and one that no
8 Intervenor should be required to go through.

9 With respect to, you know, the modeling
10 effort that's been done and the conclusions that are
11 in the DSEIS, we're really faced with a significant
12 problem that I think the Board has recognized. There
13 are several of the questions that it's presented. We
14 have a situation where the NRC staff in the DSEIS has
15 recognized actual data which was not included in the
16 environmental report.

17 And the actual data is showing that
18 salinity levels have not gone down as predicted in the
19 very modeling that the NRC staff is relying on in the
20 DSEIS. And there's a statement recognized by the
21 staff again in the DSEIS that the modelers anticipate
22 that more favorable climatic conditions, i.e., less
23 severe dry seasons, with that change, the addition of
24 upper Florida and aquifer water, should help to reduce
25 CCS water salinities to 34 PSU, practical salinity

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1 units.

2 And that's the target, that's the goal
3 that FPL has to meet. And there's no evidence on the
4 record, and you know, in the ER and specifically here
5 in the DSEIS that that salinity level will ever be
6 reached. There's no evidence that anybody considered
7 what favorable, more favorable climatic conditions
8 would be required in order to meet the 34 PSU
9 standard.

10 And then second, there's no effort to look
11 at whether any of those conditions would exist in the
12 reasonable, in the future, including the subsequent
13 license renewal period.

14 And so the conclusion that's been made by
15 the staff in the DSEIS with respect to a number of
16 different environmental impacts is fundamentally
17 flawed. And ultimately, if you take, if you look at
18 the modeling and you understand that it's flawed, it's
19 not working. They haven't met their targets, and
20 there's no effort to determine whether or not they
21 will be able to meet it, understanding data as it
22 exists today.

23 All that the staff is left with is an
24 assumption that continued oversight is going to
25 rectify the situation somehow. And as we pointed out

1 in our briefing, there's a DC Circuit case that's
2 binding on the NRC, a NEPA case that says agencies
3 cannot rely on the mere existence of permits and
4 oversight to avoid the responsibility of conducting a
5 proper NEPA analysis. And that's what we have here.

6 So if we look to the rest of the Board's
7 questions, does, you know, does the staff rely solely
8 on the existence of this oversight, the answer is yes.

9 JUDGE HAWKENS: That's your view.

10 MR. RUMELT: That's our view.

11 JUDGE HAWKENS: All right, thank you.

12 MR. RUMELT: And it's the logical
13 conclusion from what's been said in the DSEIS.

14 All right, and then Your Honors asks how
15 does the staff reconcile this difference between
16 what's been actually modeled and the outcome that has
17 been measured in the DSEIS. And we're not aware of
18 anywhere in the DSEIS that there is any reconciliation
19 of those two competing facts.

20 Your Honors ask about climatic assumptions
21 that were used in this 2014 Tetra Tech analysis that,
22 again, was not included or referenced in the
23 environmental report. And to the best of our
24 knowledge, the climatic assumptions appear at page two
25 to three in that Tetra Tech report. And it appears to

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1 be based off 22 months of hydrological and salinity
2 data from September 2010 to May 2012.

3 And, again, we go back to the
4 understanding that the modeling has not been
5 predicted, and it will take more favorable climatic
6 conditions in order for that modeling to, I'm sorry,
7 in order for the efforts to reach the 34 PSU to be
8 fruitful.

9 And last, the Board asks whether the DSEIS
10 mentions, or I'm sorry, whether the assumptions in the
11 modeling reflect the 30.5 degree increase in
12 temperature that is recognized elsewhere in the DSEIS,
13 whether that's built into any of the modeling or has
14 been considered. And Your Honors, we're not aware of
15 any place where that has been addressed.

16 I have no further.

17 JUDGE KENNEDY: Excuse me, do you have any
18 support for the other side of the equation is that --
19 do you have any support for the statement that would
20 say this target cannot be met in the ensuing 12 years
21 or 13? I can't do the math, but we have at least more
22 than a decade going forward. Is there anything in
23 your pleadings that would lead us to draw the
24 conclusion that it could not be met?

25 MR. RUMELT: Your Honor, we submitted with

1 our motion for new and amended contentions three
2 expert reports. I believe two of those expert reports
3 address the issue that you're raising directly. One
4 of those reports is by Dr. William Nuttle, a
5 hydrologist. And Dr. Nuttle addresses the issue of
6 the more favorable climatic conditions specifically
7 and references new studies on the future, what we can
8 anticipate the future will be in terms of climate.

9 In addition, the Intervenor submitted the
10 modeling report of Mr. E.J. Wexler. And Mr. Wexler's
11 report demonstrates that under the current plan to
12 freshen the canal system, it cannot work. And I would
13 refer to Mr. Wexler's report for all of the
14 information in support of that opinion.

15 JUDGE KENNEDY: Thank you.

16 MR. RUMELT: You're welcome.

17 JUDGE HAWKENS: Mr. Turk, you may proceed.

18 MR. TURK: Thank you, Your Honor. I think
19 we're going to continue to split time 50-50 with the
20 Applicants.

21 JUDGE HAWKENS: Very well.

22 MR. TURK: The difficulty with all of the
23 four new contentions, 6-E, 7-E, 8-E, and 9-E, is that
24 the Intervenor did not cite specific information or
25 data in support of any of the four contentions. They

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1 had one section in their pleading section, IV(b),
2 which contained new information. That new information
3 was very extensive.

4 It included some things that were not
5 submitted in support of the contentions, such as the
6 Miami-Dade County petition, some other proceedings
7 going on outside of the NRC's purview. They cited
8 three reports that apparently had been submitted, or
9 earlier versions had been submitted by another
10 Intervenor in this proceeding. Those are the reports
11 by Fourqurean, Wexler, and Nuttle, whose reports had
12 been relied upon by SACE, S-A-C-E in support of their
13 contentions.

14 So it's very difficult to say where in the
15 new information submitted by the Intervenors is the
16 specific support upon which they're relying in support
17 of any one of these contentions. So that's, that'll
18 be true for 6-E, as well as all the others. So that's
19 the first problem.

20 The case law at the Commission is clear
21 that the Board and other parties are not required to
22 expend their resources and time trying to figure out
23 where in the mass of information submitted by
24 Intervenor are the specific support for a contention.
25 That is something that the Intervenors had the burden

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1 of demonstrating and pleading, which they have not
2 done.

3 The Intervenors claim that the staff
4 relied solely upon governmental efforts by the state
5 of Florida and Miami-Dade County to achieve the
6 results of retraction of the plume and freshening of
7 the CCS. That's not true, that's one of the factors
8 that the staff considered.

9 As I mentioned previously, the staff also
10 considered the groundwater modeling that's been done,
11 as well as the results of the freshening efforts that
12 have taken place to date. So to say that we only are
13 relying on the state and county is wrong.

14 But there is another point to be made, and
15 that is that Commission case law establishes that it
16 is appropriate for the Board and the parties to assume
17 that state regulators will take, will do what is
18 necessary for them to do to achieve their desired
19 results. And so reliance on the state and county to
20 take regulatory actions if necessary is not improper.

21 JUDGE KENNEDY: Mr. Turk? Could you help
22 us understand a little better why the, let's take the
23 modeling for example, provides the staff with
24 confidence that these target objectives will be met?

25 MR. TURK: Yes, Your Honor. So the

1 cognizant regulatory authorities for the Clean Water
2 Act are either EPA, or in this instance, the state of
3 Florida. We rely upon those agencies to establish
4 appropriate goals and to assure themselves that the
5 technical analyses that are provided by a company,
6 here Florida Power and Light, are adequate.

7 We do not question whether the state was
8 correct or not in accepting results or in getting
9 whatever modifications to the studies that they may
10 have determined to be appropriate. We do review those
11 studies. We look to see if they're reasonable, we
12 look to see if they support a certain conclusion. But
13 we don't go behind the scenes and say, well, why did
14 you model it this way rather than another way, because
15 that's the state's authority.

16 JUDGE KENNEDY: Do you, does the staff
17 consider any uncertainties in those models, and do
18 they -- I'll let you.

19 MR. TURK: Yes.

20 JUDGE KENNEDY: But I guess what I'm
21 curious about is, you know, what possibly is at work
22 here is there's different climatic conditions, there
23 may be suggestions that there need to be different
24 refreshing rates and freshening rates.

25 Does the staff get involved in reviewing

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1 the models, in looking at was there any uncertainty
2 studies done. Is there, are these bounding analysis,
3 are they, do they cover the range of climatic
4 conditions, on and on and on? I mean it's not clear
5 to me from the DSEIS that this was done.

6 MR. TURK: We do look at the
7 uncertainties, Your Honor, and the uncertainties are
8 reflected in the draft SEIS. But we don't do a
9 detailed probe of their analysis as if it had been
10 submitted to the NRC for evaluation and acceptance.
11 That's up to the state.

12 JUDGE KENNEDY: My only recollection of
13 what's recognized in terms of uncertainties is a
14 recognition that there's uncertainties in the models.
15 Is there any more characterization than that in a
16 DSEIS?

17 MR. TURK: I believe the DSEIS recognizes
18 not just uncertainties in the model, but also
19 uncertainties in the conditions, the assumptions that
20 go into the model, as well as uncertainties in the
21 product of the model.

22 JUDGE KENNEDY: But there was no attempt
23 to quantify the impact of those uncertainties on model
24 results.

25 MR. TURK: Not in a quantitative sense,

1 Your Honor. But that does affect the qualitative
2 assessment of the projected results.

3 JUDGE KENNEDY: Yeah, I guess I'm just
4 trying to get at the staff's confidence in, again,
5 meeting the objective. And one of the points you, one
6 of the aspects you point to is the modeling, you know,
7 what played a factor in the staff's acceptance of
8 meeting the objective.

9 And yet there still seems to be
10 uncertainties that weren't evaluated or quantified,
11 and I guess I was really trying to, maybe I missed it
12 somewhere.

13 MR. TURK: No, you're correct, Your Honor.
14 But we do consider the uncertainties, as I mentioned,
15 and we don't come up with a flat answer. We recognize
16 that there might be some variation in the results due
17 to uncertainties. And that's reflected in our overall
18 finding.

19 JUDGE ABREU: And where did --

20 MR. TURK: And in our discussion.

21 JUDGE ABREU: Where in the EIS is there a
22 discussion of that uncertainty analysis? So if I
23 wanted to understand the modeling, the range of the
24 modeling thinking, where in the EIS could I see that?

25 MR. TURK: Your Honor, for that I'd have

1 to look over the lunch break and get back to you.

2 JUDGE ABREU: Okay, that'll be fine.

3 JUDGE KENNEDY: Maybe this will be a lunch
4 break question too, but you also referred to data.
5 You said modeling and data. When you say data, what
6 are you referring to? Is this plant data that's been
7 taken, or maybe I misheard you, sir. I heard that the
8 staff relied on modeling and data.

9 MR. TURK: So to the extent that I was
10 referring to data, those would be the results of
11 groundwater monitoring that had been conducted.

12 JUDGE KENNEDY: So groundwater monitoring
13 data.

14 MR. TURK: Yes.

15 JUDGE KENNEDY: Okay, thank you.

16 JUDGE ABREU: And so just specifically for
17 Contention 6, does the modeling describe, there's a
18 lot of the modeling description on 3-49 in the DSEIS.
19 Does that modeling assume that the groundwater
20 withdrawal rates during the SLR term will be no more
21 than are currently allowed under the local regulators?

22 MR. TURK: Currently allowed, yes. The
23 Intervenor's are mistaken. They say that we assume
24 that withdrawal will not be any greater than is
25 currently being conducted. In fact the, what we used

1 was the actual affirmative maximum, which is greater
2 than the withdrawals that are being made now, both by
3 Florida Power and Light as well as other users.

4 JUDGE ABREU: So it was modeled at that,
5 using that assumption.

6 MR. TURK: Yes.

7 JUDGE ABREU: And can I tell that from
8 what is in the EIS?

9 MR. TURK: Yes.

10 JUDGE ABREU: And where is that?

11 MR. TURK: I have to get you page
12 references, but there are several places where we talk
13 about use of the maximum permitted level provides a
14 conservative bounding number.

15 JUDGE ABREU: Okay, so it was limit, so it
16 was -- so the next question was then were there model,
17 was there any modeling of any groundwater withdrawal
18 rates greater than currently permitted?

19 MR. TURK: Not that I'm aware of, and
20 there's a good reason for that. At least from the
21 staff's perspective, we don't know if the state or
22 other regulators might in the future authorize greater
23 withdrawals than they do now. Where would we stop?
24 Is it a two percent increase, a 10 percent, 100
25 percent? We have no way to say what might happen in

1 the future.

2 JUDGE ABREU: Isn't that essentially what
3 a NEPA analysis does --

4 MR. TURK: No.

5 JUDGE ABREU: Is look into the future?

6 MR. TURK: It does not look at speculative
7 conditions. We can only assess what we know to be
8 true. We know that FPL is allowed to take out a
9 maximum, as stated in their permit. Let me give you
10 an example.

11 Florida Power and Light is authorized to
12 take out approximately 28 million gallons per day from
13 the Biscayne Aquifer for both freshening efforts and
14 other uses. They're currently taking out, I believe
15 19 million gallons per day, which is far less than
16 they're authorized.

17 With respect to freshening efforts,
18 they're authorized -- within that number they're
19 authorized to take out 14 million gallons per day.
20 They're taking out 13.

21 So their current withdrawals, and in fact
22 those withdrawals may have decreased, I don't know,
23 but in the SEIS we mentioned that they're currently
24 taking 13, which is less than the maximum permitted
25 level of 14 million gallons per day. So that's the

1 maximum of what we know to be a fact that we can
2 reliably discuss in the EIS.

3 JUDGE ABREU: So when we talk about then
4 the climate conditions, in the EIS there is mention
5 about the potential for the average temperature to
6 increase by about three and a half degrees Fahrenheit
7 between now and 2050. That was in the EIS. But in
8 the discussion of the modeling, it talked about an
9 assumption of more favorable climate conditions.

10 So how -- put that together with, you're
11 talking about, because you're saying something about
12 we really can't assume what might happen in the
13 future, yet we have information that says these things
14 are expected to happen. So where, how does that all
15 fit together?

16 MR. TURK: The statement, the second
17 statement you refer to, which talks about more
18 favorable climatic conditions, would have a different,
19 or might have an ameliorative effect. That's simply
20 a qualitative statement that does not affect our
21 finding.

22 It's simply a recognition that recently,
23 there had been drought conditions and there had
24 recently been significant hurricanes, both of which
25 affected the evaporation rate and the salinity levels

1 in the CCS. So the statement you referred to is
2 simply a recognition that as conditions change,
3 there's a different outcome. It did not affect our
4 assessment of the impact of the CCS.

5 JUDGE ABREU: So that assumption was not
6 used in the modeling?

7 MR. TURK: It's not something that was --
8 that came from the modeling. I believe that was just
9 a staff qualitative statement saying weather
10 conditions can affect the outcomes.

11 JUDGE ABREU: So were climate conditions
12 considered as part of the modeling?

13 MR. TURK: My --

14 JUDGE ABREU: Since that affects salinity,
15 it sounds like something that has an impact on the
16 output of that model or the --

17 MR. TURK: One moment here.

18 JUDGE ABREU: Yeah.

19 MR. TURK: So I'm very lucky to have Mr.
20 Folk with me at the table, I thank him for his help on
21 this. The consent order and consent agreement, which
22 were issued by the state and the county regulators,
23 require FPL to achieve certain results within ten
24 years. Conditions in the year 2050 don't affect that.
25 The current requirements are that by 20, I guess it

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1 would be 2027-ish, maybe 2028, that the conditions
2 must meet the state and county's goals. So the
3 weather in 2050 wouldn't matter to affect that.

4 But he also, Mr. Folk also informs me that
5 the statement in the EIS that discussed potential
6 future weather conditions might have an ameliorative
7 effect -- I shouldn't say that word, I stumble over it
8 every time I use it. That was simply to indicate that
9 a return to more normal, historically normal weather
10 conditions, would result in more favorable conditions
11 in the CCS.

12 But it's not meant to say that our
13 analysis depends upon that happening.

14 JUDGE ABREU: All right, where in the EIS
15 can someone tell what assumptions were made for the
16 modeling? That -- you -- let me make sure I clarify.
17 Earlier you said that the modeling was a factor, the
18 results of the modeling were a factor in the staff's
19 decision.

20 So let me back up a second. Earlier you
21 said that based on the groundwater modeling, that that
22 was a factor in making your determination that the
23 impact would be small. Is that a correct?

24 MR. TURK: Yes.

25 JUDGE ABREU: Okay, so if the modeling was

1 used, where can I find in the EIS the assumptions used
2 for the modeling?

3 MR. TURK: The EIS itself does not discuss
4 all the details of the modeling. But it does give a
5 reference to where the reader can go to find more
6 information on that point.

7 JUDGE ABREU: And that is?

8 MR. TURK: So for instance, we have three
9 references to the Tetra Tech models. The reference is
10 Tetra Tech 2014, 2014-A, and I believe 2017.

11 JUDGE ABREU: And what is --

12 MR. TURK: Oh, 2016, I'm sorry, 2016.

13 JUDGE ABREU: And how does an outsider get
14 those, those models? Get those references?

15 MR. TURK: If I'm not mistaken, I'd look
16 at the EIS to be sure, but I believe they're in ADAMS,
17 in the NRC's documents access.

18 JUDGE ABREU: So that even though there
19 was no ML number, there is an ML number. So you were
20 mentioning earlier about making sure to reference
21 things clearly. But -- so if you could get us those
22 ML numbers, that could be helpful.

23 MR. TURK: Your Honor, I'm looking in the
24 draft SEIS.

25 JUDGE ABREU: Yeah.

1 MR. TURK: At page 6-31.

2 JUDGE ABREU: Okay.

3 MR. TURK: And there are --

4 JUDGE ABREU: 6-31, okay, that's reference
5 section.

6 MR. TURK: Five different Tetra Tech
7 reports.

8 JUDGE ABREU: Yup.

9 MR. TURK: Each of which either has an
10 ADAMS accession number.

11 JUDGE ABREU: Okay, great.

12 MR. TURK: Or a website where the document
13 can be seen.

14 JUDGE ABREU: Okay, great, excellent. All
15 right, so in the, so I were to pull up those
16 references, I would get, within them I would be able
17 to find a list of the assumptions made that were used
18 in the modeling.

19 MR. TURK: You should find a description
20 or narrative at least of the assumptions.

21 JUDGE ABREU: Okay.

22 JUDGE HAWKENS: You had said, Mr. Turk,
23 that the staff takes a look at the models. It sounds
24 like a high altitude assessment for reasonableness, is
25 that correct?

1 MR. TURK: The staff employs
2 hydrogeologists and groundwater specialists, who I'm
3 sure take a great interest in these kinds of reports.
4 So they read them and they look not just to see what's
5 the bottom line, but they look at how the modeling was
6 conducted. I'm sure they look at the assumptions that
7 went into it. And they reach their own level of
8 comfort with those reports --

9 JUDGE HAWKENS: There's really an
10 independent assessment, then, by the NRC staff of the
11 report and the reasonableness of the model?

12 MR. TURK: Yes. Although no special
13 finding is made on that, because we do rely upon the
14 state to whom those reports were submitted in the
15 first instance. But in order to inform our decision
16 on what are impacts, our people would look at those
17 reports, at those reports and at the modeling, to be
18 sure they're satisfied that they can rely upon them.

19 JUDGE HAWKENS: So am I correct in saying
20 you, the staff, reviews it so it will have a level of
21 confidence that the models are reasonable?

22 MR. TURK: Yes, Your Honor.

23 JUDGE HAWKENS: But that conclusion is not
24 reflected in the DSEIS, is that correct?

25 MR. TURK: It's implicit. The fact that

1 we cite it and rely upon it indicates that we're
2 satisfied with it. If we were not, we would have gone
3 back to FPL and said we looked at this report, it's
4 bogus, you need to do more. But I'm not aware of any
5 time that that's happened in this application in
6 respect to Tetra Tech's work.

7 JUDGE HAWKENS: Thank you.

8 JUDGE ABREU: Returning to an earlier
9 topic we had, which is what defines a hard look. So
10 when we're discussing, say, this contention, what, how
11 would you define what would indicate a hard look had
12 been taken?

13 MR. TURK: So I would supplement what Mr.
14 Wachutka mentioned to you. To me, a hard look means
15 that we look at all relevant information and analyses
16 that could help us in our evaluation of an impact. So
17 we go out, we ask an applicant, a request for
18 additional information. If we find that the
19 environmental report is lacking information or is not
20 satisfactory to us, we may use our own knowledge of
21 reference texts.

22 We may compare, for instance, a
23 groundwater modeling report to established textbooks
24 in the field to determine is this an acceptable and
25 previously accepted approach to do modeling. I'm not

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1 saying that was done here, but that's the kind of
2 question we might ask when we see a report.

3 And we'd look for other information that
4 becomes available to us, not from the applicant but
5 from other sources or that are publically available to
6 anyone, so.

7 JUDGE ABREU: So what I'm hearing you say
8 is that we're going to consider all the factors that
9 matter.

10 MR. TURK: Yes.

11 JUDGE ABREU: Is kind of the important
12 part.

13 MR. TURK: All the factors and all the
14 information that's available.

15 JUDGE ABREU: For that specific topic.

16 MR. TURK: Yes.

17 JUDGE ABREU: And so in the EIS, to
18 document that that hard look occurred, would it be
19 correct to say that we would expect to find here are
20 the factors we considered before making our determine
21 -- we, I'm speaking in your terms, not us. Here's
22 the, the staff would say here's what we looked at, and
23 here's the assumptions we made, if we had to make any
24 assumptions. But here's the data and here's our
25 reasoning.

1 MR. TURK: Yes, that's pretty --

2 JUDGE ABREU: Is that what you would say
3 is a hard look?

4 MR. TURK: Yes.

5 JUDGE ABREU: Okay.

6 MR. TURK: Now, I can't say that every bit
7 of data would be explicitly discussed in the EIS.
8 That'd be far too much to put into a single document.
9 But we provide the reference list, and that reference
10 list comprises the information that we look at.

11 JUDGE ABREU: So in the, in Contention 6,
12 the way it's phrased is that, I believe in the, at the
13 end of the discussion of the contention, or not the
14 contention, of the impacts on surface water via
15 groundwater, it basically said that upon consideration
16 of the existing requirements in the county and state
17 oversight, we find small.

18 But before that was a big discussion of
19 the modeling. Even though the concluding sentence
20 based on what the regulators are doing, we think it's
21 small, would it be correct to say that what they
22 really meant to say was based on our look at all the
23 modeling and all the factors considered, as well as
24 the fact that the state and county are regulating
25 this, we think the impact is small?

1 MR. TURK: That's correct.

2 JUDGE ABREU: So the way it's phrased
3 didn't really communicate the full decisionmaking of
4 the staff, in a sense.

5 MR. TURK: Well, that's only one of the
6 statements that appears in the EIS.

7 JUDGE ABREU: True, but right at that kind
8 of critical point.

9 MR. TURK: Right at that point, yes.

10 JUDGE ABREU: It made it sound a bit like,
11 well, they've got it regulated, so our impact is
12 small. Even though there was all this other
13 discussion before it, it wasn't clear how the two were
14 integrated, based on the phrasing in the EIS.

15 MR. TURK: In that particular location,
16 correct. But as we mentioned in our response to the
17 contentions, the staff also had a lengthy discussion
18 in chapter 3 of the EIS, which talks about the
19 existing --

20 JUDGE ABREU: The 3-49 page.

21 MR. TURK: Yes.

22 JUDGE ABREU: I'll believe you're
23 referring to.

24 MR. TURK: I'll accept that, Your Honor,
25 I don't have it right in front of me.

1 JUDGE ABREU: But that's a page where
2 there was much discussion about the details of
3 modeling.

4 MR. TURK: That's right. And also even in
5 Chapter 4, there's more discussion of modeling.

6 JUDGE ABREU: Mm hm.

7 MR. TURK: So the one particular segment
8 by itself is out of context. It's not the complete
9 basis for the staff's finding.

10 JUDGE ABREU: Okay, thank you.

11 MR. TURK: Your Honor, I don't really have
12 much more. I think I've gone far enough. If you have
13 any specific questions you'd like me to answer, I can.

14 JUDGE KENNEDY: Yeah, I guess I, somewhere
15 between 6, 7, 8, and 9, I really want to keep, bring
16 back up the topic of the staff's conclusions. I think
17 we've been talking about the modeling. You referred
18 to modeling and data, and then there's the modeling
19 the data and reliance on state and local government
20 oversight and enforcement.

21 I think I'm still struggle with trying to
22 get a sense of if we take the modeling, how does the
23 staff communicate to the public that what they see in
24 the modeling provides them confidence that the targets
25 are going to be met in the context of the data that

1 was available or has purported to be available that
2 says they may not be met?

3 Then there's data that you reference,
4 which I think I need to understand exactly which data
5 you're referring to. And then the overall reliance on
6 state and local oversight intervention. Are those
7 three equal poles that the table sits on, or are they,
8 is the, is one much greater than the other? How
9 should we view that?

10 MR. TURK: So in our normal review, both
11 safety and environmental, an applicant will submit
12 reports to us from modeling results to us. And we
13 will then evaluate it as a matter of first impression.
14 You may, Your Honor, you may be familiar with that
15 practice where, no matter what the technical issue, we
16 look at a report and we reach a judgement on it and we
17 discuss the adequacy of the report.

18 We'll send out requests for additional
19 information about that report specifically. These
20 reports are not submitted to the NRC for our
21 evaluation and acceptance, they were submitted to the
22 state of Florida. The Clean Water Act, in fact,
23 prohibits the NRC from making technical judgements
24 about the adequacy of things like that.

25 There's established case law, I believe

1 there's the Limerick decision, where the Commission in
2 fact cited discussion, I believe it was Senator
3 Muskie, who clearly stated, I can get the citation if
4 you give me a moment, but clearly stated that federal
5 agencies are prohibited from second-guessing or from
6 challenging the EPA determinations or state
7 determinations on matters of groundwater quality,
8 matters that are covered by the Clean Water Act.

9 So it's not our place to challenge the
10 report and assess specifics regarding its adequacy.
11 But we are entitled to look at the report, determine
12 if we're comfortable relying on it, and to describe
13 the environmental impacts that result from reliance on
14 that report.

15 JUDGE KENNEDY: So if you were to pick one
16 of those points, if I was to ask you what gave you the
17 confidence in 2028 that the objectives in the CCS
18 salinity would be met, what do you point to?

19 MR. TURK: I would point primarily to
20 three things. One is that the results of the
21 freshening conducted up to the point of the DSEIS
22 publication. And later we'll talk about up to the
23 date of FSEIS. But the freshening results had been
24 successful. The governmental agencies at the state
25 and county levels are performing their role.

1 They're involved in regulatory oversight,
2 and they have the authority to do what's necessary to
3 reach those goals. And we've seen the modeling
4 reports, which give us confidence in their prediction.
5 And that's what those reports do, they predict that
6 following a certain remedial course of action will
7 achieve the results desired by the state and county.

8 JUDGE KENNEDY: So all three.

9 MR. TURK: Those three.

10 JUDGE KENNEDY: Thank you.

11 JUDGE HAWKENS: Anything else, Mr. Turk?

12 MR. TURK: No, Your Honors, thank you.

13 JUDGE HAWKENS: I think your seven and a
14 half minutes has expired.

15 MR. TURK: I'm sure they have.

16 JUDGE HAWKENS: Mr. O'Neill, you may
17 proceed.

18 MR. O'NEILL: Okay, thank you, Your Honor.
19 I want to begin just by emphasizing some key legal
20 points at the outset here, and respond to the notion
21 that FPL is not meeting the objectives. It is in full
22 compliance with both the consent order and the consent
23 agreement. That encompasses the CCS freshening
24 activities, the hypersaline plume extraction
25 activities, and other things required by the consent

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1 order and consent agreement.

2 And it has not missed any interim salinity
3 target. In fact, FPL is only about just past midway
4 through the four-year initial period prescribed by the
5 consent order for the salinity reduction, you know,
6 meeting the target of 34 PSU. So that initial target
7 I think is May 2021. And again, you know, they have
8 seen substantial reductions of salinities down to the
9 order of 50, 51 PSU.

10 And I think it's important to note when we
11 talk about the issue of public confidence. That
12 confidence, you know, from our perspective, comes very
13 much from the legal framework that is in place here.
14 And that being the consent order above else.

15 And because if further actions prove
16 necessary down the road, say they, FPL does need to,
17 you know, introduce additional water, whether it's
18 through more wells or increased pumping rates, they
19 still would be in compliance with the consent order.
20 I mean, the consent order specifically recognizes the
21 possibility that the target may not be achieved. And
22 we can't, you know, say it won't or it will at this
23 juncture, but it recognizes that possibility.

24 I think it's paragraph 20A, and it's
25 quoted on page 3-49 of the DSEIS, that if FPL fails to

1 reach an average annual salinity of at or below 34 PSU
2 by the required time periods, then the consent order
3 requires them to submit a plan within 60 days of that
4 failure to the FDEP detailing additional measures and
5 a revised timeframe for achieving the 34 PSU target.

6 So that is specifically built into the consent order.

7 And the other thing I might add is that
8 the results of the freshening activities are reported
9 to the state annually, and daily water quality and
10 salinity data is actually available, you know, to the
11 state agencies. And at this point, they haven't
12 expressed any concerns relative to FPL's progress in
13 meeting the objectives or, you know, recommended any
14 course corrections.

15 So again, from our perspective, that's a
16 significant source of confidence.

17 JUDGE HAWKENS: Mr. O'Neill, does the
18 state have the ultimate authority to direct you,
19 direct FPL to shut down if during the subsequent
20 license renewal period it becomes clear you're not
21 able to achieve the environmental goals?

22 MR. O'NEILL: That I do not know, Your
23 Honor. I don't know if that would factor into the
24 Public Service Commission process or not, I don't,
25 yeah. I've been informed that it would likely

1 involve, you know, some regulatory compliance, excuse
2 me, fines and alternative mitigation strategies would
3 have to be developed, so yeah.

4 JUDGE HAWKENS: All right.

5 JUDGE ABREU: But if you did not have a
6 permit from them could you operate?

7 MR. O'NEILL: No, the permit is definitely
8 required, yes.

9 JUDGE ABREU: So theoretically, if they
10 withdrew the permit, you'd shut down.

11 MR. BESSETTE: One moment, Your Honor.

12 MR. O'NEILL: Yeah, Your Honor, I just
13 want to emphasize again that, you know, the consent
14 order does contemplate this possibility, and the
15 prescribed action is to develop an alternative
16 strategy, you know, for achieving the 34 PSU in a
17 revised timeline. So it doesn't contemplate shutdown.

18 JUDGE ABREU: But --

19 MR. O'NEILL: But to answer your question,
20 certainly, you know, the company does have to have,
21 you know, a valid NPDES permit or a permit that
22 governs cooling water discharges to the canals, yes.

23 JUDGE ABREU: Right, so in theory, if for
24 some reason things just went horrible, the state could
25 just, could take away the permit or, you know, say

1 you're not fulfilling the consent order and do
2 whatever they do.

3 MR. O'NEILL: But again, we have no
4 reason, we believe that is unlikely hypothetical, and
5 it's all, yeah.

6 JUDGE ABREU: But in the sense of
7 possibilities, it is on the list. Unlikely, but.

8 MR. O'NEILL: The state can ultimately,
9 yeah.

10 JUDGE ABREU: They do have that control
11 over you, is what I'm --

12 MR. O'NEILL: Control to issue the permit,
13 yes.

14 JUDGE ABREU: Yes.

15 MR. O'NEILL: And to modify the permit if
16 necessary, yeah.

17 You know, another point I wanted to
18 address is as relates to, you know, future climactic
19 conditions. And you know, there's this discussion of
20 well, how do we know what the conditions will be like.
21 And I think this board, in Footnote 71 of LBP-19-03,
22 said that NRC regulations require that environmental
23 reports, and by extension the staff's draft SEIS, you
24 know, must describe in detail the affected environment
25 around the plant, not the reasonably foreseeable

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1 affected environment during the SLR period.

2 So I think that's just consistent with the
3 broader NEPA principle that, you know, we can't engage
4 in crystal ball inquiries about whether conditions
5 will be wetter or drier, you know, 30 years from now.
6 We just simply can't know that with any certainty, you
7 know, and that really goes beyond NEPA's rule of
8 reason.

9 JUDGE ABREU: And those, the Tetra Tech
10 models that are referenced in the EIS, if one were to
11 look in those references, what type of information
12 would one find, such as the assumptions that were
13 input for the model, that type of thing? Are those
14 all available in detail in there?

15 MR. O'NEILL: Yes, I think you'd find
16 fairly detailed descriptions of the models. You know,
17 for example, the water and salt balance model, that
18 was developed in the 2012 timeframe, in connection
19 with extended power uprate proceeding.

20 And there was a report issued that's
21 publically available through the state's websites,
22 that 2012 pre-uprate comprehensive report, that
23 provides quite a bit of detail on the water and salt
24 balance model.

25 And I know FPL also describes the model in

1 its annual remediation and our restoration status
2 reports. And it's certainly not going to include, you
3 know, the spreadsheet itself, but it is going to
4 describe the basic assumptions.

5 JUDGE ABREU: But it would give someone
6 who wanted to say, gee, does this make sense --

7 MR. O'NEILL: Exactly.

8 JUDGE ABREU: Be able to go in and say,
9 okay, I can see what their thinking process was.

10 MR. O'NEILL: Yes, yes, Your Honor. And
11 on that point I did want to emphasize as well that the
12 model that's related to, you know, the salinity of the
13 CCS system is a stochastic model. So it basically is
14 based on past weather sequences.

15 So it basically kind of assume that the
16 past weather will predict the future. So it
17 encompasses things like, you know, precipitation
18 amounts, temperature gradients, you know, seepage in
19 and out of the canal system, that type of thing.

20 And there definitely has been some
21 confusion about the discussion I think on page 3-49 of
22 the DSEIS, because that talks about the model I think
23 in the 2014 timeframe. And that was the initial model
24 developed in 2012, which is based on two years of
25 data, weather data. And one of the years was wetter

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1 than normal, and so it was a bit skewed in that sense.

2 And FPL has since incorporated I think
3 seven or eight years of weather data, and they
4 recalibrate the model annually. And they actually do
5 calibrate the models, kind of predictions or
6 simulations against actual data, you know, water level
7 data, salinity data from the canal system and the
8 match is very good. It's been described to me as a
9 very tight model. So we disagree vigorously with the
10 notion that the model is defective or deficient, so.

11 I had a number of issues I would have
12 liked to have gotten into, if it's --

13 JUDGE HAWKENS: I'll tell you, why don't
14 you take four more minutes.

15 MR. O'NEILL: Okay, Your Honor. Yeah,
16 Your Honor, one issue I really did want to touch on is
17 the, and again, it relates to the staff, and it's
18 ultimately their responsibility, but the nature of
19 their review or obligations under NEPA, I think
20 there's some very instructive NRC case law on this
21 point.

22 Basically holds that the NRC has to
23 exercise its independent judgement in identifying and
24 assessing the reasonably foreseeable impacts of a
25 proposed licensing action. So in doing so, it's

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1 required to kind of verify the reliability of the
2 analyses, you know, and requirements that it's looking
3 at. But it doesn't need to redo, you know, a state
4 agency's work.

5 There's some very helpful decisions, Levy
6 County, LBP-13-14. Let's see, Limerick ALAB 07-85.
7 And one case that I thought sums it very well was the
8 LES, so Louisiana Energy Services, a Board decision,
9 LBP-06-08.

10 And the Board there said, In conducting
11 its environmental review, an agency may, in its
12 discretion, rely on data analyses or reports prepared
13 by persons or entities other than Agency staff,
14 including competent and responsible state authorities.
15 And they cited LBP-78-28. Provided, however, that the
16 staff independently evaluates and takes responsibility
17 for the pertinent information before relying on it in
18 an EIS.

19 In other words, the staff need not
20 replicate the work completed by another entity, but
21 rather must independently review and find relevant and
22 scientifically reasonable any outside reports or
23 analyses on which it intends to rely.

24 So I think that gives some additional
25 insight, you know, into what the staff's obligations

1 are in this context here, where, you know, we are
2 looking at Agency, excuse me, requirements and
3 analyses provided by state agencies.

4 And from our perspective, you know, the
5 staff does provide quite a bit of detail on what the
6 state and county have required. You know, the various
7 regulatory interactions between FPL and those
8 agencies. You know, enough to meet the standard that,
9 you know, the information is relevant and
10 scientifically reasonable.

11 I don't think there's just been a blind
12 deferral to the state's requirements or
13 determinations, and that's how I would distinguish the
14 federal court case that Intervenors have cited, I
15 think from the DC Circuit. You know, there's not a
16 slavish or a blind deferral to the state agencies
17 here.

18 And I, just as a procedural matter, I
19 would echo what Mr. Turk said about the Intervenors
20 not really complying with the admissibility standards
21 fully. As he noted, Section 4-B of the motion
22 contains purported new information, FPL report, three
23 FPL reports. They're expert reports.

24 A state of Miami, excuse me, county of
25 Miami-Dade, a petition for administrative hearing,

1 which incidentally was never attached to the petition.
2 But they never really connect the dots. I mean, the
3 Board and other parties are kind of left to infer how
4 those documents support these contentions.

5 And so we would argue that, you know,
6 they're not, they haven't been sufficiently specific,
7 you know, in connecting the dots between those reports
8 and the alleged new and materially different
9 information.

10 Okay, just give me a minute here to look
11 through my notes. Okay, I think that's all I want to
12 touch on. Thank you.

13 JUDGE HAWKENS: All right, thank you, Mr.
14 O'Neill.

15 MR. RUMELT: Let me address the last issue
16 that was mentioned, and that's the specificity of the
17 motion, admitted -- new and admitted contentions. I
18 think we're having this conversation here about the
19 issues that we raised precisely because people could
20 understand the issues that we raised in our motion.
21 We feel it was very clear.

22 We listed each of the opinions that our
23 experts provided, we provided page references to their
24 reports that support those opinions, which is frankly
25 far more than we see in the draft EIS for this. In,

1 again, the fact that we're having this conversation,
2 that in their own briefing, the NRC staff and FPL have
3 both addressed specific issues with the expert reports
4 that we've raised. I don't see how there's any issue
5 with regard to the contentions and what Intervenor
6 meant.

7 The other thing that I wanted to mention
8 is, and we heard some testimony from Counsel for the
9 staff about the NRC's requirements under NEPA, and
10 particularly with the Clean Water Act. And I'm not
11 sure what case was being referred to, but I'll point
12 the Board to 10 CFR 5171, Footnote 3, and I'll read
13 that verbatim.

14 It says, Compliance with the environmental
15 quality standards and requirements of the Federal
16 Water Pollution Control Act imposed by EPA or
17 designated permitting states is not a substitute for
18 and does not negate the requirement for the NRC to
19 weigh all the environmental effects of the proposed
20 action, including the degradation, if any, of water
21 quality, and to consider alternatives to the proposed
22 action that are available for reducing adverse
23 effects. So that's in the Commission's regulations,
24 it's stated fairly plainly.

25 The other, the Counsel for FPL referenced

1 the fact that they are in compliance with the various
2 consent agreements, consent orders. And that's really
3 a red herring for us, because we're not arguing issues
4 of compliance. We recognize that FPL can be in
5 compliance with the consent order, the consent
6 agreement, yet nevertheless, the impacts aren't going
7 to be small.

8 They're in compliance with those
9 requirements now, yet, as the NRC staff has mentioned
10 earlier and has recognized in the DSEIS, the impacts
11 from the cooling canal system are moderate on
12 groundwater. So there's a disconnect there.

13 Judge Kennedy, you mentioned, I believe,
14 three buckets to try to place the various support or
15 analysis that the NRC staff has done. Regarding to
16 the modeling, the actual data, and the reliance on
17 oversight in, you know, with respect to each one, we
18 have provided, as Intervenors, evidence to at least
19 contest and create a genuine issue in disputing
20 material facts on each one of those.

21 So with respect to the model, we provided
22 our own modeling. Our modeler, Mr. Wexler, reviewed
23 all the models, the same as the NRC staff, and came to
24 different conclusions. They recognize that.

25 With regard to actual data, the actual

1 data, while there is some improvement, which one might
2 expect from pouring millions of gallons into a ten
3 square mile cooling canal system, those still have not
4 achieved the 34 PSU target that is required under the
5 consent order.

6 And we've also heard recognition that,
7 well, in the future if that doesn't work, we're going
8 to move on to plan B. Well, everything points to
9 right now, including our expert's reports, that it's
10 not going to work. And we have expert opinion saying
11 that well, if you're going to try something else, you
12 need to look at those environmental impacts.

13 If they need to add more water, we don't
14 know how much, but that's going to have impacts on
15 groundwater availability and conflicts over
16 groundwater resources. It might have other issues
17 that we need to address.

18 The DSEIS mentions that FPL's in talks
19 now, I believe with, I forget which, maybe it's the
20 county or the state, I think it's the county, over
21 possibly using waste water from an as-yet-to-be-built
22 facility to help with the freshening. Those are
23 related impacts that would need to be addressed under
24 a proper NEPA analysis.

25 And finally, with respect to reliance, we

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1 submitted this petition by Miami-Dade County, we
2 referenced it in our argument, and it's publically
3 available. And it shows that the two entities that
4 are responsible for overseeing the salinity issue, the
5 FDEP and Miami-Dade County, are at loggerheads.

6 And Miami-Dade County has taken, this
7 occurred after all the filing in our initial round of
8 contentions, they filed a claim, an administrative
9 claim against FDEP, saying we don't like this change
10 that you've made with respect to FPL's permit in this
11 issue of how low the water should be in the L31E
12 canal. And we think that's going to interfere with
13 their ability to meet the requirements with us.

14 So in terms of relying on state and county
15 oversight, it's unclear to me which one they're
16 relying on and what's the plan if they don't come to
17 an agreement. So at this stage, particularly when the
18 DSEIS was published, there's no indication of even
19 agreement between those very agencies that the staff
20 is at least in part relying on that this is going to
21 work. So I think that's all.

22 JUDGE KENNEDY: I'm just curious, did I
23 hear you say that even if FPL was in compliance with
24 the consent agreement, there would still be a negative
25 environmental impact?

1 MR. RUMELT: That's correct, Your Honor.

2 JUDGE KENNEDY: And what are you pointing
3 to in that regard?

4 MR. RUMELT: Well, I speak to present
5 facts as they exist today. FPL is claiming and has
6 claimed since the beginning of this process that they
7 are in compliance. We heard Counsel testify that they
8 are in compliance, they're hitting all of their
9 targets. But at the same time, the impacts are
10 moderate, the impacts on groundwater quality are
11 moderate. So they're not small.

12 So how in the future, when conditions are
13 going to be more difficult to reach salinity -- I'm
14 sorry, the question you asked is can they be in
15 compliance and still create environmental harms,
16 basically. And again, today the answer is yes.
17 They're in compliance, the impacts are moderate.

18 There is no reason to believe, at least
19 that's our contention supported by expert opinion,
20 that that's going to change. And again, they'll be in
21 compliance.

22 JUDGE KENNEDY: I mean, I think that's the
23 hard thing to get, for this member of the Board to get
24 his head wrapped around, is this is a 12-year evolving
25 story of which we're into, I don't know, year 2 or 3

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1 or 4, I can't remember. It depends on whether it's
2 the draft or the coming-up final, and maybe the more
3 recent modeling.

4 So I mean, yes, maybe I could agree with
5 you that the evidence is showing that they didn't meet
6 an objective target that they need to meet ten years
7 from now today. But that, I'm trying to connect the
8 dots as how that says they can't get there. And I
9 know you've pointed me to the Wexler and Nuttle expert
10 opinions or declarations, I mean, I think it's hard to
11 put this in context.

12 We're in the present, which is outside the
13 scope of this proceeding, and we've got ten to twelve,
14 I can't do the math, I need a lawyer to do the math,
15 to get us to where this becomes something that we can
16 really focus on. And it would be nice if somebody
17 showed me the dots that say this can't possibly work,
18 we're going to need a new consent agreement, and you
19 know, the path would be much clearer, the sort of
20 environmental harm that I think you envision.

21 By looking at it today, I've heard both
22 sides here. Some would argue that it's, we're working
23 the plan, it's moving in the right direction. I think
24 your experts would say that they're not going to get
25 there. I mean, is that where it comes down to us to

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1 figure out is that where we are?

2 MR. RUMELT: Your Honor, with respect, I
3 believe that's what the purpose of the hearing is.

4 JUDGE KENNEDY: I understand. I was
5 afraid you were going to say that.

6 MR. RUMELT: Well, in, you know, NEPA
7 requires the agencies to take a hard look based on the
8 information that they know now and the reasonably
9 available information. And the problem is as we sit,
10 and the reasonably available future, and as we sit
11 here today, here's what we know, at least as far as
12 we're contending: it's not going to work.

13 And we don't know what the next plan's
14 going to be, but it's likely that it would involve
15 other significant environmental impacts. More water,
16 particularly more water being used at a time where
17 every, where the EIS recognizes that there will be
18 greater demand for water, you know.

19 So we, you know, do we, this is the time,
20 this is when it's right. If Applicant wants to wait
21 to submit an application till later or if the NRC
22 wishes to push off these proceedings for the
23 indefinite future, that's fine with Intervenor, but
24 you know, we're here now and this is the only
25 opportunity we have.

1 JUDGE KENNEDY: Thank you.

2 JUDGE HAWKENS: Is that it, Mr. Rumelt?

3 MR. RUMELT: That's it.

4 JUDGE HAWKENS: All right, thank you.

5 MR. RUMELT: You're welcome.

6 JUDGE HAWKENS: Mr. Turk, your finger is
7 raised.

8 MR. TURK: Yes, Your Honor. I'd like to
9 make a correction to something I stated previously.
10 I believe I cited a Limerick decision in which Senator
11 Muskie was quoted. In fact, it's a Vermont Yankee
12 decision, CLI-07-16 at 65 NRC 371.

13 Senator Muskie's statement is referenced
14 in Footnote 19 on page 377. And that decision has an
15 extensive discussion of the reliance the Agency is
16 required to place on CWA determinations by state
17 authorities.

18 JUDGE HAWKENS: All right, thank you.
19 Counsel, I propose we take a lunch break now. I was
20 hoping to get through one more contention before the
21 break, but given the length of time that particular
22 one took, I think it would be well if we took the
23 break now. It's about 12:37.

24 Mr. Turk, you're most familiar with the
25 lunch areas and length of time for it. What would you

1 propose for the time we should resume the proceeding?

2 MR. TURK: Your Honor, I know the NRC
3 cafeteria is of fairly good quality. I think we could
4 all eat there and come back within 45 minutes. If you
5 want to allow people to go offsite, maybe a little bit
6 more time.

7 JUDGE HAWKENS: All right, why don't we
8 make it a little bit more time. Let's resume at 1:40.
9 That's about, just about an hour. We're in recess,
10 thank you.

11 (Whereupon, the above-entitled matter went
12 off the record at 12:36 p.m. and resumed at 1:40 p.m.)

13 JUDGE HAWKENS: We're ready to proceed
14 with Contention 7-E, which is groundwater impacts.
15 Mr. Rumelt, you may proceed.

16 MR. RUMELT: Thank you, Your Honor. I
17 wanted to start off and just recognize that I think
18 we've covered a number of the issues that are raised
19 under Contention 7-E, the bullet points here. I'm
20 happy to go through them individually.

21 JUDGE ABREU: Personally, if you think
22 they've been covered, I'm good.

23 MR. RUMELT: You know, the one issue that
24 I think we haven't necessarily gone through, at least
25 I haven't -- my co-counsel here may have gone through

1 it somewhat earlier today -- is the last bullet in
2 Contention 7-E.

3 In there, Your Honors ask what are the
4 statements of alleged facts or expert opinion in the
5 motion that support the Intervenor's belief that
6 impacts to groundwater quality would be moderate or
7 large?

8 And, again, I think we've gone through
9 this a little bit, but I'll state it again. The
10 starting point is the staff's conclusion that impacts
11 to groundwater quality are currently moderate and that
12 it would require a successful intervention by FPL with
13 the oversight of state and county regulators to reduce
14 those impacts to small.

15 And the various opinions that support our
16 contention that the impacts would be moderate or large
17 are based on undermining the analysis suggesting that
18 impacts would be small under those conditions.

19 So I'll point you to several opinions and
20 statements in our expert reports that address that
21 issue, but I wanted to make sure everybody understood
22 the logic train there.

23 And, again, I also don't want to undermine
24 the fact that we really do believe that our expert
25 reports cumulatively address that issue. So I don't

1 know that I can pick out any specific opinions, but I
2 will share several to ensure that there's at least
3 some answer on the record.

4 So with the respect of the ability of the
5 cooling canal system to achieve the 34 PSU target,
6 Page 5 of the Wexler declaration, towards the top,
7 states these results indicate that without being able
8 to achieve freshening at the current time or in the
9 future, the retraction of the hypersaline water is not
10 likely to occur without the addition of more wells and
11 increased pump volumes. And the report provides all
12 the support for that conclusion.

13 In addition, I would point the Board to
14 the Nuttle report in the statements and analysis on
15 Page 10, the concluding paragraph, in Opinion 3,
16 considering the historical pattern of rainfall,
17 drought and surplus, one should anticipate that the
18 years ahead will be drier than recent years and not
19 expect to return to the normal weather patterns in
20 which FPL strategy for salinity reduction appears to
21 depend.

22 But, again, I don't want to say these are
23 the only ones. The point is that the reports really
24 address the issues related to the cooling canal
25 system, what the salinity issues are going to be

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1 continuing in the future and that it's going to remain
2 a problem. Consequently, it's got to be either
3 moderate or large impacts.

4 JUDGE ABREU: Okay. That last sentence --

5 MR. RUMELT: Mm-hmm.

6 JUDGE ABREU: Based on those you're
7 saying, therefore, it would be moderate or large. And
8 do the reports -- because sometimes there are changes.

9 MR. RUMELT: Mm-hmm.

10 JUDGE ABREU: -- that occur that even
11 though something is very different than one set of
12 assumptions with another, it still doesn't change the
13 final output and it might still be small.

14 Where in the reports -- does it say
15 somewhere in those reports that it specifically would
16 be at least moderate or large? Would it be at least
17 moderate? Let's just leave it at that.

18 MR. RUMELT: I don't believe the reports
19 use that language specifically.

20 JUDGE ABREU: Okay.

21 MR. RUMELT: But to the extent that a
22 report demonstrates that the impacts from the
23 hypersaline plume, the Wexler report, will not be
24 effective. The conclusion is that those impacts would
25 be moderate because they would remain unchanged.

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1 JUDGE ABREU: Okay. That is a different
2 clarification by just basically saying even though the
3 modeling says if all these great things happen it will
4 become small. What you're saying is our experts are
5 saying it's not going to reach those levels.

6 MR. RUMELT: Mm-hmm.

7 JUDGE ABREU: But it doesn't say -- so one
8 option would be that it's not going to reach those
9 levels. And the result specifically leaves it in the
10 moderate category versus it won't reach those levels
11 but it got better. And somebody might say, well, yes,
12 it's not as good as we were hoping, but it still might
13 reach small.

14 So what you're saying is they're saying
15 specifically it's going to stay at least moderate? Do
16 you believe your experts are saying it will not get
17 better or it won't get as good as projected?

18 MR. RUMELT: I think the reports
19 demonstrate certainly that it's not going to meet the
20 target, which is the basis for the moderate impacts
21 determination.

22 JUDGE ABREU: The moderate or the small?

23 MR. RUMELT: The current moderate.

24 JUDGE ABREU: The current moderate.

25 MR. RUMELT: Right.

1 JUDGE ABREU: Well, okay.

2 MR. RUMELT: And I think that a simple way
3 to address this is that we certainly, I believe, have
4 shown that the small -- the determination of the
5 impacts will be small is not correct, inaccurate,
6 based on the information that we provided and the
7 information that's in the DSEIS.

8 And I think on that issue alone, you know,
9 we've created a genuine issue of material fact to
10 satisfy the contention admissibility standards. And
11 to the extent that we -- you know, the issue that
12 you're raising, what are the actual impacts going to
13 be? We do believe they are going to be moderate
14 because it won't be -- because the hypersaline plume
15 is not going to be addressed consistent with the
16 requirements of the consent order and consent
17 agreement.

18 And, you know, given an opportunity to
19 present, you know, at a hearing, we can address those
20 issues in greater detail. Again, our goal here and
21 contention of admissibility standards are, is there a
22 genuine dispute?

23 And we believe it's clear because one, you
24 know, because the staff indicated that the long-term
25 impacts will be small. And we have shown through

1 evidence that that analysis is flawed and unsupported.
2 So there's a dispute over that analysis.

3 JUDGE ABREU: Thank you.

4 JUDGE HAWKENS: We've heard from FPL and
5 the NRC staff regarding how 2.3.3.5 would work on this
6 contention, which unless we were to issue an advisory
7 opinion, the Licensing Board would not reach the
8 contention admissibility criteria in their application
9 to this. Do you agree with that?

10 MR. RUMELT: Well, we, as I believe my co-
11 counsel indicated earlier, the Contention 7-E is
12 related to, and forgive me if I'm misunderstanding,
13 but Contention 7-E relates to the new analysis, site
14 specific analysis, that the Board, or that the staff
15 has done on groundwater quality impacts. And, again,
16 we, you know --

17 JUDGE HAWKENS: Right. Your first
18 argument was that waiver is not required in any event.

19 MR. RUMELT: Right.

20 JUDGE HAWKENS: Let's assume that the
21 Board does not accept that argument and then goes to
22 the Millstone factors.

23 MR. RUMELT: Mm-hmm.

24 JUDGE HAWKENS: If we apply the Millstone
25 factors, do you agree that whether we find you make

1 the prima facie case, in which case we certified
2 without reaching the admissibility criteria, or we
3 find you do not and we therefore reject it as outside
4 the scope, in either event, we won't be addressing
5 admissibility unless we issue an advisory opinion. Is
6 that your understanding?

7 MR. RUMELT: Hang on for one second. Your
8 Honor, I'm afraid I'm not sure I've got a good answer
9 for you right now. I might have to provide some
10 supplemental briefing on that question.

11 JUDGE HAWKENS: You need not.

12 MR. RUMELT: Okay.

13 JUDGE HAWKENS: You need not. If you have
14 a eureka moment later on in the afternoon, please
15 share it with me.

16 MR. RUMELT: Okay.

17 JUDGE HAWKENS: Otherwise.

18 MR. RUMELT: Thank you.

19 JUDGE HAWKENS: Anything else?

20 MR. RUMELT: Not on Contention 7-E, sir.

21 JUDGE HAWKENS: All right. We will put
22 your remaining time towards rebuttal for you.

23 MR. RUMELT: Okay.

24 JUDGE HAWKENS: Mr. Turk, you have 7-1/2
25 minutes, sir. You may proceed.

1 MR. TURK: Thank you, Your Honor. I'd
2 like to begin first of all by providing answers to
3 some questions that Judge Abreu asked during
4 discussions on Contention 6.

5 One of the questions was where would you
6 be able to find uncertainties mentioned in the DSEIS?
7 And with respect to uncertainties in the groundwater
8 modeling, that's discussed at Page 4-27 and I believe
9 also 4-32.

10 There are other uncertainties discussed,
11 for instance, with respect to sea level rise. You can
12 see that at Pages 4-108 to 109. There's a discussion
13 also on gas, but I don't think that's relevant to our
14 discussions today.

15 Judge Abreu, you also asked where you
16 could find reference to the fact that the staff
17 considered the maximum permitted rate of withdrawal,
18 groundwater withdrawal, and that's at Page 4-31. That
19 appears twice on that page.

20 So with respect to Contention 7, let me
21 begin with a point that I mentioned previously and
22 that is that it's difficult to discern in the
23 Intervenor's filing which evidence supports which
24 contention.

25 They generally refer back to the Section

1 IV(b) but do not cite specific reports or specific
2 statements in those reports in support of any one
3 contention.

4 I'll qualify that later when we talk about
5 one contention, I believe it was Number 9, where they
6 do make specific reference to reports. But for the
7 first three of these, 6, 7 and 8, they don't talk
8 about specific facts in support of a particular
9 contention.

10 Our discussion previously seemed to talk
11 mostly about groundwater withdrawal. The Board was
12 asking a lot of questions about the rate of withdrawal
13 and whether it's the staff's prediction that
14 salinities will be reduced as directed by the state
15 and county to the 34 PSU level, whether that's
16 reasonable.

17 So most of that goes to groundwater
18 issues. The contention we discussed earlier today had
19 to do with surface water. So while we got into all of
20 that discussion, it really didn't relate to Contention
21 6. Contention 6 dealt with surface water impacts via
22 the groundwater pathway.

23 The staff concluded that that's a new
24 issue that we addressed in the DSEIS, and we found the
25 impacts to be small. The section of the DSEIS that

1 addresses that was Section 4.5.1.1 as cited by the
2 Intervenor.

3 Now we're talking about groundwater
4 quality in Contention 7. The relevant section of the
5 DSEIS for that as cited in the contention is Section
6 4.5.1.2.

7 So that's really where all of that
8 discussion we had before about the reasonableness of
9 the groundwater monitoring and modeling would really
10 pertain because it doesn't really relate to surface
11 water impacts. It relates to impacts to the
12 groundwater, groundwater quality degradation.

13 So looking at that issue, this is the only
14 one of the four contentions that is a Category 1 issue
15 in the GEIS.

16 The Intervenor would have to show reason
17 to believe that there is significant new information
18 that would cause the Commission to say our GEIS should
19 not be followed in this proceeding. And we submit
20 they have not done that.

21 First of all, it's very difficult to
22 discern which evidence in particular they're relying
23 upon. And they haven't shown reason to believe that
24 the impacts on groundwater quality would be greater
25 than small during the subsequent license renewal

1 period.

2 JUDGE HAWKENS: You might want to focus on
3 the -- I was curious on why I should ask you to focus
4 on admissibility when we won't be doing that. So why
5 don't -- continue, continue with what you're saying
6 although you need not repeat the arguments you
7 already made with respect to waiver this morning.

8 MR. TURK: Okay. I don't want to just
9 repeat matters that are in our response. But I really
10 don't have much more to say considering that it is a
11 generic issue.

12 JUDGE HAWKENS: Mr. Turk, what is the
13 goal, the time frame, for reducing the salinity in the
14 CCS to 34 PSU?

15 MR. TURK: I believe it is a 10-year
16 period. I believe that there's a 5-year period, as
17 Mr. O'Neill mentioned previously if he wants to
18 correct that.

19 MR. O'NEILL: If you're talking about the
20 salinity of the CCS system via freshening.

21 JUDGE HAWKENS: Correct.

22 MR. O'NEILL: That's a four year
23 compliance period.

24 JUDGE HAWKENS: And when was the start
25 date for that?

1 MR. O'NEILL: Well, I know the end date
2 is, I believe, May 2021.

3 JUDGE HAWKENS: Correct.

4 MR. O'NEILL: Roughly, yes. They actually
5 started freshening activities, with they being FPL, in
6 November of 2016. But the actual, kind of, reporting
7 or compliance period, annual period, runs from, like,
8 May to June, or whatever, May to May.

9 So, but my understanding is, yes, May
10 2021.

11 JUDGE HAWKENS: May 2021. And then the 10
12 year time frame, is that for the diminishing of the
13 hypersaline plume?

14 MR. O'NEILL: Yes. I think there's kind
15 of a five year time frame associated with a resting of
16 the migration of the plume --

17 JUDGE HAWKENS: The different stages.

18 MR. O'NEILL: -- and the time frame
19 associated with retracting it, yes.

20 JUDGE HAWKENS: Right.

21 MR. O'NEILL: And that's, you know, and
22 again, that's an entirely different activity and, you
23 know --

24 JUDGE HAWKENS: Right.

25 MR. O'NEILL: -- associated model.

1 JUDGE HAWKENS: Right. Mr. O'Neill, you
2 have the floor.

3 MR. O'NEILL: Thank you, Your Honor. I
4 would just begin by looking at the language of
5 contention. It cross-references 6-E and then argues
6 that because remediation/freshening efforts are not
7 working and are not expected to work in the future,
8 the impacts on groundwater will be moderate or large.
9 And it's just this statement is troubling in several
10 respects, I think, from a factual and a legal
11 standpoint.

12 I think as we have discussed, you know,
13 the remediation activities that are ongoing are very
14 much in the early stages. You know, freshening has
15 been going for a little over a couple of years.

16 The full scale groundwater retraction
17 activities started in May 2018, I believe, you know,
18 full scale retraction. So it just seems highly
19 speculative and premature to make bold assertions that
20 the remediation efforts are not working.

21 And, you know, again, I can't testify on
22 factual matters. But I think, you know, their annual
23 monitoring reports FPL is providing indicate that, you
24 know, including one of the ones cited by Intervenor
25 that remediation is progressing as planned.

1 And I think it is also important to bear
2 in mind as we discussed that we're talking about
3 impact that will occur during the subsequent license
4 period, which is still 13 to 14 years from now.

5 So, you know, there's quite a bit of time
6 during which the objectives can be accomplished in the
7 necessary legal mechanisms that are built into the
8 consent order, the consent agreement.

9 And I guess on that point, I'd emphasize
10 that the staff's draft SEIS points this out on Page 3-
11 71, you know, that FPL has similar reporting
12 obligations relative to the plume remediation
13 activities.

14 After five years of system operation, FPL
15 must provide a report to the FDEP that evaluates the
16 effectiveness of their recovery well system in
17 retracting the plume and be within 10 years.

18 And then if FPL's report shows that the
19 remediation efforts will not retract the plume to L31E
20 canal within 10 years, it must develop and submit an
21 alternate plan. So a very similar type of provision
22 to the one we discussed earlier.

23 You know, and again, it's, you know, I
24 can't state it enough that ultimately it is the state
25 and county regulators that did approve these

1 remediation activities in the associated models
2 through extensive reviews and in peer reviews.

3 And so it kind of begs the question, you
4 know, what would we be litigating in this proceeding?
5 I gather from Mr. Rumelt's argument that his experts
6 would want to be doing, you know, deep dives into the
7 modeling analyses. We'd be fundamentally litigating
8 the adequacy of models that have been approved by
9 state and county regulators. And that, from my
10 perspective, doesn't square with the controlling
11 Commission case law.

12 I'll just turn to the Board's questions
13 and touch on those. They, you know, are in large part
14 directed at the other parties. But the first question
15 kind of inquired about, well, what else did the staff
16 look at?

17 Mr. Turk referred to, I think, a section
18 in Chapter 4 of the DSEIS. There's quite a bit of
19 helpful, you know, information and background in
20 Section 3.5.2.2 of the DSEIS.

21 It talks about the composition and the
22 aerial extent of the hypersaline plume, you know, its
23 effects on groundwater quality, FPL's extensive
24 groundwater monitoring activities, including well
25 locations, steps, sampling frequencies, water quality

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1 parameters, analyze sampling result summaries, trends
2 in key constituents, like chlorides and tritium, total
3 dissolved salts.

4 There's an extensive discussion of the
5 history and the current status and the regulatory
6 mechanisms governing FPL's remediation activities.

7 And so, in short, it's a very detailed
8 discussion and suggests that the staff did, in fact,
9 take, you know, an independent look at the relevant
10 technical information and data. They didn't just
11 simply point to the county and state permits and say
12 we're done.

13 I think from FPL's perspective they have
14 satisfied, you know, the relevant and scientifically
15 reasonable standard, you know, exercised independent
16 judgment.

17 And it just, again, with respect to the
18 recovery well system and the model that supported the
19 development of that system, it was peer reviewed by
20 the Florida Department of Environmental Protection,
21 the Army Corps of Engineers, the Miami Dade County
22 DERM and then the South Florida Water Management
23 District. And I understand that, I think, they had
24 retained a University of Florida geology professor,
25 Dr. Motts, to look at the model, too.

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1 So, again, it's been looked at quite
2 exhaustively. I think we even used it to support FPL
3 positions in PSC, you know, Public Service Commission
4 proceedings, too. So to me that's a significant
5 indication that the models have been, you know, looked
6 at in a very robust manner.

7 The third question the Board had related
8 to the salinity in the CCS. I just wanted to answer
9 that question. I think the 3D solute transport model,
10 that's the groundwater remediation model, essentially
11 does assume a salinity of 34 PSU.

12 My understanding is it can analyze, you
13 know, effects or changes in CCS salinity. But FPL
14 views, you know, that as a reasonable assumption, that
15 is, you know, the target, the 34 PSU.

16 And, again, they've also installed 10
17 operating recovery well systems along the western
18 perimeter, you know, the L31 canal. And those are
19 intended to create a very, very significant hydraulic
20 barrier, you know, to hypersaline water that's deeper
21 in the Upper Biscayne Aquifer.

22 So it's kind of the counterpart to the
23 more shall interceptor ditch. These wells are serving
24 that function. And, you know, it's anticipated that,
25 again, they are proving to create a very significant

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1 hydraulic barrier.

2 So that's a long way of saying that, you
3 know, we think that the 34 PSU assumption in that
4 particular model is appropriate. I think that's all
5 I wanted to cover for now. Thank you.

6 JUDGE HAWKENS: Thank you. Mr. Rumelt?

7 MR. RUMELT: Thank you, sir. With respect
8 to the last statement, I want to emphasize that to
9 make sure it's not lost that the effort to determine
10 impacts on groundwater quality assumed that the
11 salinity issue is being controlled at 34 PSU. Okay?
12 And at the same time, both our expert and the NRC
13 staff recognized that the most significant contributor
14 to the hypersaline plume is salinity in the cooling
15 canal system.

16 So if the model starts at a place that
17 assumes all is okay, the output of that model is not
18 going to reflect reality when all is not okay.

19 JUDGE HAWKENS: Can you explain to me?
20 I'm not following you when you say the model assumes
21 that all is okay. What precisely does that mean?

22 MR. RUMELT: Precisely, it means that the
23 model assumed that the salinity in the cooling canal
24 system will attain 34 PSU. That is a goal. That is
25 a requirement. But it has not been attained. And we

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1 have expert testimony and opinions that contradict and
2 dispute what the staff and the FPL are saying that
3 indicate that will not be possible.

4 As a consequence, because salinity, the
5 PSU, the 34 PSU, is one of the most significant
6 contributors to the hypersaline plume, if we start at
7 the point where they have succeeded in managing
8 salinity in the canal system, the endpoint of all
9 other modeling on the hypersaline plume is going to be
10 off.

11 They need to start with conditions that
12 are real. And as we have seen them at these size,
13 conditions have not reached an annual average salinity
14 of 34 PSU. They are far higher than the modeling
15 predicted, which raises -- does everybody follow?

16 JUDGE KENNEDY: I think I'm getting
17 confused which models we're talking about. So this is
18 -- are you talking about a model for remediation of
19 the plume, starting with an assumption?

20 MR. RUMELT: Right. We're talking about
21 -- it's a 2016 Tetra Tech model that was used to
22 determine the extent and efficacy of the hypersaline
23 plume in the groundwater remediation efforts.

24 In that model in 2016, and this is in our
25 expert report, it started with the assumption that the

1 cooling canal system salinity will be managed
2 effectively. And that is an assumption that does not
3 reflect reality.

4 JUDGE HAWKENS: It doesn't reflect the
5 current reality, but I think Mr. O'Neill said the goal
6 for achieving the 34 PSU is not for a couple of years,
7 May 2021.

8 MR. RUMELT: That's true. And we have a
9 genuine dispute with that prediction.

10 JUDGE KENNEDY: That the 2021 target would
11 be achieved?

12 MR. RUMELT: Correct. Our experts have
13 shown under the information that we understand as it
14 exists today, based on information that's in the
15 DSEIS, that the current efforts to reduce the salinity
16 to 34 PSU are ineffective and will not work.

17 It's hotly disputed. And, therefore, the
18 modeling that's done based on the assumption that 34
19 PSU will be reached, you know, bears fruit that's not
20 accurate.

21 JUDGE KENNEDY: Can you speak to the time
22 frame that your experts used for the remediation, the
23 time frame of the remediation problem? I mean, is it
24 -- are we talking -- is this -- I get confused about
25 these time frames, whether it's a 1 year, 5 years, 10

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1 years point in time.

2 How much time did you give the FPL to
3 remediate the plume? Was it starting in 2021 to 2028
4 or? And maybe that's not a fair question, but.

5 MR. RUMELT: No. It's not unfair. But I
6 should have stuck with science though in college or
7 after college.

8 I'm looking at Figure 1 and -- you know
9 what? I would want to review the --

10 JUDGE KENNEDY: Mm-hmm.

11 MR. RUMELT: -- modeling work to give you
12 a precise answer. My recollection is that the model
13 looked out a number of years.

14 JUDGE KENNEDY: So are those the figures
15 in your expert's report? It had different plume
16 positions in time?

17 MR. RUMELT: Correct.

18 JUDGE KENNEDY: Okay. So we could figure
19 out by studying those. Thanks for pointing us there.

20 MR. RUMELT: I'm only a lawyer. You're
21 the nuclear scientist.

22 JUDGE KENNEDY: This is all water to me.

23 MR. RUMELT: All right. And counsel for
24 staff began their remarks on this issue by indicating
25 that Contention 6-E relates surface water and this

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1 relates to groundwater and that our discussion earlier
2 really focused on the issues here.

3 I'm not disputing that our discussion
4 earlier has significance, serious significance on
5 Contention 7-E. But we can't get away from the fact
6 that Contention 6-E also addresses the staff's
7 ultimate conclusion that's based on oversight in
8 freshening and remediation of the cooling canal system
9 impacts.

10 It's the same core set of facts and
11 issues. And it just depends on which issue you're
12 looking at from there. You make one turn it goes to
13 surface water. The other way it's groundwater.

14 There was a statement that things are
15 progressing as planned. I see my time is up.

16 JUDGE HAWKENS: Please complete your
17 thought.

18 MR. RUMELT: We've heard several times
19 that salinity management is progressing as planned.
20 Well, that's very much contrary to what's in the
21 DSEIS. The DSEIS says that the model is predicted
22 that salinity would reach 34 PSU within a year of
23 beginning those efforts. So, you know, I'm not sure
24 what other plan there is, but the plan that's stated
25 in the DSEIS is less than a year we'll get there. So

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1 in terms of progressing as planned, it seems that the
2 answer is, no, they're not progressing as planned.

3 JUDGE HAWKENS: I don't think that's
4 exactly accurate. Again, Mr. O'Neill said it's not
5 until May 2021 for that 34 PSU to be achieved.

6 MR. RUMELT: That, Your Honor --

7 JUDGE HAWKENS: That's the modeling aspect
8 of it, as opposed to they were saying, well, perhaps
9 in a year.

10 MR. RUMELT: There's certainly a deadline
11 for achieving the goal, and that's not what I'm
12 referring to. I'm referring to the understanding that
13 when they did the modeling and made the decisions to
14 engage in this salinity management effort, the model
15 said less than a year. And that's the progress that
16 everybody expected initially and that hasn't come to
17 fruition. I fully, you know, I agree that they have
18 additional time. I'm not disputing that. But as
19 planned and as forecast by the models, and these were
20 the decision documents that everyone relied on to
21 determine what to do, the forecast was less than a
22 year.

23 MR. O'NEILL: Can I respond, Your Honor?

24 JUDGE HAWKENS: I'd like to hear your
25 response, yes. I was about to ask Mr. Turk to

1 respond, but, since you volunteered, I will allow you
2 and then allow to Mr. Turk to supplement, if he
3 wishes.

4 MR. O'NEILL: I appreciate that, but I
5 think the big problem here stems from the fact that
6 Mr. Rumelt is focused on a model that has essentially
7 been outdated or superseded. I mean, it's the same
8 underlying water and salt balance model. But as I
9 tried to explain before, the discussion of DSEIS on
10 page 349 refers that the Tetra Tech 2014 A memo, and,
11 again, that's when the model was in its kind of
12 embryonic stages, if you will, and it was based on
13 about two years, actually about 22 months of data, and
14 one of those years was particularly wet and that kind
15 of skewed the initial simulations.

16 Since that time, FPL or Tetra Tech have
17 updated the model to incorporate a lot more weather
18 data. And, again, I mentioned a stochastic model.
19 And so it provides a much, encompasses a much broader
20 range of hydrologic conditions, including drier
21 conditions. And based on that refined model, FPL
22 determined that a longer period of time, the four-year
23 period that's reflected in the consent order, would be
24 needed to reduce the average annual salinity to 34
25 PSU. And FPL actually explained this in a comment on

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1 the draft SEIS. The accession number for FPL's
2 comments are ML 19141A047. That's a matter of public
3 record.

4 But, again, I had to kind of dispel any
5 notion that that specific model, the 2014 one, really
6 is still even relevant. Again, the model has been
7 subsequently updated and recalibrated. And, again,
8 based on that, that's where the four-year period came
9 from and that's reflected in the consent order.

10 JUDGE HAWKENS: We'll give you the final
11 word, Mr. Rumelt, in just a second. I want to give
12 Mr. Turk the opportunity to weigh in.

13 MR. TURK: Your Honor, I would only note
14 that the prediction for the DSEIS is not what are the
15 current conditions and is the model showing that
16 things will be fine in one year or two years or four
17 years. We're looking at the subsequent license
18 renewal period 13 years from now, and our conclusion,
19 based on all of the evidence and the predictive
20 modeling that's occurred, as well as the continued
21 state and county oversight, is that, by the time we
22 get to SLR, the impacts will be as described in the
23 DSEIS. Small.

24 JUDGE KENNEDY: Again, when you talk about
25 that modeling, is that different than the 26 -- again,

1 I get 2014 and 20 -- what you've described on 349 in
2 the DSEIS, is there a different model that you're
3 referring to now than that model? Because we're back
4 to why you have such confidence that these targets are
5 going to be met.

6 MR. TURK: Just one moment, Your Honor.

7 JUDGE KENNEDY: Sure.

8 MR. TURK: Your Honor, I think the
9 confusion is that there are two different models that
10 we're talking about. At page 3-49, there's the
11 description of the 2014 Tetra Tech model that was used
12 to estimate the freshening that would be required. In
13 Section 4.5.1.2, there's a different model that's
14 discussed, and that's the predictive modeling about
15 the, the predictive modeling done by Tetra Tech
16 regarding the pulling back of the hypersaline plume.
17 That's a 2016 model, so that's different from the
18 model that's being discussed on page 3-49.

19 JUDGE KENNEDY: There is a connection
20 between the salinity and the CCS and the remediation
21 of the plume. Does the 2016 model include updated
22 information on the salinity level in the CCS when you
23 did a predictive estimate of the remediation of the
24 plume? I can understand why I'm confused.

25 MR. TURK: Just one moment, Your Honor.

1 I don't know the answer as we sit here today, Your
2 Honor. Perhaps FPL knows the answer.

3 MR. O'NEILL: Yes, Your Honor, I guess I
4 tried to explain it before, but I understand that the
5 salinity level of the CCS is accounted for in the, you
6 know, the plume retraction model. We'll call it that.
7 It's --

8 JUDGE KENNEDY: The 2016 model?

9 MR. O'NEILL: That is maybe -- I know
10 2016, I know they also did some sensitivity studies in
11 the 2018 time frame, too, but 2016, yes. And from
12 talking to our technical folks, my understanding is
13 that, you know, the model does assume 34 PSU. Now,
14 getting into new and amended information, and counsel
15 may object, but my understanding is, since we've seen
16 the system has been operating since, I guess it was
17 May of 2018, and FPL just prepared its first annual
18 monitoring report that actually addresses the progress
19 that's seen and it is indicating a very significant
20 hydraulic barrier being created by the ten-well
21 recovery system. In other words, whether it's 34 or
22 51, you know, the kind of the salinity of the system
23 now, it doesn't matter because the wells are being
24 that effective in preventing the plume from moving
25 further, further west.

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1 JUDGE HAWKENS: Is this hydraulic barrier,
2 is that discussed in the DSEIS?

3 MR. O'NEILL: Well, certainly, the
4 recovery well system is discussed at length. I mean,
5 I'm kind of using the term hydraulic barrier. It's
6 essentially you're creating a --

7 JUDGE HAWKENS: Right. That makes sense
8 to me. I just don't recall seeing that term in the
9 DSEIS.

10 MR. O'NEILL: No, no, no, I think it is --
11 but the wells are, I think, Figure 3-14 of the DSEIS,
12 actually. So is the location of the ten recovery
13 wells, yes, and discusses the amount of water that
14 they're actually withdrawing from the ground and where
15 it's coming from and, you know, the reviews that the
16 various agencies did.

17 JUDGE HAWKENS: So your position, Mr.
18 O'Neill, would be that the fact that the model
19 regarding the retraction of the plume has an input of
20 34 PSU, which is inaccurate and has no material impact
21 on the reasonableness of the models and the accuracy
22 of the models?

23 MR. O'NEILL: Yes, although I wouldn't
24 necessary consider it to be inaccurate. I mean,
25 again, you know, the ultimate goal is within several

1 years to have, you know, the PSU approaching 34 PSU.
2 And then, of course, the groundwater extraction
3 system, that time line is ten years in terms of the
4 plume retraction. And, again, I think, ultimately,
5 from our perspective, we have to kind of look at
6 reality, what is the system itself doing. Again, the
7 model is a useful tool. I mean, it can kind of help
8 FPL and the regulators understand, you know, what
9 factors are most heavily influencing the movement of
10 the plume, you know, but --

11 JUDGE HAWKENS: Which we knew is the
12 salinity of the --

13 MR. O'NEILL: Well, actually, that is one
14 clarification I do want to make. I know --

15 JUDGE HAWKENS: Well, that's what the
16 DSEIS says.

17 MR. O'NEILL: Yes, although it refers to
18 the movement, it's the largest contributing factor of
19 the movement of the saltwater interface and there is
20 a distinction between that and the hypersaline plume.
21 The saltwater interface is basically where the water
22 has a salinity of 34 PSU, you know, like ocean water,
23 and that is affected by other factors. Certainly, the
24 plume itself, you know, affects the saltwater
25 interface movement and, of course, if you're

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1 retracting that, it's going to affect the movement of
2 the saltwater interface. But there's other kind of
3 regional processes that affect that, as well. I just
4 wanted to make that clarification.

5 JUDGE HAWKENS: Thank you for your
6 patience, Mr. Rumelt. You have the podium again.

7 MR. RUMELT: I object.

8 (Laughter.)

9 MR. RUMELT: I think it's fairly obvious
10 that we would strenuously object to the introduction
11 of new information.

12 JUDGE HAWKENS: I've heard that objection
13 earlier, so I understand what you're saying.

14 MR. RUMELT: Maybe we can make a deal.
15 But, I mean, I think we fleshed out, to an extent, a
16 lot of the facts here. The modeling of the
17 hypersaline plume was based on 34 PSU in the cooling
18 canal, which is not accurate. You know, the only
19 predictive modeling for the salinity in the cooling
20 canal system is the 2014 Tetra Tech analysis. There
21 may have been other, you know, they may have looked at
22 the model to see whether or not it's accurate and, you
23 know, looked at how it's performing. But as far as I
24 know and based on our review of the DSEIS, there's no
25 other prediction of when the cooling canal system

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1 salinities will reach 34 PSU. The only one I'm aware
2 of and our modeling expert was aware of was in 2014.
3 And I have nothing further.

4 JUDGE HAWKENS: Thank you.

5 JUDGE KENNEDY: Mr. Turk, this morning you
6 pointed us to five Tetra Tech reports that's
7 referenced in the SEIS, draft SEIS. I guess what
8 we're understanding now is these models have different
9 applications, so, for example, the 2014 may be
10 applicable to the salinity content of the CCS and the
11 2016 model may be relevant to the remediation of the
12 plume. Is there any place where all of this modeling
13 is drawn together in the SEIS to support both
14 conclusions, or are we stuck with -- and what do I do
15 with the other three Tetra Tech reports? What do I --

16 MR. TURK: Well, Your Honor, they're all
17 referenced in the body of the draft SEIS.

18 JUDGE KENNEDY: At various places.

19 MR. TURK: Yes. So each of these
20 references is designated with a unique number. For
21 instance, the 2014 report, there are two reports. One
22 is designated 2014 A, which is a technical memorandum
23 dated May 9, 2014 regarding evaluation of required
24 Floridan water for salinity reduction in the CCS.
25 2014 B is evaluation of the draw down in the upper

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1 Floridan Aquifer due to proposed salinity reduction-
2 based withdrawals. I think it's probably the 2014 B
3 report that is discussed in the DSEIS, but I'd have to
4 look there to verify. Mr. Folk is nodding his
5 agreement.

6 So in the DSEIS, when you see a Tetra Tech
7 report referenced, they'll give you that unique
8 designation. You can go to page 6-31 and see which of
9 those reports it is, and then you can go to the ML
10 number that's listed for that report and find the
11 details.

12 JUDGE KENNEDY: So by tracing the
13 references, I can understand the context in which each
14 of the reports are used?

15 MR. TURK: Yes.

16 JUDGE KENNEDY: Okay. That's really what
17 I would, that's a better way to say it.

18 MR. TURK: Thank you.

19 MR. O'NEILL: Your Honor, I would confirm
20 that I actually did go to some of those references and
21 was able to pull reports through the state's website.
22 The ones that didn't have accession numbers, they were
23 accessible through a portal. I can't recall right now
24 if it was South Florida Water Management District or
25 the FDEP, but I was able to pull the reports.

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1 MR. TURK: Thank you. The 2016 report, I
2 think this is what Mr. O'Neill just referred to, but
3 the 2016 report is a groundwater flow and salt
4 transport model of the Biscayne Aquifer dated June 13,
5 2016 and the draft SEIS gives the website where that
6 can be found, rather than an MLS number, I'm sorry,
7 rather than an ML number.

8 JUDGE ABREU: So it is correct or is it
9 correct that, even though these are all called Tetra
10 Tech models, it's just because they're done by Tetra
11 Tech but they are sometimes completely different
12 models?

13 MR. O'NEILL: Yes, that's correct.

14 JUDGE ABREU: And I think that may be
15 adding to some of the confusion because some people
16 might think it's a Tetra Tech model, and it's like,
17 wait a minute, they're doing different things. Just
18 because that's just one company who does stuff, but
19 they do lots of different modeling.

20 MR. O'NEILL: Yes, that's correct. And,
21 again, just to be clear, one of the models is a water
22 and salt balance model, kind of a spreadsheet-based
23 model, although fairly complex, that looks at, you
24 know, precipitation, water levels, and salinity within
25 the CCS, seepage in and out, you know. It's kind of

1 a mass balance type of model. And then the other
2 model, it's called a variable, I think, 3D solute
3 transport model. That's kind of the plume retraction
4 model, so you're looking at how the plume is behaving
5 within the upper Biscayne Aquifer with the hypersaline
6 plume.

7 JUDGE HAWKENS: Let's move to Contention
8 8-E. Mr. Rumelt, and I believe our attention is our
9 directed on Ms. Smith for the first bullet.

10 MS. SMITH: Yes.

11 JUDGE HAWKENS: You may proceed.

12 MS. SMITH: Thank you. May it please the
13 Board, Contention 8-E states that the draft
14 supplemental EIS fails to take the requisite hard look
15 at cumulative impacts on water resources. The first
16 question this Board had was whether this contention
17 raises a Category 1 issue. It does not.

18 According to Appendix B to Subpart A of
19 Part 51 of the regulations, cumulative impacts are a
20 Category 2 issue. The provided reasoning is that
21 cumulative impacts necessarily depend on region-
22 specific impacts and considerations. Additionally,
23 the generic EIS here identifies cumulative impacts as
24 a Category 2 consideration, and that's at page 4-244
25 through 245.

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1 Further, the draft supplemental EIS itself
2 addresses the cumulative impacts on groundwater
3 resources in Section 4.16.2.1 using site-specific
4 information. This distinguishes this contention from
5 SACE's, S-A-C-E, contentions that this Board rejected
6 in its March 7th, 2019 order. In that instance, the
7 applicant had only relied on the generic EIS in his
8 environmental report at the time those contentions
9 were brought.

10 In contrast here, the staff has analyzed
11 cumulative impacts as a Category 2 issue by applying
12 site-specific analysis in the DSEIS, rather than
13 simply relying on the generic EIS. Further, even if
14 cumulative impacts analysis implicates traditionally
15 Category 1 considerations, the staff opened the door
16 to those issues by analyzing them with site-specific
17 information. Therefore, Contention 8-E raises only
18 Category 2 issues and is appropriate for this hearing.

19 If there's no questions, I'll turn it over
20 to Attorney Rumelt for the second bullet point.

21 JUDGE HAWKENS: Thank you very much.

22 MS. SMITH: Thank you.

23 MR. RUMELT: The second bullet point asks
24 whether this contention presents a timeliness issue,
25 and I think there's two points on that. One is that

1 we submitted the contention in accordance with the
2 Board's scheduling order which authorized the filing
3 of new intentions based on the DSEIS in our review of
4 the DSEIS. We've indicated and shown throughout the
5 day today that the information that we're addressing
6 is conclusions and analysis that the staff has made.
7 And, therefore, to the extent there's a timeliness
8 issue, you know, we're not really seeing it.

9 JUDGE HAWKENS: And it's your position the
10 analysis and the conclusions in the DSEIS are
11 different than those that were in the ER?

12 MR. RUMELT: That's correct. That's all
13 I have.

14 JUDGE HAWKENS: All right. Thank you.
15 Mr. Turk?

16 MR. TURK: Thank you, Your Honor. So
17 cumulative impacts is addressed in the staff's draft
18 SEIS in Section 4.16.2. With respect to groundwater
19 resources, it's in 4.16.2.1 commencing at page 4-114.

20 First, coming to the question of
21 timeliness, there is a timeliness issue here. The
22 intervenors rely upon the Fourqurean report, I
23 believe, and possibly others. Much of that
24 information was available at the time that the ER was
25 published and contentions could have been raised

1 regarding the cumulative impacts discussion in the ER.

2 The contention does not identify how the
3 DSEIS differs from the ER such that the issue would
4 now be timely because it's new information that was
5 not addressed in the ER and does not explain why the
6 information that they rely upon could not have been
7 used to challenge the ER even if they say that there
8 was an omission in the ER. That information could
9 have been used to file a contention addressing the
10 omission.

11 The Board has asked whether this
12 contention raises a Category 1 issue. The staff's
13 view is it does not. It is a Category 2 site-specific
14 issue, so there's no barrier on that ground to the
15 intervenors raising this contention.

16 And in all other respects, I would rely
17 upon our response to the contention, Your Honor.

18 JUDGE HAWKENS: Thank you, Mr. Turk. Mr.
19 O'Neill?

20 MR. O'NEILL: Thank you, Your Honor. FPL
21 certainly doesn't dispute that the issue of cumulative
22 impacts is a Category 2 issue, as listed in Table B-1
23 in Part 51. I think, however, as we explained in our
24 answer, pages 41 to 43, we don't view the contention
25 as actually challenging the adequacy of the cumulative

1 impacts discussion in the DSEIS. You know, from our
2 perspective, this contention, like Contentions 6 and
3 7, which intervenors essentially incorporate by
4 reference or at least the bases therefore, really goes
5 to the issue of the nonradiological groundwater-
6 related impacts and the effectiveness of FPL's
7 mitigation measures, which are clearly Category 1
8 issues but, essentially, the same type of issue that
9 was raised in Contention 7. In fact, they claim to
10 challenge the staff's conclusions of Section 4.16.2.1
11 of the DSEIS concerning cumulative impacts, but do so
12 on the ground that they, quote, unquote, rely on the
13 success of applicant's remediation and freshening
14 efforts.

15 Again, as we pointed out at the outset of
16 this proceeding, SACE raised a very similar, one of
17 the other intervenors in the proceeding which has
18 since withdrawn raised a very similar issue that we
19 don't view as distinguishable, and the Board, you
20 know, rejected that aspect of their contention. On
21 pages 37 to 38 of LBP-19-3, the Board noted that the
22 ER's conclusion, and I would say like the DSEIS's
23 conclusion now, that cumulative impacts will be small
24 as based on the mitigation measures imposed by FDEP in
25 its consent order and by the DERM consent agreement.

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1 As a result, the Board found there was no genuine
2 dispute with ER's conclusion that cumulative
3 environmental impacts of the CCS will be small because
4 FPL will comply with its current permit.

5 So we see very significant parallels
6 between the two contentions, the SACE contention and
7 this one here. And I think it also kind of begs the
8 question, you know, why couldn't this issue have been
9 raised at the outset of the proceeding, given their
10 focus on, you know, the groundwater issues and the
11 adequacy of the state and county-required mitigation
12 measures?

13 And from our perspective, again, we'd
14 emphasize that the staff did an adequate job of
15 looking at cumulative impacts on water resources.
16 DSEIS Sections 3.522, 4.512, and 4.621 document the
17 staff's review of available groundwater modeling
18 information, they discuss the hypersaline plume
19 retraction system, and the staff recognized that FPL
20 may continue to operate the freshening well system,
21 you know, as long as necessary to maintain compliance
22 with state and county requirements. The staff noted
23 that FPL is required to report on the success of its
24 mitigation measures and develop other measures, if
25 necessary, to achieve the stated goals.

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1 So we think that the staff has adequately
2 addressed cumulative impacts anyhow, assuming that's
3 what intervenors are actually challenging in the
4 contention. That's it, Your Honor. Thank you.

5 JUDGE HAWKENS: All right. Thank you.

6 MR. RUMELT: Your Honors, I'd like to
7 address the Board's last order in this case first.
8 They reference that the Board stated that the SACE's
9 contention was outside the scope because it was
10 addressing a Category 1 issue.

11 With respect, we've looked at the
12 citations to the Board's order in that sentence, and
13 it referenced briefs by the staff and by FPL. And
14 when we looked at those briefs, we really didn't see,
15 one, that that argument had been raised. I think
16 that's reflected in the staff's comments today. And
17 we didn't understand it from FPL's brief that they had
18 raised that issue either.

19 And we searched for also other decisions
20 that had come to the same conclusion where we kind of
21 see this intersection of cumulative impacts and
22 potentially a Category 1 issue. And as a result of
23 that, we, again, with respect, believe that the
24 Category 2 designation by the rule and in
25 consideration of the staff's site-specific work on the

1 groundwater quality issue in this matter really do
2 elevate it to a Category 2 issue.

3 All of the issues that we've been talking
4 about today with respect to groundwater, including
5 those that will have cumulative impacts over time, are
6 very much site specific. The reason cumulative
7 impacts, as Ms. Smith said earlier, are dealt with on
8 a Category 2 site-specific basis is there are
9 differences in what's happening at any particular
10 plant over time.

11 With that in mind, again, with respect,
12 you know, we agree with the staff that this really
13 only does present a Category 2 issue and not a
14 Category 1 issue.

15 With regard to timeliness, we're again at
16 that point where our contentions were raised in
17 connection with the conclusions and the analysis that
18 the staff did in this DSEIS. So in our motion for new
19 and amended contentions, we cite the problem in the
20 staff's cumulative impacts analysis, which, again,
21 does relate to this continued oversight of the
22 hypersaline plume issue. We state the NRC staff
23 expects the continued operation of the freshening
24 system combined with proper operation and maintenance
25 of the cooling canal system will result in no

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1 substantial contribution to cumulative impacts on
2 groundwater quality or associated impacts on service
3 water in Biscayne Bay during the subsequent license
4 renewal period. That's the focus of our contention.

5 And, again, it all stems from the very
6 similar or basically the same core set of facts. Had
7 they taken a hard look at the impacts of this cooling
8 canal system and the oversight and, you know, all this
9 confusion over the different models, in our position,
10 supported by expert opinions, which, again, they're in
11 the report and they're all focused on these issues
12 that we presented. We didn't submit anything that was
13 extraneous. With respect to any of our contentions,
14 we don't understand, frankly, the confusion that is
15 apparent from some of the testimony today. But all of
16 that evidence goes to, at least in terms of the
17 cumulative impacts analysis, this conclusion.

18 JUDGE ABREU: Mr. Turk, in 4.16.2.1, there
19 are, they talk about a bunch of conditions and
20 scenarios, like, for some, the EIS states that there's
21 potential for measurable impact and then other places
22 says beneficial cumulative impacts. Can you point to
23 where the overall determination of the cumulative
24 environmental impact on water resources is stated,
25 where it is said, you know, small, moderate, large, or

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1 something similar?

2 MR. TURK: Just one moment, Your Honor.

3 JUDGE ABREU: And if you want to put that
4 aside for later to keep things moving, I don't mind.

5 MR. TURK: No, I'd assume that, if nowhere
6 else, the table, Table 2-2, should state the impact
7 finding. I haven't looked at it recently.

8 JUDGE ABREU: But regardless of the table,
9 what about in the text where the reasoning is laid out
10 to show us that there is a connection, to show us that
11 linkage between the reasoning and the determination?
12 Is it in there or is the table the only thing?

13 MR. TURK: Actually, I'm not even sure I
14 see it in the table. And I'm informed that, for
15 cumulative impacts, we don't make that kind of a
16 determination and that the instruction on how to
17 proceed with cumulative impacts is stated in the GEIS
18 and I'm informed that the GEIS says that we should not
19 use the designation of small, moderate, or large.

20 JUDGE ABREU: Okay. So that would explain
21 why there isn't one of those.

22 MR. TURK: Yes, but I can't say that with
23 personal knowledge at this time. That's information
24 that I have.

25 JUDGE ABREU: All right. So if one is

1 trying to look at the determination, how would someone
2 reading the EIS, in this case DSEIS, know what that
3 determination is?

4 MR. TURK: Could I have just one moment?

5 JUDGE ABREU: Sure.

6 MR. TURK: I'd like to look at the GEIS
7 and get the instruction from there. And, Your Honor,
8 we're looking for that reference now.

9 JUDGE ABREU: Okay.

10 MR. TURK: In the meantime, I'd like to
11 make a comment, if I may, in terms of why I said that
12 cumulative impacts are a Category 2 issue. That is
13 correct, but that doesn't mean that an intervenor can
14 raise a Category 1 issue within the context of a
15 cumulative impact challenge and, thereby, be able to
16 litigate what has already been determined generically
17 to be a Category 1 impact of small consequence.

18 So true cumulative impacts is site-
19 specific. It has many different components. To the
20 extent that a Category 1 issue is subsumed within all
21 of the different impacts that are looked at, that
22 particular resource area impact must be treated as a
23 Category 1. Everything else could be litigated but
24 not the Category 1 determination.

25 JUDGE HAWKENS: With that understanding,

1 it's still the NRC staff's position that this
2 particular contention, 8-E, is not barred as a
3 contention as a Category 1 issue?

4 MR. TURK: That's how I look at it, Your
5 Honor. But, you know, a portion of it would be barred
6 to the extent that they challenge the groundwater
7 determination, groundwater quality degradation issue,
8 which is Category 1 in the GEIS. That cannot be
9 challenged. That just has to be accepted as part of
10 the overall litigation of the contention. Other parts
11 of the contention might involve climate change or --

12 JUDGE HAWKENS: Well, this contention is
13 just dealing with water resources, though.

14 MR. TURK: Okay. And we'll get you that
15 reference to the GEIS, but, if you don't mind, I'll
16 take one more moment. At pages 4116 to 4117, there's
17 a summary of water quality considerations. There's a
18 paragraph that begins at the bottom of 4-116 that
19 talks about FPL's recovery well system being projected
20 to be successful in retracting the hypersaline plume
21 towards the boundaries of the CCS within ten years of
22 startup by 2028. It goes on to talk about beneficial
23 impacts to the aquifer. The staff makes a finding
24 that is reasonable to expect that FPL's freshening
25 well system would continue to be operated during the

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1 SLR term and for as long as necessary to maintain
2 compliance with the terms of the consent agreement and
3 consent order.

4 And this is on page 4-117, the staff finds
5 that continued operation -- I'm sorry. The staff
6 expects that continued operation of the freshening
7 system combined with proper operation and maintenance
8 of the CCS will result in no substantial contribution
9 to cumulative impacts on groundwater quality or
10 associated impacts on surface water quality in
11 Biscayne Bay during the subsequent license renewal
12 period. So I think that's the ultimate finding that,
13 Your Honor, Judge Abreu, we're looking for, although
14 it's not couched in terms of small, moderate, or
15 large. It's essentially the equivalent of small
16 impact.

17 JUDGE ABREU: Okay.

18 JUDGE HAWKENS: As joint intervenor, I
19 want to give you the opportunity if you have any
20 response or rebuttal to what Mr. Turk just said, Mr.
21 Rumelt.

22 MR. RUMELT: With respect to the Category
23 1 treatment of certain aspects of Category 2
24 cumulative impacts, we don't see that reflected in the
25 regulation. It makes no distinction based on the

1 various resources that are involved in a cumulative
2 impacts analysis.

3 In addition, with respect to our
4 particular contention, we've raised issues related to
5 ostensibly Category 1 issues. We're not conceding
6 that, groundwater quality. But also the new issue
7 that the staff has identified, which is surface water
8 impacts by the groundwater pathway, which is neither
9 a Category 1 nor Category 2.

10 Mr. Turk referenced a sentence from the
11 DSEIS at 4-117. The NRC staff finds that it's
12 reasonable to expect that FPL's freshening well system
13 will continue to be operated during the SLR renewal
14 term and for as long as necessary to maintain
15 compliance. You know, I think this goes to the issue
16 of how long this effort is going to, you know, be
17 maintained. And so, you know, to the extent that we
18 have to look out into the future, this certainly
19 suggests that those impacts and those issues will
20 continue not just through the time that exists between
21 now and 2032 or 2033 but also through the entire
22 subsequent license renewal period.

23 JUDGE HAWKENS: All right. Thank you.
24 We're approaching the goal line. This is number seven
25 of seven contentions or, excuse me, of seven issues,

1 Contention 9-E. Mr. Rumelt, we'll reserve three
2 minutes for rebuttal, and you may proceed.

3 MR. RUMELT: I'll probably reserve more
4 than that because I believe we really addressed this
5 issue about modeling the retraction of the hypersaline
6 plume and the freshening effort of the CCS, and I
7 believe that the parties have addressed both the
8 issues in the first bullet point and, at least for the
9 most part, the second bullet point.

10 As I look at the second bullet point, it
11 asks does the failure to consider the impact to
12 groundwater use conflicts if the groundwater
13 withdrawal rates exceed the current level, does that
14 render the DSEIS analysis inadequate? And, certainly,
15 based on our position and the expert reports that
16 we've provided, which indicate that freshening isn't
17 going to work and additional efforts are going to be
18 necessary, our experts have opined that, whatever
19 additional measures are taken, that would require
20 additional analysis. And with the recognition that
21 more work is, again, in our position, will be needed
22 to address salinity issues, the analysis and the DSEIS
23 is inadequate.

24 And I reserve the rest of my time for
25 rebuttal.

1 JUDGE HAWKENS: Very well. Mr. Turk, you
2 may proceed on this final issue.

3 MR. TURK: Thank you, Your Honor.
4 Contention 9-E is somewhat different from the other
5 contentions pleaded by the joint intervenors. For the
6 first time, there is specific reference to a report,
7 and that is the report by Dr. Wexler, and the staff,
8 because of that, addressed Dr. Wexler's report in our
9 response. We couldn't do that with respect the other
10 contentions. So here they've at least made their
11 reliance on a report explicit and we could address it.

12 We also point out, however, in our
13 response at page 47 through 49 that we don't feel that
14 Dr. Wexler's report provides sufficient support for
15 the admission of the contention. Essentially, he does
16 not, as I read the report, he does not disagree with
17 the evidence that FPL relies upon, he just reaches a
18 different conclusion. And we believe that's not
19 sufficient to admit the contention. It's simply his
20 prediction based on the same facts.

21 There's nothing that we can see in the
22 contention where there's a specific challenge to the
23 DSEIS. It's just that he reaches a different
24 conclusion. So in that regard, we don't see that
25 there's a general dispute of material fact, which is

1 necessary under 10 CFR 2.309(f)(2)(vi).

2 JUDGE KENNEDY: So, Mr. Turk, in the draft
3 SEIS, when the staff is considering groundwater use
4 conflicts, the level of withdrawal rates, how did they
5 relate to the permitted level of withdrawal rates?

6 MR. TURK: The model, I believe we're
7 talking about the 2016 model, assumes the maximum
8 permitted level of withdrawal, which is a 14 million
9 gallons per day withdrawal.

10 JUDGE KENNEDY: Okay. So if Mr. Wexler
11 was correct, you would have to go above the permitted
12 withdrawal rate? I mean, if he's drawing a different
13 conclusion, he's saying -- maybe I'm misunderstanding.
14 Is he saying you need to withdraw more water or
15 there's a greater impact for the same withdrawal of
16 water?

17 MR. TURK: I'm not sure if he
18 distinguishes between the maximum permitted rate and
19 the actual current rate of withdrawal. So I have to
20 say I don't know whether he's assuming the 14 million
21 gallons per day or if he's using the 13 million, but
22 I believe his conclusion is that whatever number he's
23 looking at is not enough to achieve the result and,
24 therefore, you would have to withdraw more.

25 JUDGE KENNEDY: Not that he gets a bigger

1 impact for the same number in terms of use conflicts?

2 MR. TURK: That's my understanding.

3 JUDGE KENNEDY: Okay. Do you concur?

4 MR. RUMELT: Well, Mr. Wexler's analysis
5 was different. He also used his own model. He
6 evaluated the models that were used and relied on by
7 FPL and the staff. And to the extent that it's just
8 two people looking at exactly the same thing and one
9 reads the output differently than the other, that's
10 not the case. We have what this process is about: a
11 genuine dispute. Anything that Mr. Wexler looked at
12 that he did not have any disagreement on are things
13 that are fundamental facts, things like there's a
14 canal system, there's a hypersalinity problem. We've
15 addressed this in our brief.

16 So there's got to be agreement on some set
17 of facts, but where they diverge is Dr. Wexler's
18 analysis or Mr. Wexler's analysis, excuse me, shows
19 that the system is not going to work, the freshening
20 effort is not going to work, and that the hypersaline
21 plume isn't going to be retracted. They say
22 otherwise.

23 JUDGE ABREU: Do you believe Mr. Wexler's
24 disagreement is more with the model or more with the
25 assumptions or a combination of the two?

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1 MR. RUMELT: A combination of the two.
2 Mr. Wexler points out that one of the problems with,
3 and this is the 2016 Tetra Tech model regarding the
4 hypersaline plume retraction, is that the Tetra Tech
5 modelers assumed salinity would be 34 PSU in the canal
6 system, which is an assumption that everything is
7 going to work in terms of freshening the canals. So
8 they disagree. He states that that is not a fair
9 assumption based on the information that we have.
10 Does that answer your question, Your Honor?

11 JUDGE KENNEDY: I guess this is about
12 groundwater use conflicts, so we are trying to address
13 the impact of the groundwater on other users; is that
14 not true?

15 MR. RUMELT: That is true.

16 JUDGE KENNEDY: And if the staff did their
17 evaluation at the maximum permitted withdrawal rate,
18 I'm not sure where we go with this. I understand
19 there's a disagreement. I mean, I guess I'd be more
20 interested in understanding if Mr. Wexler is
21 disagreeing with the results that the staff came up
22 with in terms of groundwater use conflicts as opposed
23 to whether we're going to remediate this plume, which
24 is a subject of all the other contentions.

25 MR. RUMELT: Your Honor, it is, the issue

1 of groundwater use conflicts is directly related to
2 how much water is being removed in order to freshen
3 the canal system, and that's also related to the
4 hypersaline plume issue because the plume, if the
5 plume is not managed, it will move further and have
6 greater impacts.

7 And as far as groundwater use conflicts,
8 if you're removing more water, which our expert says
9 is going to need to happen, then that will have
10 further draw down on nearby wells. You know, the
11 staff's analysis and FPL's modeling analysis
12 identified some level of draw down of the water table
13 as a result of the freshening effort, and we're saying
14 simply if you need to draw more water it's going to
15 lower the water levels and create more conflicts.

16 JUDGE KENNEDY: I guess I'm not sure where
17 we go from here because, if they're using the maximum
18 withdrawal rates, they really can't go beyond that.

19 MR. RUMELT: Well, as we've seen in the
20 briefing, I forget which party it is, the staff says
21 that the county can authorize additional groundwater
22 withdrawals. Hang on. So I'm looking at page 49 of
23 the staff's brief. Joint intervenors have provided,
24 the joint intervenors have provided no reason to
25 believe that the state, and it looks like there was a

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1 typo, and would refrain from modifying current
2 requirements affecting the volumes of waters currently
3 being used in the location selected for adding water,
4 if necessary, to accomplish the desired goals prior to
5 the start of the SLR period of extended operation, so
6 on and so forth.

7 So, you know, this is a situation that the
8 staff has said, you know, there's nothing to suggest
9 that they wouldn't increase the volumes of water
10 currently being used, so that's where I'm left.

11 JUDGE KENNEDY: Mr. Turk, could you shed
12 any light on what Mr. Rumelt is, I guess it's page 49
13 of your answer. I mean, he sounds like there's a
14 suggestion that the withdrawal rate could go above the
15 values that you used in the groundwater use conflicts
16 analysis.

17 MR. TURK: Just a moment, Your Honor. I
18 don't think we suggested that that's something that
19 would happen. I think what we said is that there's no
20 reason to think that the regulatory authorities
21 wouldn't increase that level if they felt it was
22 necessary. We're not predicting that that's going to
23 happen or that it's necessary to happen.

24 Regardless, if the state was to allow
25 additional or order additional withdrawals, that would

1 have to go through a permitting process within the
2 state. And at this point, the permit only has a
3 certain authorized level of withdrawal which has to be
4 abided by, unless some other limit is decided by the
5 state.

6 JUDGE KENNEDY: What does it do to their
7 conclusions in the DSEIS if you open the door that we
8 use this number but, of course, it could be different?

9 MR. TURK: Because the SEIS relies upon a
10 reasonable determination that the current facts
11 support the conclusion that is reached, there is no
12 door that opens to what happens if you're wrong. That
13 would be speculative and beyond the state of current
14 knowledge or reason to expect that to be a reasonably
15 foreseeable occurrence.

16 JUDGE KENNEDY: So we shouldn't read into
17 your answer that the door is open, just that it's
18 what? It's a possibility? It's an unlikely --

19 MR. TURK: If, in the future, the
20 intervenors are proven correct, then the state could
21 address it then. But based on all available evidence,
22 there's no reason to go there and we don't go there
23 because the current facts and analyses support the
24 conclusion in the SEIS.

25 JUDGE KENNEDY: Thank you.

1 MR. RUMELT: Your Honor, if I may, it
2 seems somewhat contradictory to suggest that our
3 expert, you know, provided unhelpful opinions because
4 he didn't address the possibility of the state
5 modifying current requirements and to now to say,
6 well, that's not really an issue. So it seems like
7 we're having a 180 of an opinion compared to what was
8 in the staff's answer.

9 JUDGE HAWKENS: Mr. Turk, did you have
10 anything more to add?

11 MR. TURK: Well, I disagree with the
12 characterization. I think --

13 JUDGE HAWKENS: No, I understand.

14 MR. TURK: I think we were clear that
15 we're dealing with the current facts and analyses.

16 JUDGE HAWKENS: Right.

17 MR. TURK: No, nothing else, Your Honor.

18 JUDGE HAWKENS: All right. Mr. O'Neill?

19 MR. O'NEILL: Thank you, Your Honor.
20 Well, just listening to joint intervenors' arguments,
21 right now it really strikes me as speculation built
22 upon speculation upon speculation. I mean, there's
23 kind of an assumption that the salinity levels in the
24 cooling canal system won't be reduced in accordance
25 with the consent order, that that, in turn, is going

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1 to impact FPL's ability to retract hypersaline plume
2 through the recovery well system --

3 JUDGE HAWKENS: That's a theme underlying
4 several of these contentions.

5 MR. O'NEILL: Yes. Which, in turn, is
6 going to require, you know, increased pumping or water
7 withdrawal rates from the upper Biscayne Aquifer. And
8 that, in turn, if approved, would have adverse impacts
9 on other groundwater users. So, to me, that's
10 entirely inconsistent with NEPA's rule of reason which
11 requires the staff and the applicant to look at
12 reasonably foreseeable impacts and to make an
13 estimate, you know, based on the best available
14 information, not unduly speculative scenarios.

15 And I think Judge Kennedy's point
16 resonated with me quite a bit. I mean, FPL, by law,
17 can't exceed the current permitted levels in terms of
18 water withdrawals. The hypersaline plume redaction
19 model, that assumes or does not assume that they would
20 exceed the permitted pumping rates. In fact, I think,
21 as the staff explains in the draft SEIS, the current
22 permitted level actually slightly bounds the maximum
23 or optimal capacity, pumping capacity of the
24 retraction system. So it certainly would be pointless
25 and frivolous to try to model groundwater or

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1 remediation activities assuming water rates that
2 exceed those of the system itself, as well as the
3 permit.

4 And one other point Judge Kennedy made is,
5 you know, ultimately, the contention is, at least
6 nominally, about groundwater use conflicts and whether
7 the staff took a hard look at those, and FPL believes
8 that it does. And looking at the draft SEIS, it's on
9 pages 4-28 through 4-33 of the draft SEIS, the staff
10 provides a very detailed discussion of groundwater use
11 conflict issues. They address, among other things,
12 FPL-specific water withdrawal rates past, present, and
13 projected, the relevant state permits and
14 authorizations governing those groundwater
15 withdrawals, FPL's legal obligations under its various
16 permits and authorizations, including withdrawal
17 allocations and mitigative actions to avoid harm and
18 other groundwater users, as well as the specific
19 modeling and confirmatory evaluations that were
20 performed by FPL and state regulators to support
21 issuance of the permits.

22 So it's a fairly detailed discussion, you
23 know, probably spanning about six pages or so in the
24 DSEIS, and it ultimately explains, I think, very
25 clearly the bases for the staff's related

1 environmental impact findings, both with respect to
2 the Biscayne Aquifer, as well as the upper Floridan
3 Aquifer. The staff explains, in discussing the
4 Biscayne Aquifer, the water use permit issued by the
5 South Florida Water Management District for operation
6 of the recovery well system, again, bounds of
7 production capacity, and it requires FPL to mitigate
8 interference with existing legal uses of groundwater
9 and mitigate harm to natural resources.

10 Similarly, with respect to the upper
11 Floridan Aquifer, the modified site certification and
12 associated conditions of certification for the Turkey
13 Point site require FPL to mitigate harm to offsite
14 groundwater users, among other things. And the staff
15 also mentions in Section 4.512 that they evaluated
16 groundwater draw-down analysis, another model,
17 entirely separate model, which assumed that FPL's
18 freshening wells would operate at maximum permitted
19 rates and combined with other existing permitted
20 withdrawals, you know, based on the best available
21 information.

22 So in a nutshell, I think there's an
23 extremely detailed discussion in the DSEIS that is
24 based on the best available information at this time.
25 And I think it's reasonable for FPL and the staff, you

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1 know, not to assume that groundwater or permitted
2 groundwater withdrawal rates will necessarily be
3 exceeded. There's just clearly no proof that that's
4 going to be necessary at this point in time. It would
5 be speculative.

6 And then I think a point we made in our
7 answer is if that ultimately proved to be necessary,
8 you know, it would be subject to review and approval
9 by the relevant state authorities, the Department of
10 Environmental Protection and the Water Management
11 District. Yes, and I guess related to that, I guess
12 any appropriate remedy for somebody concerned about
13 groundwater use conflicts would be, you know, in those
14 state fora, you know, through the state processes for
15 permitting groundwater withdrawals.

16 I have nothing further, Your Honor.

17 JUDGE HAWKENS: Thank you. Mr. Rumelt?

18 MR. RUMELT: You know, as far as
19 speculation, comments about speculation, it's not
20 speculation on behalf of, on the intervenors' part
21 based on Mr. Wexler's report that the current system
22 is not working and won't work in the future. And
23 because of that, there has to be some way to bring the
24 salinity down, and I'm unaware of any way to do that
25 other than adding water. Maybe there are others, but

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1 that seems to be the way it's done.

2 And it wasn't speculation when the company
3 modeled how much water would be necessary to pump in
4 to the canal system to reduce the salinity to 34 PSU
5 and then use that as a basis for determining what the
6 draw down on nearby groundwater users would be. So
7 we're in the same situation.

8 The only thing we don't have now, the only
9 thing that's different is that no one has said from a
10 regulator's perspective that, you know, that they
11 haven't met the 34 PSU. You can come up with a plan
12 now. They've got some more time to do that. And,
13 again, we dispute that it's even possible under this,
14 under the current efforts. But when they come back,
15 and we believe they will have to come back with
16 another plan, there will need to be an evaluation of
17 those environmental impacts, which are most likely
18 going to require additional water.

19 And if there are no further questions --

20 JUDGE HAWKENS: Thank you for your written
21 submission and your presentations today. To all the
22 counsel, to Ms. Smith, thank you for your
23 participation in today's proceeding. We appreciate
24 that.

25 Any questions or concerns counsel wish to

1 raise before we adjourn? Andrew, are you going to
2 require any information after we adjourn? All right.
3 The record so reflects. Please help out the court
4 reporter after we adjourn.

5 The case is submitted, and we are
6 adjourned now. Thank you.

7 (Whereupon, the above-entitled matter went
8 off the record at 3:13 p.m.)
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