

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before the Licensing Board:

E. Roy Hawkens, Chair
Dr. Michael F. Kennedy
Dr. William C. Burnett

In the Matter of)
Florida Power & Light Company) Docket Nos. 52-040 and 52-041
Turkey Point, Units 6 and 7) ASLBP No. 10-903-02-COL-BD01
) April 13, 2015
)

**JOINT INTERVENORS' MOTION FOR LEAVE TO FILE A NEW CONTENTION
CONCERNING THE NRC'S RELIANCE ON SPECULATIVE MITIGATION
MEASURES AND FAILURE TO ADEQUATELY EXAMINE THE EFFECTIVENESS
OF THESE PROPOSED MITIGATION MEASURES IN THE DRAFT
ENVIRONMENTAL IMPACT STATEMENT FOR THE TURKEY POINT NUCLEAR
POWER PLANT UNITS 6 & 7**

I. INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.309(f)(1) and 2.309(f)(2), Southern Alliance for Clean Energy, National Parks Conservation Association, Dan Kipnis, and Mark Oncavage (collectively, “Joint Intervenors”) seek leave to file a new contention which challenges the Nuclear Regulatory Commission (“NRC” or “Commission”) staff’s recommendation to the Commission that the combined license (“COL”) for Turkey Point Units 6 & 7 be issued as proposed, based on “potential” mitigation measures identified in the Draft Environmental Impact Statement (“DEIS”). These “potential” mitigation measures are speculative and the DEIS does

not adequately examine the effectiveness of these potential measures as required under the National Environmental Policy Act (“NEPA”).

II. FACTUAL BACKGROUND

FPL proposes to construct, operate, and maintain two new nuclear reactors (“Units 6 & 7”) at the existing Turkey Point plant. FPL is seeking combined licenses from the NRC for these two new reactors. The NRC recently issued a DEIS for the proposed COL. The U.S. Army Corps of Engineers (“Corps” or “USACE”) is a cooperating agency on the EIS pursuant to a Memorandum of Understanding. The stated goal of the cooperative agreement is to “develop one EIS that provides all of the environmental information and analyses needed by the NRC to make a license decision and to provide information needed by the USACE to perform analyses, draw conclusions, and make a permit decision in its Record of Decision documentation” under section 404 of the Clean Water Act. DEIS at 4-1. The DEIS assigns an impact determination to each affected resource, rejects other project alternatives, and recommends that a COL be issued.

III. CONTENTION

A. Statement of the Contention

The DEIS for Turkey Point Units 6 & 7 does not comply with NEPA because its determination of the project’s environmental impacts, rejection of other project alternatives, and staff’s recommendation that the COL be issued, are based on impermissibly speculative mitigation measures, the effectiveness of which have not been adequately evaluated.

B. The Contention Satisfies the NRC’s Admissibility Requirements in 10 C.F.R. § 2.309(f)(1)

1. Brief Summary of the Basis for the Contention

“Implicit in NEPA’s demand that an agency prepare a detailed statement on ‘any adverse

environmental effects which cannot be avoided should the proposal be implemented,’ 42 USC 4332(C)(ii), is an understanding that an EIS will discuss the extent to which adverse effects can be avoided.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351-52 (1989). “[M]itigation [must] be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated.” *Robertson*, 490 U.S. at 352. As federal appellate courts have ruled, “a mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA.” *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998) (quotation marks and citation omitted). An EIS involving mitigation must include a “serious and thorough evaluation of environmental mitigation options.” *O'Reilly v. United States Army Corps of Engineers*, 477 F.3d 225 (5th Cir. 2007)(quoting *Miss. River Basin Alliance v. Westphal*, 230 F.3d 170, 178 (5th Cir. 2000)). Moreover, “[a]n essential component of a reasonably complete mitigation discussion is an assessment of whether the proposed mitigation measures can be effective.” *S. Fork Band Council of W. Shoshone of Nevada v. U.S. Dep't of Interior*, 588 F.3d 718, 727 (9th Cir. 2009).

The DEIS is deficient because it merely lists “potential” and “possible” mitigation measures for terrestrial impacts (including impacts to wetlands) and does not adequately examine the effectiveness of these measures in offsetting the impacts of the proposed project. See DEIS at 4-3, 4-69-4-72. The NRC assigns an impact category level- SMALL, MODERATE, or LARGE- of potential adverse impacts for each resource area. DEIS at 4-3. This determination of the impact category levels “is based on the assumption” that the mitigation measures are implemented. DEIS at 4-3. The “possible mitigation of adverse impacts” is presented in Section 4.11. DEIS at 4-3. A number of “proposed mitigation efforts” are identified including mitigation banks, an in-lieu fee program, or permittee responsible mitigation. DEIS at 10-6. The DEIS,

however, does not adequately evaluate how these programs may or may not offset the expected impacts. In fact, it is not clear what combination or suite of measures will be implemented, considering for example that proposed mitigation options such as the NPS Hole-in-the Donut Mitigation Bank is not a federally approved mitigation bank or in-lieu-fee program for the U.S. Army Corps of Engineers. DEIS at 4-71. In fact, the NRC repeatedly states that the proposed mitigation measures have not even been evaluated by the United States Army Corps of Engineers because the applicant has not been able to demonstrate at this time that wetland impacts have been avoided and minimized pursuant to the Clean Water Act's section 404(b)(1) guidelines.

See DEIS pages 4-69, 4-70, 4-73. The Corps' evaluation of the proposed mitigation is expected to be made as part of the Corps' Record of Decision, which will not be made until after the final EIS has been issued. DEIS at 4-2. Moreover, the NRC notes that the further mitigation for impacts to wetlands and listed species may be required. *See* DEIS at 4-72.

Despite the absence of any real analysis regarding the effectiveness of these "possible" or "proposed" mitigation measures, the DEIS assigns an impact category to terrestrial and wetland ecology impacts and concludes with the NRC staff's preliminary recommendation to the Commission that the COL should be issued based on the "potential mitigation measures" identified in the Environmental Report and the DEIS. DEIS at 10-28.

NEPA requires more. The Court's decision in *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372 (9th Cir. 1998) is instructive. In that case, the Forest Service identified certain proposed mitigation measures to offset the damage of increased sediment in creeks caused by a timber sale. The Forest Service described the mitigation as including "such projects as riparian enclosures (fences around riparian areas to keep cattle out) and fish passage restoration (removing fish passage blockages)." *Id.* at 1380. There was no discussion of which of

the mitigation measures would decrease sedimentation and there was no estimate of how effective the mitigation measures would be if they were adopted or why an estimate was otherwise not possible. *Id.* at 1381. The Court found the Forest Service's analysis insufficient under NEPA. *Id.* at 1380. *Cf. Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 473-74 (9th Cir. 2000) (finding the agency's discussion of mitigating measures adequate where among other things the agency gave an effectiveness rating to each proposed mitigation measure).

Here, the closest the NRC comes to discussing the effectiveness of the proposed wetland mitigation is listing mitigation units calculated by the applicant under the state's Uniform Mitigation Assessment Method ("UMAM") for each of the proposed mitigation measures. But the DEIS does not discuss whether, why, and how these measures will adequately offset the projected wetland loss. There is also no explanation of why the expected 1:1 mitigation ratio is adequate. In fact, the NRC concedes that the Corps has not even reviewed and verified the applicant's proposed measures. Presumably this will occur in the future as part of the Corps' ROD on the applicant's permit application under the Clean Water Act. Agencies cannot rely on untested mitigation measures and bald assertions that mitigation will be successful and adequate. *See Wyoming Outdoor Council v. U.S. Army Corps of Eng'rs*, 351 F.Supp.2d 1232 (D. Wyo. 2005). That the effectiveness of the mitigation measures must be fully evaluated before a final EIS is issued is underscored by the quality and extent of wetlands that will be impacted by this project¹ and the inherent uncertainty of the NRC's "MODERATE to LARGE" impact

¹ See DEIS at 1-1 explaining that FPL's permit application to the U.S. Army Corps of Engineers requests authorization to discharge fill into approximately 1,000 acres of jurisdictional wetlands. One of these wetlands is an area known as "Mud Island," which is a special aquatic site according to the 404(b)(1) Guidelines because it has "special ecological characteristics that significantly influence or positively contribute to the general overall environmental health or vitality of the entire ecosystem of a region." DEIS at 4-6.

determination for terrestrial and wetland ecology impacts.² The DEIS does not contain the “serious and thorough evaluation of environmental mitigation options” that NEPA requires. *O'Reilly*, 477 F.3d 225.

Thus, it is entirely premature and inappropriate for the NRC to issue a DEIS, assign an impacts analysis to each affected resource, reject other project alternatives, and issue a preliminary recommendation that a COL should be issued, before the effectiveness of mitigation measures are evaluated. “[T]he very purpose of NEPA’s requirement that an EIS be prepared for all actions that may significantly affect the environment is to obviate the need for []speculation by insuring that available data is gathered and analyzed prior to the implementation of the proposed action.” *Foundation for N. Am. Wild Sheep v. U.S. Dep’t of Agric.*, 681 F.2d 1172, 1179 (9th Cir. 1982). See also, *Cabinet Res. Group v. U.S. Fish and Wildlife Serv.*, 465 F.Supp.2d 1067, 1100 (D. Mt. 2006) (finding that agency’s failure “to attempt any assessment of the importance of the missing information calls into question the validity of the [agency’s] conclusions about the impacts of the proposed action” and setting aside the EIS).

Given that the U.S. Army Corps of Engineers is a “cooperating agency” and will be relying in large part on this EIS to satisfy its NEPA obligations with respect to whether to issue a permit under section 404 of the Clean Water Act, makes it all the more reason why this analysis needs to be included in the DEIS and not part of some future decision-making process. The NRC cannot delegate its NEPA responsibilities by deferring to the U.S. Army Corps of

² The NRC staff concludes that the overall cumulative impacts on terrestrial resources in the geographic area of interest from past, present, and reasonably foreseeable future actions would be MODERATE to LARGE. “A range is provided because of the review team’s uncertainty about the possible effects from the complex interplay of habitat losses from building proposed Units 6 & 7 facilities; habitat loss and degradation from past, ongoing, and anticipated regional land development; the sensitivity of terrestrial habitats in the region to hydrological changes; the number and distribution of Federally-and State listed species present in the region; the presence of two national parks and numerous other conservation lands in the area, and the uncertainty with respect to success of CERP.” DEIS at 7-21.

Engineers to evaluate the “possible” or “potential” mitigation measures at some later date as part of its separate review process under the Clean Water Act. *See Idaho v. Interstate Commerce Comm’n.*, 35 F.3d 585, 595 (D.C. Cir. 1994) (citing *Calvert Cliff’s Coordinating Comm., Inc. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109, 1122-25 (D.C. Cir. 1971)). *See also, South Fork Band Council v. U.S. Dept. of Interior*, 588 F.3d 718, 726 (9th Cir. 2009) (finding that a non-NEPA document cannot satisfy a federal agency’s obligations under NEPA).

“NEPA emphasizes the importance of coherent and comprehensive up-front environmental analysis to ensure informed decision making to the end that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.” *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989). As the Supreme Court explained in *Robertson v. Methow Valley*, NEPA requires agencies to study the environmental impacts of their decisions so they “will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.” Accordingly, the DEIS must include more than a simple listing of “possible” or “potential” mitigation measures and explain in sufficient detail how mitigation measures will effectively offset the anticipated impacts of the proposed project. To allow the NRC staff to defer to the Corps to evaluate the proposed mitigation until after an FEIS is issued, contravenes the very purpose of NEPA and should be prohibited.

2. The Contention is Within the Scope of the Proceeding

The contention is within the scope of this proceeding because it seeks to ensure that the NRC complies with NEPA before issuing a COL for Turkey Point Units 6 & 7. NEPA mandates that an Environmental Impact Statement must seriously and thoroughly evaluate mitigation

options and the effectiveness of mitigation.

3. The Issues Raised Are Material to the Findings that the NRC Must Make to Support the Action that is Involved in this Proceeding

The issues raised in this contention are material to the findings that NRC must make to support the action that is involved in this proceeding, in that the NRC must render findings pursuant to NEPA covering all potentially significant environmental impacts. Because the impact determinations in the DEIS are based on speculative mitigation measures and the DEIS does not adequately evaluate the effectiveness of the measures to mitigate for wetland and terrestrial impacts, the contention addresses a material omission in NRC staff's environmental review.

4. Concise Statement of Facts of Expert Opinion Support the Contention

The contention is based on the contents of the DEIS, the requirements of the National Environmental Policy Act and federal court decisions regarding the requirements of NEPA.

5. A Genuine Dispute Exists with the Applicant on a Material Issue of Law or Fact

Joint Intervenors have a genuine dispute with the applicant regarding the legal adequacy of the DEIS on which the NRC relies in recommending the issuance of a COL in this proceeding. Unless or until NRC cures the deficiencies identified in this motion, or the applicant withdraws its application, this dispute will remain alive.

IV. THE CONTENTION IS TIMELY PURSUANT TO 10 C.F.R. § 2.309(f)(2)

The contention meets the timeliness requirements of 10 C.F.R. § 2.309(f)(2), which call for a showing that:

- (i) The information upon which the amended or new contention is based was not previously available;
- (ii) The information upon which the amended or new contention is based is

materially different than information previously available; and

(iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

Id.

Joint Intervenors satisfy all three prongs of this test. First, the information on which the contention is based is both new and materially different from previously available information. The contention is based on the recently released DEIS. The contention is timely because it has been submitted by April 13, 2015, the deadline for filing new contentions. *See ASLB Order Granting Citizens Allied for Safe Energy, Inc.'s Motion for Additional Time* (March 25, 2015).

V. CONSULTATION CERTIFICATION PURSUANT TO 10 C.F.R. § 2.323(b)

Joint Intervenors certify that on April 7, 2015, we contacted counsel for the applicant and the NRC staff in an attempt to obtain their consent to this motion. Counsel for the applicant stated that it would oppose this motion. While the NRC staff did not object to the filing of this motion, it stated that it reserves judgment pending the opportunity to review the specifics of the contention.

VI. CONCLUSION

For the reasons stated, Joint Intervenors respectfully request that the Atomic Safety and Licensing Board grant leave to file their contention.

Respectfully submitted this 13th of April, 2015.

/signed electronically by/

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

FLORIDA POWER & LIGHT COMPANY
(Turkey Point Units 6 and 7)

Docket Nos. 52-040-COL and 52-041-COL

CERTIFICATE OF SERVICE

I hereby certify that the **JOINT INTERVENORS' MOTION FOR LEAVE TO FILE A NEW CONTENTION CONCERNING THE NRC'S RELIANCE ON SPECULATIVE MITIGATION MEASURES AND FAILURE TO ADEQUATELY EXAMINE THE EFFECTIVENESS OF THESE PROPOSED MITIGATION MEASURES IN THE DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR THE TURKEY POINT NUCLEAR POWER PLANT UNITS 6 & 7** has been filed through the Electronic Information Exchange system this 13th day of April, 2015.

/signed (electronically) by/
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