

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

E. Roy Hawkens, Chairman
Dr. Michael F. Kennedy
Dr. Sue H. Abreu

In the Matter of

FLORIDA POWER & LIGHT COMPANY

(Turkey Point Nuclear Generating Units 3 and 4)

Docket Nos. 50-250-SLR & 50-251-SLR

ASLBP No. 18-957-01-SLR-BD01

July 8, 2019

MEMORANDUM AND ORDER

(Granting FPL's Motions to Dismiss Joint Intervenors'
Contentions 1-E and 5-E as Moot)

In LBP-19-03, this Licensing Board granted a hearing request from Friends of the Earth, Inc., Natural Resources Defense Council, Inc., and Miami Waterkeeper, Inc. (collectively, Joint Intervenors) and admitted two environmental contentions of omission they proffered challenging Florida Power & Light Company's (FPL's) subsequent license renewal application for Turkey Point Nuclear Generating Units 3 and 4. Thereafter, following the NRC Staff's issuance of the Draft Supplemental Environmental Impact Statement (DSEIS), FPL moved to dismiss the two contentions as moot based on new information in the DSEIS. For the reasons discussed below, we conclude that the new information in the DSEIS has cured the omissions identified in the two contentions, and we grant FPL's motions to dismiss.

I. BACKGROUND

This proceeding concerns the subsequent license renewal application submitted by FPL for two nuclear power reactors, Turkey Point Units 3 and 4, near Homestead, Florida.¹ As relevant here, on March 7, 2019, this Licensing Board granted hearing requests from Joint Intervenors and Southern Alliance for Clean Energy (SACE). See LBP-19-3, 89 NRC ___, ___ (slip op. at 63) (2019). We admitted two contentions of omission proffered by Joint Intervenors — Contentions 1-E and 5-E — alleging that FPL improperly failed to include required information in its Environmental Report (ER). See id. at ___ n.82 (slip op. at 63 n.82).² We also admitted two environmental contentions proffered by SACE. See id. at ___ n.81 (slip op. at 63 n.81).

On April 9, 2019, SACE withdrew from this proceeding as part of a global settlement with FPL. See [SACE's] Notice of Withdrawal (Apr. 9, 2019). In light of SACE's withdrawal, the only remaining contentions in this proceeding are Joint Intervenors' Contentions 1-E and 5-E. Contention 1-E claims that "[i]n light of the adverse impact of continued [cooling canal system (CCS)] operations on the threatened American crocodile and its critical seagrass habitat, the ER is deficient for failing to consider mechanical draft cooling towers as a reasonable alternative to the CCS in connection with the license renewal of Turkey Point Units 3 and 4." LBP-19-3, 89 NRC at ___ n.82 (slip op. at 63 n.82). Contention 5-E asserts that "[t]he ER is deficient in its

¹ See [FPL], Turkey Point Nuclear Plant Units 3 & 4 Subsequent License Renewal Application (rev. 1 Apr. 2018) (ADAMS Accession No. ML18113A146).

² "A contention of omission is one that alleges an application suffers from an improper omission, whereas a contention of adequacy raises a specific substantive challenge to how particular information or issues have been discussed in the application." Fla. Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 6 & 7), LBP-11-6, 73 NRC 149, 200 n.53 (2011); accord Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-16-11, 83 NRC 524, 534 (2016) ("Contentions that claim a failure to include an entire subject matter or study might be considered contentions of omission. Contentions that argue for alternative analyses or refinements to [an] analysis might be characterized as contentions of 'adequacy.'") (internal footnote omitted) (citing, e.g., Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 382–83 (2002)).

failure to recognize Turkey Point as a source of ammonia in freshwater wetlands surrounding the site, and in its failure to analyze the potential impacts of ammonia releases during the renewal period on threatened and endangered species and their critical habitat.” Id.

In March 2019, the NRC Staff issued a DSEIS for Turkey Point Units 3 and 4.³ Pursuant to the migration tenet,⁴ Contentions 1-E and 5-E, which originally challenged FPL’s ER, became challenges to the NRC Staff’s DSEIS.

On May 20, 2019, FPL moved this Board to dismiss Contentions 1-E and 5-E as moot, arguing that information in the NRC Staff’s DSEIS cured the omissions identified in those contentions.⁵

On June 10, 2019, the NRC Staff filed an answer supporting FPL’s motions to dismiss both contentions as moot.⁶ Joint Intervenors filed answers opposing FPL’s motions.⁷

For the reasons discussed below, we grant FPL’s motions to dismiss Contentions 1-E and 5-E as moot.

³ See Office of Nuclear Reactor Regulation (NRR), NUREG-1437, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supp. 5, Second Renewal, Regarding Subsequent License Renewal for Turkey Point Nuclear Generating Unit Nos. 3 & 4, Draft Report for Comment (Mar. 2019) (ADAMS Accession No. ML19078A330) [hereinafter DSEIS].

⁴ “[A] contention ‘migrates’ when a licensing board construes a contention challenging [an ER] as a challenge to a subsequently issued Staff [National Environmental Policy Act] document without the petitioner amending the contention.” Crow Butte Res., Inc. (In Situ Leach Facility, Crawford, Neb.), CLI-15-17, 82 NRC 33, 42 n.58 (2015).

⁵ See FPL’s Motion to Dismiss Joint Petitioners’ Contention 1-E as Moot (May 20, 2019) [hereinafter Motion to Dismiss Contention 1-E]; FPL’s Motion to Dismiss Joint Petitioners’ Contention 5-E as Moot (May 20, 2019) [hereinafter Motion to Dismiss Contention 5-E].

⁶ See NRC Staff’s Answer to FPL’s Motions to Dismiss (June 10, 2019) [hereinafter NRC Staff Answer].

⁷ See Joint Petitioners’ Answer Opposing FPL’s Motion to Dismiss Joint Petitioners’ Contention 1-E as Moot (June 10, 2019) [hereinafter Answer Opposing Motion to Dismiss Contention 1-E]; Joint Petitioners’ Answer Opposing FPL’s Motion to Dismiss Joint Petitioners’ Contention 5-E as Moot (June 10, 2019) [hereinafter Answer Opposing Motion to Dismiss Contention 5-E].

II. LEGAL STANDARD

It is undisputed that Contentions 1-E and 5-E are contentions of omission. A contention of omission claiming that an ER fails to include required information can be cured by the applicant supplying the missing information in a revised ER or by the NRC Staff supplying the missing information in an environmental impact statement (EIS). See McGuire/Catawba, CLI-02-28, 56 NRC at 384. When the missing information “is later supplied by the applicant or considered by the Staff in a draft EIS, the contention is moot” and should be dismissed. Id. at 383; accord USEC, Inc. (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 444 (2006).

III. ANALYSIS

A. CONTENTION 1-E HAS BEEN RENDERED MOOT BY THE NRC STAFF’S DSEIS

Pursuant to the migration tenet, see supra note 4, Contention 1-E alleges that the NRC Staff’s DSEIS improperly “fail[s] to consider mechanical draft cooling towers as a reasonable alternative to the CCS” in light of “the adverse impact of continued CCS operations on the threatened American crocodile and its critical seagrass habitat.” LBP-19-3, 89 NRC at ___ n.82 (slip op. at 63 n.82). FPL and the NRC Staff argue that the DSEIS’s extensive discussion of mechanical draft cooling towers as an alternative to the CCS renders Contention 1-E moot. See Motion to Dismiss Contention 1-E at 4; NRC Staff Answer at 5–7. We agree.

Section 2.2.3 of the DSEIS considers the use of mechanical draft cooling towers “that might be used to mitigate the potential impacts associated with continued use of the existing [CCS].” DSEIS at 2-12. Under the cooling towers alternative evaluated by the NRC Staff, Turkey Point Units 3 and 4 would each use three closed-cycle, wet-cooling towers to dissipate heat from the reactor cooling water systems. See id. at 2-13. These mechanical draft cooling towers would be octagonal in shape and extend about 70 feet in height and 250 feet in diameter. See id. The primary source of cooling water is assumed to be reclaimed wastewater.

See id. Cooling water makeup would be about 38 million gallons per day, and consumptive water use would be about 29 million gallons per day. See id.

Under the mechanical draft cooling towers alternative, Turkey Point Units 3 and 4 would no longer use the CCS, which, the NRC Staff reasons, would result in (1) less heat being discharged to the CCS, which could cause the water in the CCS to become less saline and, thus, more hospitable for threatened species; and (2) less flow within the CCS, which could cause the water in the CCS to become stagnant and less hospitable for threatened species. See DSEIS at 4-68.⁸ FPL would still be required to take the CCS restorative actions mandated by a 2016 Consent Order with the State of Florida⁹ and a 2015 Consent Agreement with Miami-Dade County,¹⁰ see id., which compel FPL to, inter alia, decrease the salinity in the CCS, develop a nutrient management plan for the CCS, and restore seagrass within portions of the CCS.¹¹ The NRC Staff concludes that, under these circumstances, “the CCS would likely continue to provide habitat for [Endangered Species Act]-listed species.” Id.

The DSEIS evaluated the environmental consequences of the mechanical draft cooling towers alternative with respect to each resource area that would be affected. See DSEIS

⁸ As the DSEIS explains, even if Units 3 and 4 no longer use the CCS, all liquid discharges from the Turkey Point facility, including storm water, would continue to flow into the CCS. See DSEIS at 4-35. Additionally, Unit 5 — an operating fossil-fueled unit that uses cooling towers, see id. at 3-8 — would continue to discharge cooling tower blowdowns to the CCS. See id. at 4-35. CCS water would continue to be circulated through retired fossil-fueled Units 1 and 2; however, this circulation would not add heat to the CCS. See id. at 3-8, 4-35.

⁹ See Fla. Dep’t of Env’tl. Prot. v. FPL, OGC File No. 16-02441, Consent Order (June 20, 2016) (ADAMS Accession No. ML16216A216) [hereinafter Florida Consent Order].

¹⁰ See Miami-Dade County, Dep’t of Regulatory and Econ. Res., Division of Env’tl. Res. Mgmt. v. FPL, Consent Agreement (Oct. 7, 2015) (ADAMS Accession No. ML15286A366) [hereinafter Miami-Dade Consent Agreement].

¹¹ See NRR, Biological Assessment for the Turkey Point Nuclear Generating Unit Nos. 3 and 4 Proposed Subsequent License Renewal at 36 (Dec. 2018) (ADAMS Accession No. ML18353A835) [hereinafter Biological Assessment] (incorporated by reference in the DSEIS at 4-60). The Biological Assessment explains how temperature, salinity, and water quality in the CCS affect American crocodile health, prey species, and habitat. See id. at 32–44.

§ 4.2.7 (impacts on land use and visual resources); id. § 4.3.7 (air quality and noise impacts); id. § 4.4.7 (geologic impact); id. § 4.5.7 (impact on surface water and groundwater resources); id. § 4.6.7 (impact on terrestrial resources); id. § 4.7.7 (impact on aquatic resources); id. § 4.8.3.4 (impact on special status species and habitats); id. § 4.9.4 (historic and cultural resources impacts); id. § 4.10.7 (socioeconomics and transportation impacts); id. § 4.11.7 (human health impact); id. § 4.12.4 (environmental justice impact); id. § 4.13.7 (waste management impact).

Table 2-2 of the DSEIS, in turn, summarizes the impact of the mechanical draft cooling towers alternative on different areas including terrestrial resources, aquatic resources, and special status species and habitats. See DSEIS at 2-22 to 2-23.

Notwithstanding the NRC Staff's encompassing consideration of mechanical draft cooling towers as an alternative to the CCS, the Staff ultimately determined that it "cannot forecast a particular level of impact" by the towers on the American crocodile and its habitat, DSEIS at 2-23, because, according to the NRC Staff, "the magnitude and significance of adverse impacts . . . would depend on the location and layout of the cooling towers, the design of the cooling towers, operational parameters, and the [crocodiles and habitat] present in the area when the alternative is implemented." Id. at 4-70.

Joint Intervenors assert that the above determination in the DSEIS "is not an analysis. It is a failure to analyze. It is an omission. Thus Contention 1-E is not moot and should not be dismissed." Answer Opposing Motion to Dismiss Contention 1-E at 6. We disagree.

We conclude that Contention 1-E's omission is cured because the DSEIS expressly considers mechanical draft cooling towers as an alternative to the CCS, as well as the capacity of cooling towers to reduce adverse impacts on the American crocodile and its habitat. Contrary to Joint Intervenors' assertion, the NRC Staff's professed inability to forecast a particular level of impact on the American crocodile and its habitat cannot fairly be characterized as a wrongful omission given the Staff's explanation that a more precise forecast is not possible because it

would depend on factual information that is not currently available. See DSEIS at 4-70.¹²

Rather, in our judgment, the alleged deficiency now advanced by Joint Intervenors is in the nature of a claim of adequacy that must be advanced, if at all, as a new contention. See supra note 2; infra note 18 and accompanying text.

Because the DSEIS now considers mechanical draft cooling towers as a reasonable alternative to the CCS in light of the CCS's adverse impact on the American crocodile and its habitat, Contention 1-E is moot.

B. CONTENTION 5-E HAS BEEN RENDERED MOOT BY THE NRC STAFF'S DSEIS

Pursuant to the migration tenet, see supra note 4, Contention 5-E alleges that the NRC Staff's DSEIS improperly fails to (1) "recognize Turkey Point as a source of ammonia in freshwater wetlands surrounding the site"; and (2) "analyze the potential impacts of ammonia releases during the renewal period on threatened and endangered species and their critical habitat." LBP-19-3, 89 NRC at ___ n.82 (slip op. at 63 n.82). FPL and the NRC Staff argue that the DSEIS cures both omissions, thereby rendering Contention 5-E moot. See Motion to Dismiss Contention 5-E at 3–6; NRC Staff Answer at 8–12. We agree.

Regarding the first omission, Joint Intervenors do not dispute that it has been cured. The DSEIS explicitly recognizes the existence of ammonia in the CCS caused by the decay of organic material, see DEIS at 3-42,¹³ and it acknowledges that ammonia is transported from the CCS by the outflow of water into groundwater that then travels to adjacent surface water bodies. See id. at 3-41, 3-44. This discussion renders the first omission moot.

¹² The NRC Staff was similarly unable to make a forecast in this resource area for the no-action alternative and the replacement power alternatives. See DSEIS at 2-22, 2-23.

¹³ According to the DSEIS, between June 2010 and May 2016, ammonia concentrations in the CCS ranged from below detectable levels to 0.3 milligrams per liter (mg/L), with an average concentration of 0.04 mg/L, which is more than an order of magnitude below the Miami-Dade County water quality standard for ammonia of 0.5 mg/L. See DSEIS at 3-42, 4-22; Biological Assessment at 15.

Joint Intervenors argue, however, that the second omission in Contention 5-E is not moot because the DSEIS allegedly fails to address the potential impacts of ammonia releases on the following threatened and endangered species and their habitat: the Florida panther, American crocodile, indigo snake, snail kite, red knot, and wood stork. See Answer Opposing Motion to Dismiss Contention 5-E at 3. We disagree.

The DSEIS states that, although ammonia concentrations in the CCS are below the Miami-Dade County ammonia water quality standard, see supra note 13, sampling data in 2015 and 2016 revealed concentrations of ammonia exceeding that standard in stagnant water at the bottom of two deep excavations outside of and adjacent to the CCS. See DSEIS at 4-22; see also Biological Assessment at 61 (stating that several other sampling locations in remnant, stagnant canals revealed ammonia concentrations in 2018 above the Miami-Dade County water quality standard).¹⁴ Under the regulatory direction of the State of Florida and Miami-Dade County, FPL is taking steps to eliminate the excess ammonia problem in these stagnant, excavated areas. See DSEIS at 4-23; see also id. at 3-50 to 3-52; Biological Assessment at 60. In light of FPL's restorative actions, the NRC Staff states that "elevated ammonia levels are not expected to be a long-term issue." Biological Assessment at 61.

Moreover, pursuant to the Florida Consent Order and Miami-Dade Consent Agreement, "FPL maintains an extensive water quality monitoring program [in which it] monitors the CCS, Biscayne Bay, Card Sound, and other nearby water bodies for ammonia . . . among other

¹⁴ The DSEIS states that ammonia concentrations "at the bottom of these excavations may be influenced by groundwater that has been in contact with CCS waters." DSEIS at 3-50. However, according to the DSEIS, the fact that ammonia concentrations in the bottom samples were consistently higher than ammonia levels in the CCS implies that "some of the ammonia in the [excavations] was coming from other sources," including runoff from "agriculture, urban, and wetland land use." Id.; see also FPL, Site Assessment Report, Ammonia in Surface Waters, Turkey Point Facility at 21 (Mar. 17, 2017) ("[T]he observed presence of ammonia [at the bottom of excavations] is consistent with nitrogen cycling of organic matter under [] anoxic [i.e., low oxygen] conditions such as are present at the bottom of a dead-end canal.") (referred to in DSEIS as FPL 2017c and cited, e.g., at 3-51).

nutrients and parameters.” Biological Assessment at 60. The NRC Staff states that, “[t]o date, FPL has identified no evidence of an ecological impact on the areas surrounding the CCS and no discernible influence from the CCS on Biscayne Bay.” Id. Given the totality of these circumstances, the DSEIS concludes that “the impacts [of ammonia] on adjacent surface water bodies via the groundwater pathway from the CCS during the subsequent license renewal period would be SMALL.” DSEIS at 4-23.¹⁵

Finally, the DSEIS “analyzes the potential impacts of the proposed Turkey Point subsequent license renewal [on the six threatened and endangered species specified by Joint Intervenors],” DSEIS at 4-60, and it summarizes the impacts in Table 4-4. See id. at 4-60 to 4-61. We conclude that NRC Staff analyzed ammonia releases within and around the Turkey Point site and considered the impacts on the listed species and their habitats such that the second omission in Contention 5-E is cured, thereby rendering the contention moot.

¹⁵ Aside from the samples collected from the bottom of the excavated areas and remnant canals showing elevated ammonia levels that FPL is remediating, the NRC Staff found that no other ammonia sample concentration from the CCS or within Biscayne Bay near the CCS exceeded the Miami-Dade surface water standard for ammonia. See DSEIS at 3-51; accord Biological Assessment at 62.

Joint Intervenors nevertheless argue that the NRC Staff's analysis remains deficient because it fails to analyze ammonia impacts on the six listed species or their habitats as specifically as it analyzed ammonia impacts on the West Indian manatee. See Answer Opposing Motion to Dismiss Contention 5-E at 7.¹⁶ Contrary to Joint Intervenors' understanding, this type of argument does not preserve Contention 5-E as a contention of omission; rather, it constitutes a challenge to the adequacy of the Staff's analysis and must be advanced, if at all, as a new contention. See supra note 2; infra note 18 and accompanying text.

IV. CONCLUSION

For the foregoing reasons, we grant FPL's motions and dismiss as moot Contentions 1-E and 5-E.¹⁷

¹⁶ While assessing the environmental impacts of ammonia on the West Indian manatee (also a threatened species), the NRC Staff stated that it "assumes that the relevant State water quality criteria are reasonably protective of manatees because under Section 303(c) of the Clean Water Act, the Environmental Protection Agency or the State is required to adopt water quality standards to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Biological Assessment at 60–61. "Therefore, if waters inhabited by manatees meet water quality criteria for ammonia, the NRC staff assumes that there would be no lethal effects or impairment to growth, survival or reproduction to manatee individuals." Id. at 61.

¹⁷ Any mandatory disclosure obligations associated with those contentions are terminated. See 10 C.F.R. § 2.336(d); see also Licensing Board Order (Granting in Part Intervenors' Joint Motion for Partial Reconsideration of Initial Scheduling Order) (Apr. 2, 2019) at 3 n.3 (unpublished) [hereinafter Revised Scheduling Order].

Although our dismissal of Joint Intervenors' contentions disposes of all the admitted contentions in this case, we do not terminate this proceeding at the Licensing Board level for the following reason: in compliance with the governing Scheduling Order, see Revised Scheduling Order at 3, Joint Intervenors have timely proffered new contentions based on the DSEIS, including new contentions alleging that the curative information in the DSEIS has given rise to contentions of adequacy.¹⁸ See [Joint Intervenors'] Motion to Migrate Contentions & Admit New Contentions in Response to NRC Staff's [DSEIS] at 8–17, 21–25 (June 24, 2019). We thus retain jurisdiction of this case, and we shall address Joint Intervenors' motion in a subsequent memorandum and order.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

E. Roy Hawkens, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Michael F. Kennedy
ADMINISTRATIVE JUDGE

/RA/

Dr. Sue H. Abreu
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 8, 2019

¹⁸ That a contention of omission has been cured and dismissed as moot does not perforce insulate the new curative information from challenge. However, to challenge the adequacy of the new information, an intervenor must timely file a new contention that addresses the factors in 10 C.F.R. § 2.309(f)(1). See McGuire/Catawba, CLI-02-28, 56 NRC at 383.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)	
)	
FLORIDA POWER & LIGHT COMPANY)	Docket Nos. 50-250-SLR
)	50-251-SLR
(Turkey Point Nuclear Generating)	
Units 3 & 4)		

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Granting FPL's Motions to Dismiss Joint Intervenor's Contentions 1-E and 5-E as Moot)** have been served upon the following persons by Electronic Information.

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Turkey Point, Units 3 & 4, Docket Nos. 50-250 and 50-251-SLR

MEMORANDUM AND ORDER (Granting FPL's Motions to Dismiss Joint Intervenors' Contentions 1-E and 5-E as Moot)

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[Original signed by Clara Sola _____]
Office of the Secretary of the Commission

Dated at Rockville, Maryland,
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