May 8, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
Florida Power & Light Company	)	Docket Nos. 52-040-COL
	)	52-041-COL
(Turkey Point Units 6 and 7)	)	
	)	ASLBP No. 10-903-02-COL
(Combined License)	)	

FLORIDA POWER & LIGHT COMPANY'S ANSWER OPPOSING JOINT INTERVENORS' MOTION TO FILE NEW CONTENTION

I. INTRODUCTION

Florida Power & Light Company hereby answers and opposes Joint Intervenors' Motion for Leave to File a New Contention Concerning 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 (April 13, 2015)("Motion").[1] The Motion should be denied because it does not meet the criteria for timeliness of contentions based on environmental review documents or the standards for admissible contentions.

Joint Intervenors' claim that the discussion of mitigation measures in the Draft Environmental Impact Statement ("DEIS") for the Florida Power & Light Company's ("FPL") Turkey Point Nuclear Power Plants Units 6 &7 ("Turkey Point") dated February 2015 is deficient because it merely lists potential mitigation measures for terrestrial impacts and does not

[1] The Joint Intervenors are: Mark Oncavage, Dan Kipnis, Southern Alliance for Clean Energy, and the National Parks Conservation Association.

adequately evaluate their effectiveness. Motion at 3. The information in the DEIS upon which the proposed Contention is based, however, is not new or materially different than the information previously available in (1) Turkey Point's Environmental Report ("ER"); and (2) Turkey Point's Units 6 & 7 Mitigation Plan ("Mitigation Plan"), upon which the DEIS relies. The Mitigation Plan has been available to the Joint Intervenors for years, including when they raised similar mitigation claims in their initial Petition to Intervene.[2] In that Petition, Joint Intervenors claimed that the discussion of mitigation measures associated with construction and operation of the transmission line corridors was "cursory" (and these claims were dismissed).[3] Thus, the proposed new contention is not timely and should be dismissed.

Furthermore, even if the Contention were timely, which it is not, it is nevertheless inadmissible under NRC requirements. Joint Intervenors fail to acknowledge the detailed discussion of mitigation measures in the DEIS, fail to acknowledge that the DEIS relies on standard, state-required methods for quantifying the effectiveness of these measures, provide no basis for disputing the effectiveness of these measures, and misapply the National Environmental Policy Act's ("NEPA") mitigation requirements. As a result, the contention is unsupported and fails to raise a genuine dispute on a material issue of fact or law, contrary to 10 C.F.R. § 2.309(f)(1)(iv)-(vi).

II. BACKGROUND

A. NRC COLA Proceeding

On June 30, 2009, FPL submitted an application to the NRC seeking a combined license ("COL") for Turkey Point Units 6 & 7 ("COLA"). As required under the NRC's regulations

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[2] Petition for Intervention (Aug. 17, 2010) ("Petition").

[3] *Florida Power & Light Company* (Turkey Point Units 6 and 7), LBP-11-6, 73 N.R.C. 149, 209 (2011).

implementing NEPA, the COLA included an ER. FPL has submitted several revisions to the COLA since the initial filing. The current version of the ER is Revision 6. All of the revisions are available on the NRC's website.[4]

As the ER describes, on the same day that FPL submitted the COLA, FPL made the following additional filings related to Turkey Point 6 & 7: (1) an application for a permit from the U.S. Army Corps of Engineers ("USACE" or "Corps") pursuant to Section 404 of the Clean Water Act and Sections 10 and 14 of the Rivers and Harbors Act (collectively "USACE Application");[5] and (2) a Site Certification Application ("SCA") to the State of Florida Department of Environmental Protection. ER Rev. 0 at 1.2-5. FPL's USACE Application and the SCA included Revision 0 of FPL's comprehensive Mitigation Plan.[6]

On August 17, 2010, Joint Intervenors filed a petition to intervene in the Turkey Point COL proceeding. The Joint Intervenors were clearly aware of the SCA and Mitigation Plan at that time because they attached portions of the SCA as an exhibit to their Petition and discussed some of the mitigation proposals.[7] The Board granted Joint Intervenors' petition, ruling that they had proffered one contention that was admissible, in part, concerning the environmental impacts

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[4] *See* Combined License Application Documents for Turkey Point Units 6 and 7, Application, *available at* http://www.nrc.gov/reactors/new-reactors/col/turkey-point/documents.html#application.

[5] The USACE is a cooperating agency with the NRC in developing the Turkey Point Environmental Impact Statement ("EIS"). DEIS at xxxi. Its role as a cooperating agency is to ensure that the information presented is adequate to meet USACE regulations. *Id*. at 1-5. The USACE will complete an independent evaluation of FPL's Section 404 permit application to determine whether to issue, deny, or issue with modifications, a permit for this project. *See id.* at iii, 1-6 to 1-7.

[6] FPL provided links to the Site Certification Application and its first amendment in response to an NRC Staff Request for Additional Information on June 3, 2011. Letter from W. Maher to NRC, Response to NRC Environmental Request for Additional Information Letter 1104271 (RAI 5699) Environmental Standard Review Plan Section EIS 1.5 – Compliance and Consultations (June 3, 2011) (ADAMS Accession No. ML11157A123), Att. 1 at 1. *See also* TN1231-Florida Power and Light, Co., Turkey Point, Units 6 &7 Project, Amendment to Site Certification Application (ADAMS Accession No. ML14216A492). The current revision of the Mitigation Plan, which was approved in Florida's site certification process, is Turkey Point Unit 6 & 7 Mitigation Plan, Revision 2 dated July 2011, and was added to ADAMS on September 26, 2012 (ADAMS Accession No. ML12269A222).

[7] Petition at 33 (referring to the land swap and "Hole in the Donut" mitigation bank), and Exhibit 2.

of injecting reclaimed water into the Floridan Aquifer via underground injection wells. The Board also dismissed eight other of the Joint Intervenors' contentions, including Contention NEPA 5.[8]

Contention NEPA 5 alleged, in relevant part, that FPL's ER had failed to adequately address how the applicant would avoid and/or minimize impacts to wetlands caused by construction and operation of transmission line corridors and associated access roads. Petition at 38. Similar to its current proposed contention, Joint Intervenors asserted that the "ER states only that a three-pronged approach to mitigation would be used: active mitigation, 'land-swapping,' and the purchase of wetland credits from the Everglades Mitigation Bank." Petition at 43. Joint Intervenors argued that the ER does not elaborate on any of these and that "cursory references to mitigation plans" fall short of the NRC's NEPA regulations. *Id.* The Board ruled Joint Intervenors' Contention NEPA 5 inadmissible because it overlooked those portions of the ER that elaborate on the mitigation measures, thus erred in claiming that the discussion was "cursory," and failed to raise any specific challenge to the mitigation plans. *Turkey Point*, LPB-11-6, 73 N.R.C. at 208. Although Joint Intervenors clearly had access to FPL's Mitigation Plan, they did not raise any challenge to the detailed measures or their effectiveness.

B. Florida Site Certification Proceeding

The State of Florida's review of FPL's SCA proceeded in parallel with the NRC's review of the COLA.[9] In addition to numerous rounds of completeness questions by the parties, the

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[8] *Turkey Point*, LBP-11-6, 73 N.R.C. at 226.

[9] The Florida Power Plant Siting Act ("PPSA") creates a centrally coordinated, "one-stop" permitting process for any proposed electrical power plant of greater than 75 megawatts in steam generating capacity. Fla. Stat. §§ 403.502; 403.506(1). Certification under the PPSA is in lieu of any State of Florida permit, license or other approval that may otherwise be required for the construction and operation of an electrical power plant subject to the PPSA. Fla. Stat. § 403.511(1), (3). Final certification under the PPSA is issued by the "Siting Board,"

State's review involved eight weeks of hearing before an administrative law judge ("ALJ"), with twenty-three parties, including one of the Joint Intervenors here, the National Parks Conservation Association.[10] The location of Turkey Point's transmission line corridors was a significant issue in that hearing.[11] The hearing included testimony on wetlands impacts and mitigation of those impacts.[12]

On December 5, 2013, the ALJ issued a Recommended Order with extensive findings of fact and conclusions of law, which the Florida Siting Board adopted on May 19, 2014.[13] The ALJ found that "FPL's wetland mitigation plan *can be implemented*, assuring the protection of the public welfare in preserving wetland functions in the state."[14] The ALJ also found that "FPL's proposed wetland mitigation plan for the transmission lines *will offset* the adverse effects, including functional loss, caused by the location, construction, operation and maintenance of the transmission lines in the certified corridors."[15]

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comprised of the Governor and Cabinet of Florida (statewide elected officials). Fla. Stat. §§ 403.503(8); 403.509(3). When issued, the PPSA certification becomes the sole authorization, and all local and state permits are rolled into a single license. Fla. Stat. § 403.551. The Florida Department of Environmental Protection administers the processing of applications for site certification submitted under the PPSA and oversees the implementation of Conditions of Certification that may be imposed in any final order granting certification under the PPSA. Fla. Stat. § 403.504.

[10] Final Order on Certification, In Re Florida Power and Light Company Turkey Points Units 6 & 7 Power Plant Siting Application No. PA 03-45A3. State of Florida Siting Board, OGC Case No. 09-3107, Division of Administrative Hearings, Case No. 09-03575 at 1-2 (May 19, 2014)(ADAMS Accession No. ML14345A291)("Siting Board Order").

[11] Siting Board Order at 5.

[12] *See, e.g.,* Siting Board Order at 137, citing testimony from Mr. Karl Bullock, an expert in terrestrial and wetland ecology, that "(1) FPL looked to all corridors it owns and proposed the one that avoids the most impacts; (2) FPL minimized impacts by co-locating where possible and through transmission line design; (3) FPL will restore adjacent wetlands after construction is complete; (4) FPL will preserve and maintain the area to reduce and eliminate the impacts to wetlands; and (5) FPL will fully mitigate all wetlands impacts."

[13] Siting Board Order at 1.

[14] Siting Board Order at 23 (emphasis added).

[15] Siting Board Order at 136-137 (emphasis added).

The Siting Board adopted the ALJ's recommendation and issued a Final Order certifying the Turkey Point site, subject to proposed Conditions of Certification ("COC"), which were attached to the Order.[16] In responding to challenges to the ALJ's findings regarding whether the mitigation plan would offset the wetland impacts from the transmission lines, the Siting Board Order stated that "FPL properly evaluated the quality of all wetlands to be impacted by the project by using the [Uniform Mitigation Assessment Method]" and "the competent substantial record evidence supports the finding that *FPL's wetland mitigation plan can, and does, fully offset the adverse impacts*, including functional loss thereof, to all wetlands proposed to be impacted."[17] Thus, contrary to Joint Intervenors' assertion that the DEIS relies on "speculative mitigation measures" (Motion at 2), the DEIS relies on measures which an independent tribunal has found "can, and does, fully offset adverse impacts." Siting Board Order at 164.

On May 19, 2014, the Florida Department of Environmental Protection ("FDEP") issued the final COC for Turkey Point Units 6 & 7, which incorporates FPL's Mitigation Plan and includes it as Attachment C.[18] The COC specifically require that FPL provide mitigation in accordance with its Mitigation Plan and adds additional mitigation requirements.[19] Thus, there is no question regarding "whether" FPL's mitigation plans will be implemented because, as

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[16] Siting Board Order at 223.

[17] Siting Board Order at 162, 164 (emphasis added).

[18] Conditions of Certification, Florida Power & Light Company, Turkey Point Plant Units 6 & 7, PA 03-45A3, May 19, 2014, Section B, Condition II.A.1("The Turkey Point Units 6 & 7 Wetland Mitigation Plan is incorporated and attached herein.") at 34. Available at http://publicfiles.dep.state.fl.us/Siting/Outgoing/Web/Certification/pa03_45_2014_units6_7.pdf.

[19] *Id.* at 87 (*e.g.*, requiring an additional 8.4 credits "by conducting additional applicant-sponsored mitigation activities that achieve the equivalent wetland lift;" "FPL shall mitigate for impacts to mangroves and associated habitat at the Units 6 and 7 site, by permanently deducting 148.4 coastal units from the Everglades Mitigation Bank (EMB) prior to any earthwork or construction at the Unit 6 and 7 site;" "[c]onstruction or use of the roadways that impact mangroves or wetlands shall not occur prior to initiation of the mitigation for those impacts.").

identified in the DEIS, FPL is required to offset wetland impacts in accordance with the Mitigation Plan pursuant to the COC, which "are binding." Motion at 6; DEIS at 4-1, 4-73.

On that same day, FPL provided notice to the Board and all parties that the Siting Board had issued its final order.[20] This notice included a link to the Siting Board Final Order. Attached to this Order was FPL's detailed Mitigation Plan, which had been approved by the Siting Board.

On June 12, 2014, Joint Intervenors filed a Motion for Leave to File a New Contention Concerning the Siting and Environmental Impacts of Transmission Lines at the Turkey Point Nuclear Power Plant, which attached the Final Order of the Siting Board. The proposed contention alleged that the ER failed to evaluate the impacts associated with the construction, operation and maintenance of transmission lines through a corridor not fully contemplated in the ER. It did not seek to raise any issue relating to the approved Mitigation Plan. On June 26, 2014, after learning that an ER Supplement already addressed the impacts of the transmission corridor and appeared to resolve many of their concerns,[21] the Joint Intervenors moved to withdraw that proposed contention,[22] which the Board granted.[23]

On March 5, 2015, the NRC published a notice of the DEIS' availability. 80 Fed Reg. 12,043 (Mar. 5, 2015). Joint Intervenors then filed their current Motion, seeking admission of a new contention alleging "[t]he DEIS for Turkey Point Units 6 & 7 does not comply with NEPA

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[20] Letter from S. Hamrick, Florida Power & Light Company to E.R. Hawkins, Dr. M.F. Kennedy, and Dr. W. C. Burnett, re: Final Order of the Florida Power Plant Siting Board. (May 19, 2014).

[21] Letter from W. Maher to NRC, Supplemental Transmission Corridor Information for the Combined License (Nov. 5, 2013) (ADAMS Accession No. ML13311A105).

[22] Joint Intervenors' Unopposed Motion to Withdraw the Contention Concerning the Siting and Environmental Impacts of Transmission Lines at the Turkey Point Nuclear Plant (June 26, 2014).

[23] Order (Granting Joint Intervenors Motion to Withdraw Contention)(June 27, 2014).

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." Motion at 2. As will be discussed in this Answer, Joint Intervenors do not identify how the material in the DEIS is new or materially different from what has been available to them for years.

III. APPLICABLE LEGAL STANDARDS FOR CONTENTIONS FILED AFTER THE INITIAL DEADLINE AND ADMISSIBLE CONTENTIONS

The NRC does not look with favor on amended or new contentions filed after the initial filing. *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 N.R.C. 631, 638 (2004). As the Commission has repeatedly stressed,

> our contention admissibility and timeliness rules require a high level of discipline and preparation by petitioners "who must examine the publicly available material and set forth their claims and the support for their claims at the outset." There simply would be "no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements" and add new contentions at their convenience during the course of a proceeding based on information that could have formed the basis for a timely contention at the outset of the proceeding. Our expanding adjudicatory docket makes it critically important that parties comply with our pleading requirements and that the Board enforce those requirements.

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 N.R.C. 235, 271-72 (2009) (footnotes omitted).

Accordingly, the Commission's rules of practice require that "[c]ontentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner." 10 C.F.R. § 2.309(f)(2). With respect to NEPA-related issues, contentions are to be based on the applicant's environmental report. *Id.* New or amended environmental contentions may be filed after the

initial filing deadline – for example, based on a draft or final NRC environmental impact statement – only "if the contention complies with the requirements in paragraph (c) of this section." *Id.* 10 C.F.R. 2.309(c)(1), in turn, requires that the contention "not be entertained" absent a demonstration of good cause by showing that:

> (i) The information upon which the filing is based was not previously available;
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> (ii) The information upon which the filing is based is materially different from information previously available; and
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> (iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.

10 C.F.R. § 2.309(c)(1)(i)-(iii).

In short, new or amended contentions – even when ostensibly based on recently issued NRC environmental review documents – "must be *based on new facts* not previously available." *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-10, 75 N.R.C. 479, 493 n.70 (2012); *See also DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-01, 81 N.R.C. __, slip op. at 7, 8 (Jan. 13, 2015) ("Our rules of practice require contentions to be raised at the earliest possible opportunity. . . . Our rules of practice require a material difference between the information on which the contention is based and the information that was previously available – for example a difference between the environmental report or the draft EIS"). Indeed, when promulgating the recently revised Section 2.309(c)(1), the Commission explained that "in most cases where the NRC compiles or uses previously available information in a new document, *the previously available information cannot be used as the basis for a new or amended contention filed after the deadline*." Final Rule, Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46,562, 46,566 (Aug. 3, 2012) (emphasis added). This means, for example, that information in a draft environmental impact statement cannot form

the basis for a timely new contention when substantially the same information was previously found in an applicant's environmental report or was otherwise previously available.

Further, as the proponent of an order admitting the proposed contention, Joint Intervenors have the burden of demonstrating that it meets the good cause standards in 10 C.F.R. § 2.309(c)(1). 10 C.F.R. § 2.325. 10 C.F.R. § 2.309(c)(1) requires that the "*participant has demonstrated good cause*" by showing that the standards are met (emphasis added). The failure to comply with these pleading requirements constitutes sufficient grounds for rejecting the petition. *Florida Power & Light Company,* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2, *et.al.*), CLI-06-21, 64 N.R.C. 30, 2006; *Florida Power & Light Company*, (St. Lucie Nuclear Power Plant, Unit 2), CLI-14-11, 80 N.R.C. 167, 175-76 (2014)("we do not consider hearing requests after the deadline in Section 2.309(b) has passed absent a determination that the petitioner has demonstrated good cause.").

In addition, new or amended contentions, including those based on NRC environmental review documents, must meet the admissibility standards that apply to all contentions under 10 C.F.R. § 2.309(f)(1):

> (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
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> (ii) Provide a brief explanation of the basis for the contention;
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> (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
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> (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
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> (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;

> (vi) In a proceeding other than one under 10 CFR 52.103, provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

10 C.F.R. § 2.309(f)(1)(i)-(vi). These standards also are enforced rigorously. "If any one . . . is not met, a contention must be rejected." *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Unit Nos. 1, 2, and 3), CLI-91-12, 34 N.R.C. 149, 155 (1991) (citation omitted); *USEC, Inc.* (American Centrifuge Plant), CLI-06-9, 63 N.R.C. 433, 437 (2006) ("These requirements are deliberately strict, and we will reject any contention that does not satisfy the requirements." (footnotes omitted)). A licensing board is not to overlook a deficiency in a contention or assume the existence of missing information. *Palo Verde,* CLI-91-12, 34 N.R.C. at 155; *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 N.R.C. 235, 260 (2009) (the contention admissibility rules "require the petitioner (*not the board*) to supply all of the required elements for a valid intervention petition." (emphasis added) (footnote omitted)).

Under these standards, a petitioner is obligated "to provide the [technical] analyses and expert opinion" or other information "showing why its bases support its contention." *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 N.R.C. 281, 305, *vacated in part and remanded on other grounds*, CLI-95-10, 42 N.R.C. 1, *aff'd in part*, CLI-95-12, 42 N.R.C. 191 (1995). Where a petitioner has failed to do so, "the [Licensing] Board may not make factual inferences on [the] petitioner's behalf." *Id.*, citing *Palo Verde*, CLI-91-12, 34 N.R.C. 149. *See also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 N.R.C. 142, 180 (1998) (a "bald assertion that a matter

ought to be considered or that a factual dispute exists . . . is not sufficient"; rather, "a petitioner must provide documents or other factual information or expert opinion" to support a contention's "proffered bases").

Further, admissible contentions "must explain, with specificity, particular safety or legal reasons requiring rejection of the contested [application]." *Dominion Nuclear Connecticut, Inc.*, (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 N.R.C. 349, 359-60 (2001) (citation omitted). In particular, this explanation must demonstrate that the contention is "material" to the NRC's findings and that a genuine dispute on a material issue of law or fact exists. 10 C.F.R. §§ 2.309(f)(1)(iv), (vi). The Commission has defined a "material" issue as meaning one where "resolution of the dispute *would make a difference in the outcome* of the licensing proceeding." 54 Fed. Reg. 33,168, 33,172 (Aug. 11, 1989) (emphasis added).

As the Commission has observed, this threshold requirement is consistent with judicial decisions, such as *Connecticut Bankers Association v. Board of Governors*, 627 F.2d 245, 251 (D.C. Cir. 1980), which held that:

> [A] protestant does not become entitled to an evidentiary hearing merely on request, or on a bald or conclusory allegation that . . . a dispute exists. The protestant must make a minimal showing that material facts are in dispute, thereby demonstrating that an "inquiry in depth" is appropriate.

651 F.2d at 251; *see also Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-14, 48 N.R.C. 39, 41, *motion to vacate denied*, CLI-98-15, 48 N.R.C. 45, 56 (1998) ("It is the responsibility of the Petitioner to provide the necessary information to satisfy the basis requirement for the admission of its contentions "). A contention, therefore, is not to be admitted "where an intervenor has no facts to support its position and where the intervenor contemplates using discovery or cross-examination as a fishing expedition which

might produce relevant supporting facts." 54 Fed. Reg. at 33,171.[24] As the Commission has emphasized, the contention rule bars contentions where petitioners have what amounts only to generalized suspicions, hoping to substantiate them later, or simply a desire for more time and more information in order to identify a genuine material dispute for litigation. *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2), CLI-03-17, 58 N.R.C. 419, 424 (2003).

Therefore, under the Rules of Practice, a statement "that simply alleges that some matter ought to be considered" does not provide a sufficient basis for a contention. *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 N.R.C. 200, 246 (1993), *review declined*, CLI-94-2, 39 N.R.C. 91 (1994). Similarly, a mere reference to documents does not provide an adequate basis for a contention. *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 N.R.C. 325, 348 (1998).

Rather, the NRC's pleading standards require a petitioner to read the pertinent portions of the license application, including the safety analysis report and the ER, state the applicant's position and the petitioner's opposing view, and explain why it has a disagreement with the applicant. 54 Fed. Reg. at 33,171; *Millstone*, CLI-01-24, 54 N.R.C. at 358. If the petitioner does not believe these materials address a relevant issue, the petitioner is "to explain why the application is deficient." 54 Fed. Reg. at 33,170; *Palo Verde*, CLI-91-12, 34 N.R.C. at 156. A contention that does not directly controvert a position taken by the applicant in the license application is subject to dismissal. *See Texas Utilities Electric Co.* (Comanche Peak Steam

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[24] *See also Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 N.R.C. 460, 468 (1982), *vacated in part on other grounds*, CLI-83-19, 17 N.R.C. 1041 (1983) ("[A]n intervention petitioner has an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable [the petitioner] to uncover any information that could serve as the foundation for a specific contention. Stated otherwise, neither Section 189a. of the [Atomic Energy] Act nor Section 2.714 [now 2.309] of the Rules of Practice permits the filing of a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the applicant or staff.").

Electric Station, Unit 2), LBP-92-37, 36 N.R.C. 370, 384 (1992), *appeal dismissed*, CLI-93-10, 37 N.R.C. 192, *stay denied,* CLI-93-11, 37 N.R.C. 251 (1993). Furthermore, an allegation that some aspect of a license application is "inadequate" or "unacceptable" does not give rise to a genuine dispute unless it is supported by facts and a reasoned statement of why the application is unacceptable in some material respect. *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-16, 31 N.R.C. 509, 521 & n.12 (1990).

IV. JOINT INTERVENORS' MITIGATION CONTENTION IS UNTIMELY AND OTHERWISE INADMISSIBLE

Joint Intervenors' proposed Contention – which alleges that the DEIS does not comply with NEPA because its determination of the project's impacts impermissibly relies on "speculative mitigation measures, the effectiveness of which have not been adequately evaluated" (Motion at 2) – is untimely and inadmissible. As discussed below, the Joint Intervenors make no demonstration that this Contention is based on new information. Indeed, since Joint Intervenors raised similar objections to the ER at the outset of this proceeding (which were dismissed), they cannot possibly make such a demonstration.

Furthermore, Joint Intervenors fail to raise a material dispute with the DEIS. They assert that the DEIS merely lists potential mitigation measures associated with terrestrial impacts, but they fail to acknowledge, "much less raise a specific challenge" to, the detailed discussion in the DEIS and the cited Mitigation Plan. *Turkey Point,* LBP-11-6, 73 N.R.C. at 209. Finally, Joint Intervenors misapply NEPA's mitigation requirements and, therefore, fail to raise a genuine dispute with the ER on a material issue of law. 10 C.F.R. § 2.309(f)(1)(vi).

A. The Proposed Contention is Inexcusably Untimely

Joint Intervenors' proposed Contention must be dismissed because Joint Intervenors have not demonstrated good cause by showing that the Contention is based on new and materially different information than was previously available, as required by 10 C.F.R. § 2.309(c)(1). Joint Intervenors merely assert that "the information on which the contention is based is both new and materially different from previously available information" because "[t]he contention is based on the recently released DEIS." Motion at 9. This conclusory assertion does not come close to meeting Joint Intervenors' burden of demonstrating good cause. Moreover, contentions challenging an EIS are not automatically admissible. Otherwise, the requirement in 10 C.F.R. § 2.309(f)(2) allowing new or amended contentions after issuance of the DEIS only if the "contention complies with the requirements in paragraph (c) of this section" would be meaningless. Rather, 10 C.F.R. § 2.309(f)(2) and 10 C.F.R. § 2.309(c)(1) require the proponent of a new contention challenging a DEIS to demonstrate the contention is based on information in the DEIS that is materially different from that which was previously available, such as a material difference between the DEIS and ER. *Fermi*, CLI-15-01, 81 N.R.C. ___, slip op. at 8.

Nowhere in the proposed Contention do the Joint Intervenors attempt to show, much less affirmatively demonstrate, that the proposed new Contention is based on new or materially different information from what was previously available. The Joint Intervenors do not identify any information in the DEIS that was not previously available.

Further, it is evident that the discussion of mitigation alternatives in the DEIS is based on and consistent with previously available information. DEIS Section 4.11, which provides a table summarizing the mitigation measures and controls proposed by FPL to limit adverse impacts, explicitly states that this table "is the review team's adaptation from FPL's Table 4.6-1" of the

ER. DEIS at 4-143. Similarly, the DEIS cites the ER (identified as FPL 2015-TN4058) in describing the standard industry construction practices and environmental best management practices that FPL uses. *See* DEIS at 4-22. In addition, the DEIS describes the measures that FPL proposed in the Turkey Point Units 6 & 7 Mitigation Plan (Rev. 2) (identified as FPL 2011-TN1012). *See* DEIS at 4-69 to 4-72. The activities described in the DEIS are consistent with the proposed measures described in the ER to offset loss of wetlands and wetland function from the Turkey Point site and offsite areas through "wetland enhancement, restoration, and/or purchase of Everglades Mitigation Bank credits." ER at 4.3-8, 4.3-9, 4.3-11. Moreover, as previously discussed, the SCA containing the Mitigation Plan was referenced in the original ER, and Revision 2 of the Mitigation Plan (the version eventually approved by the Florida Siting Board and included in the Conditions of Certification) was made available on ADAMS in 2012.[25] Thus, the mitigation measures discussed in the DEIS are not new or materially different from information that has been available for years.

Joint Intervenors refer to the DEIS's discussion of the use of Uniform Mitigation Assessment Method ("UMAM") in evaluating the effectiveness of the proposed mitigation measures (*see* Motion at 5), but that information too has been long available. It was described in detail in the Section 404(b)(a) Alternatives Analysis that was submitted in October 2011[26] and again in Revision 2 to the Mitigation Plan (available in ADAMS in 2012). Joint Intervenors were certainly aware of the assessment in the Mitigation Plan because Joint Intervenor National Parks Conservation Association participated in the SCA proceeding during which the contents of

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[25] *See supra* note 6.

[26] Turkey Point Units 6 & 7 COL Application, Environmental Report, Turkey Point Units 6 & 7 Section 404(b)(1) Alternatives Analysis, October 2011 (ADAMS Accession No. ML1139A035), submitted in Letter from W. Maher to NRC, Response to NRC Request for Additional Information RAI 5340 Revision 1 (Nov. 10, 2010) (ADAMS Accession No. ML11319A037).

the Mitigation Plan were thoroughly examined. *See* Siting Board Order at 2 n.2, 136-138, 162-64. If Joint Intervenors had any dispute with this assessment of the effectiveness of the proposed mitigation measures, they should have raised the contention when the UMAM assessment became available in 2011.

In sum, Joint Intervenors have been aware of FPL's proposed mitigation measures from the outset of this proceeding, as evidenced by their reference to the Hole in the Donut Mitigation Bank (which has been part of the Mitigation Plan from the outset) in their original intervention Petition.[27] Joint Intervenors could have challenged the effectiveness of the proposed mitigation measures at the outset of the proceeding, or the UMAM assessment when it was made available in 2011. Their attempt to do so now is untimely.

B. The Proposed Mitigation Contention Is Inadmissible

Even if the Board were to find Joint Intervenors' Contention to be timely, that Contention is nevertheless inadmissible because it is unsupported and does not raise a genuine dispute with the COLA on a material issue of law or fact, contrary to the requirements of 10 C.F.R. § 2.309(f)(1)(iv)-(vi). First, Joint Intervenors mischaracterize and misstate information in the Turkey Point 6 & 7 environmental documents, and provide no support whatsoever to question the effectiveness of the mitigation measures, thus failing to demonstrate any genuine material factual dispute. Second, Joint Intervenors' claims that the DEIS must "fully evaluate" mitigation measures and that the NRC cannot issue a DEIS until USACE completes its permitting process are wrong as a matter of law.

[27] *See supra* note 7.

1. Intervenors Have Not Raised With Requisite Support A Genuine Dispute with the DEIS on a Material Issue of Fact

Joint Intervenors assert that "[t]he 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 those measures in offsetting the impacts of the proposed project." Motion at 3. In particular, Joint Intervenors fault the DEIS for identifying mitigation measures such as "mitigation banks, an in-lieu fee program, or permittee responsible mitigation" but "not adequately evaluat[ing] how these programs may or may not offset the expected impacts." Motion at 3- 4. The Contention also claims that the DEIS does not identify "whether, why, and how these measures will adequately offset the projected wetland loss." Motion at 5.

These claims are inadmissible because they fail to raise a genuine factual dispute. The DEIS, and the Mitigation Plan that the DEIS repeatedly cites, do much more than list possible mitigation measures. They describe in considerable detail measures in a specific Mitigation Plan approved and required by the Florida Siting Board,[28] and evaluate their effectiveness. Joint Intervenors cannot raise a genuine dispute with the DEIS by neglecting to read, ignoring, or misstating the contents of the DEIS. *See Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 N.R.C. 2069, 2076 (1982); *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), LBP-82-107A, 16 N.R.C. 1791, 1804 (1982);

[28] The Mitigation Plan is also part of FPL's application to the Corps of Engineers required to obtain the 404 permit. The Corps has a substantive obligation under Section 404(b)(1) to permit the least environmentally damaging practicable alternative. *See* 33 U.S.C. 1344(b)(1); *see also* DEIS at 1-7, 4-1 to 4-2. While the Corps is still reviewing FPL's 404 permit, there is no question that, ultimately, the Corps must determine substantively that wetland impacts are adequately avoided, minimized and mitigated. The DEIS recognizes the Corps' substantive authority and is circumspect in describing the mitigation measures as proposed to avoid infringing upon the Corps' substantive decision-making authority. This does not make FPL's proposed mitigation measures "speculative," prevent the NRC from assessing FPL's proposed measures on its own, or preclude the NRC from recognizing FPL's proposed measures as reasonably representative of the mitigation measures that the Corps may require and police.

Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 N.R.C. 1423, 1504-05 (1982).

In particular, the DEIS identifies the final Conditions of Certification issued by the Florida Siting Board on May 19, 2014, and states, "The final Conditions of Certification issued are binding and subject to the requirements listed [therein]." DEIS at 1-2. Section 4.3.1.6 of the DEIS later describes the compensatory mitigation measures in detail, and quantifies the effectiveness of these measures using recognized standard methods. As the DEIS describes:

- FPL has proposed to mitigate loss of wetlands and wetland function from the Turkey Point site as well as offsite areas that would be affected through wetland restoration, enhancement, preservation, and purchase of mitigation credits within a mitigation bank.

- The proposal contains mitigation options that include removal of exotic vegetation, ditch removal and grading, planting of native wetland vegetation, in situ restoration, wetland creation through grading and planting, purchase of mitigation credits within approved mitigation banks and preservation through conservation easements. Completion of all proposed mitigation proposes to provide functional lift equaling 509 wetland credits to offset direct impacts on 710 ac of wetlands, secondary impacts on 48 ac, and temporary impacts on 50 ac.

- FPL instituted measures during project planning to avoid and minimize impacts on wetlands to the greatest extent practicable. Proposed avoidance and minimization measures include maximizing the use of previously disturbed areas while minimizing use of areas with high-quality intact wetlands. Corridor selection for the reclaimed water pipeline, potable water pipeline, and transmission facilities maximized collocation with other existing or proposed infrastructure to limit disturbance.

- FPL has also proposed mitigation measures intended to reduce and compensate for impacts on terrestrial resources expected during preconstruction and construction of proposed Units 6 and 7 and associated facilities. Proposed mitigation actions include restoration of wetlands at two locations, restoration of disturbance from pipeline installation, and use of mitigation banks.

- The first wetland restoration site, the Northwest Restoration Site, is located approximately 2 mi from proposed Units 6 and 7. It comprises several FPL-owned parcels totaling 238 ac within the proposed Biscayne-

Everglades Greenway and at the entrance to Biscayne National Park. FPL proposes to remove or control exotic vegetation, backfill ditches, grade the land to resemble a natural state, and plant native wetland vegetation as necessary. FPL also proposes to maintain and monitor vegetation for 3 years after mitigation activities and to preserve the lands under a conservation easement.

- A second wetland restoration site, the SW 320th Street restoration site is 574 ac found 4 mi northwest of proposed Units 6 and 7. FPL proposes to remove and control exotic plants on these lands with mechanical means and herbicide treatment where appropriate. FPL proposes to grade and backfill to restore natural contours, and plant herbaceous wetlands plants to encourage rapid colonization, and transfer these lands to a public trust to be managed by a qualified government entity after the conclusion of mitigation actions.

- FPL has proposed to purchase mitigation credits from the Everglades Mitigation Bank ("EMB") to offset wetland losses from the development of the proposed Units 6 and 7 plant area, RWTF, nuclear administration building, training and parking area, and the East Preferred corridor.

- FPL has proposed purchasing mitigation credits within the NPS Hole-in-the-Donut Mitigation Bank to offset wetland acreage and function lost from development of the West Preferred corridor.

DEIS at 4-69 to 4-72.

As the DEIS explains, FPL used the UMAM to assess the condition of wetlands that would be affected by all of the proposed actions that would be mitigated by means other than the EMB, as well as to quantify the amount of mitigation necessary to offset wetland impacts not avoided. DEIS at 4-71. The UMAM is a standardized method for assessing ecological function, the loss thereof, and the amount of mitigation to offset this loss. *Id.* at 4-70.[29] The UMAM approach includes consideration of relative location within the landscape, quantity and quality of water available within a wetland, and vegetation community structure to calculate functional

[29] The UMAM is used to determine the degree of improvement in ecological value of proposed mitigation bank activities, the quantity of acreage of mitigation, and the amount of credits from a mitigation bank required to offset wetlands impacts if necessary. Fla. Admin Code 62-345.100(2). The amount of mitigation required to offset adverse impacts to wetlands is referred to as "functional lift" and is quantified in terms of UMAM credits. Improvements resulting from restoration projects are also expressed in terms of "functional lift."

value. *Id.* at 4-71. FPL used the Wetland Assessment Technique for Environmental Review ("W.A.T.E.R.") that is required for mitigation using the EMB. W.A.T.E.R. is another procedure for evaluating functional loss and lift for wetlands in southeast Florida that formed the basis for establishing credits in the EMB. *Id.* The results of this assessment are presented in Table 4-11 of the DEIS, demonstrating that the proposed restoration and purchase of credits offset wetlands impacts on a one to one basis. DEIS at 4-71.

Thus, the DEIS clearly does more than "merely list[]" mitigation measures, as the Joint Intervenors claim. Motion at 3. Joint Intervenors' claims that the DEIS simply lists mitigation measures and does not evaluate their effectiveness are simply not true.[30]

Further, while Joint Intervenors attempt to dismiss the UMAM assessment, they offer absolutely no basis for rejecting it. As the DEIS indicates, the UMAM method and the W.A.T.E.R. method are standard methods in Florida for assessing mitigation and determining appropriate credits. While Joint Intervenors assert that the "DEIS does not discuss whether, why and how these measures will adequately offset the projected wetland loss" (Motion at 5), this statement simply ignores the standard methods discussed in the DEIS showing that the proposed mitigation measures will adequately compensate for unavoidable loss of wetlands. Joint Intervenors do not offer any expert opinion, alleged facts, or references to specific sources or

[30] Nor is the discussion in the DEIS comparable to that criticized in *South Fork Band Council of Western Shoshone of Nevada v. U.S. Department of the Interior*, 588 F.3d 718, 727 (9th Cir. 2009), which Joint Intervenors quote as holding that "[a]n essential component of a reasonably complete mitigation discussion is an assessment of whether the proposed mitigation measures can be effective." Motion at 3. In that case, the Ninth Circuit faulted an environmental impact statement's discussion of mitigation measure effectiveness because the discussion stated *only* that "[f]easibility and success of mitigation would depend on site-specific conditions and details of the mitigation plan." *S. Fork Band Council*, 588 F.3d at 727. While the federal agency argued that a mitigation plan was not required because it was impossible to predict the location and extent of groundwater impacts, the Court ruled that "[e]ven if the discussion must necessarily be tentative or contingent, NEPA requires that the agency give some sense of whether" the impacts could be mitigated. *Id.* The Turkey Point 6 & 7 Mitigation Plan far exceeds the standard set forth in *South Fork Band Council* by demonstrating that the proposed restoration and purchase of credits offset wetlands impacts on a one to one basis.

documents supporting any claim that these methods are inadequate, as is required by 10 C.F.R. § 2.309(f)(1)(v). They similarly fail to provide sufficient information to demonstrate that there is a genuine material dispute with the assessment, as required by 10 C.F.R. § 2.309(f)(1)(vi).

Joint Intervenors' query regarding why the expected 1:1 mitigation ratio is adequate (Motion at 5) is similarly unsupported. Joint Intervenors do not provide any expert opinion, alleged facts, or references suggesting that a greater ratio is required. Nor is there any apparent reason why mitigation would need to *more than offset* the calculated impact.[31]

In addition, Joint Intervenors do nothing more than argue vaguely that agencies cannot rely on "untested mitigation measures" (Motion at 5), without identifying any specific measures that are untested or what additional testing might be required. A bald assertion that something ought to be considered is not sufficient to make a contention admissible. *Private Fuel Storage*, LBP-98-7, 47 N.R.C. at 180. Joint Intervenors point out that the Hole-in-the Donut Mitigation Bank is not a federally-approved mitigation bank, but fail to say why that might be a problem. Joint Intervenors do not "provide any documents or other factual information or expert opinion" explaining why the Bank not being federally-approved means that it is an "untested mitigation

[31] To the contrary, based on the evidentiary record after hearings in which Joint Intervenor National Parks Conservation Authority participated as a party, the Florida Siting Board held, "the competent substantial record evidence supports the finding that FPL's wetland mitigation plan can, and does, fully offset the adverse impacts, including functional loss thereof, to all wetlands proposed to be impacted." Siting Board Order at 164. Further, the basis for the 1:1 mitigation ratio is fully explained in FPL's Mitigation Plan at page 8 ("Rather than an acre-for-acre mitigation or the use of mitigation ratios, the calculation of wetland mitigation requirements typically involves use of a wetland functional assessment value multiplied by the acreage of impact to determine the required number of mitigation credits to offset the loss of wetland functions. Wetland functional assessments involve ranking the subject wetland relative to several variables, such as vegetation, wildlife utilization, hydrology, and surrounding landscape conditions. The goal of the functional assessment is to determine the ecological value of the wetland prior to disturbance to ensure that mitigation will replace the wetland's ecological functions rather than merely replacing the acreage of fill. Using this rationale, a 2-acre wetland dominated by exotic vegetation with altered hydrology and little wildlife utilization would have a lower functional value and thus require fewer mitigation credits to offset unavoidable impacts as compared to a 2-acre wetland supporting a diverse assemblage of native flora and fauna and an unaltered hydrologic regime.). Again, Joint Intervenors have not provided any basis to challenge the methods used in FPL's Mitigation Plan.

measure" or cannot be used to compensate for loss of wetlands. *Id*. They also fail to acknowledge that (1) the Hole-in-the-Donut Mitigation Bank has been approved by the State of Florida; and (2) the State of Florida has approved FPL's Mitigation Plan, which relies in part on mitigation through that Bank.

Indeed, Joint Intervenors should be collaterally estopped from questioning the effectiveness of the Mitigation Plan, because they are in privity with the National Parks Conservation Authority, which was a party to the hearing before the Florida Siting Board and litigated the adequacy of the Mitigation Plan. *Public Service Company of New Hampshire* (Seabrook Station, Units 1 & 2), CLI-78-1, 7.N.R.C. 1, 26-27 (1978) ("where another agency has acted 'in a judicial capacity and resolve[d] disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate,' we will not hesitate to give res judicata or collateral estoppel effect to its findings to enforce repose.'")(citations omitted). The Commission has held that where "litigants have one full and fair opportunity to contest a particular issue, they need not be given a second opportunity to reopen the whole matter before another tribunal where the same issue is relevant." *Id*.

Collateral estoppel applies (1) if the issue in the prior adjudication is the same as that in the subsequent case; (2) that issue was actually litigated in the prior action; (3) the judgment in the case is final and entered by a court of competent jurisdiction; (4) the determination of that issue was necessary to the outcome of the first action; and (5) the party to which the estoppel is to be applied must have been a party, or in privity with a party, that litigated the issue in the prior proceeding. *In re Geisen*, CLI-10-23, 72 N.R.C. 210 (2010); *Private Fuel Storage LLC* (Independent Spent Fuel Storage Installation), LBP-02-20, 56 N.R.C. 169, 181 (2002).

The issues raised by Joint Intervenors here are the same as those litigated in the Site Certification Proceeding - Joint Intervenors are challenging the mitigation measures set forth in FPL's Mitigation Plan. As previously described, the Florida Siting Board in its final order[32] unequivocally found that "FPL's wetland mitigation plan *can be implemented*" and it "*will* offset the adverse effects" on wetlands. Siting Board Order at 23, 136. In explicitly rejecting the National Parks Conservation Authority's exceptions (*id*. at 162- 64), the Siting Board in its final order held that "the competent substantial record evidence supports the finding that FPL's wetland mitigation plan can, and does, fully offset the adverse impacts, including functional loss thereof, to all wetlands proposed to be impacted." *Id.* at 164. This finding was necessary to the outcome of the state proceeding because FPL is required to offset all adverse impacts to wetlands. For these reasons, the principles of collateral estoppel must be applied here to prohibit Joint Intervenors from re-litigating this issue.

Finally, Joint Intervenors fail to show that the issue they seek to raise is material to the findings that the NRC must make, as required by 10 C.F.R. § 2.309(f)(1)(iv). Joint Intervenors do not provide any information or discussion demonstrating that any further assessment of mitigation measures would alter the NRC's findings on the environmental impacts of the proposed action. In this case, the DEIS has found that the impacts on terrestrial resources are MODERATE. DEIS at 4-75. As the DEIS explains, this conclusion is based on the DEIS review team's independent assessment of the ER, the SCA, FPL's answers to requests for

[32] The Florida Siting Board Order has been appealed by Miami-Dade County, City of South Miami, Village of Pinecrest, and City of Miami to the State of Florida's Third District Court of Appeal. *See e.g.* Initial Brief of Appellant, City of South Miami, Miami-Dade County, et al. v. Florida Power & Light Co., et al., No. 3D14-1467 (Fla. App. 3d Dist. Jan. 23, 2015). National Parks Conservation Authority has not appealed. None of the appellants challenge the Siting Board's findings regarding mitigation measures or FPL's Mitigation Plan. *Id. See also,* Initial Brief of Appellant, Miami-Dade County, Miami-Dade County, et al. v. Florida Power & Light Co., et al., No. 3D14-1467 (Fla. App. 3d Dist. Jan. 23, 2015); Initial Brief of Appellant, Village of Pinecrest, Miami-Dade County v. Florida Power & Light Co., et al., No. 3D14-1467 (Fla. App. 3d Dist. Jan. 23, 2015).

additional information ("RAIs"), the identified mitigation measures and best management practices, and takes into account the "potential time lag and uncertainties associated with the mitigation." DEIS at 4-75. That the DEIS review team accounted for the "potential time lag and uncertainties associated with the mitigation" belies the Joint Intervenors' assertion that the DEIS merely lists and fails to evaluate the effectiveness of FPL's mitigation measures. Moreover, the Joint Intervenors provide no information that would suggest that wetlands impact would be more than MODERATE.

For the reasons set forth above, the DEIS, and FPL's Mitigation Plan cited in the DEIS, contain a detailed discussion of wetland mitigation measures and their effectiveness. Joint Intervenors have failed to allege facts or provide expert opinion or other support explaining why those mitigation measures are not sufficient, and therefore have failed to raise a genuine dispute with the DEIS on a material factual issue. *See Millstone*, CLI-01-24, 54 N.R.C. at 358. Accordingly, Joint Intervenors' Contention is inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(iv)-(vi).

2. The Contention Does Not Raise a Material Issue of Law

Joint Intervenors' Contention also is inadmissible because it does not raise a material issue of law. 10 C.F.R. § 2.309(f)(1)(iv) and (vi). While Joint Intervenors contend that the DEIS is deficient because the "effectiveness of mitigation measures must be fully evaluated before a final EIS is issued" (Motion at 5), NEPA does not require that an Environmental Impact Statement ("EIS") contain such details.

a. NEPA Does Not Require Detailed Explanation of Mitigation Measures that Will Be Employed

Section 102 of NEPA, as amended, directs that an EIS be prepared for all Federal Actions that significantly affect the quality of the human environment. 42 U.S.C. § 4332(C)(i). The Commission has found that NEPA serves a dual purpose: to ensure that officials fully take into account the environmental consequences of Federal Action before reaching major decisions, and to inform the public, Congress, and other agencies of those consequences. *Private Fuel Storage L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 N.R.C. 340, 347 (2002). .

An EIS is not a research document. *Entergy Nuclear Generation Co.,* (Pilgrim Nuclear Power Station), CLI-10-22, 72 N.R.C. 202, 208 (2010). NEPA does not mandate particular results, but prescribes the necessary process. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). While an EIS should set forth "possible" measures to mitigate adverse environmental consequences, NEPA does not require "'a detailed explanation of specific measures which *will* be employed to mitigate the adverse impacts of a proposed action.'" *Id.* at 353 (emphasis in original).[33] In fact, "a mitigation plan need not be legally enforceable, funded or even in final form to comply with NEPA's procedural requirements." *Pac. Coast Fed'n of Fishermen's Ass'ns v. Blank*, 693 F.3d 1084, 1103 (9th Cir. 2012). Here, not only does the DEIS contain a detailed discussion of possible mitigation, but it cites an even more detailed, publicly available Mitigation Plan that has been thoroughly reviewed and approved by the State of Florida.[34] *See* Mitigation Plan Appendix A (providing the detailed UMAM functional

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[33] The Commission has cited these principles with approval. See, e.g. *Hydro Resources, Inc*. (P.O. Box 777, Crownpoint, NM 87313), CLI-06-29, 64 N.R.C. 417, 426-27 (2006);*McGuire/Catawba*, CLI-03-17, 58 N.R.C. at 431.

[34] NEPA allows an agency to rely on environmental studies and analyses prepared by competent state and local authorities as part of its overall independent assessment of environmental impacts. *New England Council on Nuclear Pollution v. NRC*, 582 F.2d 87, 99 (1st Cir. 1978); *Progress Energy Florida* (Levy County Nuclear

assessment worksheets for each impacted area); Siting Board Order at 23, 136. For these reasons, it is indisputable that the DEIS satisfies NEPA's requirements that the agency identify possible mitigation measures.

Joint Intervenors rely on the 9th Circuit's decision in *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372 (9th Cir. 1998) to support their position that the Turkey Point DEIS analysis of mitigation measures is insufficient. Rather than support Joint Intervenors' Contention, this case shows that the DEIS provides more than a reasonably complete discussion of mitigation measures.

In *Neighbors of Cuddy Mountain*, the 9th Circuit found the United States Forest Service's discussion of mitigation measures to be "perfunctory" and therefore inconsistent with NEPA's requirements. In that case, the Forest Service's discussion of mitigation was the following:

> [S]mall increases in sedimentation and other effects of logging and road construction in Grade and Dukes creeks would be mitigated by improvements in fish habitat in other drainages.... Even minor improvements in other drainages, such as Wildhorse River or the Weiser River, would affect more fish habitat than exists in Grade and Dukes creeks. (See Forest Plan, page IV-38 for a list of offsetting mitigation projects.)
>
> Offsetting mitigation would include such projects as riparian enclosures (fences around riparian areas to keep cattle out) and fish passage restoration (removing fish passage blockages). These activities can be effective but cannot be quantified with present data.

Neighbors of Cuddy Mountain, 137 F.3d at 1380.

In contrast, the DEIS here does far more than reference a list of offsetting mitigation projects. As described above, the DEIS quantifies the impacted area using the State of Florida's approved UMAM and W.A.T.E.R. methodologies, identifies and describes restoration projects in

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Power Plant, Units 1 and 2), LBP-13-4, 77 N.R.C. 107, 191 (2013); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), ALAB-490, 8 N.R.C. 234, 239-40 (1978).

detail, quantifies the benefits provided by these restoration projects, and describes the mitigation banks and the credits necessary from those banks to offset the wetland impacts. Additionally, throughout its discussion of wetlands impacts, the DEIS references FPL's even more detailed Mitigation Plan.

According to Joint Intervenors, the DEIS does not discuss "whether, why, and how" these measures will adequately offset the projected wetland loss. As the Commission stated in *Hydro Resources*, Joint Intervenors demand a level of detail not required by NEPA. CLI-06-29, 64 N.R.C. at 426. In *Hydro Resources*, the intervenors claimed that the FEIS did not adequately address mitigation measures that included replacing water supply wells and a water delivery system because the measures were insufficiently discussed and had to be supported by scientific studies and substantial evidence. *Id.* The intervenors added that the FEIS did not discuss whether there were other locations that met the drinking water standards, which regulatory agency would be responsible for oversight, whether existing or new infrastructure would be needed, and whether building such infrastructure was even feasible. *Id.* In response, the Commission found that the purpose of addressing possible mitigation measures in an FEIS is only to ensure that environmental consequences have been "fairly evaluated." *Id.* The Commission added that NEPA does not require a complete mitigation plan or a detailed explanation of specific measure which will be employed. A mitigation plan does not have to be legally enforceable, funded, or even in final form to comply with NEPA. According to the Commission, it is not improper for the EIS to describe mitigation measures in general terms and rely on general processes. *Id*. at 427.

Moreover, even if NEPA were to require a discussion of the "whether, why, and how," the DEIS explicitly answers those questions by relying upon the standard, state-approved

wetland assessment methodology to quantitatively show that the impacted wetlands are offset by: (1) the restoration projects; and (2) purchase of mitigation bank credits. In addition, the DEIS explains how the restoration projects would be accomplished and how restoration would be protected with a conservation easement and a perpetual maintenance fund pursuant to its mitigation banking instrument. DEIS at 4-70-4-7.

The DEIS also states that compensatory mitigation for unavoidable wetlands impacts is required by the Florida Environmental Resource Permitting process and that the final Conditions of Certification accompanying Turkey Point's state certification are binding. DEIS at 4-1, 4-73. Unlike the "broad generalizations and vague references to mitigation measures" in *Neighbors of Cuddy Mountain,* the DEIS discusses mitigation measures in substantial detail. 137 F.3d at 1381.

b. NEPA Does Not Prevent the NRC from Issuing its DEIS before the USACE Has Completed its Review

The DEIS states that the USACE has not yet completed its independent review of FPL's proposed compensatory mitigation plan. DEIS at 4-69. Joint Intervenors cite this statement to support a claim that the DEIS is improperly relying on "untested mitigation measures and bald assertions that mitigation will be successful and adequate." Motion at 5, citing *Wyo. Outdoor Council Powder River Basin Res. Council v. U.S. Army Corps of Eng'rs,* 351 F. Supp. 2d 1232 (Wyo. 2005).

As an initial matter, as demonstrated above, the DEIS relies on state-approved mitigation measures that clearly are not "untested." Nor is there any validity to Joint Intervenors' claim that the NRC is delegating its NEPA responsibilities by deferring to the USACE to evaluate the mitigation measures at some later date as part of its separate review process. Motion at 7. The

DEIS contains the NRC's own evaluation. The DEIS describes the compensatory mitigation measures in detail, quantifies the effectiveness of these measures in terms of the state-required wetlands assessment methodology, and comes to an independent conclusion regarding the impacts on terrestrial resources in light of these impacts. That is more than sufficient under NEPA.

More importantly, the status of the USACE's 404 permit review is irrelevant. As the U.S. Supreme Court has found, NEPA does not prevent an agency from acting until another agency has reached a final conclusion on what mitigating measures they consider necessary. *Robertson,* 490 U.S. at 352-353.[35]

Joint Intervenors suggest that, because the USACE has not completed its 404 permitting activities, the DEIS's analysis is somehow incomplete. Motion at 5. However, Joint Intervenors do not point to any specific mitigation measure that is missing or needs additional analysis. They simply claim, without support, that the NRC cannot issue a DEIS without the USACE completing its permitting activities. While the USACE is a cooperating agency and will be relying in part on the data presented in the DEIS, its permitting decision is independent of the NRC's decision on the COL.[36] And, it is not uncommon for even a *Final* EIS to be issued before

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[35] *See also Progress Energy Florida, Inc*. (Levy County Nuclear Plant, Units 1 and 2), LBP-09-10, 70 N.R.C. 51, at n.40 (stating that "the agency required to perform the EIS is required to make its decision (e.g., whether to issue the license) based on a consideration of all environmental impacts, even those outside its jurisdiction, but the lead agency is not to assume responsibility or jurisdiction over all environmental impacts. Unless otherwise shown, other agencies can be assumed to be doing their respective regulatory functions.").

[36] Furthermore, because the NRC and the Corps are cooperating on the EIS, the Corps' least environmentally damaging practicable alternative ("LEDPA") decision cannot be made until after the final EIS is issued. For that reason, having the LEDPA decision reflected in the Record of Decision is the norm. *See* COL/ESP-ISG-026 at 6, Attachment 6: Staff Guidance for Alternatives Reviews for New Reactor Environmental Impact States (ADAMS Accession No. ML12328A075). The Joint Intervenors' position would create an impossible situation where the DEIS cannot be issued because the Corps' LEDPA decision has not been made and the Corps LEDPA decision cannot be made because it is not supported by an FEIS, or preclude the Corps and NRC from acting as cooperating agencies.

the USACE has completed its permitting process. *See, e.g., Levy*, LBP-13-4, 77 N.R.C. at 191-220. In fact, even in situations where there is a conflict between the lead agency and a cooperating agency, the lead agency can issue its EIS.[37]

Furthermore, Joint Intervenors' reliance on the Court's analysis in *Wyoming Outdoor Council* is misplaced. The court in *Wyoming Outdoor Council* was applying a different legal standard than is applicable here, because it was deciding whether the USACE could issue a Clean Water Act permit based on an environmental assessment and a finding of no significant impact ("FONSI"), without having to prepare an EIS. In such cases, courts have found that mitigation measures can form the basis of a FONSI where: (1) the mitigation is more than just a possibility, it must be imposed by statute or regulation or have been so integral to the initial proposal that it is impossible to define the proposal without the mitigation; and (2) the mitigation measures relied upon must provide an adequate buffer to render the impacts so minor as not to require an EIS. 351 F. Supp. 2d at 1250.[38]

Those criteria do not apply to an analysis of whether mitigation measures are sufficiently discussed in an EIS. *Robertson* holds that NEPA *does not require that action be taken to mitigate* adverse effects of major federal actions, nor does it require "'a detailed explanation of specific measures which *will* be employed to mitigate the adverse impacts of a proposed actions.'" 490 U.S. at 353. In the case of Turkey Pont 6 & 7, the NRC and the USACE are not

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[37] Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations ("Forty Questions"), 46 Fed. Reg. 18,026, 18,035 (Mar. 23, 1981).

[38] Even in the context of *Wyoming Outdoor Council* (i.e., in determining whether mitigation measures may be relied upon in support of a finding of no significant environmental impact), the Courts have also held that mitigation measures are adequately supported when they are "likely to be adequately policed." *See Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs*, 702 F.3d 1156 1172-73 (10th Cir. 2012) (citing *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 17 (2d Cir. 1997). With regard to Turkey Point Units 6 & 7, implementation of the Mitigation Plan is not only required under the Florida Siting Order, but will also be required to obtain the 404 permit.

relying on mitigation to make a FONSI determination in order to avoid having to prepare an EIS. In this case, an EIS is being prepared and, even with the proposed mitigation measures, the DEIS has taken into account the "potential time lag and uncertainties associated with the mitigation" and found that the impacts on terrestrial resources are MODERATE. DEIS at 4-75.

V. CONCLUSION

For the reasons set forth above, the Board should find that Joint Intervenors' proposed Contention is inadmissible because it is untimely. Even if the Board were to find that the Contention is timely, it should nevertheless rule that the Contention is inadmissible because it fails to raise a genuine dispute on a material issue of fact or law.

Respectfully submitted,

/Signed electronically by David R. Lewis/

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
Florida Power & Light Company	)	Docket Nos. 52-040-COL
	)	52-041-COL
Turkey Point Units 6 and 7	)	
(Combined License Application)	)	ASLBP No. 10-903-02-COL
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Florida Power & Light Company's Answer Opposing Joint Intervenors' Motion to File New Contention has been served through the E-Filing system on the participants in the above-captioned proceeding, this 8th day of May, 2015.

/Signed electronically by David R. Lewis/

David R. Lewis