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1 UNITED STATES OF AMERICA

2 NUCLEAR REGULATORY COMMISSION

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4 ATOMIC SAFETY AND LICENSING BOARD PANEL

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6 HEARING

7 -----x

8 In the Matter of: :

9 FLORIDA POWER & : Docket Nos. 52-040-COL

10 : and 52-041-COL

11 LIGHT COMPANY : ASLBP No. 10-903-02-

12 : COL-BD01

13 (Turkey Point Units 6 and 7):

14 -----x

15 Thursday, July 16, 2015

16
17 Nuclear Regulatory Commission

18 Hearing Room T-3 B45

19 11545 Rockville Pike

20 Rockville, Maryland

21
22 BEFORE:

23 E. ROY HAWKENS, Chair

24 MICHAEL F. KENNEDY, Administrative Judge

25 WILLIAM C. BURNETT, Administrative Judge

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WASHINGTON, D.C. 20005-3701

(202) 234-4433

(202) 234-4433

1 APPEARANCES:

2
3 On Behalf of Joint Intervenors:

4 JASON TOTOIU, ESQ.

5 of: Everglades Law Center, Inc.

6 3305 College Avenue

7 Ft. Lauderdale, Florida 33314

8 (863) 298-8000

9
10 KATHERINE LEE, ESQ.

11 of: Turner Environmental Law Clinic

12 Emory University School of Law

13 1301 Clifton Road, SE

14 Atlanta, Georgia 30322

15 (404) 727-3432

16
17 On Behalf of Florida Power & Light Company:

18 DAVID LEWIS, ESQ.

19 KIMBERLY HARSHAW, ESQ.

20 of: Pillsbury, Winthrop, Shaw, Pittman, LLP

21 1200 17th Street, NW

22 Washington, DC 20036

23 (202) 663-8474

1 On Behalf of the Nuclear Regulatory Commission:

2 ROBERT M. WEISMAN, ESQ.

3 ANTHONY WILSON, ESQ.

4 of: Office of the General Counsel

5 Mail Stop - O-15 D21

6 U.S. Nuclear Regulatory Commission

7 Washington, D.C. 20555-0001

8 (202) 415-1696

9

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P-R-O-C-E-E-D-I-N-G-S

1:01 p.m.

CHAIR HAWKENS: Good afternoon. My name is Roy Hawken. We're here for oral argument in the case entitled Florida Power & Light Company, Turkey Point Units 6 and 7. Docket Numbers 52-040-COL and 52-041-COL.

I am chairman of the Licensing Board. I am joined by Dr. Mike Kennedy, who is a nuclear engineer. And by Dr. Bill Burnett, who is an oceanographer and an environmental scientist.

Also assisted by law clerks Matt Zogby, Nicole Pepperl. And also the Board's administrative assistant Karen Valloch, who is in the back. And the Board's IT assistant Andy Welkie.

This proceeding is being transcribed and an electronic transcript will be available to the public on the NRC website in the docket of this case shortly. Probably within the next few days.

Additionally, we have a listen-only line, a telephone line devoted to members of the public who cannot join us in Rockville today.

And finally, the proceeding is being broadcast on the NRC television line, Channel 50. So, just a heads up to counsel that certainly when you're

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1 speaking, you'll be televised. And even when you're
2 not, you may be. So, heads up.

3 Three parties are presenting argument
4 today. The Joint Intervenors, they are comprised of
5 the National Parks Conservation Association, the
6 Southern Alliance for Clean Energy, Mark Oncavage and
7 Dan Kipnis; Florida Power and Light and the NRC staff.

8 Would counsel for the parties please
9 introduce themselves?

10 MR. TOTOIU: Good afternoon, Board. This
11 is Jason Totoiu appearing for the -- I mean appearing
12 on behalf of Joint Intervenors.

13 MS. LEE: Katherine Lee, Turner
14 Environmental Law Clinic, Joint Intervenors.

15 CHAIR HAWKENS: Thank you.

16 MR. LEWIS: Good morning, Judge Hawkens
17 and Judge Kennedy and Judge Burnett. My name is David
18 Lewis. I'm with the law firm of Pillsbury Winthrop
19 Shaw Pittman representing Florida Power and Light.

20 Joining me is Mr. Steven Hamrick, senior
21 attorney for Florida Power and Light on my right, and
22 Kim Harshaw from my firm on my left.

23 MR. WEISMAN: Good morning.

24 CHAIR HAWKENS: Good morning.

25 MR. WEISMAN: This is Bob Weisman for the

1 NRC staff. And with me, counsel today is Anthony
2 Wilson.

3 CHAIR HAWKENS: Welcome. This proceeding
4 involves an application by Florida Power and Light for
5 a combined license to construct and operate two
6 nuclear power plants in southern Florida, Turkey Point
7 Units 6 and 7.

8 Today's argument concerns a motion filed
9 by the Joint Intervenors seeking to submit a new
10 contention challenging the draft environmental impact
11 statement that was recently issued by the NRC staff.

12 The new contention alleges as follows:
13 The draft environmental impact statement for Turkey
14 Point Units 6 and 7 does not comply with the National
15 Environmental Policy Act, because its determination of
16 the project's environmental impacts, rejection of
17 other project alternatives and staff's recommendation
18 that the COL be issued are based on impermissibly
19 speculative mitigation measures, the effectiveness of
20 which have not been adequately evaluated. The NRC
21 staff and FPL oppose admission of the new contention.

22 The Board has read the parties' pleadings.
23 We determined that oral argument would assist us in
24 determining the admissibility of the contention and on
25 July 2nd, we issued an order that scheduled today's

1 argument, identified topics we'd like the parties to
2 address and provided the order an allotment of time
3 for counsel in today's argument.

4 We'll hear first from Joint Intervenors.
5 We'll have up to 45 minutes of argument time and may
6 reserve a portion of that time for rebuttal.

7 After hearing from them, we'll hear from
8 the NRC staff, and then from FPL -- I've been advised
9 I'm a little bit too close to the mic. A little bit
10 later I'll be advising counsel to speak directly into
11 the mic for the benefit of the audience and those on
12 the listening line, but apparently you can be too
13 close to it as well, as a heads up. Our IT expert
14 will keep you advised.

15 As I said, we'll hear from the NRC staff
16 and FPL. Each will have up to 30 minutes of argument
17 time.

18 Counsel during the presentation of their
19 argument and then answering questions may remain
20 seated at counsel table.

21 During a party's presentation in addition
22 to asking questions of a particular party, a board
23 member may wish to direct a question to one of the
24 other two parties.

25 If that does occur, Nicole will be keeping

1 track of time and she will not attribute the time
2 asked of another party and answered by another party
3 to the party who actually has the podium.

4 The argument is scheduled to take
5 approximately two hours. We anticipate endeavoring to
6 take a break about halfway through, which may coincide
7 with the completion of the initial presentation by the
8 Joint Intervenors, but we'll play that by ear as the
9 argument progresses.

10 Do counsel at this time have any questions
11 or any concerns they wish to raise?

12 MR. WEISMAN: None from the staff.

13 CHAIR HAWKENS: All right. Thank you very
14 much.

15 We'll start off then hearing from Joint
16 Intervenors. Mr. Totoiu, do you wish to reserve any
17 time, sir?

18 MR. TOTOIU: I do. Ten minutes, please.

19 CHAIR HAWKENS: All right. You may
20 proceed.

21 MR. TOTOIU: Well, good afternoon. We're
22 seeking leave to file a new contention which
23 challenges the NRC staff's recommendation to issue a
24 combined license for Turkey Point Units 6 and 7 based
25 on potential mitigation measures identified in the

1 draft EIS.

2 The importance of wetland avoidance,
3 minimization and mitigation cannot be overstated in
4 this case.

5 This project will impact approximately a
6 thousand acres of wetlands near two national parks.
7 The Everglades National Park, which is a World
8 Heritage Site, and Biscayne National Park, which
9 protects one of the most extensive coral reef tracts
10 in the world.

11 We submit that the mitigation measures
12 identified in the draft environmental impact statement
13 are speculative and the draft environmental impact
14 statement does not adequately examine their
15 effectiveness as required under NEPA.

16 Instead of performing a fully informed
17 analysis in cooperation with the US Army Corps of
18 Engineers, the NRC is essentially taking FPL's
19 proposals at face value.

20 The Everglades is far too important as
21 evidenced by the multibillion dollar restoration
22 project currently underway, to issue an environmental
23 impact statement that does not contain a fully
24 informed analysis of this project's mitigation
25 measures.

1 I'd like to begin by first addressing the
2 timeliness of this contention. The new information in
3 the draft environmental impact statement is
4 significant in threefold.

5 First, the US Army Corps of Engineers
6 participated in the preparation of an EIS as a
7 cooperating agency. Second, that the Corps has not
8 reviewed the adequacy of the mitigation measures. And
9 third, that the mitigation measures would not be
10 approved until after the final environmental impact
11 statement was issued.

12 And why is this important? Why is this
13 materially different? To begin with, the draft
14 environmental impact statement states that the goal of
15 the cooperating agencies is to have a single
16 environmental impact statement.

17 That's reflected and pursuant to the
18 Cooperative Agency Agreement between the NRC and the
19 Army Corps of Engineers.

20 Without Corps approval or at least further
21 information in the draft environmental impact
22 statement, it's impossible to determine whether or not
23 those mitigation measures discussed in that draft
24 environmental impact statement will actually be
25 required and whether FPL's assessment of the

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1 effectiveness is correct.

2 Thus, the discussion of these measures in
3 the draft environmental impact statement is
4 speculative.

5 NRC's failure to incorporate the Corps'
6 review of the plan renders the impact statement
7 fundamentally deficient and incomplete.

8 CHAIR HAWKENS: Is it your position, Mr.
9 Totoiu, that the Clean Water Act analysis and
10 mitigation measures required by that must always be
11 completed before, in this instance, the staff can
12 issue its DEIS?

13 MR. TOTOIU: I think in this instance,
14 this presents a situation where NRC staff and the US
15 Army Corps of Engineers enter into a cooperative
16 agreement.

17 The purpose of that cooperative agreement
18 --

19 CHAIR HAWKENS: May I ask the question
20 again then?

21 MR. TOTOIU: Sure.

22 CHAIR HAWKENS: So, is it your position --
23 in answer to the first question, is it your position
24 that the Clean Water Act analysis must always be
25 completed before the DEIS can issue, or is it your

1 position --

2 MR. TOTOIU: Before the final EIS is
3 issued, yes.

4 CHAIR HAWKENS: Before the final EIS.

5 MR. TOTOIU: Yes.

6 CHAIR HAWKENS: Do you have any case law
7 to support that?

8 MR. TOTOIU: Absolutely. And I think that
9 this is very analogous to Calvert Cliffs. I think in
10 Calvert Cliffs versus the Atomic Energy Commission,
11 which is DC Circuit 1971, made clear they struck down
12 procedural rule adopted by the Atomic Energy
13 Commission to govern its consideration of
14 environmental issues in reviewing license
15 applications.

16 Under one of those rules, proof that the
17 license applicant is equipped to observe and agrees to
18 observe environmental standards set forth by other
19 federal agencies would be considered a satisfactory
20 showing that there will not be a significant adverse
21 effect on the environment.

22 And the court found that that attempt to
23 rely entirely on the environmental judgments of that
24 other agency is in fundamental conflict with the basic
25 purpose of NEPA.

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1 And so, I think it's very similar here in
2 what's occurring. We're waiting -- essentially the
3 NRC staff is going forth with the draft environmental
4 impact statement, it will continue forward with the
5 final environmental impact statement, and the Corps at
6 some unidentified point afterwards will issue its
7 determination under Section 404 of the Clean Water
8 Act.

9 I believe it's fundamentally in conflict
10 with what NEPA requires that those impacts, as Calvert
11 Cliffs -- as Judge Skelly wrote in Calvert Cliffs
12 explained, NEPA is unique. It requires a cost-benefit
13 analysis of all the environmental impacts whether
14 that's air, whether that's water, whether that's
15 impacts to endangered species. It is a -- in a single
16 environmental impact statement.

17 We're not dealing with a situation where
18 the Army Corps is preparing its own environmental
19 impact statement.

20 It's very clear from this, from the
21 reading of the draft environmental impact statement
22 coupled with the MOU, that this will be a single EIS.

23 And if that's what the NRC staff intended,
24 then it needs to incorporate that analysis into a
25 single document.

1 CHAIR HAWKENS: What impact on your
2 argument would -- what impact would it have on your
3 argument to learn that it's not at all unusual for the
4 Corps to issue its Clean Water Act analysis after a
5 final EIS is prepared and issued?

6 MR. TOTOIU: Well, I --

7 CHAIR HAWKENS: Because I think the case
8 law does support that.

9 MR. TOTOIU: Again, I don't think that
10 consistent with what the Supreme Court cases and the
11 DC Circuit cases like Calvert Cliffs, I don't know if
12 you -- I don't think you can square that decision-
13 making with what NEPA requires.

14 You know, traditionally what we have is --
15 and oftentimes, and maybe I'm digressing a little bit,
16 but, you know, you're not dealing necessarily always
17 with a cooperative agreement.

18 So, the Army Corps of Engineers may issue
19 an environmental impact statement and the NRC may do
20 the same separately, or another federal agency such as
21 a transportation project.

22 If two environmental impact statements are
23 issued, I think that's a different situation. But
24 what we're dealing with here today is the intent for
25 the NRC staff -- between the NRC staff and the Army

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1 Corps of Engineers to engage in a cooperative,
2 collaborative arrangement and analysis under that
3 cooperative agreement.

4 And the purpose of that cooperative
5 agreement, actually, is to make it more efficient,
6 more streamlined and so that those considerations
7 would be taken together.

8 And I can point to certain -- to a couple
9 excerpts of that cooperative agreement, which I think
10 articulates that.

11 The responsibility of both agencies under
12 that MOU on Page 5 is described to ensure that the
13 individual permitting process and related permit
14 review activities occur on a concurrent rather than
15 sequential basis with the objective of avoiding
16 unnecessary delays in the process and schedule
17 established by the NRC.

18 And the responsibilities of the NRC
19 specifically coordinating early with the Corps,
20 consider the views of the Corps which includes, as
21 examples, Section 404 of the Clean Water Act,
22 conducting the Corps' public interest review and
23 determining the least environmentally damaging
24 practical alternative.

25 And I think one more section of this draft

1 environmental impact statement which reflects what
2 we're dealing with here which contemplates a broader
3 review is on Page 4-3 of the environmental impact
4 statement, which speaks where the NRC staff has
5 articulated that because of a collaborative effort
6 between the NRC and the United States Army Corps of
7 Engineers in this environmental review, the combined
8 impacts of construction activities that would be
9 authorized by the NRC with its issuance of a COL and
10 the pre-construction activities are presented in this
11 chapter.

12 So, it's an implicit acknowledgment that
13 this is a broader review. And if it's a broader
14 review of the impacts, it should include a broader
15 review of the mitigation in a similar vein.

16 JUDGE KENNEDY: Mr. Totoiu, in your
17 opening remarks I heard you -- this is Judge Kennedy.
18 I heard you mention the word "approval" of mitigation
19 measures as a distinction, at least I would make,
20 between an assessment evaluation of mitigation
21 measures.

22 Did you purposely intend that distinction
23 to be made? And if so, what is the -- I guess I'd
24 like you to maybe open that up just a bit more.

25 MR. TOTOIU: Sure.

1 JUDGE KENNEDY: Are you looking for
2 approval of mitigation measures versus an evaluation,
3 and where in NEPA --

4 MR. TOTOU: I think at the bottom we're
5 looking at a review and assessment. I think that that
6 can be done concurrently in this process. I think,
7 you know, it's extremely important because the
8 permitting process under the Army Corps of Engineers,
9 as in the Clean Water Act, is quite substantial.

10 There's at least 14 steps. There's about
11 22 factors for consideration of the public interest
12 criteria under 404(b)(1) guidelines. And so with all
13 that, things could change.

14 We cannot -- I think it would be improper
15 to accept at face value the mitigation measures that
16 were identified. Those mitigation could be different.
17 It could be more. There could be some instances that
18 the Army Corps determines that a particular resource
19 cannot be impacted and that there is no mitigation for
20 such a special aquatic site. For example, the mud
21 flat that was identified in the draft EIS.

22 JUDGE KENNEDY: For argument sake, could
23 the mitigation measures be less at a future date?

24 MR. TOTOU: It is possible. Whatever
25 that may be, I think it's important that we hear from

1 the Corps and have the Corps' analysis. Because I
2 think what that mitigation will demand, I think that
3 there's a relationship there with both the impacts and
4 the alternatives analysis as well, that these are --
5 there's an interworking here amongst these factors for
6 consideration.

7 JUDGE KENNEDY: So, if I'm free to drop
8 the word "approval of mitigation measures" and
9 substitute "assessment and evaluation" concurrent with
10 the drafting of the EIS, that would satisfy your
11 concern?

12 MR. TOTOU: I think that the concern
13 still remains in the sense that that could stay --
14 that could be influx, but I think at bottom that what
15 we need is a review and analysis.

16 The concern there is that, you know, new
17 information may come about prior to the issuance of a
18 permit and then the analysis changes.

19 CHAIR HAWKENS: If new information comes
20 about as a result of the Corps' Clean Water Act
21 analysis, though, if it's sufficiently important,
22 wouldn't the NRC staff be required to issue a
23 supplement to the FEIS?

24 MR. TOTOU: That's correct, Your Honor.
25 But I think that what we're dealing with here today is

1 not in contemplation of a supplemental environmental
2 impact statement.

3 And the concern may arise in that
4 following the federal environmental impact statement
5 is issued and the combined license is issued and new
6 information comes about, the whole purpose of NEPA is
7 to have up front decision-making before we go into a
8 decision.

9 You know, there's a famous line from
10 Robertson versus Methow Valley, a Supreme Court case,
11 is the decision -- the time, you know, essentially is
12 now before the die is cast.

13 It's a lot harder after that license is
14 issued to then start to maybe take measures to
15 remediate, if necessary, and construction has broken
16 ground and things are underway.

17 CHAIR HAWKENS: So, is your position that
18 as a matter of law Clean Water Act analysis must be
19 completed before an agency can issue its FEIS?

20 MR. TOTOIU: I think in this instance --

21 CHAIR HAWKENS: Was that a yes or a no?

22 MR. TOTOIU: Yes, with a qualification,
23 I'll say.

24 CHAIR HAWKENS: All right.

25 MR. TOTOIU: That qualification being that

1 if the NRC were to go forward and issue a final
2 environmental impact statement without the benefit of
3 the Corps' analysis, then it must itself undertake an
4 independent analysis.

5 And so, if the Corps wants, you know, and
6 we're not dealing with that today because of the
7 cooperating agreement, but assuming there was no
8 cooperating agreement and the Corps was to perhaps
9 prepare an environmental impact statement and then
10 tier to this one, that's a different set of
11 circumstances.

12 But I think in that case, yes, it's
13 possible that, you know, as long as the NRC takes an
14 independent analysis. And we don't feel that's been
15 done today at this point in time.

16 CHAIR HAWKENS: But it's possible that the
17 staff could have completed a reasonably thorough
18 analysis. And in that case, your position would be
19 that the Clean Water Act analysis would not have had
20 to precede the FEIS?

21 MR. TOTOIU: If they had performed a
22 reasonable analysis and it provided a range of
23 mitigation options beyond that which was just simply
24 submitted by the applicant and had no independent
25 verification, then, yes, perhaps.

1 I think the problem here is that that
2 analysis is entirely inadequate. It accepts the
3 mitigation plan at face value and includes a host of
4 measures, restoration projects, enhancement
5 preservation, buying mitigation credits, even
6 transferring land to an unidentified land trust, but
7 of all the NRC's assessments are discussed using that
8 -- the FPL's plan as a baseline.

9 And it assumes not only that these
10 mitigation measures will ultimately be required by
11 FPL, but they'll also be effective.

12 And to reach its conclusions, I think the
13 NRC effectively assumes two things. First, that the
14 mitigation measures proposed by FPL will be required
15 by the Corps.

16 It didn't evaluate the possibility that
17 the Corps could require less, more, different, as I
18 mentioned later.

19 And second, the FPL's assessment of the
20 effectiveness of these measures is correct. Though
21 the draft environmental impact statement incorporated
22 FPL's UMAM water assessments, it fails to address the
23 fact that the Corps reviews those inputs of those
24 assessments as well. What goes in matters in terms of
25 what goes out.

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1 The outputs from those UMAM and water
2 assessments are only as good as their inputs. Those
3 inputs include how many wetland acres are going to be
4 destroyed. The restoration sites and mitigation banks
5 that will be used. The assessments of both the
6 original and the mitigated wetland sites, which is
7 done by assigning values to those sites based on
8 quantitative assessments of numerous wetland
9 characteristics such as hydrologic function,
10 importance of fish and wildlife, et cetera, but all
11 those inputs are subject to Corps review.

12 And we submit that, in effect, what NRC
13 has done here is no different than what the Fifth
14 Circuit held to be inadequate in O'Reilly.

15 Its analysis essentially a list of
16 possible mitigation measures without the assessment to
17 support whether those measures actually address or
18 remediate the adverse impacts.

19 And I know -- I believe FPL in their
20 response noted the calculations in terms of mitigation
21 banking and credit.

22 Well, the same thing occurred in O'Reilly.
23 They identified 50 some credits, but in that case the
24 court found that they didn't adequately link the
25 mitigation, the effectiveness of that mitigation to

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1 those impacts.

2 CHAIR HAWKENS: They were not using the
3 UMAM system there or the water system in O'Reilly,
4 were they?

5 MR. TOTOIU: It's not clear, Your Honor.
6 It was a mitigation credit presumably through banking.
7 I can give you the case cite here.

8 CHAIR HAWKENS: I have that. Thank you.

9 MR. TOTOIU: Okay. But in short, NEPA
10 requires the Corps' and the NRC's full review. And
11 the NRC cannot issue a final environmental impact
12 statement based on this incomplete information.

13 And I think one of the things that I would
14 like to point out in terms of the importance of -- and
15 relevant to the staff's mitigation conclusions and why
16 I think this matters and why I think this is, you
17 know, particularly important is -- if we turn to Page
18 721 of the draft environmental impact statement which
19 speaks to the great uncertainty we're dealing with in
20 many regards to the impact and which the Corps needs
21 to review.

22 (Pause.)

23 MR. TOTOIU: On 721, the NRC staff
24 concludes that the overall cumulative impacts on
25 terrestrial resources in the geographic area of

1 interest would be moderate to large -- and I'm
2 paraphrasing here, but I would turn your attention to
3 721.

4 And a range is provided, they say, because
5 of the review team's uncertainty about the possible
6 effects from the complex interplay of habitat loss
7 from building units 6 and 7, habitat loss and
8 degradation from past, ongoing and participated
9 regional land development, sensitivity of terrestrial
10 habitats in the region to hydrologic changes, the
11 number and distribution of federally and state-listed
12 species present in the area, and perhaps most notably
13 the presence of two national parks and numerous other
14 conservation lands in the area and the uncertainty
15 with respect to the success of cert.

16 So, I think that the Corps' involvement
17 here is even more important. Not only is the Corps
18 the lead federal wetland permitting agency, it's also
19 the lead federal agency in charge of implementing the
20 Comprehensive Everglades Restoration Plan.

21 So, to have their expertise and
22 involvement here in terms of the review of the
23 mitigation is invaluable given what those potential
24 impacts could be cumulatively.

25 CHAIR HAWKENS: But they were -- the Corps

1 presumably signed off on that paragraph.

2 MR. TOTOIU: Well, Your Honor, I would
3 submit that it's unclear from this draft environmental
4 impact statement what the Corps' involvement was.

5 There is portions that say -- that
6 reference the NRC staff. There's portions that
7 represent the review team's analysis.

8 It's not clear to us, at least, what the
9 Corps' involvement was in terms of making those
10 conclusions.

11 JUDGE BURNETT: The Corps was on the
12 review team.

13 MR. TOTOIU: That's correct, Your Honor,
14 but there are portions in this draft environmental
15 impact statement, and I could cite some of them if you
16 wish, but where it merely states the NRC staff
17 concluded this. Presumably the Corps was not involved
18 in that aspect of the review.

19 So, it's unclear, at best, as to what that
20 involvement is in many regards.

21 JUDGE KENNEDY: Do you have at least one
22 example --

23 MR. TOTOIU: Yes.

24 JUDGE KENNEDY: -- in regard to mitigation
25 measures where it's less clear that it's the Review

1 Team?

2 MR. TOTOIU: One moment, Your Honors.

3 (Pause.)

4 MR. TOTOIU: So, in some places in the
5 draft environmental impact statement the NRC staff
6 made the impact determination that the construction
7 and pre-construction activities would be small and no
8 mitigation would be warranted. That's Page 4-35 of
9 the draft environmental impact statement.

10 Again, in another instance the impact
11 statement refers to both the Review Team and the NRC
12 staff, impacts from operation would be small. Page 5-
13 81.

14 CHAIR HAWKENS: Of course what's critical
15 in the FEIS and the DEIS is that the NRC staff make
16 the evaluation of the assessment; is that correct?

17 To the extent the Review Team makes it,
18 the NRC staff is involved in it. To the extent the
19 NRC staff makes a conclusion, that's good from the --

20 MR. TOTOIU: Yes.

21 CHAIR HAWKENS: -- standpoint of NEPA.

22 MR. TOTOIU: Depending on the adequacy,
23 yes, Your Honor. Yes, I mean, it, you know, that is
24 important, but also what's important is the adequacy
25 and whether or not that was an independent review and

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1 judgment.

2 JUDGE BURNETT: I'd like to follow up on
3 a question concerning the UMAM assessment for
4 wetlands.

5 MR. TOTOIU: Yes.

6 JUDGE BURNETT: So, it's my understanding
7 that in the State of Florida that that is the approach
8 that should be used for wetland impact credits and
9 restoration mitigation credits. So, we relied on that
10 method to a great extent in the mitigation plan.

11 Do you feel that there's a problem with
12 that approach?

13 MR. TOTOIU: The situation with UMAM and
14 then to a lesser degree WATER, which applies to the
15 Everglades Mitigation Bank, is that those are
16 assessment tools that, yes, the State of Florida
17 applies, as well as the Army Corps of Engineers, but
18 there's limitations on UMAM.

19 It's used to determine the amount of
20 mitigation that will be required to offset functional
21 loss of wetlands in Florida.

22 Under the Florida Administrative Code
23 which implements UMAM, UMAM was a statutorily-directed
24 mitigation tool under Chapter 373.414 before the
25 statutes, under the Federal Administrative Code, which

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1 in Florida implements that Statute 62-345.100
2 Subsection 4, there's limitations.

3 It's not intended to determine the
4 appropriateness of the type of mitigation proposed or
5 to assess whether the impacts meet other criteria for
6 permit issuance or the extent to which those impacts
7 would be approved.

8 And secondly, you know, what goes into
9 that UMAM scoring matters, you know. What goes out is
10 only so good as what comes in.

11 And so, it's our position that without any
12 independent review of what the applicant submitted,
13 that it's an incomplete assessment even under UMAM as
14 to what, you know, what the mitigation would provide.

15 CHAIR HAWKENS: You have not provided any
16 expert statements to support your view that this UMAM
17 analysis or the water analysis which have been
18 endorsed both by the State of Florida and by the Corps
19 is deficient in any way; is that correct?

20 MR. TOTOIU: No. I mean, I'm not
21 disputing the various, you know, assessment score --
22 I mean the scores that were assessed in --

23 CHAIR HAWKENS: No, but it sounded like
24 you were disputing the validity or the accuracy of the
25 methodology.

1 MR. TOTOU: All I am saying is that
2 without the Corps' review it's premature and
3 incomplete. We just don't -- we simply don't know.
4 We're just taking it at face value.

5 CHAIR HAWKENS: Without the Corps' review
6 of --

7 MR. TOTOU: Of those UMAM -- of the UMAM
8 scoring.

9 CHAIR HAWKENS: And what do you base your
10 conclusion that they were not involved in it or they
11 did not review it?

12 MR. TOTOU: Well, according to the draft
13 environmental impact statement they had stated on
14 several occasions that they hadn't even gotten to
15 mitigation, because FPL has yet to demonstrate that
16 wetland impacts have been avoided and minimized.

17 CHAIR HAWKENS: Is that limited, though,
18 to the analysis required under the Clean Water Act?

19 MR. TOTOU: Well, it -- under the Clean
20 Water Act it's a sequential analysis. It's a three-
21 step process.

22 CHAIR HAWKENS: Can you show me --

23 MR. TOTOU: Sure.

24 CHAIR HAWKENS: -- in the DEIS what you're
25 relying on for the conclusion that the Coast Guard did

1 not do a mitigation analysis within the requirements
2 of NEPA in support of the NRC staff.

3 MR. TOTOIU: Yes, I can point to the
4 statements in the draft environmental impact
5 statement, which point to that mitigation was not
6 vast.

7 (Pause.)

8 MR. TOTOIU: Okay. On Page 4-48 the
9 United States Army Corps of Engineers has yet
10 independently reviewed and verified FPL's proposed
11 compensatory mitigation plan for unavoidable impacts
12 to jurisdictional wetlands, because avoidance and
13 minimization have not been demonstrated pursuant to
14 Clean Water Act 404(b)(1) guidelines.

15 CHAIR HAWKENS: And you believe that NEPA,
16 a reasonably thorough NEPA analysis would require the
17 Coast Guard to do that as opposed to the Clean Water
18 Act requirements.

19 MR. TOTOIU: Yes, Your Honor. I think
20 consistent with Calvert Cliffs and case law it -- the
21 environmental impact statement has to incorporate that
22 assessment.

23 Now, that can be done going back to my
24 previous point, the Corps can do an environmental
25 impact statement if it wished, independently.

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1 We're not dealing with that today. We're
2 dealing with a cooperative agreement and a single
3 environmental impact statement as evidenced on Page --
4 I believe it is 4.1 of the environmental impact --
5 draft environmental impact statement.

6 Quote: The goal of this cooperative
7 agreement is to develop one EIS that provides all of
8 the environmental information and analysis needed by
9 the NRC to make the licensing decision and to provide
10 information needed by the Corps to perform analysis,
11 draw conclusions and make a permanent decision in --

12 CHAIR HAWKENS: That's interesting. That
13 statement says it is designed to provide all the
14 information needed by the staff for the DEIS/FEIS and
15 provide information for the Corps.

16 Not all the information the Corps will
17 need for its Clean Water Act analysis, but just
18 information.

19 There's clearly additional -- an
20 additional process the Corps has to go through to
21 complete its permit process under the Clean Water Act.

22 MR. TOTOIU: That's true. They have to go
23 through the 404 (b)(1) analysis.

24 CHAIR HAWKENS: And that's substantively
25 different. Different purpose. Different standards --

1 MR. TOTOIU: Yes.

2 CHAIR HAWKENS: -- performed by the Corps
3 and not --

4 MR. TOTOIU: Yes, but the information that
5 is part of -- and that assessment is vital. It's
6 intricately important to the cost-benefit analysis
7 which NEPA requires.

8 That cost-benefit analysis is unique to
9 NEPA in that way in that it encompasses all of these
10 environmental impacts. And it's to be done in a
11 single environmental impact statement as contemplated
12 here between these two parties.

13 They're both authors of the same -- of the
14 document. They are -- there is no indication that
15 there is another environmental impact statement down
16 the road or in another context that would govern that
17 404 permitting process.

18 CHAIR HAWKENS: So, are you challenging
19 the fact that the Coast Guard has not performed an
20 adequate FEIS analysis for its Clean Water Act
21 analysis?

22 MR. TOTOIU: No, I'm not here today to say
23 that. What I'm concerned with here today is the
24 degree of adequacy of this draft environmental impact
25 statement as it relates to NRC.

1 And that the fact that the Corps is a
2 cooperating agency, it's contemplated that there's one
3 single environmental impact statement.

4 And if we were to go forward -- I mean if
5 the NRC staff were to go forward and issue that, it
6 would be incomplete.

7 And I don't see other than perhaps, you
8 know, what you pointed out earlier was maybe a
9 supplemental EIS, but it's too late at that point.

10 CHAIR HAWKENS: You're saying it would be
11 incomplete because the Coast Guard -- or the Army
12 Corps of Engineer has not performed its 404 permit
13 analysis yet. And that's required for this COL DEIS.

14 MR. TOTOU: What's important here is the
15 mitigation component of that analysis. I mean, I
16 understand --

17 CHAIR HAWKENS: Under the Clean Water Act.

18 MR. TOTOU: Under the Clean Water Act.
19 I understand that the Army Corps of Engineers under
20 404, you know, it's a very elaborate process, which I
21 alluded to earlier some 14 steps, multiple criteria,
22 and they make, you know, they have other unique
23 determinations.

24 But with respect to this EIS today, it is
25 the mitigation that I think is the -- which is the

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1 focus of our contention because whether or not the
2 applicant has chosen to -- has chosen -- in terms of
3 the other alternatives and the extent of those
4 impacts, it's tied in many ways to mitigation, because
5 in some instances mitigation can't be, you know, you
6 can't compensate for a particular loss or impact.

7 So, I think that that's particularly
8 important, or you -- there are instances where, you
9 know, there maybe needs to be more.

10 I'm going to this point of one-to-one
11 mitigation ratio, which the Board asked about. One-
12 to-one is -- the origins of the one-to-one mitigation
13 ratio buys in the no net loss wetland policy that was
14 during the George H. Walker Bush Administration by
15 1990 as pursuant to a memorandum of agreement, which
16 basically was -- the goal was that we needed to offset
17 the loss of wetlands by compensating at least on a
18 one-to-one ratio.

19 That subsequently was implemented in the
20 Army Corps of Engineers' regulations. And what's
21 interesting there is that a ratio of greater than one-
22 to-one may be necessary depending on the method of
23 mitigation, the likelihood of success, the difference
24 between original and replacement wetlands or the
25 distance between where wetlands are lost and where

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1 they will be replaced. That's 33 CFR 332.3 Subsection
2 S Subsection 2.

3 So, at bottom, you know, the floor is one-
4 to-one, but it is possible that a greater than one-to-
5 one mitigation ratio will be required, and would be
6 required by the Corps.

7 And so, I think it's premature to just
8 accept that conclusion that it's one-to-one at this
9 point.

10 I have a couple of just additional points
11 to address.

12 CHAIR HAWKENS: Please go ahead and take
13 a few -- I think your time is up according to our
14 official timekeeper.

15 MR. TOTOIU: Oh, time is up.

16 CHAIR HAWKENS: But, no, let's hear your
17 final points, please.

18 MR. TOTOIU: Okay. I would just say in
19 closing that NEPA does not allow for speculative
20 mitigation. The purpose is to obviate the need for
21 speculation. Federation for North American Wild Sheep
22 versus USDA, Ninth Circuit, 1982.

23 The time to gather and analyze all data is
24 now. It doesn't permit a cursory list of mitigation
25 measures and then state how those impacts will be

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1 minimized -- does not permit a cursory list of
2 mitigation measures.

3 An EIS must provide adequate detail to
4 demonstrate that those mitigation measures adequately
5 address and remediate the adverse impacts so they
6 don't significantly affect the environment. O'Reilly
7 Neighbors of Cutty Mountain.

8 An agency impermissibly advocates its NEPA
9 obligations when it presumes that compliance with
10 another agency's permitting requirements means that
11 the environmental effects of a proposed action are
12 insignificant.

13 Additionally, throughout this
14 environmental impact statement, for instance, Section
15 40-11, there is numerous references to proposing to
16 use standard industry construction practices, best
17 management practices and mitigation measures to ensure
18 adverse effects will be avoided, minimized, mitigated.

19 Respectfully, that says little. Repeated
20 statements that actually comply with Federal
21 permitting rules is no substitute for analysis.
22 Calvert Cliffs.

23 In closing, to wait until the final
24 environmental impact statement is issued before the
25 Corps evaluates the appropriateness and effectiveness

1 of these mitigation measures would violate NEPA's
2 single requirement that environmental impacts must be
3 considered before actions are taken and the die is
4 case. Thank you.

5 JUDGE BURNETT: Yes. If I could follow up
6 and ask about -- you've been using the words
7 "speculative" and " cursory." And when I look at the
8 mitigation plan, there's actually quite a bit of
9 detail about the measures that they may use. And I
10 just wonder, you know, why do you assume that it's
11 really speculative or cursory?

12 MR. TOTOU: I think there are a couple
13 different reasons for that. First, as I mentioned
14 earlier, I think it's speculative just to accept the
15 calculations of the applicant essentially at face
16 value and not have independent review.

17 I think moreover it's speculative in that
18 we have a list of mitigation measures, but there is --
19 and the impacts, but there's no connection being drawn
20 between the two. And I think that that's critically
21 pretty important.

22 So, you know, why is, you know, why is one
23 tool adequate to offsetting a particular impact, et
24 cetera.

25 That kind of analysis is a matter of

1 degree, which the courts have acknowledged, but I
2 think that that is grossly inadequate here.

3 And, you know, in some instances where
4 courts have upheld mitigation analysis, the applicant
5 has provided a rating system saying this particular
6 mitigation tool has -- it will be, you know, has a
7 high probability or chance of effectively compensating
8 for that loss over time given certain considerations,
9 lag time, certain uncertainties.

10 Maybe a moderate chance here. Maybe a
11 lesser chance here. That case was Okanogan, I
12 believe, which we cited to in our - in our pleadings,
13 but I think that stands in sharp contrast to what's
14 being done here today, which is before you today
15 without that connection.

16 JUDGE BURNETT: You mention this
17 connection between impacts and proposed mitigation
18 methods. It seems like they have made connections at
19 least in many cases.

20 If you have exotic plants growing on a
21 wetland that they need to mitigate and you remove
22 those exotic plants and replace them with native
23 plants, doesn't that make a connection?

24 MR. TOTOU: Your Honor, I won't get into
25 the -- we're not disputing the, I guess, the, you

1 know, the details of the specifics as to the adequacy,
2 but what would I say in that instance is on face value
3 that sounds fair, but there's lots of considerations.

4 How is it done? What is the time between,
5 for instance, you know, the plantings? Is it enough?
6 I mean, I think, Your Honor, I think that that is best
7 -- that has to be analyzed. And I think that the
8 Corps in that situation as the lead wetland permitting
9 agency with expertise in this regard going back to the
10 early days of the Clean Water Act, you know, has that
11 experience. And I think it's much needed.

12 JUDGE BURNETT: You wouldn't consider that
13 the applicant drew up the mitigation plan and the NRC
14 staff is evaluating that plan in their environmental
15 impact statement together with the Corps.

16 MR. TOTOIU: I don't know, I mean, Your
17 Honor, respectfully, if that has occurred here. Going
18 back to my prior point, it -- the statement is, is
19 that the Corps hasn't -- I mean, I'll go back to -- I
20 think it was Page 1.1-1 of the draft environmental
21 impact statement. Maybe it was 4-1.1 -- 4-48.

22 They -- it's unclear -- at best, it's
23 unclear who did what, but there's at least one or more
24 statements in there that the Corps has not yet
25 reviewed the mitigation because avoidance and

1 minimization has not been demonstrated.

2 So, to me, that's an acknowledgment under
3 the sequential step process under the Clean Water Act
4 that they haven't. The Corps has to follow that
5 analysis, that three-step process.

6 JUDGE BURNETT: Which they will.

7 MR. TOTOIU: Which they will, but they
8 have not done at this point.

9 JUDGE BURNETT: They haven't done it yet.

10 CHAIR HAWKENS: Mr. Totoiu, you mentioned
11 something in answering Judge Burnett's question that
12 in other context where the evaluating agencies look at
13 probability of success and risks, that may be more
14 acceptable and that type of analysis has not been
15 performed here?

16 MR. TOTOIU: I think in that instance what
17 I was alluding to was, if I could perhaps just have
18 one moment to cite that case --

19 (Pause.)

20 MR. TOTOIU: I promise I have it. I
21 apologize. It's right there in front of me. Okanogan
22 Highlands Alliance versus --

23 CHAIR HAWKENS: I'm familiar with that
24 case. You cited it.

25 MR. TOTOIU: Yes. In that case, they

1 employed a rating system which the court found
2 adequate in terms of the mitigation analysis.

3 They recognized that that type of analysis
4 is one of degree, but they specifically for each, you
5 know, mitigation tool or practice, proposal that was
6 intended to compensate for a particular loss, they had
7 a rating system in place which gauged the
8 effectiveness, the presumed effectiveness, the
9 likelihood of success.

10 I think that that paints a far different
11 picture than what's before us today.

12 CHAIR HAWKENS: Please correct me if I'm
13 wrong. I thought the UMAM analysis had embedded
14 within it a time lag and risk component which would be
15 the equivalent of a likelihood of success of the
16 mitigation measure.

17 MR. TOTOU: It does, Your Honor. What's
18 lacking in that regard is, again, the Corps' review,
19 an independent review of that. And so, I think it
20 paints also a different picture here.

21 I mean, this was a plan that, you know,
22 we're acting on essentially incomplete information,
23 you know. One agency or half the agencies involved
24 are -- the Corps has not done that analysis.

25 So, you know, I think it's premature to

1 just take the --

2 CHAIR HAWKENS: Finish your thought. I'm
3 sorry.

4 MR. TOTOIU: That's all.

5 CHAIR HAWKENS: All right. You keep
6 mentioning the Corps has failed to complete an
7 independent analysis, but I think it's important to
8 keep in mind NEPA places the burden on the staff to
9 perform the analysis.

10 Now, it can be assisted with a partner
11 agency, but the burden is on the staff ultimately to
12 perform the independent assessment.

13 MR. TOTOIU: That's correct, Your Honor.
14 And I think the NRC staff -- yes. For the purposes
15 pertaining -- yes. And for in this instance, yes.
16 But by going into it without the benefit of the Corps'
17 analysis, I think, is --

18 CHAIR HAWKENS: And I want to be clear.
19 Without the benefit of the Corps' Clean Water Act
20 analysis.

21 MR. TOTOIU: Of mitigation, correct.

22 CHAIR HAWKENS: Of mitigation.

23 MR. TOTOIU: Yes. So, this is specific to
24 mitigation as a contention.

25 CHAIR HAWKENS: All right. Anything else?

1 (No comments.)

2 CHAIR HAWKENS: Do you have anything else,
3 Mr. Totoiu? I know we've taken you over your allotted
4 time, but we'll nevertheless provide rebuttal time.

5 MR. TOTOIU: I believe that is all, Your
6 Honor, if I can have just have one moment?

7 (Pause.)

8 MR. TOTOIU: That is all.

9 CHAIR HAWKENS: All right. Thank you.

10 The Board would propose a 10-minute break
11 unless a party objects.

12 MR. LEWIS: No objection here, Your Honor.

13 CHAIR HAWKENS: All right. Let's take a
14 recess and let's convene again at five after. Thank
15 you.

16 (Whereupon, the proceedings went off the
17 record at 1:55 p.m. for a brief recess and went back
18 on the record at 2:05 p.m.)

19 CHAIR HAWKENS: Please be seated. I think
20 we're at the time in our proceeding where we're going
21 to hear from the NRC staff which has up to 30 minutes
22 of argument time available to it.

23 MR. WEISMAN: Thank you, Your Honor.

24 CHAIR HAWKENS: You may proceed.

25 MR. WEISMAN: I'm going to start with just

1 a brief introduction, and then I'm going to try to
2 respond to some of the bullet points that the Board
3 put in its July 2nd order.

4 The joint intervenors here are arguing
5 that the DEIS is deficient because it lacks detail
6 regarding proposed mitigation measures.

7 However, the Joint Intervenors do not
8 indicate why this asserted deficiency is material in
9 the NRC decision on the application as required by
10 Section 2.309(f)(1)(IV), they do not proffer any
11 expert opinion or other factual support to establish
12 this asserted deficiency as required by Section 2.309
13 -- sorry -- 2.309(f)(1)(V), nor did they specifically
14 dispute any information in the DEIS as required by
15 Section 2.309 (f)(1)(VI).

16 The Joint Intervenors' motion at Three,
17 Four and Five appear to challenge compensatory
18 mitigation measures regarding relevance, but the Joint
19 Intervenors' reply at Four and today here at oral
20 argument, the Joint Intervenors explicitly disclaim
21 the new challenge to the FPL mitigation measures.
22 They state that the new contention does not challenge
23 any specific mitigation measures provided by FPL.

24 The Joint Intervenors do not dispute the
25 completeness, accuracy or efficacy of those measures,

1 which are the same measures analyzed in the DEIS.

2 Further, Joint Intervenors argue that more
3 detail should be added to the DEIS, but they do not
4 assert such detail as material to the NRC decision.

5 I think I've gone over that already. And
6 then finally, according to the Commission's decisions
7 in Pilgrim and the Clinton ESP decision, an EIS is not
8 intended to be a research document.

9 While there will always be more data that
10 can be gathered, agencies must have some discretion to
11 draw the line and move forward with decision-making.
12 And Commission has stated that our boards do not set
13 to, quote, flyspeck environmental documents or to add
14 details to nuances.

15 If the ER or EIS on its face comes to grip
16 with all important consideration, nothing more need be
17 done. This is the rule of reason that applies to the
18 level of detail the agency environmental documents.

19 The DEIS here describes the mitigation
20 measures and it does come to grips with the important
21 considerations with regard to mitigation.

22 The Joint Intervenors have not asserted or
23 identified any specific deficiency in mitigation
24 measures analyzed in the DEIS, much less how
25 additional detail might remedy such a deficiency or

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1 add to the NRC decision-making.

2 It appears from today's oral argument that
3 the Joint Intervenors seem to think that the NRC staff
4 did not review FPL's proposed mitigation plan, but
5 accepted it at face value.

6 But on Page 4-75 of the EIS, the EIS says,
7 based on the review team's independent evaluation of
8 the Turkey Point project, that includes the NRC staff
9 and the Corps, including the ER, the SEA, FPL's
10 responses to NRC's RAIs, the identifying mitigation
11 measures in BMPs, best management practices, and
12 consultation with other Federal, state and county
13 regulatory agencies, the review team concludes that
14 the impacts of pre-construction and construction
15 activities on terrestrial ecological resources,
16 including wetlands and threatened endangered species,
17 would be moderate.

18 And that whole paragraph there explains
19 what the NRC staff's findings are. And the review
20 team as well.

21 The last paragraph of the -- of that --
22 the last sentence of that paragraph says, the Review
23 Team considers the impacts to be noticeable despite
24 the proposed mitigation considering the complexity and
25 extent of the impacts, potential time lag and

1 uncertainties associated with the mitigation and the
2 unavoidable presence of workers and equipment in
3 sensitive terrestrial habitats, including Pine
4 Rocklands, even if only temporary.

5 So, there is no question that this
6 information has been reviewed by the staff. And the
7 staff has made a finding that FPL's plan is
8 acceptable, it's not that the staff has not simply
9 adopted FPL's ER at face value.

10 In regard to the Army Corps of Engineers
11 participation in the NEPA process, the Joint
12 Intervenors appear to misunderstand --

13 CHAIR HAWKENS: Mr. Weisman, may I
14 interrupt for a moment?

15 MR. WEISMAN: Yes, Your Honor.

16 CHAIR HAWKENS: Can you tell me a little
17 bit about the staff's review of the UMAM analysis in
18 the FPL's mitigation plan?

19 How far in depth does the staff review it?

20 MR. WEISMAN: Okay. I do have some
21 information on that, Your Honor.

22 CHAIR HAWKENS: And where is that depth of
23 review reflected in the DEIS?

24 MR. WEISMAN: What I can say immediately
25 is that the DEIS is simply a summary of -- it

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1 summarizes the mitigation measures in the FPL's
2 mitigation plan. And the staff has reviewed that
3 mitigation plan in depth.

4 It summarizes the staff's conclusion. It
5 does not go point by point on every matter that's
6 dealt with in the mitigation plan.

7 If the Joint Intervenors wish to raise
8 contention in regard to that mitigation plan, they
9 should have identified some of the matters that they
10 indicated in their oral argument.

11 They said the results are only as good as
12 the inputs. So, what's wrong with the inputs? The
13 Joint Intervenors don't tell us that.

14 CHAIR HAWKENS: Do you know whether the
15 staff's review of the mitigation plan actually
16 includes a review of the input just, you know, to get
17 a sense where on the face of it, it looks reasonable?

18 MR. WEISMAN: If you will give me a moment
19 to consult, Your Honor, I don't know that answer
20 sitting here.

21 CHAIR HAWKENS: Uh-huh.

22 (Pause.)

23 (Discussion off the record.)

24 MR. WEISMAN: Thank you, Your Honor.

25 So, upon consulting with the staff,

1 verified that they had, in fact, reviewed all of the
2 inputs to the UMAM code and also the WATER code. So,
3 and they found those inputs reasonable and
4 appropriate.

5 CHAIR HAWKENS: Thank you.

6 MR. WEISMAN: So, regarding the Army Corps
7 of Engineers' participation, under CEQ regulations a
8 lead agency is required to invite certain agencies who
9 have expertise or review-related projects to cooperate
10 in the preparation of an EIS, but the invited agency
11 can refuse entirely, or it can join the lead agency in
12 signing the EIS, or it can do anything in between. If
13 it refuses entirely, it has to notify the Council on
14 Environmental Quality.

15 The extent the Joint Intervenors argue
16 that the EIS is premature or it's somehow deficient
17 because steps remain in that Army Corps of Engineers
18 permitting process, that argument is really a red
19 herring.

20 CEQ regs explicitly indicate that a
21 cooperating agency may adopt an EIS signed by a lead
22 agency.

23 There's no requirement for a cooperating
24 agency to express its final decision on matters
25 addressed in the EIS in the first instance as the

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1 Joint Intervenors argue.

2 But in such a case, a cooperating agency
3 can adopt the EIS only provided that it conducts an
4 independent review of the statement and finds that its
5 comments and suggestions have been satisfied.

6 And as a preview in response to the
7 Board's inquiries regarding the Corps' role in regard
8 to the DEIS and the applicable legal requirements,
9 there is a Fourth Circuit decision. That's Webster
10 versus the US Department of Agriculture. That's 685
11 F. 3d 411. That's a Fourth Circuit case from 2012.

12 We didn't cite this in our brief, Your
13 Honor, but this is in response to your question. And
14 that explicitly holds there is no need for an agency
15 to delay issuing even a final EIS to wait for the
16 Corps to issue a Department of the Army permit.
17 That's at 433. With that, I'll turn to the latest
18 argument.

19 The staff did not address the filing after
20 the deadline in our initial answer, because, as we've
21 already indicated, we believe the motion was focused
22 on the adequacy of the mitigation measures described
23 in the DEIS and the Joint Intervenors' failure to
24 satisfy the contention requirements in 2.309(f)(1) was
25 dispositive. So, there was really no need to address

1 the lateness arguments.

2 But in their reply, the Joint Intervenors
3 appear to have changed their position. And the staff
4 will address that.

5 As I already indicated, the Joint
6 Intervenors, and they've also admitted this at
7 argument, have disclaimed any dispute with FPL's
8 mitigation measures.

9 So, such claims have undoubtedly failed to
10 meet the standards for filing new contentions after
11 the deadline, because the Joint Intervenors do not
12 satisfy the element of good cause requiring that the
13 information was not previously available.

14 In its reply and also at oral argument
15 today, the Joint Intervenors argued that new
16 information is that the Corps participated in the
17 preparation of the EIS as a cooperating agency.

18 In the reply, but not at oral argument
19 today, they also said that that proposed actions
20 related to FPL application include the US Army Corps
21 of Engineers' decision regarding a Department of the
22 Army permit.

23 But those matters are not new, because
24 they are documented in the NRC scoping report, which
25 was included in the NRC staff initial disclosures

1 dated on April 7th, 2011. So, they were an actual
2 notice for some years that that's been a case.

3 In the other two matters that they're
4 claiming, that they're relying on, is that the
5 proposed mitigation measures have not been reviewed
6 and approved by the Corps and the Corps will not make
7 a determination regarding the adequacy of mitigation
8 measures until after the FEIS is issued.

9 But as I said in my introduction, that's
10 not materially new information, which is the second
11 prong of the requirements in 2.309(c)(1) and because
12 under Webster, that doesn't matter.

13 The staff is free to issue the EIS even
14 though the Corps has not completed its review process
15 for the Department of the Army permits. So, it's not
16 materially different from that which was previously
17 available. So, that's really all I have on lateness.

18 Briefly, I'll go to some more details of
19 the mitigation measures.

20 CHAIR HAWKENS: May I ask, I don't think
21 you took a position on collateral estoppel either in
22 your pleading.

23 MR. WEISMAN: Well, Your Honor --

24 CHAIR HAWKENS: Is that correct?

25 MR. WEISMAN: That is correct. The staff

1 did not take a position on that in our pleading.

2 CHAIR HAWKENS: You need not take one now,
3 but I'll give you an opportunity to say anything about
4 it, if you'd like.

5 MR. WEISMAN: What I will say is that it
6 is an intriguing argument and the staff is not going
7 to take a position on that.

8 CHAIR HAWKENS: Thank you.

9 MR. WEISMAN: So, I guess I don't have all
10 that much. I've already said what I have to say about
11 the details of the mitigation measures.

12 The DEIS summarize and tabulates the
13 mitigation measures in DEIS Chapter 10. Construction
14 impacts and mitigation measures are tabulated in Table
15 10-1. Operating impacts and mitigation measures are
16 tabulated in Table 10-2.

17 Detailed information on the various
18 impacts and associated mitigation measures are set
19 forth basically throughout the EIS. Chapter 4 for
20 construction, Chapter 5 for operation, Chapter 7,
21 which the Joint Intervenors refer to today in oral
22 argument and also in their reply addressed as
23 cumulative impacts.

24 Initially, it seemed to the staff that the
25 Joint Intervenors focused on the wetlands mitigation

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1 in their motion. And we likewise focused on that
2 issue in our answer.

3 But as I said in my introduction, the
4 discussion of impacts of terrestrial ecology,
5 including mitigation, is addressed in the DEIS Section
6 4.3.1, and summarized in DEIS 4.3.1.7. Page 4-75 that
7 I referred to is in Section 4.3.1.7.

8 And the DEIS discussion references the FPL
9 mitigation plan at 4.4-69. All of the DEIS references
10 are listed in DEIS Chapter 11 together with the ADAMS
11 accession numbers for all the publicly available
12 documents, which includes the FPL mitigation plan.

13 I think that's really all I have to say
14 about details of the mitigation.

15 JUDGE KENNEDY: Mr. Weisman.

16 MR. WEISMAN: Yes, Your Honor.

17 JUDGE KENNEDY: Before you leave
18 mitigation, in your -- in staff's answer on Page 13,
19 you noted that the DEIS has fully -- I guess I'm
20 quoting here: The DEIS has fully examined the
21 available information regarding the proposed
22 mitigation measures and describe their significance to
23 the impacts of the proposed action.

24 I know you've been citing a number of
25 pages over there. What would you specifically like

1 the Board to look at in regards to where the DEIS has
2 fully examined the available information regarding the
3 proposed mitigation measures maybe with a focus on
4 wetlands, if you so choose.

5 MR. WEISMAN: All right. The pages where
6 the wetland mitigations -- mitigation measures are
7 described are 4-69 to 4-72, but the conclusions, the
8 staff conclusions regarding those matters are in the
9 next section, which will be 4-73 to 4-75. Yes. And
10 that is the conclusion for the terrestrial and
11 wetlands discussion.

12 I believe that discussion starts back on
13 page 4-39, if I'm not mistaken. Give me a moment.
14 I'll check that.

15 (Pause.)

16 MR. WEISMAN: Yes, but the -- from 4-39 to
17 4-69, most of that discussion is focused on impacts as
18 opposed to mitigation.

19 JUDGE KENNEDY: But how should the Board
20 view Table 4-11? What's your thoughts on that table?

21 MR. WEISMAN: Well, I'm not entirely
22 certain what that table is.

23 (Pause.)

24 MR. WEISMAN: Oh, all right. I'm looking
25 right at it. I'm sorry. I just wasn't familiar with

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1 the number.

2 Table 4-11 includes the evaluation of the
3 Everglades Mitigation Bank and the other mitigation
4 bank, the other mitigation efforts. Let me be clear.

5 Okay. The Everglades Mitigation Bank is
6 evaluated using the WATER method. And all the other
7 mitigation measures evaluated in the DEIS use the
8 Uniform Mitigation Assessment Method, or UMAM.

9 So, that table presents the staff's
10 conclusions regarding the use of both of those
11 methods.

12 JUDGE KENNEDY: So, is it fair to say this
13 is a summary assessment of the mitigation plan?

14 MR. WEISMAN: I believe so, Your Honor.

15 JUDGE KENNEDY: Do you have a sense why --
16 well, I guess I don't even know is this all of the
17 mitigation measures? Do you know if this is a
18 selected set of mitigation measures?

19 And, again, I guess we're focusing on
20 wetlands here.

21 MR. WEISMAN: In regard to wetland
22 function, I believe that this is a comprehensive
23 study.

24 JUDGE KENNEDY: Okay.

25 (Pause.)

1 MR. WEISMAN: As far as the Corps'
2 participation in the EIS process -- excuse me -- the
3 Corps has worked with the NRC staff throughout the
4 entire environmental review process, including the
5 pre-application phase for the Turkey Point COL review.

6 The Corps staff has participated in both
7 the site and alternative sites audits. They have
8 presented at public meetings, the scoping meetings and
9 the draft EIS meetings. The scoping meetings were in
10 July of 2010. The site and alternative sites audits
11 were in June and July of 2010.

12 The public, they participated in writing
13 sessions in August of 2012, March of 2014 and April of
14 2014.

15 They have been present at most of the
16 meetings with Federal, state, tribal and local
17 agencies discussing the various resource areas
18 analyzed in the EIS.

19 They've provided input and feedback to the
20 extent Corps regulations allow on the various
21 independent analyses performed by the NRC staff in
22 support of the environmental review.

23 So, some of those activities are described
24 in the executive summary in the DEIS on Page Roman
25 small 30, xxx.

1 And as I said above, the short answer is
2 that -- oh, I'm sorry. The Board had a bullet point
3 on the Part 332 process. I'm prepared to move on to
4 that if the Board has questions about -- any further
5 questions about the Corps' participation.

6 CHAIR HAWKENS: I have a question on Page
7 4-75 of the DEIS. The second full paragraph.

8 MR. WEISMAN: Yes, Your Honor.

9 CHAIR HAWKENS: Can you tell me what that
10 means? It said the Corps is currently -- concurrently
11 reviewing the project, but will not have enough
12 information to support this determination until after
13 it gets more information.

14 It's not clear to me what "this
15 determination" is. It appears to be something in the
16 prior paragraph it's referring to, but the prior
17 paragraph talks about the Review Team has made its
18 determination.

19 MR. WEISMAN: Yes, Your Honor. And it
20 appears that at least the last conclusion, that's the
21 one on Line 16 where it says, however, the Review Team
22 considers the impacts to be noticeable.

23 I read that sentence earlier. I'm not
24 certain, but that sentence appears to go to that
25 conclusion.

1 It might go to the whole conclusion. It
2 could be that that whole paragraph is just the NRC
3 staff's conclusion.

4 CHAIR HAWKENS: Well, that would be
5 consistent with the first sentence of the first
6 paragraph.

7 MR. WEISMAN: Yes. Yes. You're right,
8 Your Honor.

9 CHAIR HAWKENS: So, that needs to be
10 clarified --

11 MR. WEISMAN: Needs to be clarified.

12 CHAIR HAWKENS: -- in the final EIS.

13 MR. WEISMAN: Yes, it does.

14 CHAIR HAWKENS: I noted that the sites in
15 this were not accessible unless you had a password.

16 MR. WEISMAN: Yes.

17 CHAIR HAWKENS: And I think in one of your
18 pleadings in another case you conceded that it should
19 not have been prepared that way; is that correct?

20 MR. WEISMAN: Yes, Your Honor.

21 CHAIR HAWKENS: Will that be corrected
22 before the issuance of the FEIS so the public can --

23 MR. WEISMAN: It is supposed to --

24 CHAIR HAWKENS: -- maybe provide comments.

25 MR. WEISMAN: Yes, Your Honor. It is

1 supposed to have -- it is supposed to have already
2 been corrected. But as I noted earlier, every
3 reference that is identified as a live link here,
4 which is not a live link, every one of those
5 references is listed in Chapter 11 with an ADAMS
6 accession number that does work.

7 So, anybody who wants to make a comment on
8 the DEIS has full accessibility to public information
9 that's referenced in this DEIS.

10 I did want to add one thing when I
11 answered your question about this short paragraph here
12 on Page 4-75. And that is that the Corps of Engineers
13 makes its decisions also based on public comments on
14 the application, the Department of the Army
15 application.

16 And it published -- it gave notice of the
17 availability of the Department of the Army application
18 for public comment on March 13th, 2015.

19 Typically the Corps will publish such a
20 notice concurrently with issuance of a DEIS. So, the
21 Corps is not going to make any decisions until it
22 receives all that public comment.

23 And that's part of the reason that the
24 Corps is not -- it's not the entire reason why the
25 Corps is not joining into some of these conclusions,

1 because they don't want to appear, but have made
2 conclusions before considering public comments under
3 the normal process.

4 And I guess with respect to the Part 332
5 process, counsel for the joint intervenors has
6 explained that it is a sequential process.

7 It starts the Corps considers avoidance of
8 environmental impacts. And once the applicant has
9 avoided as many impacts as it can, it goes to
10 minimization. And after minimization, it goes to
11 compensatory mitigation.

12 So, it's a sequential process. And the
13 Corps doesn't know what compensatory measures will be
14 needed, if any, until it goes through that process.

15 And I think the significance of that for
16 this FEIS is summarized by what the court said in
17 Methow Valley that there's a fundamental distinction
18 between a requirement that mitigation be discussed in
19 sufficient detail to ensure that environmental
20 consequences have been fairly evaluated on the one
21 hand, and a subsequent requirement that a complete
22 mitigation plan be actually formulated and adopted on
23 the other.

24 In that case, it was a local agency that
25 was formulating or proving mitigation plans, the

1 complete mitigation. And the court noted that it
2 would be incongruous to conclude that the Forest
3 Service has no power to act until the local agencies
4 have reached a final conclusion on what mitigation
5 measures they consider necessary.

6 Then we focus on the next sentence, which
7 where the court said even more significantly it would
8 be inconsistent with NEPA's reliance on procedural
9 mechanisms as opposed to substantive results-based
10 standards to demand the presence of a fully developed
11 plan that will mitigate environmental harm before an
12 agency can act. That's 490 US at 352 to 353.

13 CHAIR HAWKENS: I believe joint
14 intervenors tried to distinguish that on the ground
15 that it should be different here because on the one
16 hand that was a state actor who could have held up
17 Federal action. And here we have two Federal actors
18 and they're suggesting, I believe, that at least there
19 should be a compelling reason to justify the staff
20 issuing its FEIS before the Corps has completed its
21 CWA analysis.

22 What would your response to that be?

23 MR. WEISMAN: My response is that the
24 second sentence that I wrote, or the second sentence
25 that the Corps wrote that I quoted that it would be

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1 inconsistent with NEPA's reliance on procedural
2 mechanisms. It would be inconsistent to require that
3 here.

4 The Corps is going to make a substantive
5 determination. They are not going to make their
6 substantive determination until they issue their
7 record of decision, or ROD.

8 And they're not going to forecast what
9 that decision is going to be in EIS. So, it would be
10 inconsistent with NEPA's reliance on procedural
11 mechanisms to require what the joint intervenors are
12 arguing for in this case.

13 CHAIR HAWKENS: Going to Table 4-11 again,
14 please.

15 MR. WEISMAN: Yes, Your Honor.

16 CHAIR HAWKENS: I think I speak for
17 everybody on the Board when I say toward the bottom
18 right-hand portion of it the subtotal 5,914.7, we
19 weren't sure where that figure came from.

20 MR. WEISMAN: The Board is correct. There
21 is an arithmetic error in the table. And the staff
22 intends to correct that in the final.

23 CHAIR HAWKENS: Is it limited to that one
24 number, or are there other errors?

25 MR. WEISMAN: I do not know what the

1 arithmetic error is. I can consult, if you wish.

2 CHAIR HAWKENS: If you're able to consult
3 and provide the answer now, we'd be grateful.

4 (Pause.)

5 (Discussion off the record.)

6 MR. WEISMAN: Our technical staff informs
7 me that the error is limited to that number.

8 CHAIR HAWKENS: Do they have the corrected
9 number available?

10 MR. WEISMAN: I can ask.

11 CHAIR HAWKENS: Thank you.

12 (Discussion off the record.)

13 MR. WEISMAN: We don't have the corrected
14 number available here today, Your Honor. I suppose
15 that it can be easily derived from these columns.

16 CHAIR HAWKENS: All right. Thank you.

17 Mr. Weisman, I see that your time is up,
18 but please go ahead and --

19 MR. WEISMAN: I may complete?

20 CHAIR HAWKENS: -- finish.

21 MR. WEISMAN: Thank you, Your Honor.

22 The joint intervenors frequently quote the
23 DEIS statements regarding, quote, possible, or, quote,
24 potential mitigation measures and infer that those
25 measures are speculative or uncertain.

1 In doing so, the joint intervenors ignore
2 the statement in Methow Valley regarding, quote, the
3 requirement that an EIS contain a detailed discussion
4 of possible mitigation measures, closed quote. That's
5 490 US at 351. But the EIS simply uses the language
6 sanctioned by the Corps.

7 Since the joint intervenors do not raise
8 any dispute regarding the possible mitigation
9 measures, the joint intervenors fail to satisfy the
10 contention requirements of Section 2.309(f)(1). And
11 that argument is dispositive.

12 JUDGE KENNEDY: Mr. Weisman.

13 MR. WEISMAN: Yes, Your Honor.

14 JUDGE KENNEDY: I may have missed it in
15 the bullets that the Board had asked for briefing on,
16 the basis for the one-to-one mitigation ratio.

17 Did you address that?

18 MR. WEISMAN: I did not, Your Honor. I'm
19 sorry. That mitigation, it verges on getting into the
20 merits, Your Honor. So, I'm a little bit hesitant to
21 discuss it in detail, but my understanding is that
22 that one-to-one ratio is built into the UMAM and WATER
23 methods.

24 And unless there's some flaw in that
25 methodology, which the intervenors don't point to one,

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1 that is an adequate ratio.

2 JUDGE KENNEDY: Maybe a bad choice of
3 words on my part. I guess I'm interested in if it's
4 embedded in the code, is it viewed as an acceptance
5 criteria, a figure of merit?

6 I mean, we heard earlier that joint
7 intervenors had raised some questions about, you know,
8 whether one-to-one was sufficient.

9 I guess I'm really after, you know, how we
10 should view that number in the context of this summary
11 table. I mean, it's drawing conclusions on, I
12 perceive, on that basis.

13 So, I'm really not so much interested in,
14 I mean, too deep into the numbers, but really kind of
15 a fundamental --

16 MR. WEISMAN: Right.

17 JUDGE KENNEDY: -- discussion of what, you
18 know, what is its -- how the Board should view that
19 ratio, what would its origin be as a figure of merit
20 for mitigation measures, et cetera.

21 MR. WEISMAN: Well, my understanding, Your
22 Honor, is that the one-to-one ratio includes such
23 matters as the particular quality of the wetlands that
24 are being disturbed and the particular quality of the
25 wetlands that are being used to compensate for the

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1 loss, that sort of thing.

2 Provided that the inputs are correct,
3 which the staff has reviewed them and found that they
4 were appropriate inputs, the methodology itself will
5 then assure that a one-to-one ratio is adequate for
6 compensation.

7 JUDGE KENNEDY: And the attributes that
8 you described, the quality of the wetlands and so
9 forth, that's embedded within the UMAM method?

10 MR. WEISMAN: Yes, Your Honor. That's my
11 understanding.

12 JUDGE BURNETT: Just to follow up on that,
13 it is correct, isn't it, that the one-to-one ratio
14 does not mean one acre per one acre.

15 MR. WEISMAN: No, Your Honor.

16 JUDGE BURNETT: It means one credit as
17 scored on UMAM --

18 MR. WEISMAN: Absolutely.

19 JUDGE BURNETT: -- versus one debit.

20 MR. WEISMAN: Yes. I'm sorry I didn't
21 make that clear.

22 JUDGE BURNETT: In Table 4-11 it has the
23 listing of the acres and there's something like 670 or
24 so impact acres, but over 1120 that are being
25 mitigated.

1 MR. WEISMAN: Yes, Your Honor.

2 JUDGE BURNETT: So, it's not at all a one
3 acre per one acre plan.

4 MR. WEISMAN: That is correct, Your Honor.

5 CHAIR HAWKENS: Is there anywhere in the
6 DEIS where the staff evaluates the effectiveness of
7 the UMAM technique or the WATER technique?

8 MR. WEISMAN: I don't believe so, Your
9 Honor. There is -- that would be -- the UMAM and
10 WATER techniques are both widely used, well-accepted
11 methods. The UMAM --

12 CHAIR HAWKENS: UMAM appears to be
13 accepted by the State of Florida in its code; is that
14 correct?

15 MR. WEISMAN: Yes, you're right. Yes,
16 Your Honor.

17 CHAIR HAWKENS: Why is there a WATER
18 technique for the Everglades Mitigation Bank? Why --
19 if UMAM is so universally accepted, why wasn't that
20 used for the Everglades Bank?

21 MR. WEISMAN: And the answer to that is
22 that the Everglades Mitigation Bank was developed
23 before UMAM was developed.

24 The WATER technique was developed at least
25 in part to analyze the use of the Everglades

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1 Mitigation Bank. So, FPL continues to use it and the
2 staff relied on it.

3 CHAIR HAWKENS: Okay. Thank you, Mr.
4 Weisman.

5 MR. WEISMAN: Thank you very much, Your
6 Honor.

7 CHAIR HAWKENS: Mr. Lewis.

8 MR. LEWIS: Thank you.

9 Before I address the Board's questions,
10 I'd also like to put this contention in perspective
11 and I agree with the NRC staff's conclusion that
12 ultimately this contention is immaterial.

13 The most telling thing that the joint
14 intervenors stated today and in their reply, is that
15 they do not challenge the mitigation plan.

16 They have also indicated today that they
17 do not challenge the UMAM methodology or the WATER
18 methodology. That those are Corps-blessed processes.

19 So, ultimately this comes down to a
20 contention that simply wants more discussion of
21 mitigation measures, the effectiveness of which joint
22 intervenors don't dispute and that really becomes
23 flyspecking.

24 CHAIR HAWKENS: I'm not so sure I agree
25 with that. The staff has a statutory obligation to

1 comply with NEPA. And if they haven't, then the joint
2 intervenors have a right to have a contention
3 litigated.

4 MR. LEWIS: I agree with that, but the
5 gravamen of their argument is that the NRC staff's
6 obligation entails requiring putting in a final
7 blessing from the Corps on these mitigation measures.
8 And that, as Mr. Weisman correctly said, is simply
9 inconsistent with Robertson versus Methow Valley,
10 which says they only have to be possible mitigation
11 measures.

12 And the factual situation here is that the
13 mitigation measures are identified specifically in the
14 DEIS. They're not, in fact, possible measures.
15 They're measures that are in a detailed mitigation
16 plan that has been approved by the State and is
17 required to be complied with by conditions of the
18 siting approval. So, to call them possibilities is
19 really a stretch.

20 CHAIR HAWKENS: So, it's fair to say this
21 mitigation plan dated July 2011, all the requirements
22 in it are binding on FPL?

23 MR. LEWIS: Yes. There are specific
24 conditions that we cited in our answer in the
25 Conditions of Certification, which we cited and

1 provided a link to, which require us to implement that
2 mitigation plan.

3 And, again, beyond that the effectiveness
4 of those mitigation measures was spelled out in great
5 detail if using these accepted methodologies in the
6 mitigation plan and is reflected in the DEIS.

7 So, it's hard to see how there's any
8 dispute that the NRC has, you know, failed to comply
9 with NEPA. It's taken a hard look, it's identified
10 them, it's using well-established methodologies to
11 reflect their effectiveness.

12 And where joint intervenors go beyond is
13 to say, well, you need more than that. You need the
14 Corps' final substantive determination, or it's not
15 good enough.

16 Ultimately, you know, that's a catch 22.
17 The Corps has its own substantive obligation to make
18 a least environmentally damaging practical alternative
19 finding, a LEDPA finding, and these determinations on
20 avoidance and mitigation are part of that process.

21 This is a substantive finding. Because
22 they're making a substantive permitting finding, they
23 have to go through NEPA. You know, they have to issue
24 a draft EIS. They have to issue a notice. They need
25 to get comments.

1 Before they make these final
2 determinations, they need to consider all those
3 inputs. So, they prepare the final EIS and then a
4 Record of Decision to make their final judgment.

5 To say you're going to make your final
6 judgment now is, you know, not only premature, but it
7 would make the Corps violate all its procedural
8 obligations to, you know, issue a notice which is
9 done.

10 The Corps issued the notice following the
11 DEIS just as the NRC did and invited public comment.
12 And they will consider those in due course. And they
13 will reflect their determinations.

14 I believe the joint intervenors indicated
15 that the die is cast, but we're only at the draft EIS
16 stage, too.

17 You know, there's a long ways to go.
18 There's further inputs. I'm not sure at what point,
19 but the one thing that's true is that a Record of
20 Decision will probably, you know, follow the FEIS, but
21 I'm not sure why the die is cast.

22 If the FEIS supports the final
23 determination for the NRC licensing and Corps
24 licensing at the same time, it seems that, you know,
25 that timing works, you know, perfectly, you know, well

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1 for the joint intervenors and public as far as
2 ultimately knowing when this process is finished, what
3 are those mitigation measures and, you know, are they
4 effective?

5 And you were right. If there was a
6 significant change in the proposal, then there could
7 be a requirement to prepare either a supplemental DEIS
8 or supplemental FEIS if there's still a proposed
9 action going on.

10 CHAIR HAWKENS: That would be one remedy
11 and I guess the public also, as you indicated, can
12 participate in the 404 permitting process.

13 MR. LEWIS: Yes. So, let me turn to the
14 Board responses -- the Board issues and respond to
15 those.

16 CHAIR HAWKENS: Mr. Lewis, do you have a
17 -- can you provide an estimate for when you think the
18 Corps may complete the 404 permitting process? And it
19 can be a very rough approximation.

20 MR. LEWIS: Yes. Only after the FEIS.
21 And I'm trying to think what the schedule for that is,
22 but when they finish the FEIS, they'll issue the
23 Record of Decision and make the determination at that
24 point.

25 CHAIR HAWKENS: How long after that point?

1 MR. LEWIS: I guess I would ask the staff.
2 I don't have a window into the Corps' --

3 CHAIR HAWKENS: Mr. Weisman, do you have
4 any idea?

5 MR. WEISMAN: I do not, Your Honor.

6 CHAIR HAWKENS: Thank you. Please
7 continue.

8 MR. LEWIS: Let me start with the Board's
9 question on timeliness. Our position in our answer
10 was that the joint intervenors failed to address the
11 standards for timeliness. They simply said our
12 contention is based on the DEIS.

13 That did not satisfy the standard in 10
14 CFR 2.309(c)(1) which required identification of
15 specific information in the DEIS that was not
16 previously available.

17 And from our perspective, the failure to
18 have put that information in their initial motion is
19 dispositive.

20 And the fact that they're now come up for
21 the first time in their reply with new arguments, I
22 think, is tardy. Nevertheless when you look at those
23 arguments, none of them have any merit in their reply.

24 They identify four items they say is --
25 are new and the basis for now being able to come in

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1 with their contention.

2 The first is that the proposed action
3 relates to both the Corps permit and the NRC COL.
4 That's in reply to two.

5 In this proceeding in the scoping report
6 in November 2010, the NRC identified a proposed action
7 associated with this proceeding as the NRC issuance of
8 the COL and the Army Corps 404 process.

9 And I could provide an ADAMS accession
10 number if you want, but from the beginning they've
11 identified the proposed actions. So, that's not new.

12 In that same scoping report, they
13 identified that the Corps would participate in
14 preparing the environmental impact statement as a
15 cooperating agency and participate cooperatively on
16 the Review Team.

17 The second point that the joint
18 intervenors raised in their assertion that their
19 contention was timely was that the Corps participated
20 as a cooperating agency and a member of the review
21 team. That's specifically what the NRC told the world
22 in November 2010.

23 And, in fact, the Corps' participation as
24 a member of the Review Team was also discussed at the
25 scoping meeting, transcribed, at which the joint

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1 intervenors attended.

2 The Corps accepted the invitation to be a
3 cooperating agency in 2009, and there's a letter from
4 the Corps to the NRC on the docket again identifying,
5 yes, we're going to be a cooperating agency. So, the
6 fact that the Corps is part of the Review Team and a
7 cooperating agency is very old news.

8 Their last points are that the measures
9 have not been approved by the Corps and the Corps will
10 not make a determination of the adequacy until after
11 the FEIS is issued.

12 During the environmental scoping meeting,
13 the Corps stated the Corps' permit decision on a
14 proposed project will be made after the FEIS has been
15 completed, but will likely precede the final decision
16 by NRC for their combined license.

17 So, from the initial scoping, the Corps
18 has told the world, you know, our final decision will
19 be after our FEIS probably before it issues the
20 license. Actually, not even an assurance.

21 If there was actually a problem with that
22 proposal, it should have been raised, you know, in
23 2010 where it was announced to the world.

24 Further, in an April 7th, 2004 letter on
25 the docket, the NRC actually explained in a November

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1 13th, 2013 public meeting it was agreed that the
2 Corps' LEPDA review would be conducted separately from
3 the NRC staff's NEPA review.

4 So again, I mean, it's been clearly
5 apparent, you know, throughout this process that the
6 Corps' substantive findings were not going to be made
7 with DEIS.

8 And the fact that we're now here with a
9 contention saying DEIS is deficient because the Corps'
10 final determination isn't reflected, is just simply
11 not based on anything new, you know, anywhere in the
12 DEIS.

13 I'm going to skip the details on the NRC
14 reviews of our proposed mitigation measures. I think
15 Mr. Weisman was in a better position to address what
16 the NRC did.

17 Let me just address the question on the
18 location in the DEIS and the staff's conclusions
19 concerning with mitigation options will reduce impacts
20 and to what extent.

21 As was reflected in both the DEIS and our
22 mitigation plan, the UMAM and WATER assessments
23 identify the compensatory mitigation credits needed.

24 The DEIS includes a discussion that WATER
25 is a procedure for evaluating functional lost and lift

1 for wetlands in southeast Florida that form the basis
2 for establishing credits to the EMB. So, it explains
3 what that is.

4 It also indicates that the Everglades
5 Mitigation Bank has an approved mitigation banking
6 instrument authorized by the Corps. That is what
7 allows this methodology to be used as blessed by the
8 Corps in considering both the credits from using the
9 WATER method to assess the functional lift, as well as
10 the same methodology, because you have to use the same
11 methodology to compare apples and oranges in looking
12 at what is being mitigated.

13 The DEIS also describes the UMAM
14 methodology referencing the mitigation plan. This is
15 in the DEIS at 4-46, 4-70 and 4-71. And explains it's
16 a standard method for assessing wetland ecological
17 function, the loss throughout and the amount of
18 mitigation.

19 So, they have identified standard methods
20 where assessing effectiveness. They then summarize
21 the results in Table 4-11.

22 I do need to identify we have comments
23 coming in on the DEIS, I think, tomorrow. There is
24 some other comments on this table that I think need to
25 be reflective.

1 The foremost if you look at Table 4-11
2 under the WATER debits, the west prefer transmission
3 line should not be under the WATER debits. It should
4 be under the UMAM debits. It's just in the wrong
5 place.

6 And the DEIS has it right. The DEIS
7 states that on Page 4-71, impacts to freshwater
8 wetlands within the west-preferred transmission line
9 are mitigated with purchase of credits from the Hole-
10 in-the-Donut.

11 That would be that they're evaluated on
12 the UMAM. So, all the other items under WATER debits
13 are correct, but this one is just out of place.

14 So, if you take that 300 and -- sorry --
15 that 240.84 debit, so the west transmission line, and
16 you move them down to the UMAM debits, what you end up
17 is for the WATER debits, around, you know, 200 and
18 some. And then the UMAM debits, about 326.

19 And ultimately, you know, that then
20 correlates debits -- or the WATER debits would be 200
21 -- the WATER credits would be 200. So, there would be
22 a correlation between what's being evaluated. The
23 UMAM debits would be 326, and the UMAM credits would
24 be 335. And there you see the very close correlation.

25 So, by having this was just in the wrong

1 place, but you'd see the correlation much better if
2 that had been in the right line.

3 The other thing I think will be updated is
4 as reflected in here, the reclaimed water treatment
5 facility was relocated. Was relocated actually to
6 reduce the wetland impacts.

7 There's a footnote here indicating this is
8 still the original location. When that gets updated,
9 then actually the credits will be a little lower. So,
10 it's not a material change, but that's also, I think,
11 one of our comments that put in the current location
12 that would change the numbers a little bit.

13 What this ultimately shows is, you know,
14 on a functional change basis the credits equaling the
15 debits, meaning that a loss function is being offset
16 completely by the functions gained.

17 Maybe I'll talk quickly about the one-to-
18 one basis, which you had some questions on that.
19 Joint intervenors were correct in stating that
20 originally the one-to-one concept stems back to 1989
21 or 1990, the original George Bush proposal to require
22 no net loss of wetlands.

23 And for many years, that was applied on an
24 acreage or lineal foot basis. And so, usually when
25 you see people saying needs to be a one-to-one ratio,

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1 they're talking about, you know, no loss of acres or
2 no loss of linear feet of streams.

3 In 2004 there was a provision in the
4 National Defense Authorization Act that required the
5 Corps to establish performance standards and criteria
6 for use of in lieu fee and mitigation banking as
7 compensation for lost wetland functions.

8 And as a result, the Corps and the EPA
9 jointly promulgated the Compensatory Mitigation Rule
10 that's in 33 CFR Part 32 and 40 CFR Part 230.

11 And in those rules at 33 CFR 332.3(f)(1)
12 and then the corresponding EPA rule which is
13 identical, there is a provision that says if a
14 function or other suitable method is not used, a
15 minimum one-to-one acre or linear foot ratio must be
16 used.

17 In the Statement of Consideration in this
18 rule, which is 73 Federal Register at 19633, the
19 statement explains that only where a functional
20 conditional assessment or other suitable metric is
21 used can you -- it will require less than one-to-one.
22 So again, they're still using one-to-one as meaning
23 one-to-one on acreage or one-to-one on linear foot,
24 but functional assessment methodology is one that
25 assures equivalency.

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1 You are correct that these methodologies
2 are conservative and they take into account time lag,
3 they take into account risk that the mitigation won't
4 be effective.

5 And when you look in our mitigation plan,
6 I don't have the citations at my fingers, but they
7 were in our answer to the portions of our mitigation
8 plan that identify where we took into account temporal
9 lag and risk that the measure will be ineffective,
10 they're factored into the score.

11 If you actually look at what we have done,
12 you know, they are so much more than a one-to-one on
13 a linear foot or an acreage basis.

14 The total impact that we're having is 710
15 acres. That's in the DEIS. And when you look at the
16 acreage, it's approximately 2,500. It's far more
17 acres being restored than are being affected.

18 And our acre impacts are very
19 conservative. And this is also discussed in the DEIS.
20 The corridors have been selected, but the final
21 wetways can't be determined until a state siting
22 process for the right-of-ways.

23 And that can't start until the appeal on
24 the site authorization process has been completed.
25 So, we assumed very conservative numbers for the

1 impacts to the transmission corridors.

2 We also assumed for the access roads that
3 the -- all the impacts are permanent even though we've
4 explained that we think actually 50 percent of the
5 impacts will be restored, you know. So, these are
6 very purposely conservative estimates of the impacts.
7 All of which is, you know, completely unchallenged by
8 joint intervenors.

9 You asked, too, I'm also doing -- I'll
10 address the origin of the UMAM and WATER
11 methodologies.

12 In 2000, the Florida Office of Policy
13 Analysis and Government Accountability found that
14 mitigation ratios again just on an acreage or linear
15 foot basis don't adequately account for gain or loss
16 of wetland functions.

17 And as a result, Florida enacted a law
18 requiring the DEP and other water management districts
19 to develop a uniform mitigation assessment method in
20 consultation with the Corps.

21 It says, the statute provided involving
22 the uniform mitigation assessment method, the
23 Department shall seek input from the Army Corps of
24 Engineers in order to promote consistency with the
25 mitigation assessments.

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1 The State then undertook a four-year
2 permitting process resulting in the UMAM ruling
3 effective in 2004.

4 The Army Corps' website reflects the
5 Corps' involvement in that process. If you go to the
6 Jacksonville office website of the Army Corps and you
7 go under Admissions, then under Regulatory, then under
8 Source Book, you'll see the Corps stating UMAM was
9 developed by various State of Florida regulatory
10 agencies with input from local government and the
11 Corps of Jacksonville District.

12 On February 2nd, 2004, UMAM went into
13 effect at the State level. And those state and local
14 governments responsible for environmental regulations
15 were required to begin utilizing the methodology.

16 Prior to its implementation at the federal
17 level, the Corps conducted a study of the method and
18 recommended UMAM be used for federal wetlands
19 regulatory purposes starting August 1st, 2005.

20 So, the Corps' own website shows their
21 involvement both in the development and in trying it
22 out afterwards. And they do identify some areas where
23 they suggest some adjustment which I think they'll
24 apply.

25 CHAIR HAWKENS: Is the UMAM technique

1 used outside the State of Florida?

2 MR. LEWIS: It's a Florida process, yes.
3 I'm not aware of it being used outside, but the UMAM
4 rule has a provision that says with respect to
5 mitigation banks that had their instruments approved
6 prior to the effectiveness, they should continue to
7 use that approved methodology until -- unless the
8 mitigation bank, you know, updates its process to
9 adopt UMAM.

10 That's why WATER is being used for the
11 Everglades Mitigation Bank. The Everglades Mitigation
12 Bank has represented the DEIS as an instrument as
13 approved by the Corps and blesses that methodology.

14 So again, both of these are approved
15 federal methodologies, you know. Very standardized.

16 JUDGE BURNETT: I'm sorry. Did you say
17 federal methodologies?

18 MR. LEWIS: I'm saying federal-approved
19 methodologies, I should say. The WATER methodology is
20 in the -- is reflected in the mitigation banking
21 instrument, which is the instrument that approves use
22 of mitigation bank.

23 That mitigation banking instrument is, you
24 know, before it's issued is approved by an interagency
25 review team that consists of the Corps, the EPA, the

1 National Park Service, Fish and Wildlife, I think
2 National Fisheries. There's a bunch of agencies that
3 review it and sign off on the process.

4 JUDGE BURNETT: So, the WATER assessment
5 technique is the applicant's own design, but it has
6 been approved --

7 MR. LEWIS: Yes.

8 JUDGE BURNETT: -- by these federal
9 agencies.

10 MR. LEWIS: Yes.

11 JUDGE BURNETT: And it's only being used
12 in the mitigation bank; is that correct?

13 MR. LEWIS: Well, it's used to assess --
14 like when you open the mitigation bank, they are
15 mitigating the project site, the mitigation site, the
16 Everglades area. And it's used to identify the
17 credits that are derived from their mitigation
18 activities, but you also use the same methodology in
19 assessing the impact at the -- impact sites on the
20 Turkey Point site, again, because you have to measure
21 apples to apples.

22 And this goes back all the way -- there
23 was a -- there used to be a 1995 guidance document
24 from the Corps. It's been superseded now, but it
25 always made it clear that use same assessment

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1 methodology for the mitigation bank as you do for the
2 impact site.

3 I think it's actually just been self-
4 evidence, I mean, if you --

5 JUDGE BURNETT: So, they can't use the
6 UMAM approach for the -- all the other areas? I mean,
7 it seems like in your Table 4-11 it's partly WATER
8 assessment technique and partly UMAM.

9 MR. LEWIS: The Everglades Mitigation Bank
10 has not been approved and assessed under UMAM. It
11 predated UMAM. So, all its credits are based on
12 WATER.

13 Yes, you could go back and re-permit or do
14 a whole new evaluation of it, but it's not required by
15 the State or by the Corps and hasn't been done at --

16 JUDGE BURNETT: So, UMAM is only for
17 assessment projects after a certain date, 2004.

18 MR. LEWIS: Yes, unless the mitigation
19 bank voluntarily decides to update its methodology.
20 For example, a Hole-in-the-Donut, which has been, you
21 know, mentioned, which is an existing mitigation bank
22 or in lieu fee program, that actually has been in
23 effect for quite some time and was established -- this
24 is a mitigation bank that was established by the
25 Everglades National Park, the National Park Service

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1 and actually the Corps was involved in it.

2 They have been going through a renewal
3 process for their permit. And as part of that
4 process, they decided to update their methodology to
5 adopt the UMAM.

6 That's the only reason that the Hole-in-
7 the-Donut is not currently Corps-approved is they're
8 going through this updating process voluntarily.

9 And we have actually been told that that
10 is expected to be completed very soon. In fact,
11 perhaps even within a month.

12 I should add one other thing. The Corps'
13 and EPA compensatory mitigation rule strongly
14 encourages functional assessment. It's stated in the
15 Statement of Consideration. It's reflected in the
16 rule itself.

17 So, the functional assessment methodology
18 is the preferred approach, you know, using acreage or
19 linear foot is not one.

20 CHAIR HAWKENS: What regulation is that
21 embodied in?

22 MR. LEWIS: It's the Compensatory
23 Mitigation Rule, which is 33 CFR -- I just turned the
24 page. 33 CFR Part 332. And the same rule is also in
25 the EPA regulations in 40 CFR Part 230. And the

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1 Statement of Consideration for that rule was issued
2 April 10th, 2008, in 73 Federal Register. I don't
3 have the first page cited here. 19633 is part way
4 through that Statement of Consideration.

5 (Pause.)

6 MR. LEWIS: Let me just briefly address
7 the point about the need for Corps input. Joint
8 intervenors referred to the Calvert Cliffs case.

9 I don't think it was cited before. So, I
10 don't have it in front of me, but the holding that
11 they referred to is really an apposite.

12 Calvert indeed held that the NRC cannot
13 avoid preparing an EIS simply by saying another agency
14 will review it later, but what Calvert held was what
15 the NRC needed to do was evaluate the impacts, not
16 wait for the other agencies.

17 So, that case does not stand for the
18 proposition that you can't proceed with EIS until
19 other agencies are active, our stance on the
20 proposition is NRC should make its own independent
21 look and can't just rely on the fact that other
22 agencies will look at it later.

23 There's actually a decision, I believe, in
24 the -- one of the other proceedings, COL proceedings
25 that also indicates that there's no need to wait for

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1 the Corps.

2 I'm doing this out of sequence. So, bear
3 with me for just a second.

4 (Pause.)

5 MR. LEWIS: Well, let me -- let me address
6 it this way: There are a number of NRC decisions that
7 indicate that NRC licensing is no way dependent on the
8 issuance of an MPDS permit. That's a very well-
9 established line of case law.

10 MPDS, you know, decisions can also have
11 mitigation. They can reflect, you know, the alternate
12 determination, but the Commission has very clearly
13 said, you know, you don't need to wait for, you know,
14 those permitting decisions.

15 I submit to you the Corps is no different.
16 That those cases indicating that NRC's review process,
17 you know, continues, you know, applies broadly.

18 Joint intervenors referred to the O'Reilly
19 case as saying in that case that the discussion of
20 mitigation credits was insufficient.

21 When you look at that case, what was
22 absent was any explanation where the credits came
23 from. They was a one-sentence statement in there that
24 said the Corps would require 50 some credits.

25 What was unsatisfying to the Corps in that

1 case was there wasn't the slightest explanation of how
2 those credits were derived, what they were meant to
3 offset.

4 That is, you know, extremely different
5 from what we have here where you have, you know,
6 specific methodologies identified as specific impacts,
7 you know, identified and you have the whole functional
8 assessment laid out in the mitigation plan.

9 CHAIR HAWKENS: Do you distinguish Cutty
10 Mountain on the same, similar grounds?

11 MR. LEWIS: Yes. Cutty Mountain is a case
12 where, you know, there was almost, you know, no
13 discussion of the real mitigation measures.

14 The language in Cutty Mountain, you know,
15 held a mere listing as insufficient, but, you know,
16 the Corps -- sorry -- the Forest Service in that case,
17 its own experts, found that listing, you know, so
18 vague as to render it useless.

19 Here again we have established
20 methodologies, you know, one that's a mitigation
21 banking instrument approved by the Corps, another in
22 a rule that's been, you know, developed in
23 consultation with the Corps and approved by the Corps
24 that are specifically established to make sure that
25 functional loss and functional gain are, you know,

1 completely offset.

2 When you look at Cutty Mountain, you know,
3 the statement that here's the mitigation measures, but
4 who knows what they'll do, you know, is just apples
5 and oranges.

6 CHAIR HAWKENS: I see your time is up. If
7 you could conclude -

8 MR. LEWIS: That will be my conclusion.

9 CHAIR HAWKENS: All right. Thank you.

10 Mr. Totoiu, I believe you reserved 10
11 minutes of rebuttal time?

12 MR. TOTOIU: Correct.

13 I would like to go to this point of
14 waiting for the Corps prior to the completion of
15 federal -- I mean the final environmental impact
16 statement. And I'd like to, as we discuss this, go
17 back to Methow Valley as well.

18 I believe Mr. Weisman attempted to
19 distinguish that case based on that second paragraph
20 there where it would be inconsistent with NEPA's
21 reliance on procedural mechanisms to wait, in that
22 case, for state and local agencies to act.

23 Well, first I would submit the Corps is a
24 federal agency. NEPA applies to federal agencies
25 only. And therefore, we're dealing with a different

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1 situation.

2 CHAIR HAWKENS: Why is that distinction
3 material? I didn't follow that.

4 MR. TOTOU: Sure. Moreover because it's
5 consistent with the procedural mechanisms that Mr.
6 Weisman suggested that is limited to NEPA. That NEPA
7 is a procedural, is a statute of procedure and not
8 substance.

9 It's relevant in that the agencies here
10 have chosen a path, they've taken an approach where
11 they would cooperate together as two federal agencies
12 through a Memorandum of Understanding.

13 And as a matter of NEPA law, it requires
14 an environmental impact statement for every major
15 federal action that may affect the human environment
16 and it further requires a full analysis.

17 So, there's two options here. There is
18 the approach that was taken with the MOU with the
19 Corps in that we would -- that the NRC staff and the
20 Corps would work collaboratively together in a
21 cooperating fashion through this process.

22 The other approach, which is not before us
23 today, is that the NRC engage, you know, not wait for
24 the Corps and go forth, but that hasn't happened
25 either in the sense that the NRC staff hasn't fully

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1 assessed the range of mitigation options.

2 Going to, I think it was, Judge Kennedy's
3 question earlier of Mr. Weisman was, you know, what is
4 -- does this suite of mitigation measures represent a
5 comprehensive list? And I believe the answer to that
6 question was, yes, it represents a complete list of
7 what was looked at.

8 Well, we would submit that that is not
9 enough. That is taking FPL's proposal at face value.
10 And, in fact, what I think was illustrated here is
11 that the question about they are concerning the extent
12 to which the NRC was involved in the UMAM review, it
13 appears that the calculations at least as far as we
14 know in the ER, it's not reflected there, that the NRC
15 staff actually took a review of those numbers, the
16 inputs and the outputs.

17 Moreover, the numbers that were cited to
18 just a little bit ago by counsel for FPL was citing a
19 710-acre impact figure. Well, on Page 1.1 of the DEIS
20 it cites approximately a thousand acres.

21 I think, you know, to make an informed
22 decision, you take -- it's absolutely necessary that
23 we have, you know, information that's not only
24 accurate, but is thoroughly reviewed and I don't -- I
25 believe in this instance that hasn't happened.

1 And to address counsel for FPL's point,
2 well, the die is not cast, we're not saying -- the die
3 is cast when -- at the point that the final
4 environmental impact statement is issued.

5 We still don't have the Corps' review.
6 And if we were to take this draft environmental impact
7 statement now, we don't have a fully informed
8 comprehensive review by NRC staff and then the COL is
9 issued, yes, then the die is cast. And so, that is
10 the concern.

11 And just going back real quickly to the
12 UMAM calculations, I believe it was -- the other
13 important aspect of that is what's telling you is that
14 the numbers weren't analyzed by NRC staff or at least
15 in the ER to reflect that, is that those numbers are
16 dependent, as I said, on FPL's numbers.

17 If the Corps were to find those
18 calculations incorrect, that may affect the state's
19 position relative to UMAM.

20 CHAIR HAWKENS: A representation, though,
21 by the staff, that the NRC staff which is obligated to
22 conduct the NEPA analysis, did examine the figures in
23 the mitigation plan.

24 MR. TOTOU: Okay. I was unclear, Your
25 Honor, if it was -- to what extent that they did.

1 It's absent in the ER, but I would continue to
2 maintain, though, that if that UMAM calculation
3 changes, so would the State's position possibly as
4 well.

5 So, then what we're left with then is, you
6 know, a UMAM calculation that does not have federal or
7 state agreement.

8 CHAIR HAWKENS: What is the best Supreme
9 Court or Appellate -- federal appellate court case in
10 support of your position that the FEIS cannot issue
11 before the 404 permitting process?

12 MR. TOTOIU: Where I want to be clear,
13 Your Honor, is we're saying that to the extent that
14 the Army Corps of Engineers and the NRC have entered
15 in this cooperative agreement, that's the path that's
16 being taken.

17 CHAIR HAWKENS: You wouldn't be here today
18 if the Corps was not part of the review team?

19 MR. TOTOIU: If the Corps -- if the Corps
20 had decided to --

21 CHAIR HAWKENS: Answer that question
22 first, and then you can follow up with an explanation.

23 MR. TOTOIU: Right.

24 CHAIR HAWKENS You would not be here if
25 the Corps were not a member of the review team; is

1 that correct?

2 MR. TOTOIU: If the Corps were not a
3 member of the review team.

4 CHAIR HAWKENS: Yes. You --

5 MR. TOTOIU: I think --

6 CHAIR HAWKENS: -- were saying that it was
7 critical in this case that it was a cooperative --

8 MR. TOTOIU: I think it's critical. But
9 at the same time we don't believe that the analysis,
10 assuming the Corps hasn't looked at it, that the
11 analysis that's in that ER is enough, is what
12 satisfies NEPA in terms of its completeness, in terms
13 of the NRC staff's review.

14 It hasn't given a range of mitigation
15 options that beyond that or an independent study of
16 those that are submitted. So, that's what I am saying
17 today.

18 CHAIR HAWKENS: Can I repeat what my
19 understanding of what you're saying is?

20 MR. TOTOIU: Sure.

21 CHAIR HAWKENS: What's critical to your
22 position is that the Corps was a cooperating agency,
23 a member of the Review Team in this NEPA process.

24 MR. TOTOIU: In this instance, yes.

25 CHAIR HAWKENS: Your contention hinges on

1 that fact.

2 MR. TOTOIU: Yes, that's the situation
3 we're dealing with. That's the direction that --

4 CHAIR HAWKENS: Give me -- again, my
5 initial question, a supreme court case or a federal
6 appellate court case that would support that position,
7 if you have any. You may not have any.

8 MR. TOTOIU: Right. I think when we're
9 dealing with a cooperating agency, it's a somewhat
10 unique situation. It's a little -- it's not, I
11 wouldn't say, typical of most maybe federal, I mean,
12 if I were to speculate, I think in the ways that I
13 have stated -- for the reasons I have stated
14 previously, I think that the lack of the Corps'
15 involvement review as a coauthor and for those
16 statements in the draft environmental impact statement
17 to suggest that this permitting process that's part of
18 the Clean Water Act will essentially take care of
19 things, go through the review and make a
20 determination, I think that that is in direct line
21 with what the Corps, you know, said was impermissible
22 in Calvert Cliffs.

23 I think that we are dealing with the same
24 type of situation. Granted, that was a rule that was
25 challenged, but this deferment of relying on a process

1 to kind of sort out all the details, do that review
2 after the fact, I think a reading of Calvert Cliffs
3 would strongly support our position here today with
4 respect to the involvement of the agency.

5 I guess -- I believe I may only have a
6 couple minutes left, if any.

7 CHAIR HAWKENS: No more than that.

8 MR. TOTOU: Okay. Well, I respect that.
9 My time is --

10 CHAIR HAWKENS: If you have any concluding
11 statements, I'd be pleased to hear them.

12 MR. TOTOU: I think that, you know, I
13 think there's just the overarching importance here
14 going back to these conflicting numbers that I think
15 were revealed, for instance, in wetland acreage.

16 I mean, this is not an academic exercise.
17 We're not here today -- this is an engaged net. We're
18 dealing with the potential --

19 CHAIR HAWKENS: Can I interrupt?

20 MR. TOTOU: Sure.

21 CHAIR HAWKENS: Just because that is
22 something I think along the line of what Mr. Lewis was
23 saying. And when I say some might view it as an
24 academic exercise, I don't mean to minimize the
25 position you're taking.

1 But if you're not -- you're conceding, it
2 would appear, the adequacy of the mitigation measures,
3 that is to say you're not challenging the mitigation
4 plan, your complaint is simply that the staff -- its
5 review of it has not been in compliance with NEPA.

6 So, at the end of the day one might say,
7 well, the staff will re-review it, it will come up
8 with a more comprehensive EIS, but the outcome will be
9 the same and joint intervenors will be satisfied
10 because they don't challenge the mitigation plan.

11 How would you respond to that?

12 MR. TOTOU: The fundamental purpose of
13 NEPA is to assess these impacts now, and not after the
14 final environmental impact statement is issued.

15 And I think that the importance -- and I
16 go back to my opening statement -- is that what we're
17 dealing with here is approximately a thousand acres of
18 wetland impact.

19 These wetlands are in proximity to two
20 national parks, or, in some cases, they incur within
21 the transmission lines either within or adjacent to,
22 possibly.

23 So, we're dealing with two ecological
24 wonders both of which, you know, have been the subject
25 -- the Everglades in particular the subject of a

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1 national commitment.

2 And that national commitment to
3 restoration is spearheaded by the Army Corps of
4 Engineers.

5 And so, not to have that review, I think
6 I would respectfully say it could -- there is the
7 potential that it would compromise those resources in
8 that if the review is not there by the leading expert,
9 who is going to do it? And who is going to do it
10 before the FEIS is issued and a license is issued?

11 And I think what we're talking about here
12 is, you know, this is not a situation of, you know,
13 seeking to delay. It is -- this is what the
14 Memorandum of Understanding envisioned.

15 It envisioned a cooperative process in a
16 framework that envisioned two agencies working
17 together efficiently and early on since 2008 to have
18 a process that is collaborative, that's integrated and
19 where that decision-making would be done fully and
20 comprehensively.

21 And that all these impacts and the
22 restoration, I mean, and the compensatory mitigation
23 that's tied to the impacts fully fleshed out and
24 reviewed so that, you know, if this project goes
25 forward that, you know, the park and other resources

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1 are fully protected.

2 CHAIR HAWKENS: How would you respond to
3 the question that accepting your position may result
4 in lead agencies deciding not to enter into
5 memorandums of understanding and not having
6 cooperating agencies because it would delay their
7 completion of the DEIS and delay their issuance of the
8 FEIS?

9 MR. TOTOIU: Well, I think that the
10 Memorandum of Understanding is clear and encourages
11 early cooperation and collaboration. And so, I don't
12 see that this -- that the MOU would be in any way a
13 deterrent.

14 This was freely and voluntarily entered
15 into between the Army Corps of Engineers and the NRC
16 staff. And there are numerous provisions in this MOU
17 which clearly contemplate something that's a very
18 well-run process that's smooth and efficient, or at
19 least that's the hope. And so, you know, I don't see
20 it as a deterrent.

21 The other option, and going back to my
22 earlier point, which is not before us today, is the
23 MOU was not signed, it was not agreed, and the NRC
24 staff could have taken a full assessment of all the
25 range of mitigation options, which we submit hasn't

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1 been done.

2 So, there are options. This was the
3 course that was chosen, and I think that this -- if
4 the agencies work collaboratively and efficiently and
5 together, it can be done.

6 JUDGE KENNEDY: Mr. Totoiu, in your
7 rebuttal remarks here, I want to go back. You seem to
8 acknowledge Mr. Weisman's statement that Table 4-11
9 was a comprehensive list of mitigation measures. Yet,
10 you went on to say that that's insufficient. That
11 there should be more.

12 What, I guess, trying to narrow the focus
13 to Table 4-11, what do you see in 4-11 that drives you
14 to ask us to consider that more mitigation measures
15 should be looked at?

16 I mean, I think the staff has said that's
17 a comprehensive list and I guess I conclude that they
18 believe they're done, but you see something else.

19 MR. TOTOIU: Yes.

20 JUDGE KENNEDY: And I guess I'd like to
21 give you a chance to --

22 MR. TOTOIU: I say that it's -- their
23 statement was that it was complete in that everything
24 that was looked at is reflected in those pages.

25 I would submit that the simple -- just

1 simply the acceptance of the applicant's mitigation
2 plan, mitigation options or proposals is not enough.

3 It doesn't -- NEPA requires an independent
4 review and analysis. We don't believe that's
5 happened. And furthermore, if those numbers were
6 wrong, you know, there hasn't been a review by the
7 Corps to --

8 JUDGE KENNEDY: It seems like we keep
9 parsing your words. I mean, it appeared to me the
10 staff has stated that they have reviewed the inputs.
11 I have no reason to believe they're not independent.

12 I guess I'm struggling -- I'm looking for
13 what -- you're seeing something that drives you to ask
14 the Board, as part of your contention, to open up this
15 proceeding for more mitigation measures. I'm looking
16 for some clarity to that.

17 MR. TOTOU: What I would say is, is that
18 it's only as complete as what was provided to them.
19 So --

20 JUDGE KENNEDY: But is it inadequate?
21 What's inadequate about it?

22 MR. TOTOU: Well, what's --

23 JUDGE KENNEDY: What's not reasonable?

24 MR. TOTOU: Sure. What's inadequate is,
25 you know, going back to my point earlier, we don't

1 believe that those options that were identified are
2 that -- there's a connection between those options and
3 what those impacts are going to be.

4 So, unless there is some analysis, it's
5 incomplete. It's not --

6 JUDGE KENNEDY: But isn't UMAM, by
7 definition, analysis?

8 MR. TOTOIU: It's analysis insofar as
9 that's what the applicant has submitted, but those
10 UMAM numbers could change.

11 And that's subject to, you know, the
12 federal review, the -- and if the federal review then
13 has a different outcome or a determination or -- and
14 the inputs were incorrect here, then it's not
15 complete.

16 JUDGE KENNEDY: When you say "federal
17 review," do you mean the Cops?

18 MR. TOTOIU: The Corps. I'm sorry.

19 JUDGE KENNEDY: Just one point of
20 clarification, and I'll start with Mr. Lewis, but it
21 may be more appropriate for Mr. Weisman.

22 You mentioned the NPS Hole-in-the-Donut
23 mitigation bank. Joint intervenors in their petition
24 have raised the issue that that's not a federally-
25 approved mitigation bank.

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1 I guess I'll ask you first, and you can
2 defer to Mr. Weisman, but how would you respond to
3 that?

4 MR. LEWIS: The Hole-in-the-Donut project
5 has been federally approved in the past. It's a
6 longstanding and valuable project that's mitigating
7 property in the Everglades that was established by
8 federal agencies, by the Everglades National Park, the
9 National Park Service with the Corps' involvement.

10 When UMAM was adopted in connection with
11 renewal of permits for that mitigation bank, the Hole-
12 in-the-Donut decided they were going to adopt the UMAM
13 methodology.

14 As a result, that process is ongoing.
15 Very close to being completed. The reality is at this
16 very moment, it's not an approved project simply
17 because the old permit has lapsed and the new one
18 hasn't been issued yet, but there has been a joint
19 agency review of the new methodology. And by the time
20 we rely on it, it will be back in place.

21 I would say, you know, if there were
22 really an issue with that mitigation bank being
23 unsuitable or we had information that it was not going
24 to be available in the future, certainly the joint
25 intervenors didn't raise it.

1 I would also say, by the way, that the
2 National Park Service is also a cooperating agency
3 with the NRC, as is the Corps.

4 And if there was a problem with our
5 referring to Hole-in-the-Donut as a mitigation option
6 that was going to be available and appropriate, I
7 would certainly have suspected that the DEIS would
8 have reflected that face.

9 JUDGE KENNEDY: Anything to offer, Mr.
10 Weisman.

11 MR. WEISMAN: The only thing I would have
12 to add is that the NRC staff could for the purposes of
13 this DEIS approve on its own just for this limited
14 purpose, the Hole-in-the-Donut program. It could.

15 JUDGE KENNEDY: Your Honor or joint
16 intervenors want to respond maybe quickly?

17 MR. TOTOU: In terms of the extent we're
18 discussing a Hole-in-the-Donut, it's not federally
19 approved today.

20 I think what matters is the contents of
21 the DEIS in front of us, the draft environmental
22 impact statement in front of us.

23 And I think that that includes any, you
24 know, additional statements or representations that
25 are made that were not reflected in it.

1 CHAIR HAWKENS: The case is submitted.
2 We're grateful --

3 MR. LEWIS: I just want to correct one
4 statement I made just so the record is clear. I said
5 that there would be 710 acres of impact that comes
6 with the EIS. I should have said 710 direct acres as
7 that same section of DEIS refers to some secondary and
8 indirect.

9 I just wanted to clarify that that was not
10 the total. That's the direct impact, not the total.

11 CHAIR HAWKENS: As the moving party, I
12 want to give you the last word to address that if you
13 want to have the last word, Mr. Totoiu.

14 MR. TOTOIU: That's fine, Your Honor.

15 CHAIR HAWKENS: All right. The case is
16 then submitted. Thank you for being here with us
17 today. Your preparation is going to be very helpful
18 to the Board. We are adjourned.

19 (Whereupon, at 3:38 o'clock p.m. the
20 hearing was adjourned.)
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