LBP-15-23

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

In the Matter of FLORIDA POWER & LIGHT COMPANY (Turkey Point Units 6 and 7)	Docket Nos. 52-040-COL and 52-041-COL ASLBP No. 10-903-02-COL-BD01 August 21, 2015

MEMORANDUM AND ORDER
(Denying Joint Intervenors' Motion to Admit New Contention)

Southern Alliance for Clean Energy, National Parks Conservation Association, Dan Kipnis, and Mark Oncavage (collectively, Joint Intervenors) move for leave to file a new contention in this proceeding involving the combined license (COL) application of Florida Power & Light Company (FPL) for Turkey Point Units 6 and 7.[1] Joint Intervenors' proffered contention challenges the adequacy of the discussion of mitigation measures in the NRC Staff's Draft Environmental Impact Statement (DEIS). For the reasons discussed below, we conclude that the proffered contention is not admissible, and we therefore deny Joint Intervenors' motion.

[1] See Joint Intervenors' Motion for Leave to File a New Contention Concerning the NRC's Reliance on Speculative Mitigation Measures and Failure to Adequately Examine the Effectiveness of These Proposed Mitigation Measures in the Draft Environmental Impact Statement for the Turkey Point Nuclear Power Plant Units 6 & 7 (Apr. 13, 2015) [hereinafter Joint Intervenors' Motion].

I. BACKGROUND

On February 28, 2011, we granted Joint Intervenors' original request to intervene in this Turkey Point Units 6 and 7 COL proceeding, admitting one of their then-proffered contentions.[2] In May 2012, we admitted an amended version of Joint Intervenors' contention,[3] and in August 2012, we reformulated it to eliminate an issue rendered moot by FPL's curative action.[4] Joint Intervenors' Contention 2.1, as amended and reformulated, is now the sole contention pending before the Board.[5]

In February 2015, the NRC Staff published the DEIS for Turkey Point Units 6 and 7.[6] The NRC served as the lead agency in the document's development, and the United States Army Corps of Engineers (Corps) was a cooperating agency. See DEIS at 10-3.[7] The Staff's "preliminary recommendation to the Commission related to the environmental aspects of [FPL's COL request] is that the COLs should be issued." Id. at 10-27. The Staff explained that its recommendation included the following considerations:

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[2] See LBP-11-06, 73 NRC 149, 251-52 (2011).

[3] See LBP-12-09, 75 NRC 615, 629 (2012).

[4] See Licensing Board Memorandum and Order (Granting in Part and Denying in Part Motion for Summary Disposition of Amended Contention 2.1) at 10 (Aug. 30, 2012) (unpublished).

[5] See LBP-15-19, 81 NRC __, __ (slip op. at 7) (June 10, 2015).

[6] Division of New Reactor Licensing, Office of New Reactors, Environmental Impact Statement for [COLs] for Turkey Point Nuclear Plant Units 6 and 7 Draft Report for Comment, NUREG-2176 (Feb. 2015) (ADAMS Accession Nos. ML15055A103 and ML15055A109) [hereinafter DEIS].

[7] Participation by the Corps as a cooperating agency arose from FPL's request, incident to its Turkey Point COL application, for a Department of Army "permit pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899 to authorize certain construction activities potentially affecting waters of the United States." DEIS at xxxii; see also id. at 10-1 to 10-3. Because the Corps plans to adopt the EIS in its record of decision, it seeks to ensure to the maximum extent practicable that the information in the DEIS will be adequate to fulfill its regulatory requirements for resolving FPL's request. See id. at 10-3.

> (1) the [Environmental Report (ER)] submitted by FPL; (2) consultation with Federal, State, Tribal, and local agencies; (3) the review team's[8] own independent review; (4) the staff's consideration of public scoping comments; and (5) the assessments summarized in this EIS, including the potential mitigation measures identified in the ER and the EIS.

Id. at 10-28 (citation omitted).

On April 13, 2015, Joint Intervenors moved for leave to file a new contention challenging the discussion of mitigation measures in the DEIS. See Joint Intervenors' Motion at 1. Because Joint Intervenors initially proffered nine contentions, and the Board denied admission of a tenth in 2013,[9] we will refer to this proposed new contention as "Contention 11." Contention 11 alleges that the proposed mitigation measures are too speculative and that the DEIS does not adequately examine their effectiveness, in violation of the National Environmental Policy Act (NEPA). See Joint Intervenors' Motion at 1-2.

On May 8, 2015, FPL and the NRC Staff each filed answers opposing Joint Intervenors' motion.[10] On May 15, 2015, Joint Intervenors filed their reply.[11]

On July 16, 2015, this Board heard oral argument on the admissibility of Contention 11.[12]

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[8] The NRC, its contractors, and the Corps constitute the "review team" referenced in the DEIS. See DEIS at iii.

[9] See Licensing Board Memorandum and Order (Denying Without Prejudice Joint Intervenors' Motion to Admit New Contention) (Mar. 28, 2013) (unpublished).

[10] See FPL's Answer Opposing Joint Intervenors' Motion to File New Contention (May 8, 2015) [hereinafter FPL Answer]; NRC Staff Answer to [Motion] (May 8, 2015) [hereinafter NRC Staff Answer].

[11] See Reply by Joint Intervenors to Oppositions by FPL and NRC Staff to Motion to Admit New Contention Regarding NRC's Reliance on Speculative Mitigation Measures and Failure to Adequately Examine the Effectiveness of These Proposed Mitigation Measures in the [DEIS] for Turkey Point Units 6 & 7 (May 15, 2015) [hereinafter Joint Intervenors' Reply].

[12] See Licensing Board Notice and Order (Scheduling and Providing Instructions for Oral Argument) at 2 (July 2, 2015) (unpublished); Transcript, "Atomic Safety and Licensing Board Panel Hearing [in the Matter of] Florida Power & Light Company" at 305-413 (July 16, 2015) [hereinafter Tr.].

II. CONTENTION ADMISSIBILITY STANDARDS

An intervenor who moves to file a new contention must demonstrate good cause for proffering the contention after the initial deadline for the filing of contentions. See 10 C.F.R. § 2.309(c)(1).[13] In addition to being timely, the proposed new contention must satisfy the six-factor contention admissibility standard in 10 C.F.R. § 2.309(f)(1), which states, in relevant part, that a petitioner must:

> (i) Provide a specific statement of the issue of law or fact to be raised or controverted . . . ;
>
> (ii) Provide a brief explanation of the basis for the contention;
>
> (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
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> (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
>
> (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; [and]
>
> (vi) . . . [P]rovide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

10 C.F.R. § 2.309(f)(1).[14]

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[13] Because we conclude infra Part III.B that Contention 11 fails to satisfy the contention admissibility standard in 10 C.F.R. § 2.309(f)(1), we do not consider whether it is timely under section 2.309(c)(1).

[14] To satisfy section 2.309(f)(1)(vi), a petitioner must show that a genuine dispute exists on a material issue of law or fact relating to the application. In this case, Joint Intervenors challenge the NRC's DEIS, which is the applicable environmental document at this stage of the proceedings.

The Commission has emphasized that the contention admissibility standard is "strict by design."[15] Failure to comply with any of its requirements renders a contention inadmissible.[16]

III. ANALYSIS

A. The Parties' Positions on Contention 11

In Contention 11, Joint Intervenors allege that:

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

Joint Intervenors' Motion at 2. According to Joint Intervenors, instead of adequately considering mitigation measures and assessing their effectiveness, the DEIS improperly defers to a not-yet-completed review the Corps is conducting pursuant to its Clean Water Act (CWA) 404 permit analysis. See id. at 4. Joint Intervenors argue that, to satisfy NEPA's requirements, the NRC Staff must either (1) include the Corps' 404 permit analysis in the DEIS, or (2) conduct a more thorough analysis of mitigation measures. See id. at 6.

The NRC Staff and FPL argue that Contention 11 must be rejected because it fails to satisfy the admissibility criteria in section 2.309(f)(1). See NRC Staff Answer at 6-15; FPL Answer at 18-32. Additionally, FPL argues that Contention 11 must be rejected on grounds of untimeliness and collateral estoppel. See FPL Answer at 15-17, 23-24.

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[15] Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001); see also USEC, Inc. (Am. Centrifuge Plant), CLI-06-09, 63 NRC 433, 437 (2006).

[16] See Private Fuel Storage, LLC (Indep. Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

B. Licensing Board Ruling on Contention 11

We deny admission of Contention 11 because it fails to satisfy 10 C.F.R. § 2.309(f)(1) in two respects. First, as we show infra Part III.B.1, Contention 11 fails to raise a material issue as required by 10 C.F.R. § 2.309(f)(1)(iv) because, contrary to Joint Intervenors' assertion, the DEIS need not include the Corps' CWA 404 permit analysis in order to satisfy NEPA. Second, as we show infra Part III.B.2, Contention 11 fails to demonstrate a genuine dispute with the DEIS as required by 10 C.F.R. § 2.309(f)(1)(vi) because, although Joint Intervenors claim that the NRC did not adequately review FPL's proposed mitigation plan, they fail to identify any specific deficiency in the DEIS, relying instead on unsupported claims that the NRC merely accepted FPL's proposals at face value.[17]

1. Joint Intervenors' Assertion that the DEIS is Deficient Unless It Includes the Corps' 404 Permit Review Does Not Raise a Material Issue

When a proposed project, such as Turkey Point Units 6 and 7, would cause the discharge of dredged or fill material into wetlands, an applicant must seek a permit from the Corps under section 404 of the CWA. See 33 U.S.C. § 1344; see also DEIS at 1-5 to 1-9; supra note 7. Pursuant to the CWA, before being granted a 404 permit, an applicant must demonstrate to the Corps that it has taken "all appropriate and practicable steps to avoid and minimize adverse impacts." 33 C.F.R. § 332.1(c)(2). If impacts are unavoidable, the applicant shall provide mitigation measures that "must be, to the extent practicable, sufficient to replace lost aquatic resource functions." Id. § 332.3(f)(1); see generally Greater Yellowstone Coal. v. Flowers, 359 F.3d 1257, 1269 (10th Cir. 2004) (discussing section 404 permit process).

According to Joint Intervenors, the NRC Staff abdicated its NEPA responsibilities by issuing the DEIS before the Corps completed its 404 permit review. See Joint Intervenors'

[17] Because we conclude that Contention 11 fails to satisfy the admissibility criteria in section 2.309(f)(1), we do not address FPL's alternative arguments that Contention 11 must be rejected on grounds of untimeliness and collateral estoppel. See supra Part III.A.

Motion at 6-7. In support of their argument, Joint Intervenors cite Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971), for the proposition that, as the lead agency responsible for drafting the DEIS, the NRC Staff's "attempt to rely entirely on the environmental judgments of [the Corps] is in fundamental conflict with the basic purpose of NEPA." Tr. at 317; see also Joint Intervenors' Motion at 6-7.

Joint Intervenors are correct that, under Calvert Cliffs, an agency cannot relinquish its NEPA responsibility to evaluate environmental impacts by relying on expected compliance with the environmental standards of another agency. See 449 F.2d at 1122-23. In Calvert Cliffs, the Atomic Energy Commission (AEC) adopted a rule that excluded certain environmental impacts from its NEPA consideration and "defer[red] totally" to environmental quality standards devised and administered by other agencies. Id. at 1122. The court held that this rule violated NEPA, which "mandates a case-by-case balancing judgment" by the federal agency conducting the NEPA review. Id. at 1123. "Certification by another agency that its own environmental standards are satisfied," held the court, "involves an entirely different kind of judgment. Such agencies, without overall responsibility for the particular federal action in question, attend only to one aspect of the problem" without considering the broad range of environmental concerns and considerations mandated by NEPA. Id. The court in Calvert Cliffs thus struck down the AEC's rule, holding that it constituted an impermissible abdication of the AEC's NEPA responsibilities. See id. at 1123, 1124.

Joint Intervenors' reliance on Calvert Cliffs, however, is misplaced. Unlike Calvert Cliffs, the NRC here did not abdicate its responsibility to evaluate environmental impacts and proposed mitigation measures associated with the license application. Rather, the DEIS includes a discussion and assessment of the project's (1) impacts on terrestrial and wetland resources, see DEIS at 4-39 to 4-51; and (2) potential mitigation measures for terrestrial and wetland resources. See id. at 4-69 to 4-75. The DEIS also refers to the "independent"

evaluation of "the review team,"[18] while noting that the conclusions made do not rely on the Corps' 404 permit review. See, e.g., id. at 4-75; see also id. at 10-28. In short, because the NRC Staff did not "defer totally" to the Corps' 404 permit review to justify the conclusions in the DEIS, 449 F.2d at 1122, the comparison to Calvert Cliffs is inapt.[19]

Nor is there merit to Joint Intervenors' related assertion that, under NEPA, the NRC Staff's mitigation assessment in the DEIS is deficient as a matter of law until the Corps completes its 404 permit review under the CWA. See Joint Intervenors' Motion at 4-7; see also Tr. at 334-37. NEPA and the CWA are different statutes using different standards to achieve different goals. As described above, the 404 permit review process authorizes the Corps to impose substantive requirements on a permit applicant to prevent environmental impacts (i.e., avoidance, minimization, and required compensatory mitigation). In contrast, NEPA imposes procedural requirements on an agency to consider mitigation options, but "[it] does not mandate particular results." Robertson v. Methow Valley, 490 U.S. 332, 350 (1989). As the Tenth Circuit explained, "[w]hile the CWA imposes substantive restrictions on agency action, NEPA imposes procedural requirements aimed at integrating 'environmental concerns . . . into the very process

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[18] At different points, see, e.g., DEIS at 4-75, the DEIS attributes the DEIS's conclusions either to the NRC Staff alone or to the "review team," which includes both the NRC Staff and the Corps as a cooperating agency. See supra note 8. Whatever role the Corps played in drafting the DEIS, the Board treats all of these statements as attributable to the NRC Staff in determining the adequacy of the Staff's NEPA review.

[19] At oral argument, counsel for the NRC Staff reiterated what the DEIS states: namely, that the Staff conducted an independent review of FPL's proposed mitigation measures. See, e.g.,Tr. at 351-52 (counsel represents that the NRC Staff conducted an "independent evaluation" of environmental impacts and mitigation measures); id. at 353 (referring to Table 4-11, which is located on page 4-71 of the DEIS, counsel represents that the NRC Staff "reviewed that mitigation plan in depth").

Of course, counsel's representations at oral argument are not "evidence" of how thoroughly the NRC Staff reviewed FPL's proposed mitigation measures. But the above representations are consistent with the DEIS's statement that the Staff conducted an "independent" review of the mitigation measures, see DEIS at 4-75, which Joint Intervenors have not rebutted, other than to assert, without support, that the Staff accepted those measures at face value. See infra Part III.B.2.

of agency decision-making.'" Greater Yellowstone Coal., 359 F.3d at 1273-74. It follows that NEPA cannot reasonably be interpreted to require that the NRC delay issuance of the DEIS until the Corps completes its substantive review under the CWA.

Finally, not only do Calvert Cliffs and NEPA fail to support Joint Intervenors' argument that the DEIS is deficient until completion of the Corps' 404 permit review, that argument is inconsistent with case law that affirmatively recognizes that the 404 permit review can permissibly be conducted after issuance of an FEIS. See City of Carmel-by-the-Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1152 (9th Cir. 1997). That the 404 permit review is conducted after issuance of the FEIS does not impact an agency's duty under NEPA; rather, it "serves to highlight the distinction between [NEPA] and the [CWA]: the former is procedural and is simply not as demanding as the CWA on the issue of wetlands." Id.; see also Webster v. U.S. Dep't of Agric., 685 F.3d 411, 433 (4th Cir. 2012) (holding that NEPA is not violated when an agency issues a supplement environmental impact statement before the Corps completes a section 404 permit review).[20]

In sum, to the extent that Joint Intervenors ground Contention 11 on the argument that the DEIS is inadequate solely because it does not include the results of the Corps' 404 permit review, they fail to raise an issue material to the determinations the NRC must make, as required by 10 C.F.R. § 2.309(f)(1)(iv).[21]

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[20] Cf. Alaska Survival v. Surface Transp. Bd., 705 F.3d 1073, 1089 (9th Cir. 2013) ("[W]hen the agency otherwise complied with NEPA's requirement of a reasonably thorough [mitigation] analysis," there is "no error in the [agency's] reliance on § 404's substantive requirements as mitigation measures" even though the section 404 permit review is not yet complete.).

[21] At oral argument, Joint Intervenors appeared to argue that the NRC's Memorandum of Understanding (MOU) with the Corps requires that the 404 permit be completed before issuance of an FEIS. Tr. at 324-25. This argument is untimely because it was raised for the first time at oral argument. See Nuclear Mgmt. Co., LLC (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006). Even if the argument were timely, however, we would reject it, because Joint Intervenors' interpretation of the MOU is not a tenable reading of the document's language. See [MOU] Between [Corps] and [NRC] on Environmental Reviews Related to the

2. Joint Intervenors' Challenge to the Adequacy of the NRC Staff's Review of Mitigation Measures Fails to Raise a Genuine Dispute

NEPA requires an agency's DEIS to "contain a detailed discussion of possible mitigation measures." Methow Valley, 490 U.S. at 351. Although NEPA does not require the DEIS to include a fully formulated or adopted mitigation plan, see id. at 353, its discussion must provide "sufficient detail to ensure that environmental consequences have been fairly evaluated." Id. After all, "the very purpose of NEPA's requirement that an EIS be prepared . . . is to obviate the need for . . . speculation by insuring that available data is gathered and analyzed prior to the implementation of the proposed action." Found. for N. Am. Wild Sheep v. U.S. Dep't of Agric., 681 F.2d 1172, 1179 (9th Cir. 1982).

Guided by the above principles, we conclude that Joint Intervenors' challenge to the adequacy of the NRC Staff's discussion of mitigation measures fails to raise a genuine dispute with the DEIS.

Joint Intervenors first argue that the DEIS's discussion of mitigation measures is inadequate because it "merely lists 'potential' and 'possible' mitigation measures" without identifying "what combination or suite of measures will be implemented." Joint Intervenors' Motion at 3-4. This argument is flawed for two reasons.[22] First, Joint Intervenors err as a legal matter in asserting that the DEIS must identify the specific mitigation measures that will be implemented. NEPA requires "that an EIS contain a detailed discussion of possible mitigation measures." Methow Valley, 490 U.S. at 351 (emphasis added). It "does not mandate particular results" and, accordingly, does not "demand the presence of a fully developed plan that will

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Issuance of Authorizations to Construct and Operate Nuclear Power Plants at 7-8 (Sept. 12, 2008) (ADAMS Accession No. ML082540354).

[22] As an initial matter, contrary to Joint Intervenors' assertion, see Joint Intervenors' Motion at 4-5, the DEIS's discussion of proposed mitigation measures bears no resemblance to the perfunctory "mere listing" that the court in Neighbors of Cuddy Mountain v. U.S. Forest Serv., 137 F.3d 1372, 1380 (9th Cir. 1998), found to be insufficient under NEPA.

mitigate environmental harm before an agency can act." Id. at 350, 353. Second, Joint Intervenors err as a factual matter in alleging that the DEIS merely discusses "possible" mitigation measures. This assertion ignores that the Florida Department of Environmental Protection issued final Conditions of Certification (COC)[23] to FPL on May 19, 2014, and – as the DEIS states – the COC is "binding." DEIS at 1-2, 4-1, 10-1. The COC incorporates FPL's Mitigation Plan[24] and specifically requires that FPL provide mitigation in accordance with that Plan.[25] Hence, contrary to Joint Intervenors' assertion, there is no question that FPL must implement mitigation measures consistent with its Mitigation Plan pursuant to the COC, which is "binding." Id.[26]

Joint Intervenors also argue that the DEIS is inadequate because the analysis of proposed mitigation measures is "speculative [insofar as it] accept[s] the calculations of the applicant essentially at face value and [without an] independent review." Tr. at 342; see also Joint Intervenors' Motion at 5, 8. As mentioned earlier, however, the DEIS discusses the proposed mitigation measures, see DEIS at 4-69 to 4-75, and states explicitly that the NRC Staff conducted an "independent evaluation" of those measures. Id. at 4-75.[27] At oral

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[23] See Conditions of Certification, [FPL], Turkey Point Plant Units 6 & 7, PA 03-45A3 (May 19, 2014) [hereinafter COC], available at http://publicfiles.dep.state.fl.us/Siting/Outgoing/Web/Certification/pa03_45_2014_units6_7.pdf.

[24] See Turkey Point Units 6 & 7, Wetlands Mitigation Plan Rev. 2 (July 2011) (ADAMS Accession No. ML12269A222) [hereinafter Mitigation Plan].

[25] See COC at 34, 87; see also FPL Answer at 6-7.

[26] Notably, the COC not only requires FPL to implement the measures in its Mitigation Plan, it also provides for additional mitigation requirements. See FPL Answer at 6 & n.19. The Corps is also empowered to require additional compensatory mitigation pursuant to its section 404 review. See DEIS at 4-73.

[27] The DEIS at 4-75 states (emphasis added):

> Based on the review team's independent evaluation of the Turkey Point project, including the ER, the [Site Certification Application)], FPL's responses to NRC's [Requests for Additional Information], the identified mitigation measures and [best management practices], and consultation with other Federal, State, and

argument, the Staff confirmed that they independently evaluated the proposed mitigation measures, see Tr. at 351, 352, asserting that they "reviewed all of the inputs to the [Uniform Mitigation Assessment Method (UMAM)] code and also the [Wetland Assessment Technique for Environmental Review (W.A.T.E.R.)] code . . . . and they found those inputs reasonable and appropriate." Id. at 354.[28] Joint Intervenors do not point to any specific deficiency in the DEIS's discussion of proposed mitigation measures, nor do they provide any reason to question the DEIS's statement that the Staff "independent[ly] evaluat[ed]" those measures. DEIS at 4-75. Joint Intervenors' assertion thus fails to give rise to a genuine dispute regarding the adequacy of the Staff's review of mitigation measures.

Finally, Joint Intervenors argue that the DEIS is inadequate because the closest the DEIS comes to discussing the effectiveness of the mitigation proposals is to include mitigation units that the applicant calculated using UMAM. See Joint Intervenors' Motion at 5.[29] Joint Intervenors assert that the DEIS fails to explain how and why the proposed measures "will adequately offset projected wetland loss" or "why the expected 1:1 mitigation ratio is adequate."

> County regulatory agencies, the review team concludes that the impacts of preconstruction and construction activities on terrestrial ecological resources (including wetlands and threatened and endangered species) would be MODERATE.

[28] UMAM is a comprehensive methodology embedded in the Florida Administrative Code, Chapter 62-345, that "provides standardized methods for assessing wetland ecological function, the loss thereof, and the amount of mitigation to offset this loss." DEIS at 4-70. UMAM "quantifies wetland quality or health through evaluation of several variables, including location and landscape, water environment, and community structure." Mitigation Plan at 8. W.A.T.E.R. is a similar "procedure for evaluating functional loss and lift for wetlands in southeast Florida." DEIS at 4-71. The UMAM and W.A.T.E.R. methods reflect the Corps' preferred approach to compensatory mitigation under the CWA, see 33 C.F.R. § 332.1(f)(1), and counsel for FPL represents that both UMAM and W.A.T.E.R. are "federal-approved methodologies." Tr. at 390; see also id. at 388-94 (discussing history and applicability of UMAM and W.A.T.E.R.); Mitigation Plan at 8-11 (discussing UMAM and W.A.T.E.R.).

[29] Joint Intervenors do not mention the degree to which mitigation units calculated using the W.A.T.E.R. methodology amounts to a discussion of effectiveness. Because there appears to be little difference between the UMAM and W.A.T.E.R. methods, see Tr. at 390-92; supra note 28, we assume that Joint Intervenors' arguments apply to both.

Id. Joint Intervenors do not dispute the analytical approach of the UMAM and W.A.T.E.R. methods for calculating wetland losses and offsetting mitigation credits, see Tr. at 333-34,[30] but they allege that "a ratio greater than [1:1] may be necessary depending on the method of mitigation." Id. at 339. This argument misapprehends the manner by which the UMAM and W.A.T.E.R. methods measure environmental impacts on wetlands and the effectiveness of mitigation measures. These methods measure "wetland functional change,"[31] which goes beyond mere loss or gain of wetland acreage. See supra note 28. The DEIS thus evaluates FPL's mitigation proposals using UMAM and W.A.T.E.R. to determine that the loss of wetland function is being replaced with an equivalent amount of functional lift at a ratio of 1:1. See DEIS at 4-71 to 4-72.

In sum, Joint Intervenors' arguments in support of Contention 11's admissibility fail to articulate how the DEIS's analysis of mitigation proposals is speculative or lacks an adequate assessment of effectiveness. Joint Intervenors thus fail to present a genuine dispute with the DEIS, as required by 10 C.F.R. § 2.309(f)(1)(vi).

* * * * *

As discussed above, we decline to admit Contention 11 due to Joint Intervenors' failure to satisfy the admissibility criteria in section 2.309(f)(1)(iv) and (vi). In doing so, however, we note that the NRC Staff could have drafted the DEIS in such a way as to more clearly indicate the line between FPL's mitigation proposals and the NRC's analysis of those proposals, and in particular, its independent analysis of the UMAM and W.A.T.E.R. calculations. Although the Staff might have felt that the fact that it had engaged in a thorough review was obvious, see Tr.

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[30] To the extent any of Joint Intervenors' arguments can be interpreted as alleging deficiencies in the UMAM and W.A.T.E.R. methods, the challenge fails to satisfy 10 C.F.R. § 2.309(f)(1)(v) due to the lack of alleged facts or expert opinions. See Tr. at 333.

[31] See DEIS at 4-71 (Table 4-11) (emphasis added); see also Mitigation Plan at 8-11; Tr. at 387-89.

at 352, Joint Intervenors' confusion appears to confirm the Holmesian adage that "[t]here is nothing more deceptive than an obvious fact."[32] Clarifying edits by the Staff to the FEIS prior to its publication may provide the public with a clearer understanding of the nature and extent of the Staff's NEPA review.

IV. CONCLUSION

For the foregoing reasons, we deny Joint Intervenors' motion for leave to admit a new contention based on the NRC Staff's DEIS.

This Memorandum and Order is subject to interlocutory review in accordance with the provisions of 10 C.F.R. § 2.341(f)(2). A petition for review that meets the requirements of section 2.341(f)(2) must be filed within twenty-five (25) days of service of this Memorandum and Order, pursuant to 10 C.F.R. § 2.341(b)(1).

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA

_____
E. Roy Hawkens, Chairman
ADMINISTRATIVE JUDGE

/RA/

_____
Dr. Michael F. Kennedy
ADMINISTRATIVE JUDGE

/RA/

_____
Dr. William C. Burnett
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 21, 2015

[32] Arthur Conan Doyle, The Adventure of the Boscombe Valley Mystery, in The Adventures of Sherlock Holmes 76, 80 (Barnes & Noble, Inc. 2009) (1892).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
FLORIDA POWER & LIGHT COMPANY	)	Docket Nos. 52-040 and 52-041-COL
(Juno Beach, Florida)	)	
	)	
(Turkey Point, Units 6 & 7)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Denying Joint Intervenors' Motion to Admit New Contention)** have been served upon the following persons by Electronic Information Exchange, and by electronic mail as indicated by an asterisk.

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[Original signed by Brian Newell]
Office of the Secretary of the Commission

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