UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket Nos. 50-250-SLR and 50-251-SLR
FLORIDA POWER & LIGHT COMPANY	)	ASLBP No. 18-957-01-SLR-BD01
(Turkey Point Nuclear Generating Units 3 and 4)	)	July 19, 2019

FLORIDA POWER & LIGHT COMPANY'S ANSWER TO INTERVENORS' PETITION FOR WAIVER OF CERTAIN 10 C.F.R. PART 51 REGULATIONS

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I. INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.309(i)(1) and 2.335(b), Florida Power & Light Company ("FPL") hereby files this Answer to the Petition for Waiver ("Waiver Petition") filed on June 24, 2019 by Natural Resources Defense Council, Friends of the Earth, and Miami Waterkeeper ("Intervenors").[1] Intervenors seek a "limited waiver" of the following Nuclear Regulatory Commission ("NRC") regulations: 10 C.F.R. §§ 51.53(c)(3), 51.71(d), and 10 C.F.R. Part 51, Subpart A, Appendix B.[2] They request the waiver in connection with two of their proposed new contentions, 6-E and 7-E, which challenge the NRC Staff's compliance with the National Environmental Policy Act ("NEPA").[3] Those contentions challenge aspects of the Staff's Draft Supplemental Environmental Impact Statement ("DSEIS") for FPL's subsequent license renewal ("SLR") application for Turkey

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1 Natural Resources Defense Council's, Friends of the Earth's, and Miami Waterkeeper's Petition for Waiver of 10 C.F.R. §§ 51.53(c)(3) and 51.71(d) and 10 C.F.R. Part 51, Subpart A, Appendix B (June 24, 2019). Intervenors also filed the June 24, 2019, Declaration by Kenneth Rumelt ("Rumelt Decl."), Counsel for Friends of the Earth, in support of the Waiver Petition.

2 Waiver Petition at 1.

3 Natural Resources Defense Council's, Friends of the Earth's, and Miami Waterkeeper's Amended Motion to Migrate Contentions & Admit New Contentions in Response to NRC Staff's Supplemental Draft Environmental Impact Statement (June 24, 2019, as amended on June 28, 2019) ("Motion") (ML19179A316). FPL has concurrently filed a separate response to Intervenors' Motion. *See* Florida Power and Light Company's Answer Opposing Intervenors' Motion to Migrate or Amend Contentions 1-E and 5-E and to Admit New Contentions 6-E, 7-E, 8-E, and 9-E (July 19, 2019) ("FPL's Answer to Intervenors' Motion").

Point Nuclear Generating Units 3 and 4 ("Turkey Point").[4] Intervenors seek a waiver to challenge two issues discussed in the DSEIS: (1) groundwater quality degradation (plants with cooling ponds in salt marshes) and (2) water quality impacts on adjacent water bodies (plants with cooling ponds in salt marshes).[5] They argue, in the alternative, that a waiver is "not necessary" to submit a contention challenging the adequacy of the DSEIS's analysis regarding either of these issues.[6]

For the reasons set forth in Section IV.C, *infra*, the Board should deny the Waiver Petition with regard to the first issue (groundwater quality degradation) because Intervenors have not made a *prima facie* showing that a waiver of any Part 51 regulation is warranted under Section 2.335.[7] With regard to the second issue (water quality impacts on adjacent water bodies), FPL does not object to Intervenors' claim that a waiver is not necessary to file a proposed contention, given the Staff's determination in the DSEIS that the issue is a new, site-specific issue that is neither Category 1 nor Category 2.[8] However, FPL does not agree that the second issue presents an admissible contention and does not waive any previous arguments or arguments contained in the concurrently-filed FPL's Answer to Intervenors' Motion.[9] In the event the Board concludes that a waiver also is required to challenge the DSEIS analysis of water quality impacts on adjacent water bodies, FPL contends that Intervenors have not made the required *prima facie* showing for the same reasons set forth in Section IV.C below.

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4 NUREG-1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 5, Second Renewal, Regarding Subsequent License Renewal for Turkey Point Nuclear Generating Unit Nos. 3 and 4, Draft Report for Comment" (Mar. 2019) (ML19078A330).

5 Waiver Petition at 1, 3-4.

6 *See id.* at 5, 6, 9.

7 *See* 10 C.F.R. § 2.335(c) (requiring the petitioner to make a "*prima facie* showing" that the application of a specific Commission rule or regulation (or provision thereof) should be waived or an exception granted).

8 *See* DSEIS at xvii, 4-2, 4-21 to 4-22.

9 For the reasons set forth in FPL's Answer to Intervenors' Motion, both Contentions 6-E and 7-E are untimely under 10 C.F.R. § 2.309(c)(1) and inadmissible under 10 C.F.R. § 2.309(f)(1), irrespective of whether a waiver is needed or is granted with respect to either contention.

II. PROCEDURAL HISTORY

On January 30, 2018, FPL submitted its application to the NRC seeking to renew the Turkey Point operating licenses for an additional 20-year period.[10] The NRC subsequently published a notice in the *Federal Register* providing an opportunity for interested persons to request a hearing.[11] On August 1, 2018, Intervenors filed their Petition to Intervene in this SLR proceeding, requesting a hearing, and proposing five contentions, each of the latter challenging various aspects of the Environmental Report ("ER") included as part of the SLR application.[12]

In LBP-19-3, the Board found that Intervenors had standing to participate in this proceeding, and admitted for litigation portions of two of their proposed contentions: 1-E and 5-E.[13] On April 3, 2019, the NRC Staff informed the Board and parties that it had issued the DSEIS, which documents the Staff's environmental review of the Turkey Point SLR. On June 24, 2019, Intervenors filed their Motion, seeking to amend or "migrate" Intervenors' earlier-admitted contentions (1-E and 5-E), and to admit four new contentions (6-E, 7-E, 8-E, and 9-E) in response to the DSEIS.[14]

In support of their Motion, Intervenors submitted the instant Waiver Petition. Therein, they seek a waiver of 10 C.F.R. §§ 51.53(c)(3) and 51.71(d), as well as 10 C.F.R. Part 51, Subpart A, Appendix B, to the extent the Board "interprets those regulations to preclude Intervenors from

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10 *See* Letter from M. Nazar, FPL, to NRC, Turkey Point Units 3 and 4 Subsequent License Renewal Application (Jan. 30, 2018) (ML18037A824).

11 *See* Florida Power & Light Company; Turkey Point Nuclear Generating, Unit Nos. 3 and 4; License Renewal Application; Opportunity to Request a Hearing and to Petition for Leave to Intervene, 83 Fed. Reg. 19,304 (May 2, 2018).

12 Request for Hearing and Petition to Intervene Submitted by Friends of the Earth, Natural Resources Defense Council, and Miami Waterkeeper (Aug. 1, 2018) (ML18213A418) ("Intervenors' Petition to Intervene").

13 *See Fla. Power & Light Co.* (Turkey Point Nuclear Generating Units 3 and 4), LBP-19-3, 89 NRC __ (slip op. at 42-44, 51-53, 63) (Mar. 7, 2019).

14 FPL filed separate Motions to Dismiss Contentions 1-E and 5-E as moot because the information alleged by those contentions to be missing from the ER is provided in the DSEIS. *See* FPL's Motion to Dismiss Joint Petitioners' Contention 1-E as Moot (May 20, 2019) (ML19140A355); FPL's Motion to Dismiss Joint Petitioners' Contention 5-E as Moot (May 20, 2019) (ML19140A356). The Board granted FPL's Motions on July 8, 2019, in LBP-19-6, concluding that "the new information in the DSEIS has cured the omissions identified in the two contentions." *See Fla. Power & Light Co.* (Turkey Point Nuclear Generating Units 3 and 4), LBP-19-6, 90 NRC __ (slip op. at 1) (July 8, 2019).

submitting new contentions 6E and 7E challenging the NRC Staff's analysis in the [DSEIS] . . . regarding two issues: (1) groundwater quality degradation (plants with cooling ponds in salt marshes) and (2) water quality impacts on adjacent waterbodies (plants with cooling ponds in salt marshes)."[15]

III. FACTUAL BACKGROUND

A. FPL's Reliance on NRC's Category 1 Findings in the Environmental Report

FPL submitted its ER as an appendix to the SLR application. ER Chapter 4 addresses each of the Category 1 and Category 2 issues set forth in the NRC Generic Environmental Impact Statement ("GEIS")[16] for license renewal and, as summarized in a series of tables, indicates why each is applicable or not applicable to Turkey Point.[17] The ER incorporates by reference the GEIS findings for all applicable Category 1 issues, and did not identify any new and significant information regarding any Category 1 issues.[18] As relevant to the Waiver Petition, the ER identified "groundwater quality degradation (plants with cooling ponds in salt marshes)" as a Category 1 issue that is applicable to Turkey Point. The ER does not mention the second issue identified by Intervenors in their Waiver Petition, "water quality impacts on adjacent water bodies (plants with cooling ponds in salt marshes)," because that issue is not included in Table B-1 of Appendix B to 10 C.F.R. Part 51 or the GEIS. As explained below, the NRC Staff identified that issue as a new, site-specific issue in its DSEIS for Turkey Point SLR.

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15 Waiver Petition at 1. Contention 6-E alleges that the DSEIS fails to take the requisite "hard look" at the impacts of SLR on "surface waters via the groundwater pathway." Motion at 40. Contention 7-E asserts the DSEIS does not take a hard look at the impacts of SLR to "groundwater quality." *Id.* at 44.

16 NUREG-1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants," Rev. 1, Vols. 1-3 (June 2013) (ML13107A023) (package).

17 *See* ER at 4-5 to 4-10 (Tables 4.0-1 through 4.0-3).

18 *See* ER at 5-4.

B. The NRC's Treatment of the Relevant Cooling Canal System ("CCS") Environmental Impact Issues in the DSEIS

The DSEIS relies on the GEIS analyses and findings, as appropriate. As pertinent here, the DSEIS notes that the Staff evaluated new and potentially significant information related to the Category 1 issue of groundwater quality degradation (plants with cooling ponds in salt marshes), and concluded that the site-specific impacts for this issue at the Turkey Point site are MODERATE for current operations, but will be SMALL during the SLR term "as a result of ongoing remediation measures and State and county oversight."[19] In addition, the Staff identified one new issue in the DSEIS: water quality impacts on adjacent water bodies (plants with cooling ponds in salt marshes).[20] The DSEIS states that the GEIS did not consider how a nuclear power plant with a cooling pond in a salt marsh may indirectly impact the water quality of adjacent surface water bodies via a groundwater pathway.[21] It further notes that this "new, site-specific issue" is not categorized as Category 1 or 2.[22] Therefore, Section 4.5.1.1 of the DSEIS includes a site-specific analysis for this issue that evaluates the potential impacts of temperature, salinity, ammonia, and nutrients on surface water bodies adjacent to the CCS.[23] The DSEIS concludes that the impacts on adjacent surface water bodies via the groundwater pathway from the CCS during the SLR term would be SMALL and, therefore, the information that it identified as new is not significant.[24]

Intervenors seek waivers with respect to both issues—groundwater quality degradation and water quality impacts on adjacent waterbodies. Alternatively, they argue that the requested waivers

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19 *See* DSEIS at 4-23 to 4-28.

20 *See id.* at 4-21.

21 *See id.*

22 *Id.* at xvii, 4-21.

23 *See id.* at 4-21 to 4-23.

24 *Id.* at 4-23.

are "not necessary" to challenge the DSEIS, and that they have filed their Waiver Petition in "an abundance of caution."[25]

IV. ARGUMENT

Intervenors incorrectly claim that a waiver is "not necessary" to challenge new information on a Category 1 issue. They also fail to meet the Commission's stringent standard for a waiver of NRC regulations in connection with the Category 1 issue of groundwater quality degradation (plants with cooling ponds in salt marshes). While not waiving any arguments regarding contention timeliness or admissibility, FPL does not object to Intervenors' position that no waiver is needed to file a proposed contention related to the issue of water quality impacts on adjacent water bodies (plants with cooling ponds in salt marshes), given the Staff's treatment of that issue as a new, site-specific issue in the DSEIS. In the event the Board concludes that a waiver also is required to challenge the DSEIS analysis of water quality impacts on adjacent water bodies, FPL contends that Intervenors have not made the required *prima facie* showing for the same reasons set forth in Section IV.C below.

A. Contrary to Intervenors' Claim, A Waiver Is Necessary for Challenging New Information for a Category 1 Issue

As a threshold matter, Intervenors incorrectly argue that "[n]o NRC regulation prohibits Intervenors from challenging new information identified and evaluated by the NRC Staff in a DSEIS with respect to a Category 1 issue."[26] As this Board noted, a petitioner "may not circumvent the regulatory bar against challenging a Category 1 issue by alleging the existence of new and significant information."[27] This observation is consistent with the Commission's holding that "the new and significant information requirement in 10 C.F.R. § 51.53(c)(3)(iv) [does] not override, *for*

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[25] Waiver Petition at 6.

[26] *Id.*

[27] *Turkey Point*, LBP-19-3, slip op. at 53 n.73.

the purposes of litigating the issues in an adjudicatory proceeding, the exclusion of Category 1 issues in 10 C.F.R. § 51.53(c)(3)(i) from site-specific review."[28] Consequently, "a waiver [is] required to litigate any new and significant information relating to a Category 1 issue."[29] In summary, the fact that the Staff discusses potentially new and significant information in the DSEIS, as it is required to do, does not *per se* mean that the information is the proper subject of a contention—a waiver still is required.

B. <u>Given the NRC Staff's Determination in the DSEIS That "Water Quality Impacts on Adjacent Water Bodies" Is a "New Issue" That Is Not Category 1 or Category 2, It Appears That No Waiver Is Needed With Respect to This Specific Issue</u>

As reflected in its Answers to Southern Alliance for Clean Energy's ("SACE's") and Intervenors' Petitions to Intervene, FPL believes that the issue of water quality impacts on adjacent water bodies via the groundwater pathway is properly subsumed within the Category 1 issue of groundwater quality degradation (plants with cooling ponds in salt marshes), and possibly other Category 1 issues insofar as the petitions suggested CCS-related impacts to terrestrial and/or aquatic organisms.[30] The Board reached the same conclusion.[31] In short, given that the CCS does not directly discharge to surface waterbodies, and that any potential CCS impacts to such waterbodies necessarily depend on their hydrological connection with groundwater, FPL views the issue as

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[28] *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-12-19, 76 NRC 377, 384 (2012) (citation omitted) (emphasis added).

[29] *Id. See also Entergy Nuclear Vt. Yankee, LLC* (Vt. Yankee Nuclear Power Station) & *Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-07-3, 65 NRC 13, 20-21 (2007).

[30] *See* Applicant's Answer Opposing Southern Alliance for Clean Energy's Request for Hearing and Petition to Intervene at 8-12, 21-23, 46 (Aug. 27, 2018) (ML18239A450); Applicant's Answer Opposing Request for Hearing and Petition to Intervene Submitted by Friends of the Earth, Natural Resources Defense Council, and Miami Waterkeeper at 56-58 (Aug. 27, 2018) (ML18239A445); *see also* NRC Staff's Corrected Response to Petitions to Intervene and Requests for Hearing Filed by (1) Friends of the Earth, Natural Resources Defense Council and Miami Waterkeeper and (2) Southern Alliance for Clean Energy at 54, 62-63 (Aug. 27, 2018) (ML18239A458) (taking same position as Applicant's answers regarding water quality impacts).

[31] *See Turkey Point*, LBP-19-3, slip op. at 34-37, 53-54 (rejecting SACE Contentions 1A, 1B, and 1C as well as portions of Intervenors' Contention 5-E as impermissibly challenging Category 1 issues related to altered salinity gradients in surface waters, groundwater quality degradation at plants with cooling ponds in salt marshes, cooling system impacts on terrestrial resources in wetlands, and the effects of non-radiological contaminants on aquatic organisms).

fundamentally a groundwater quality concern. Nevertheless, FPL recognizes and respects the NRC Staff's determination in the DSEIS to treat this as a new issue and to prepare a site-specific analysis (thereby treating the issue as the functional equivalent of a Category 2 issue). Therefore, without waiving any previous arguments or arguments made in FPL's Answer to Intervenors' Motion, FPL does not object to Intervenors' positon that a waiver is not needed in this discrete (and possibly unprecedented) situation to file a proposed contention. If the Board concludes that a waiver is in fact required, then FPL respectfully submits that Intervenors have failed to make a *prima facie* showing for the same reasons set forth in Section IV.C, *infra*.

C. The Issue of Groundwater Quality Degradation Is a Category Issue 1 That Requires a Waiver, and for Which Intervenors Have Not Met Their "Substantial Burden" Under Section 2.335(b) and *Millstone* to Justify a Waiver of the Pertinent Part 51 Regulations

1. The Commission's Waiver Standard Is Stringent by Design

The Commission's waiver standard is "stringent by design."[32] To challenge the generic application of a rule, a petitioner seeking waiver must show that "there is something extraordinary about the subject matter of the proceeding such that the rule should not apply."[33] Therefore, Section 2.335(b) provides only a "limited exception" to the NRC's general prohibition against challenges to NRC rules or regulations in adjudicatory proceedings.[34]

To litigate an issue that otherwise would be outside the scope of an adjudication, a petitioner must show that "special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which . . . [it] was adopted."[35] The waiver petitioner must include an

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[32] *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-13-7, 78 NRC 199, 207 (2013).

[33] *Id.* (citations omitted).

[34] *Id.* at 206.

[35] *Id.* at 206-07 (quoting 10 C.F.R. § 2.335(b)).

affidavit that states "with particularity" the special circumstances that justify waiver of the rule.[36] In 2005, in the *Millstone* license renewal proceeding, the Commission set forth a four-part test that it has "long used" in ruling on waiver petitions.[37] That test requires the petitioner to show that:

> (i) the rule's strict application would not serve the purposes for which it was adopted;
>
> (ii) special circumstances exist that were not considered, either explicitly or by necessary implication, in the rulemaking proceeding leading to the rule sought to be waived;
>
> (iii) those circumstances are unique to the facility rather than common to a large class of facilities; and
>
> (iv) waiver of the regulation is necessary to reach a significant safety [or environmental] problem.[38]

All four *Millstone* factors must be met to justify a rule waiver.[39] "The waiver petitioner faces a substantial burden, but not an impossible one," given the Commission's longstanding view that "in general, challenges to regulations are best evaluated through generic means."[40]

2. Intervenors' Waiver Petition Must Be Denied Because They Have Not Met Their Substantial Burden to Satisfy All Four *Millstone* Factors

Intervenors have not satisfied any of the four *Millstone* factors with respect to the groundwater quality degradation issue identified in their Waiver Petition and raised in Contention 7-E. Accordingly, the Petition should be denied.

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[36] *Id.* at 206 (quoting 10 C.F.R. § 2.335(b)).

[37] *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559-60 (2005).

[38] *Id.*

[39] *Limerick*, CLI-13-7, 78 NRC at 206.

[40] *Id.* (citation omitted).

a. Intervenors Have Provided No Reason to Waive the Strict Application of Any Part 51 Regulation in This Case

Intervenors argue that neither they nor the broader public have yet had an opportunity to review or challenge the sufficiency of the new information concerning groundwater quality degradation discussed in the DSEIS.[41] They claim that strictly applying the regulations in question to prevent challenges to analysis of new information in the DSEIS "would be contrary to NEPA's requirement that agencies 'broad[ly] disseminat[e]' information to 'permit[] the public and other government agencies to react to the effects of a proposed action at a meaningful time.'"[42] Intervenors further assert that allowing challenges to the adequacy of NRC Staff analyses of new information regarding a Category 2 issue, while preventing such challenges with respect to new information on a Category 1 issue, "would not serve the purposes for which sections 51.53(c)(3) and 51.71(d) and Appendix B were adopted."[43] As explained below, they are incorrect.

Intervenors' arguments do not establish that "the purpose for which the challenged regulation[s] [were] promulgated would be perverted if applied as written in the ongoing proceeding."[44] First, strictly applying these regulations—as intended by the Commission—in no way undermines the NEPA requirement that the NRC broadly disseminate the information and analyses presented in the DSEIS, or take the requisite "hard look" at potential environmental impacts. While the NRC Staff's final SEIS adopts all applicable Category 1 environmental impact findings from the GEIS, it also must "take[] account of public comments, including plant-specific claims and new information on generic findings."[45] Moreover, "Part 51 requires the final SEIS to

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41 Waiver Petition at 7; Rumelt Decl. ¶ 2.

42 Waiver Petition at 7 (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989)).

43 *Id.* at 7-8; *see also* Rumelt Decl. ¶ 2.

44 *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), Licensing Board Order (Denying CRORIP's 10 C.F.R. § 2.335 Petition) at 3 (July 31, 2008) (unpublished) (ML082130426).

45 *Turkey Point*, LBP-19-3, slip op. at 12 (quoting *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 12 (2001)).

weigh *all* of the expected environmental impacts of license renewal, both those for which there are generic findings and those described in plant-specific analyses."[46] In this case, Intervenors, like many other stakeholders, have submitted comments on the DSEIS, including comments that mirror the concerns presented in their proposed new contentions and Waiver Petition.[47] NRC regulations require the NRC Staff to address all public comments on the DSEIS in its final SEIS.[48] Insofar as Intervenors believe that a hearing on any new information discussed in the DSEIS is compulsory, they are incorrect. Neither the Atomic Energy Act of 1954, as amended ("AEA") nor NEPA confers an automatic right to a hearing on any of the issues raised by Intervenors in their pending Motion or Waiver Petition.[49]

Second, as this Board has noted, the "explicitly stated regulatory purpose" of 10 C.F.R. § 51.53(c)(3) "is to promote efficiency in the environmental review process for license renewal applications"[50] by "divid[ing] the environmental requirements for license renewal into generic and plant-specific components."[51] Indeed, the U.S. Court of Appeals for the First Circuit similarly has observed that the NRC's "divergent treatment of generic and site-specific issues is reasonable and consistent with the purpose of promoting efficiency in handling license renewal decisions."[52]

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46 *Id.* (emphasis in original); *see also Turkey Point*, CLI-01-17, 54 NRC at 15 ("Resolving an environmental issue generically does not reduce its importance. In making a final decision on license renewal, the NRC will still weigh *all* of the different environmental impacts from extended operation, whether those impacts occur generically at all plants or on a plant-specific basis." (citations omitted) (emphasis in original)).

47 *See* Letter from Intervenors' Counsel to NRC, "Re: Comments of Natural Resources Defense Council, Friends of the Earth, and Miami Waterkeeper on the Draft Supplemental Environmental Impact Statement for Turkey Point Nuclear Generating Units Nos. 3 and 4 (NUREG–1437, Supplement 5, Second Renewal, draft) (Docket ID NRC-2018-0101)" (May 20, 2019) (ML19141A253).

48 *See* 10 C.F.R. § 51.91(a)(1)-(3).

49 *NRDC v. NRC*, 823 F.3d, 641, 652 (D.C. Cir. 2016) ("[N]either the AEA nor NEPA guarantees an absolute right to a hearing and neither dictates how the Commission should determine who receives a hearing."); *see also Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 548 (1978) ("[T]he only procedural requirements imposed by NEPA are those stated in the plain language of the Act."); *Beyond Nuclear v. NRC*, 704 F.3d 12, 18-19 (1st Cir. 2013))) ("NEPA does not mandate particular hearing procedures and does not require hearings." (citations omitted)).

50 *Turkey Point*, LBP-19-3, slip op. at 17 (citing Environmental Review for Renewal of Nuclear Power Plant Operating Licenses; Final Rule, 61 Fed. Reg. 28,467 (June 5, 1996)).

51 *Turkey Point*, CLI-01-17, 54 NRC at 11.

52 *Massachusetts v. NRC,* 522 F.3d 115, 120 (1st Cir. 2008).

Moreover, as discussed above, the Commission has held that a waiver is "required to litigate any new and significant information relating to a Category 1 issue."[53] Thus, the fact that the Staff evaluated potentially new and significant information in the DSEIS related to groundwater quality degradation does not, by itself, entitle Intervenors to file contentions based on that information.

For the above reasons, Intervenors fail to satisfy the first prong of the *Millstone* test. That failure alone is grounds for denial of their Waiver Petition.

b. Intervenors Have Not Identified Any "Special Circumstances" That Would Warrant a Waiver in This Case

Intervenors fare no better with respect to the second *Millstone* factor—the need for "special circumstances" to exist that were not considered, either explicitly or by necessary implication, in the rulemaking proceeding leading to the rule sought to be waived.[54] They argue that "a long and well-documented history of impacts to groundwater and surface water" due to the CCS "have resulted in numerous enforcement actions by state and county regulators and the requirement that the Applicant engage in extraordinary measures to mitigate those harms."[55] Intervenors further assert that "no other nuclear generating unit's cooling system has resulted in a hypersaline plume that has migrated through groundwater, threatening local drinking supplies."[56]

Intervenors' baseless assertions do not suffice to show the existence of the special circumstances required for a waiver of NRC regulations. First, the groundwater-related salinity issues associated with CCS operation have not resulted in "numerous" enforcement actions or threatened local drinking water supplies. Intervenors present no information in their Waiver Petition or associated proposed contentions that substantiates these claims. Section 3.5.2.2

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53 *Limerick*, CLI-12-19, 76 NRC at 384.

54 *Millstone*, CLI-05-24, 62 NRC at 560.

55 Waiver Petition at 8.

56 *Id.*; Rumelt Decl. ¶ 3.

("Groundwater Quality") of the DSEIS explains that while FPL received a notice of violation ("NOV") from the MDC-DERM in October 2, 2015, and an NOV from the FDEP on April 25, 2016, those NOVs were resolved through the October 2015 Consent Agreement and June 2016 Consent Order, respectively.[57] FPL is in full compliance with its State and local permits, and is implementing corrective actions approved by both the FDEP and MDC-DERM, including measures to reduce CCS salinity levels and plume-specific remediation actions, as required by the Consent Agreement and Consent Order.[58]

Intervenors also provide no information to support their claim that the hypersaline plume poses a threat to public drinking water supplies. As noted in the DSEIS, such supplies are located miles away from the Turkey Point site.[59] And the further migration of the hypersaline plume is being addressed through the aforementioned remediation actions.[60] In this regard, the DSEIS notes that the effectiveness of the recovery well system in halting and retracting the hypersaline plume is subject to regulatory oversight by FDEP and DERM, and the terms of the Consent Order and Consent Agreement.[61] The DSEIS concludes that, in light of these ongoing remediation activities and "continued regulatory oversight and enforcement" by the FDEP and MDC-DERM, "the impacts on groundwater quality from operations during the [SLR] term would be SMALL."[62]

The GEIS and site-specific supplements thereto are, by design, focused on impacts that could occur during the SLR term. In their Waiver Petition, Intervenors point to no evidence indicating that CCS impacts on groundwater quality are likely to exceed the "SMALL" impact level

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57 *See* DSEIS at 3-67 to 3-73.

58 *See id.*

59 *See id.* at 3-83 to 3-84.

60 *See generally id.* at 3-67 to 3-70, 4-5, 4-27 to 4-33, 4-114 to 4-117.

61 *See id.* at 3-67 to 3-68, 3-70 to 3-71, 4-27.

62 *Id.* at 4-27.

identified in the GEIS and the DSEIS during the SLR term for this Category 1 issue. If they had provided such evidence, then a showing of special circumstances might be possible. However, as the DSEIS notes, the SLR term does not commence until 2032 and 2033 for Units 3 and 4, respectively, allowing substantial time for groundwater remediation to be achieved.[63] And, as noted above, FPL's remediation actions are governed by binding legal instruments and subject to long-established regulatory oversight. As the Board explained in LBP-19-3, Intervenors' apparent dissatisfaction with FPL's current mitigation measures, and their skepticism that FPL will comply with—and that the FDEP/MDC-DERM will enforce—those legally-mandated measures, do not give rise to any litigable issue within the scope of this proceeding.[64] By logical extension, those same (unfounded) concerns do not constitute special circumstances that were not considered in the rulemaking proceeding for the Part 51 regulations that Intervenors request be waived in this proceeding.[65] For the same reason, Intervenors' unsubstantiated claims about threats to local drinking water supplies also fail to support the showing of special circumstances that is required for a waiver under 10 C.F.R. § 2.335 and *Millstone*.

For the above reasons, Intervenors fail to satisfy the second prong of the *Millstone* test. That failure alone is grounds for denial of their Waiver Petition.

c. Intervenors Have Not Identified "Unique" Circumstances That Would Warrant a Waiver in This Case

In attempting to show that they satisfy the third *Millstone* factor, Intervenors rely on the same arguments refuted above concerning alleged special circumstances, but add that "the NRC did not consider issues of salinity in cooling canals or the possibility that operation of a cooling canal

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63 *See id.* 4-27 to 4-28.

64 *Turkey Point*, LBP-19-3, slip op. at 38, 53-54 (citing *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Units 3 & 4), CLI-16-18, 84 NRC 167, 174-75 n.38 (2016)).

65 *Millstone*, CLI-05-24, 62 NRC at 560.

system might result in a hypersaline plume migrating through surrounding groundwater."[66] However, the GEIS specifically discusses this potential issue under "Groundwater Quality Degradation (Plants with Cooling Ponds in Salt Marshes),"[67] and the DSEIS addresses the new information identified by the NRC Staff during its review of the Turkey Point site-specific SLR application.[68] As a result, Intervenors' argument falls short of satisfying the "uniqueness" criterion.

Furthermore, the issue that Intervenors plainly wish to litigate via Contention 7-E (and their other new contentions) as well as the Waiver Petition—*i.e.*, whether the NRC Staff may rely on "ongoing remediation measures and State and county oversight"—is not unique to Turkey Point.[69] Indeed, while the NRC must exercise its independent judgment with regard to the ultimate conclusions about a project's environmental impacts, the GEIS makes clear that applicant and Staff reliance on mitigation actions required and enforced by state and local agencies is reasonable and appropriate.[70] This is especially true in the present context, where the "NRC's authority does not extend to requiring operating nuclear plants to replace or modify their cooling systems to reduce impacts."[71] Moreover, this Board, upon reviewing "binding" NRC case law, concluded that it must "accord 'substantial weight' to the determination of FDEP and DERM that FPL will comply with its legal obligations,"[72] and that "absent evidence to the contrary . . . [it] presume[s] that FDEP will

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66 Waiver Petition at 8.

67 *See* GEIS, vol. 1 at 4-50 to 4-51 ("Because all the ponds are unlined (NRC 1996), the water discharged to them can interact with the shallow groundwater system and may create a groundwater mound. In this case, groundwater below the pond can flow radially outward, and this groundwater would have some of the characteristics of the cooling system effluent.").

68 *See* DSEIS at 4-24 to 4-28.

69 Motion at 45, 47 (quoting DSEIS at 4-27). *See also* Waiver Petition at 9 (asserting that FPL has been required to take "extensive" mitigation measures, and that those measures have been "largely unsuccessful").

70 *See, e.g.*, GEIS, vol. 1 at 4-91 ("The NRC expects that any site-specific mitigation required under the NPDES permitting process should result in a reduction in the impacts of continued plant operations."). *See also id.*, vol. 2, app. A at A-101 ("The actual requirements for mitigation are determined among the licensee and Federal or State agencies with jurisdiction over the affected resource.").

71 *Id.*, vol. 2, app. A at A-220.

72 *Turkey Point*, LBP-19-3, slip op. at 38 (quoting *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), CLI-77-8, 5 NRC 503, 527 (1977)).

enforce, and FPL will comply with, the legally mandated measures in the Consent Order."[73] Thus, there is nothing unique about the concerns underpinning Intervenors' Waiver Petition.

For the foregoing reasons, Intervenors fail to satisfy the third prong of the *Millstone* test. That failure alone is grounds for denial of their Waiver Petition.

d. Intervenors Have Not Identified a Significant Environmental Problem That Would Warrant a Waiver in This Case

Intervenors' attempt to satisfy the fourth *Millstone* factor also fails. Citing alleged threats to drinking water supplies from the hypersaline plume and the "largely unsuccessful" nature of ongoing FPL's mitigation measures, they claim that a waiver "is necessary to reach this significant environmental issue because Intervenors have no other avenue by which it can assert that the DSEIS's analysis of new information is insufficient."[74] As explained above and in FPL's Answer to Intervenors' proposed new contentions, these claims are factually groundless. In addition, Intervenors *do* have another avenue by which to convey their concerns about the DSEIS analysis—through their submittal of comments on the DSEIS in May 2019.[75] Finally, Intervenors have presented no information or argument to suggest that a waiver is necessary to ensure that the NRC Staff will take the required hard look at groundwater quality degradation and other issues in the DSEIS. In fact, the Staff's robust discussion of such issues in the DSEIS—which concludes that the impacts on groundwater quality from operations during the SLR term will be SMALL—disproves that claim and the notion that a "significant environmental problem" has gone unaddressed.

For the above reasons, Intervenors fail to satisfy the final prong of the *Millstone* test. That failure alone is grounds for denial of their Waiver Petition.

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[73] *Id.* at 54.

[74] Waiver Petition at 9.

[75] *See* n.47, *supra.*

In conclusion, Intervenors have not met their substantial burden under 10 C.F.R. § 2.335 and the *Millstone* test, and thus have not made a *prima facie* showing that a waiver of any Part 51 regulation is warranted with respect to the issue of groundwater quality degradation.

V. CONCLUSION

For the foregoing reasons, Intervenors' have not met their burden to show that a waiver of any Part 51 regulation is warranted in this case, insofar as a waiver is needed in connection with proposed new Contentions 6-E and 7-E.[76] Their Petition should be accordingly denied.

Respectfully submitted,

Executed in Accord with 10 C.F.R. § 2.304(d)

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Counsel for Florida Power & Light Company

Dated in Washington, D.C.
this 19th day of July 2019

[76] As noted above, FPL also opposes Contentions 6-E and 7-E as being untimely filed under 10 C.F.R. § 2.309(c)(1) and inadmissible under 10 C.F.R. § 2.309(f)(1). *See* FPL's Answer to Intervenors' Motion.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket Nos. 50-250-SLR and 50-251-SLR
FLORIDA POWER & LIGHT COMPANY	)	ASLBP No. 18-957-01-SLR-BD01
(Turkey Point Nuclear Generating Units 3 and 4)	)	July 19, 2019

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, a copy of the foregoing "Florida Power & Light Company's Answer to Intervenors' Petition for Waiver of Certain 10 C.F.R. Part 51 Regulations" was filed on the Electronic Information Exchange (the NRC's E-Filing System) in the above-captioned proceeding. A copy of the foregoing also was sent by electronic mail to Richard E. Ayres, Esq. at ayresr@ayreslawgroup.com.

Signed (electronically) by Martin J. O'Neill

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