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Title: Florida Power and Light Co.
Turkey Point Units 3 & 4

Docket Number: 50-250-SLR and 50-251-SLR

ASLBP Number: 18-957-01-SLR-BD01

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

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HEARING

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In the Matter of: : Docket Nos.

FLORIDA POWER & LIGHT CO. : 50-250-SLR,

: 50-251-SLR

(Turkey Point Units 3 & 4) : ASLBP No.

-----x 18-957-01-SLR-BD01

Tuesday, December 4, 2018

Homestead City Hall

City Council Chambers

100 Civic Court

Homestead, Florida

BEFORE:

E. ROY HAWKENS, Chair

MICHAEL F. KENNEDY, Administrative Judge

SUE ABREU, Administrative Judge

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P R O C E E D I N G S

8:34 a.m.

JUDGE HAWKENS: Today's case is entitled Florida Power and Light Company, Turkey Point Units 3 and 4. Docket Number is 50-250-SLR and 50-251-SLR.

My name is Roy Hawkens. I'm joined by Judge Mike Kennedy, who has his PhD in nuclear engineering. And I'm also joined by Judge Sue Abreu, who has her MD and her areas of expertise include nuclear medicine.

This case involves challenges to FPL's request for a subsequent renewal of its license to operate Turkey Point Units 3 and 4, and a subsequent license renewal is a request for a second 20-year renewal of its license to operate its power plants.

We received hearing requests challenging FPL's application from Southern Alliance for Clean Energy, whom we will refer to as SACE; as collectively, Friends of the Earth, Natural Resources Defense Council, and Miami Waterkeeper, whom we will refer to as Joint Petitioners; and from a third petitioner, Mr. Albert Gomez, who will be submitting his hearing request on the written pleadings that he has filed.

Would Counsel for Petitioners please

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1 introduce themselves, starting with SACE, please?

2 MS. CURRAN: Good morning. My name is
3 Diane Curran and I represent Southern Alliance for
4 Clean Energy.

5 JUDGE HAWKENS: Thank you, Ms. Curran.
6 Joint Petitioners?

7 MR. RUMELT: My name is Ken Rumelt and I
8 represent Friends of the Earth.

9 MR. AYRES: My name is Richard Ayres and I
10 represent Friends of the Earth.

11 JUDGE HAWKENS: Good morning.

12 MR. FETTUS: My name is Geoffrey Fettus and
13 I represent the Natural Resources Defense Council and
14 Miami Waterkeeper.

15 JUDGE HAWKENS: Thank you, good morning.
16 FPL?

17 MR. BESSETTE: Good morning, your honor.
18 My name is Paul Bessette and I represent FPL. I want
19 to introduce some of my colleagues: Martin O'Neill,
20 Steve Hamrick from FPL, and my other colleague, Ryan
21 Lighty representing FPL as well.

22 JUDGE HAWKENS: Good morning. NRC staff?

23 MR. TURK: Good morning, your honor.
24 Sherwin Turk, I have the pleasure of appearing before
25 you today on behalf of the NRC staff. To my right are

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1 my co-counsel on the case, and I will let them
2 introduce themselves.

3 MR. WACHUTKA: Good morning. I'm Jeremy
4 Wachutka, representing the NRC staff.

5 JUDGE HAWKENS: Good morning.

6 MS. HOUSEMAN: Good morning. My name is
7 Esther Houseman and I represent the NRC staff.

8 JUDGE HAWKENS: Good morning.

9 MR. RUMELT: If I may, your honor? I'd
10 also like to --

11 JUDGE HAWKENS: One second, make sure your
12 -- the red light comes on and that way, your mic is
13 hot and our court reporter will be able to hear you.

14 MR. RUMELT: All right. Red means go,
15 right?

16 JUDGE HAWKENS: Red means go.

17 MR. RUMELT: All right. I just wanted to
18 also introduce two students that have come with me
19 from the law school. And that's Kyron Williams and
20 Benjamin Waldrop, who are behind me.

21 JUDGE HAWKENS: Welcome, glad you're here
22 today. We've provided Counsel with a list of topics
23 that they should include in their presentations today.
24 The parties have submitted extensive briefing and the
25 Board has read and is familiar with all the briefs.

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1 The principal purpose of the argument
2 today is for the Board to ensure we understand
3 Counsel's arguments and the rationale and the support
4 underlying their arguments.

5 We also issued an order that prescribed
6 the format for today's oral argument. We'll first
7 hear from the parties on an issue of regulatory
8 interpretation, whether Section 51.53(c)(3) applies to
9 subsequent license renewals.

10 The Petitioners, that is SACE and Joint
11 Petitioners, will first address this issue and they've
12 been allotted a total of 20 minutes to divide among
13 themselves as they deem appropriate.

14 We'll then hear from FPL and the NRC
15 staff, who likewise have been allotted 20 minutes and
16 will divide that time among themselves as appropriate.

17 I contemplate taking a short break after
18 that argument, at which time, we'll hear arguments
19 from the parties on the admissibility of their
20 contentions.

21 We will first hear from SACE, who will be
22 allotted one hour and ten minutes, to be followed by
23 FPL and the NRC staff, who likewise will have that
24 amount of time to divide among themselves as they
25 wish.

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1 I anticipate that we'll take a break for
2 lunch following that argument. And after lunch, we'll
3 hear from Joint Petitioners on the admissibility of
4 their contention. They will be allotted 50 minutes to
5 be divided among themselves.

6 And then, we will hear from FPL and the
7 NRC staff, who will likewise be allotted that amount
8 of time to be divided among themselves.

9 The building, I'm advised, closes at 4:30,
10 so our goal is to complete arguments no later than
11 4:00, hopefully sooner than that, so that you all and
12 we will have ample time to pack up and depart before
13 the building closes.

14 I'd like to introduce the Board's law
15 clerks. They are to my left and to your right, Taylor
16 Mayhall and Joe McManus.

17 Taylor will be assisting us and assisting
18 Counsel in keeping track of the allotted time. When
19 there are five minutes left, she will hold up an
20 amber sign. Two minutes, another amber sign. And
21 when the time is up, the red sign.

22 So, when Counsel see the signs starting to
23 rise, and especially when they see the red sign, if
24 they could wrap it up. If we have additional
25 questions, we'll keep you up there, but in order to

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1 keep things on time, we ask you to respect Taylor's
2 placards.

3 Before we begin, do Counsel have any
4 questions or anything they would like to address?

5 MR. TURK: Your honor, Sherwin Turk.

6 JUDGE HAWKENS: Yes, sir?

7 MR. TURK: My green light is --

8 JUDGE HAWKENS: One second, okay. Red,
9 ready to go.

10 MR. TURK: Your honor, before I begin, I'd
11 like to introduce to you several members of the NRC
12 staff who are here with us today.

13 They are involved either in review of the
14 application itself or in review of the Environmental
15 Report. And they will be participating in the
16 development of the draft Supplemental Environmental
17 Impact Statement.

18 And as I call their name, I'd just ask
19 them to stand to introduce themselves to you. First,
20 we have Mr. Benjamin Beasley. And with him are Dr.
21 William Ford, Kevin Folk, Michelle Moser, and Lois
22 James, who is the Project Manager for the Turkey Point
23 SLR application review.

24 JUDGE HAWKENS: Good morning and welcome.
25 Any other matters to address? All right.

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1 MS. CURRAN: Judge Hawkens, I'm waiting for
2 the red light.

3 JUDGE HAWKENS: Oh, okay. Good, thank you.
4 Please proceed.

5 MS. CURRAN: I would also like to
6 introduce, sitting directly behind me is Jim Porter,
7 who is another attorney for SACE. He has not entered
8 an appearance in this case.

9 Jim represents SACE in the Clean Water Act
10 lawsuit that is mentioned in our pleadings and he's
11 going to be sitting with me at Counsel table to help
12 me out during the second -- the argument on the
13 admissibility of the contentions. Thank you.

14 JUDGE HAWKENS: All right. Thank you. We
15 will now proceed with the argument on 51.53(c)(3).
16 Let me ask Petitioners how they wish to divide their
17 time and if they wish to reserve any time for
18 rebuttal? I'm sorry?

19 MS. CURRAN: Oh, do I have to hit the
20 button? I'm getting the hang of it.

21 JUDGE HAWKENS: So are we.

22 MS. CURRAN: I would like to take ten
23 minutes for initial argument and ten minutes for
24 rebuttal, please. And I am going to do the argument,
25 but I may ask Mr. Rumelt to help out a little, if I

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1 need it.

2 JUDGE HAWKENS: That would be fine. And
3 let me address this question to all Counsel. We are
4 content to have you present argument from your seat,
5 as opposed to coming up to the podium, if you all are
6 content with that as well. I want to --

7 MS. CURRAN: Yes, thank you.

8 JUDGE HAWKENS: All right. Thank you. Ms.
9 Curran --

10 MS. CURRAN: Okay.

11 JUDGE HAWKENS: -- you may proceed.

12 MS. CURRAN: Thank you. The question of
13 whether 10 CFR 51.53(c)(3) applies to FP&L's SLR
14 application is governed by basic principles of the
15 Administrative Procedure Act and the National
16 Environmental Policy Act, or NEPA.

17 An agency may not alter the plain language
18 of a regulation through interpretation. It has to go
19 through notice and comment rulemaking, with only very,
20 very limited exceptions.

21 And the content of an Environmental Impact
22 Statement may not be altered through interpretation
23 either. Under NEPA, the subject matter of an EIS --

24 JUDGE HAWKENS: Ms. Curran?

25 MS. CURRAN: Yes.

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1 JUDGE HAWKENS: 51.53(c)(3) applies to
2 development of the ER.

3 MS. CURRAN: Yes.

4 JUDGE HAWKENS: So, how does this have any
5 impact on the development of the EIS?

6 MS. CURRAN: Because 51.53(c)(3) makes
7 Table B1 of Part A to 10 CFR Part 51 applicable in
8 this case to the Environmental Report. 51.53(c)(3)
9 references Table B-1 and tells the applicants that
10 they need not address Category 1 issues --

11 JUDGE HAWKENS: All right.

12 MS. CURRAN: -- in Table B-1.

13 JUDGE HAWKENS: Understand. Let me
14 rephrase my question, then. 51.53(c)(3) places no --
15 does not impact the NRC staff's development of the
16 draft SEIS, is that correct?

17 MS. CURRAN: That is correct. And from
18 SACE's perspective, we must treat the Environmental
19 Report as essentially a draft of the Environmental
20 Impact Statement that ultimately the staff will
21 prepare, because we must base our contentions on the
22 Environmental Report.

23 And only if the Environmental Impact
24 Statement changes what's in the Environmental Report
25 can we submit any new contentions on the issues that

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1 concern us.

2 JUDGE HAWKENS: It's clear, is it not, that
3 the staff can rely upon the GEIS and Table B-1, the
4 Category 1 issues, in development of its draft EIS, is
5 that correct?

6 MS. CURRAN: No, that is not correct in our
7 view.

8 JUDGE HAWKENS: Tell me why, because I --
9 it's something people might argue, that the
10 regulations expressly provide that they may rely upon
11 that.

12 MS. CURRAN: Okay. Table B-1 only exists
13 in order to codify findings in the 1996 Environmental
14 Impact Statement, as revised in 2013. It can't exist
15 in any other way. It must refer -- it codifies the
16 finding of that EIS.

17 So, the regulations, 10 CFR 51.71 and 10
18 CFR 51.95, which tell the staff what to put in an
19 Environmental Impact Statement for license renewals,
20 say, you can rely on Table B-1 for license renewal,
21 doesn't it use the word initial, as 51.53(c)(3) does.

22 But there is, in the rulemaking documents
23 that establish 10 CFR 51.53(c)(3) and 51.71 and 51.95,
24 as they refer to Table B-1, those regulations make it
25 clear, the preamble to the 1991 proposed rule, as well

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1 as language in the 1996 GEIS, especially in Chapter 2,
2 Pages 2-1 and 2-28, I think, they say explicitly, this
3 GEIS applies to initial license renewal, that is, the
4 first 20 years after the 40-year term.

5 When the NRC, at the time that it proposed
6 to revise the 1996 GEIS, that was in 2003, that
7 process started. At that time, I'm not even sure that
8 half of the license renewal, initial license renewal
9 applications for reactors had been reviewed. So, they
10 were still in the process of reviewing initial license
11 applications.

12 In our view, there is nothing to indicate
13 that the NRC had anything else in mind in promulgating
14 those regulations for its own use, but initial license
15 renewal. Never used the term subsequent license
16 renewal.

17 The first time you will see the term
18 subsequent license renewal is in the draft Regulatory
19 Analysis for SECY-12-0063, in which the staff said, we
20 expect we may get some SLR applications down the road.

21 There is no rulemaking document, no NEPA
22 document, that says that the NEPA analysis on which
23 Table B-1 and, therefore, 10 CFR 51.71 and 51.95 rely,
24 considered anything other than initial license
25 renewal.

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1 In other words, the NRC had not even
2 contemplated subsequent license renewal at that point.
3 And the NRC did need to notify licensees, having said
4 under Part 54, licenses can be renewed multiple times
5 under the Atomic Energy Act, the NRC made it clear to
6 licensees, license renewal applicants, you don't get
7 to just use the GEIS over and over again for any
8 subsequent license renewal application. We only use
9 this GEIS for the first, the initial license renewal.

10 They did not need to include that language
11 in their own regulations, they had already established
12 that.

13 JUDGE KENNEDY: Ms. Curran, what part of
14 the GEIS do you believe subsequent license renewal
15 would impact? It sounds like you're making a
16 distinction that the 1996 GEIS is only applicable to
17 an initial license renewal and you --

18 MS. CURRAN: That's correct.

19 JUDGE KENNEDY: -- discussed the timing of
20 the 2003 update, which as I understand it, was
21 suspended for a while and really didn't come out until
22 2013.

23 MS. CURRAN: Yes.

24 JUDGE KENNEDY: But at the end of the day,
25 what part of the GEIS is really relevant, it would be

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1 negated by a subsequent license renewal? I presume --

2 MS. CURRAN: I think I --

3 JUDGE KENNEDY: -- it's relevant.

4 MS. CURRAN: -- understand your question.

5 There's no reason for FP&L in its Environmental Report

6 not to refer to the license renewal GEIS.

7 It's a perfectly usable document, just as
8 if you'll see in many Environmental Reports, they
9 cross-reference other Environmental Impact Statements,
10 as there's rules for how you do that, if you can do
11 that.

12 Our concern here is that the regulation,
13 Table B-1, makes the Category 1 findings binding on us
14 in our -- we are precluded from challenging -- for
15 instance, the issues that we raise in our Contention
16 1, ordinarily, if this had been the initial license
17 renewal term, we would be precluded from raising
18 Contention 1, unless it was accompanied by a waiver
19 petition or a petition for rulemaking.

20 I have two minutes left. So, we -- that's
21 the concern that we have. We want to be able to raise
22 the contention and have you consider its admissibility
23 without having to do a waiver petition or a petition
24 for rulemaking.

25 The basic gravamen of our argument here is

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1 that the binding determinations of Table B-1 do not
2 apply to subsequent license renewal. That doesn't
3 mean that FP&L can't cross-reference the license
4 renewal GEIS, but we could also come in with a
5 contention and say, that GEIS is outdated and it
6 doesn't address this, that, and the other thing.

7 JUDGE HAWKENS: If the -- so, you believe
8 the GEIS is outdated? It doesn't take into account
9 more recent occurrences in updating the Category 1
10 items?

11 MS. CURRAN: Yes.

12 JUDGE KENNEDY: And that's the 2013 GEIS?

13 MS. CURRAN: Yes, the 2013 revision was, by
14 its own terms, an update. And you cannot find
15 anywhere, not in the draft of that GEIS, that revised
16 GEIS, not in the scoping notices, which literally are
17 supposed to tell people if there's a change in the
18 scope, nothing there.

19 You can't find a word saying that the
20 temporal scope of that environmental review was
21 changed in any way. They were -- and you can find
22 language, which we cite, in the 2013 revised GEIS,
23 that talks about the 40-year term plus 20 years.

24 JUDGE KENNEDY: So, in your mind, what
25 would the time frame be of the GEIS? If the GEIS is

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1 for the license renewal period --

2 MS. CURRAN: The GEIS is --

3 JUDGE KENNEDY: -- why would that not be 20
4 years?

5 MS. CURRAN: The GEIS is for the first 20
6 years after the initial operating license, it does not
7 apply to any subsequent license renewal term. So, in
8 other words, it goes out to 60 years and stops.

9 JUDGE HAWKENS: I'm having a memory, and
10 maybe you can help me out, but I thought the revision
11 in 2013 indicated that it took into account not only
12 a number of initial license renewals, but also a
13 certain discrete number of impending anticipated
14 subsequent license renewals in a cost-benefit
15 analysis.

16 MS. CURRAN: That's not correct, your
17 honor. There is no reference in the 2013 GEIS to any
18 subsequent license renewal.

19 JUDGE HAWKENS: Well, does it --

20 MS. CURRAN: The only --

21 JUDGE HAWKENS: Does it make any
22 distinction between initial and subsequent? It just
23 talks in terms of license renewals, is that correct?

24 MS. CURRAN: The word subsequent, the words
25 subsequent license renewal --

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1 JUDGE HAWKENS: Okay, can you just answer
2 that question first? And then --

3 MS. CURRAN: There's no -- I mean, they
4 didn't mention it. There --

5 JUDGE HAWKENS: Not initial or subsequent?

6 MS. CURRAN: Well, they do use the word
7 initial, they use the word initial. They make it
8 clear they're talking about the first 20 years after
9 the 40-year term.

10 The first place you will see a reference
11 to subsequent license renewal is that draft Regulatory
12 Analysis from 2012, where they say, we're anticipating
13 some of these applications coming in. There's nothing
14 in the rulemaking or NEPA documents that refers to
15 anything other than initial license term.

16 JUDGE KENNEDY: If we can get beyond the
17 plain language of the statute, of the regulation, do
18 you see anything within the current 2013 GEIS
19 document, from a technical standpoint, that would
20 impede it being used for subsequent license renewal
21 applications?

22 MS. CURRAN: As a general matter, there's
23 nothing that would bar FP&L from cross-referencing the
24 2013 revised GEIS.

25 But the degree to which that GEIS is

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1 adequate to support the current Environmental Review
2 for the subsequent license renewal application would
3 be a legitimate topic for challenge by the
4 Petitioners.

5 This is our concern here, that we not be
6 barred from saying -- if you reference -- the only
7 reference that FP&L makes to the license renewal GEIS
8 is to say, well, these are Category 1 issues.

9 What you would expect to see if it was
10 cross-referenced in the ordinary course would be, I'm
11 going to point you to Page X of the license renewal
12 GEIS, which has a discussion, for example, of such-
13 and-such an issue, and we think that that's still
14 good, because things haven't changed since then.

15 That would be okay. And then, we would be
16 entitled to come along and say, well, as a matter of
17 fact, they have changed and you didn't look at X, Y,
18 and Z, and that would be for you to review as to
19 whether that's an admissible claim.

20 JUDGE KENNEDY: So, is the only argument
21 here whether you're forced to file a waiver to
22 challenge the Category 1?

23 MS. CURRAN: That's correct.

24 JUDGE KENNEDY: Okay, thank you.

25 MS. CURRAN: The only question here is

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1 whether those Category 1 determinations can be binding
2 on us for purposes of raising contentions.

3 JUDGE HAWKENS: And your principal
4 argument, that it is not that the staff can no longer
5 rely on the GEIS and Category 1 for subsequent is
6 because, in your view, the GEIS has not been -- it was
7 initially promulgated to apply only to initial and it
8 hasn't been sufficiently updated to provide the
9 necessary information that would support a Category 1
10 finding for the NRC staff preparing its Supplemental
11 EIS?

12 MS. CURRAN: Judge Hawkens, we're not
13 saying that FP&L cannot rely on the license --

14 JUDGE HAWKENS: No, no, I'm not talking
15 about FPL at this point --

16 MS. CURRAN: Or the NRC.

17 JUDGE HAWKENS: -- I'm talking about the
18 NRC staff.

19 MS. CURRAN: We're not saying they can't
20 rely on it, per se, we're saying, they can't codify
21 it. They can't rely on it as a codified document.

22 JUDGE HAWKENS: And the reason is because
23 you believe it wasn't intended to apply to subsequent
24 and it has not been updated?

25 MS. CURRAN: That's right. And neither has

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1 the rulemaking that makes it binding. So, two things
2 have to be updated. If these Category 1 findings are
3 going to be binding in the subsequent license renewal
4 term, two things have to happen.

5 First of all, the draft GEIS has to be
6 revised with a clearly stated new scope. We are now
7 going to look at 60 years plus 20, not 40 years plus
8 20. And that has to go out first with the scoping
9 notice and then, a draft EIS, so that the public can
10 comment on it.

11 Second, if that GEIS is going to be made
12 binding, through Category 1 findings, there needs to
13 be a new rulemaking that updates Table B-1 and says
14 clearly, this table now applies to a subsequent
15 license renewal term.

16 And it would be hard for me to imagine
17 that the NRC could legitimately say that a GEIS would
18 apply to all subsequent license renewal terms, because
19 that's just a long time for a NEPA analysis, because
20 in a NEPA analysis, you have to look at, what's the
21 environment --

22 JUDGE HAWKENS: Although, that's --

23 MS. CURRAN: -- right now?

24 JUDGE HAWKENS: That's why they --

25 MS. CURRAN: What are the impacts?

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1 JUDGE HAWKENS: -- intended to revise it
2 every ten years or so, right?

3 MS. CURRAN: That's right --

4 JUDGE HAWKENS: I think --

5 MS. CURRAN: -- because they had to take
6 another look at, has the environment changed? Have
7 the impacts changed? Are these assumptions that we
8 made still good?

9 It's interesting that, if you look at
10 SECY-14-0016, the NRC talks about how there's issues
11 that relate to the aging of reactors that they still
12 don't understand. They still don't know how some of
13 these phenomena work.

14 So, that would be another thing you'd look
15 at, what have we learned about aging reactors and what
16 do we need to put into this Environmental Impact
17 Statement? And those, of course, are the things that
18 the public would want a chance to comment on.

19 JUDGE KENNEDY: I guess I asked this
20 question before, but I'm curious to understand, from
21 your perspective, is there no reference to 60-year
22 operating history in the 2013 GEIS?

23 MS. CURRAN: That's correct.

24 JUDGE KENNEDY: Not even when it talks
25 about decommissioning?

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1 MS. CURRAN: No. It goes from -- it takes
2 40 and adds 20. And so, you get a total of 60, but
3 you don't start with 60 as the baseline. They talk
4 about the baseline being 40, not 60.

5 JUDGE KENNEDY: I guess I'll have to review
6 that. It appeared to me that they were taking 60
7 years as an operating history, when they looked at the
8 impact in the GEIS.

9 MS. CURRAN: Judge Kennedy, we went over
10 this with a fine-tooth comb. And if you will look at
11 our brief, in the various footnotes, we have page
12 citations to where over and over again, the 2013 GEIS
13 refers to 40 plus 20. There is no place where you
14 will see 60 plus 20.

15 JUDGE KENNEDY: I agree with you, but what
16 it does say, when they're looking at decommissioning
17 costs, they start with an operating history of 60
18 years. And the GEIS is intended to cover the renewal
19 period, which is another 20 years. I will check it,
20 I --

21 MS. CURRAN: Well --

22 JUDGE KENNEDY: -- it's just curious that
23 I --

24 MS. CURRAN: And maybe the difference,
25 decommissioning is a little different, isn't it?

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1 Because decommissioning comes at the very end.

2 So, maybe they're saying, with
3 decommissioning, we're going to take 40 and add 20 and
4 then, we're going to look at what happens right there.
5 But for most of these impacts, they look at -- the
6 baseline is the first 40 and then, let's add 20.

7 If you look, for instance, at public
8 health impacts or impacts to workers of radiation
9 exposure, in the 2013 GEIS, they talk about 40 plus
10 20. Very clear.

11 JUDGE KENNEDY: All right, thank you.

12 JUDGE HAWKENS: I think you're approaching
13 your 20-minute. We will give you more --

14 MS. CURRAN: Thank you.

15 JUDGE HAWKENS: -- time for rebuttal.

16 MS. CURRAN: Thank you.

17 JUDGE HAWKENS: Thank you for answering our
18 questions. Let's go now to NRC staff. How much time
19 will you be taking, sir?

20 MR. TURK: Your honor, I believe your
21 honors have allotted 20 minutes to the applicant and
22 the staff to split and we've agreed on a 50/50 split
23 of our time.

24 JUDGE HAWKENS: All right.

25 MR. TURK: So, I will be taking ten

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1 minutes. I'm not --

2 JUDGE HAWKENS: Please proceed.

3 MR. TURK: I'm not sure that you would
4 allow me to stop after ten minutes, but we'll see what
5 happens.

6 Your honor, the arguments raised by Ms.
7 Curran are very tempting, but there are a lot of
8 errors in the argument. Let me begin, if I may, with
9 a brief opening statement and then, I'd like to come
10 back to some of the questions that your honors asked
11 Ms. Curran.

12 The Commission, back in 1991, instituted
13 a proposed rulemaking and indicated that what was in
14 their mind was the development of an efficient process
15 for the consideration of the many license renewal
16 applications that the Commission anticipated
17 receiving.

18 If we all look back to 1991, we have to
19 remember that nuclear power plants were first licensed
20 for commercial operation approximately 20 years before
21 that. Construction permits were issued in the mid to
22 late 1960s and initial operating licenses were issued
23 pretty much in the early 1970s, at the beginning.

24 So, 20 years later, the Commission said,
25 well, we have 40-year terms, we have to start thinking

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1 about what comes next.

2 And in my mind, that's why the phrase
3 initial license renewal appeared in the regulation,
4 with respect to what license renewal was envisioned to
5 be at that time.

6 They didn't foreclose the possibility that
7 subsequent license renewal applications would be
8 submitted --

9 JUDGE HAWKENS: I'm wondering why they
10 haven't clarified the regulation in the interim
11 period. There's been ample time, even during the
12 pendency of this proceeding.

13 MR. TURK: I'm sure there are many of us in
14 the room who ask the question, why? And I don't have
15 an answer for that. All we know is what is in the
16 documentation.

17 And in the record, we see that the only
18 time that the term initial was used was in that one
19 subsection of the regulation, which says that
20 applicants for initial license renewal should keep in
21 mind the considerations that the GEIS renders it
22 unnecessary to look at Category 1 issues in their
23 Environmental Reports.

24 JUDGE ABREU: So, in that initial use of
25 the term initial, in 1991, would you agree that it was

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1 intentional? That that was not an accident that that
2 word is in there?

3 MR. TURK: I don't know, because if you're
4 asking, what was the intent?, I cannot go back and
5 find out the intent.

6 JUDGE ABREU: Well, when you look at the
7 1991 proposed rule, it does talk about the difference
8 in what was going on with Part 54 and Part 51. There
9 is --

10 MR. TURK: Yes.

11 JUDGE ABREU: -- in the text, it does say,
12 specifically, that it's for one renewal.

13 MR. TURK: Yes. And in fact, we've brought
14 that to your attention in our initial response to
15 contentions. I think --

16 JUDGE ABREU: So, with that statement,
17 isn't that some evidence that the use of the term
18 initial was done with intent in the proposed rule? It
19 wasn't just an accident?

20 MR. TURK: Your honor, I can only tell you
21 how it appears to me, I can't tell you if I'm correct
22 --

23 JUDGE ABREU: And what do you think --

24 MR. TURK: -- in understanding their
25 intent.

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1 JUDGE ABREU: How does it appear to you?

2 MR. TURK: Exactly as you stated it.

3 JUDGE ABREU: That it --

4 MR. TURK: That the thought was that we're
5 dealing now with initial license renewal.

6 JUDGE ABREU: Okay. So --

7 MR. TURK: In 1991.

8 JUDGE ABREU: If that is the intent --

9 MR. TURK: It appears that way, in 1991.

10 JUDGE ABREU: So, then --

11 MR. TURK: But --

12 JUDGE ABREU: -- from 1991, we had notice
13 and comment, adopted -- we have a final rule adopted,
14 then, 1996, published 1997. Correct?

15 MR. TURK: Well, when you get to 1996,
16 you're already in different territory.

17 JUDGE ABREU: But it's still a notice and
18 comment that adopted that regulation.

19 MR. TURK: The notice and comment had to
20 deal with the initial idea by the staff, which was, we
21 will issue an Environmental Assessment, we don't need
22 an EIS for license renewal.

23 JUDGE ABREU: But --

24 MR. TURK: The proposal was, license
25 renewal is pretty much going to involve the same

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1 issues that we had seen before and, therefore, we
2 don't need to --

3 JUDGE ABREU: We've got that part.

4 MR. TURK: -- go into an expansive
5 document.

6 JUDGE ABREU: I think we all have a pretty
7 good understanding from your pleadings about the big
8 picture of the intent to streamline the process for
9 subsequent renewal. For initial and then, subsequent
10 renewal.

11 But we're still going back to, this was a
12 regulation adopted through notice and comment. Why
13 shouldn't it be fixed through notice and comment, if
14 now the intent is that it should refer to both initial
15 and subsequent?

16 MR. TURK: When you go into the rulemaking
17 that led to the 1996 rule, you'll see no further
18 mention of the word initial.

19 JUDGE ABREU: That's a different topic.
20 I'm just asking --

21 MR. TURK: And you'll see no mention of the
22 word subsequent.

23 JUDGE ABREU: But I wanted --

24 MR. TURK: You'll only see discussion --

25 JUDGE ABREU: Please get back --

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1 MR. TURK: -- of license renewal.

2 JUDGE ABREU: -- to the question I asked,
3 which is, why shouldn't it be fixed with notice and
4 comment, since it was adopted with notice and comment?

5 MR. TURK: Well, I'm not sure I know
6 specifically what you're referring to, because --

7 JUDGE ABREU: Well, we have a statement
8 that says, initial renewed license. And the
9 discussion is that, well, this really can apply to
10 initial and subsequent, or just any renewed license,
11 a renewed license.

12 Why shouldn't that terminology change be
13 done through notice and comment, when the initial
14 statement, a renewed license, was part of notice and
15 comment rulemaking?

16 MR. TURK: Well, you did have a notice and
17 comment rulemaking. And in that rulemaking, the
18 Commission did not distinguish between initial license
19 renewal applications --

20 JUDGE ABREU: But we've got --

21 MR. TURK: -- and subsequent. They only
22 talk about --

23 JUDGE ABREU: Let's get back --

24 MR. TURK: -- license renewal.

25 JUDGE ABREU: -- to the wording of the

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1 regulation. We have a --

2 MR. TURK: Well, you're talking about --

3 JUDGE ABREU: -- regulation that says, a
4 renewed license, correct?

5 MR. TURK: Yes.

6 JUDGE ABREU: That was adopted through
7 notice and rulemaking, correct?

8 MR. TURK: Yes.

9 JUDGE ABREU: Why wouldn't the fix to that,
10 to make it clear what it applies to, or clear, based
11 on the big picture of the intent to simplify the
12 renewal process, why not fix it to be clear through
13 rulemaking with notice and comment?

14 MR. TURK: That would have been nice, it
15 didn't happen that way.

16 JUDGE ABREU: Okay. So, is it --

17 MR. TURK: But in 2013, we have a revised
18 rule. And in the 2013 rulemaking, there is
19 recognition in the Regulatory Analysis that numerous
20 SLR applications were anticipated.

21 JUDGE ABREU: We got that part from --

22 MR. TURK: And the rule itself was then
23 revised in its words to delete some references to the
24 term initial -- or, I'm sorry, instead of referring to
25 the first 20 years of a license renewal, they simply

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1 say, the current license.

2 JUDGE ABREU: We got that part from the --
3 we got that.

4 MR. TURK: Okay.

5 JUDGE ABREU: So, we're back to that
6 sentence, where we've all got this sentence here, it's
7 like, we've all written reports for things and you've
8 looked at it 20 times and you just don't see a certain
9 phrase that, when you hand it to somebody else, they
10 notice that you said something that wasn't exactly
11 what you meant.

12 And would it be fair to say that's kind of
13 like what we're seeing here? Basically, this -- we've
14 seen that this regulation has been revised, multiple
15 times, since it was initially adopted.

16 In fact, that exact sentence was revised
17 subsequently. Yet, it didn't get changed to the newer
18 concept. The newer concept of, oh, we're thinking
19 beyond initial to subsequent, okay.

20 Is it -- could it be that they just kind
21 of, nobody realized it still said it and we really
22 should have fixed it? Is that kind of --

23 MR. TURK: That's quite possible.

24 JUDGE ABREU: Okay.

25 MR. TURK: I can't tell you definitively --

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1 JUDGE ABREU: Right. But it just --

2 MR. TURK: -- that's what they were
3 thinking or --

4 JUDGE ABREU: -- when you sit back and look
5 at it, it just kind of looks like it just got left
6 behind and we just didn't fix it. So, why not start
7 -- is there a rulemaking in progress on this?

8 MR. TURK: Not that I'm aware of.

9 JUDGE ABREU: Why not start one?

10 MR. TURK: That's a good question, your
11 honor.

12 JUDGE ABREU: Why not start one and ask a
13 stay of this proceeding until you fix it?

14 MR. TURK: I'm not sure that that's
15 necessary. It may be after the Board rules on
16 contentions that that will become more apparent that
17 it is necessary, or maybe it will become apparent that
18 it's not necessary.

19 JUDGE ABREU: If you could waive a magic
20 wand, what would you want that sentence to say?

21 MR. TURK: I think the phrase having to do
22 with what a license renewal applicant must submit, it
23 could say initial or subsequent, or simply, the word
24 initial could be deleted.

25 I'd like to come back, if I may, to some

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1 of the questions that the Board asked Ms. Curran.
2 First of all, there is nothing in the 2013 rulemaking
3 that says, this rulemaking applies to initial license
4 renewal.

5 I believe Ms. Curran stated that, but it's
6 not correct. There is no mention of either initial or
7 subsequent in the rulemaking for the 2013 revisions.

8 Your honor, you had asked, does it matter
9 what the license renewal applicant does, because isn't
10 it the staff's EIS that matters and the staff is
11 required to follow 51.95(c), which says that the staff
12 will rely on the GEIS?

13 That's entirely true. We're sitting here
14 in early December. Approximately one to two months
15 from now, you're going to see the draft SEIS. And you
16 will see there the staff's analysis that relies upon
17 the GEIS. Now --

18 JUDGE HAWKENS: Can you address Ms.
19 Curran's argument that the GEIS has not been
20 adequately updated, and even if it were, it needs to
21 be re-codified?

22 MR. TURK: The GEIS has been adequately
23 updated. We are aware of nothing in there that
24 requires further updating in order to address
25 subsequent license renewal specifically.

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1 And that is because the GEIS addresses 20-
2 year increments of operation, regardless of when those
3 20 years begin. Whether it's after the initial 40 or
4 after 60, it's a 20-year increment of license renewal.

5 There is nothing that you could see in Ms.
6 Curran's brief that tells you the analysis in the GEIS
7 addresses 60 years of operation, it doesn't.

8 There are numerous instances where the
9 GEIS talks about dose impacts of 20 years of operation
10 and they compare it to the initial 40 and they say, if
11 the doses for 40 years operation were, for instance,
12 one millirem, then 20 years will get you half of that.

13 So, it's simply an incremental analysis,
14 does not tie itself to a combined, cumulative period
15 of 60 years.

16 You had asked a question about
17 decommissioning. That is the one time that 60 years
18 is mentioned. And what they do in that analysis is,
19 they say, what is the average life of the fuel that
20 would be put into storage?

21 And there, they talk about the 40 years
22 plus 20 years and you come to a midpoint of 30. That
23 is the one time that a 60-year analysis is discussed.
24 But it's very simple to go from that to saying, okay,
25 well, what is the 80-year impact? It's a simply

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1 calculation.

2 And one thing that's very important about
3 the use of the GEIS is that the GEIS can be set aside
4 any time there is new and significant information that
5 would cause you to say, the GEIS determinations don't
6 apply in this instance.

7 But in order to raise that challenge, they
8 would have to file a petition for waiver and they
9 would have to have the Commission grant the waiver.

10 And that's clear in several decisions that
11 have come down, starting with the initial Turkey Point
12 license renewal decision in 2001, going through
13 Pilgrim Vermont Yankee and then, more recently, the
14 Limerick decision.

15 They all make it clear that, yes, you can
16 challenge the GEIS, if you first file a petition for
17 waiver and make a prima facie showing to the Board
18 reasons why the GEIS should be set aside. And that
19 can then be sent up to the Commission for their
20 determination.

21 And that hasn't happened here. Ms. Curran
22 indicated that they would like to go forward with
23 their contentions without having to file a petition
24 for waiver.

25 But why? It would be very simple for them

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1 to take pen to paper and say, here's why specific
2 aspects of the GEIS do not apply or should not be
3 applied in this proceeding and here's why you should
4 find special circumstances --

5 JUDGE HAWKENS: Of course, you --

6 MR. TURK: -- and allow us to --

7 JUDGE HAWKENS: -- understand why they
8 prefer not to go that route?

9 MR. TURK: I don't.

10 JUDGE HAWKENS: It's a very high hurdle for
11 them to overcome.

12 MR. TURK: Well, unfortunately, it's an
13 even higher --

14 JUDGE HAWKENS: But that's the purpose of
15 the Category 1 to promote efficiency in the EIS
16 process.

17 MR. TURK: That's right. And that same
18 efficiency would apply for subsequent license renewal.
19 We're sitting here look at the first SLR application
20 to cross the doorstep of the NRC.

21 We have another one that's already been
22 received and there will be an oral argument in that
23 one. I think it's Peach Bottom. That will be coming
24 up next, and we're expecting several other SLR
25 applications to come in this year.

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1 So, the same thing will happen on each
2 proceeding. Someone will say, I don't need to go with
3 a petition for waiver, I'm just going to challenge all
4 the GEIS findings.

5 Well, that would lead to tremendous
6 inefficiency if the staff and the applicants and the
7 Boards would have to study each basis for each of the
8 generic determinations in the GEIS.

9 That's already been resolved through
10 notice and comment rulemaking. There's no need to
11 subject that to hearing procedures in order to have a
12 determination again on the adequacy of the GEIS
13 determination.

14 JUDGE HAWKENS: Okay.

15 MR. TURK: Essentially, the interveners,
16 the Petitioners are focusing on what the applicant's
17 responsibility should be.

18 And they're saying the applicant cannot
19 rely on the GEIS, they have to do a specific analysis
20 of each issue. But the staff will be relying on the
21 GEIS, we are required to do that by regulation, as is
22 the Board and the Commission.

23 So, what would be the point of having the
24 applicant come in with its own site-specific analysis
25 of all of these generic determinations if we're not

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1 even going to consider that beyond looking to see, is
2 there anything new and significant here beyond what's
3 already in the GEIS?

4 And that's what the Petitioners are
5 required to do, is to show, is there something new and
6 significant here that would cause us to say the GEIS
7 should not apply, you need to do something more in
8 this case? And they haven't done that.

9 JUDGE ABREU: Moving back to the regulation
10 itself, in a situation like this, where we have a
11 regulation that was written and promulgated through
12 notice and comment, and then, the world moved forward
13 around it, so to speak, we went from thinking about
14 initial to now, initial and subsequent, yet the
15 regulation never got updated.

16 Can you give me -- can you find any
17 examples of case law that deal with that type of
18 statute or regulation problem? Many of the cases
19 cited in the applicant's and the staff's briefs dealt
20 with issues of, like, ambiguity, which is a different
21 situation than we have here.

22 I haven't heard anyone claim that this is
23 an ambiguous statement. It may be -- the situation
24 may become awkward, but -- so, do you have any
25 examples of cases where you have seen this type of

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1 situation?

2 MR. TURK: I don't, your honor.

3 JUDGE ABREU: Okay.

4 MR. TURK: But I would note, Ms. Curran
5 spoke a bit about the plain language of the rule. The
6 rule is very clear, it's very explicit that initial
7 license renewal applicants must follow the GEIS and
8 must address certain issues.

9 The rule is silent with respect to
10 subsequent license renewal. That's where you might
11 say there's some ambiguity, because subsequent license
12 renewal is not explicitly addressed.

13 I would not throw the rule out, because
14 it's clear what an initial license renewal applicant
15 must do.

16 JUDGE ABREU: So, you, but you would still
17 want it to say, rather than an initial -- and sort of,
18 you're saying that it also could say, and subsequent
19 --

20 MR. TURK: Yes.

21 JUDGE ABREU: -- it's just not stated?

22 MR. TURK: Yes. And we read the rule to
23 apply. What would happen if you did not have
24 subsequent license renewal follow the same rule?

25 All you would have, and this is suggested

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1 by SACE's petition, they say, what applies is
2 51.53(c)(2), which is the regulation immediately
3 before (c)(3).

4 JUDGE ABREU: Right.

5 MR. TURK: (c)(2) is very general, it says
6 a license renewal applicant should submit information
7 concerning the proposed action, any refurbishment, and
8 any impacts.

9 It doesn't tell them specifically what
10 impacts they need to address. It doesn't tell them
11 that they have to submit new and significant
12 information to update the ER. It doesn't say that
13 they have to address SAMAs or not address SAMAs.

14 JUDGE ABREU: But if we add the words and
15 subsequent, we're, in a sense, negating what was
16 written, which says, an initial. It removes --
17 because you're saying, you would just as well -- we
18 talked earlier, you said you could rewrite it to say,
19 a renewed license.

20 MR. TURK: I would negate what it says, I'm
21 not suggesting that you do. I'm saying that it's very
22 clear that it addresses initial and because the rules
23 apply in substance, regardless of which period of time
24 is being sought for the renewal, there is no reason
25 why it should not also apply to subsequent license

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1 renewal.

2 JUDGE ABREU: Is there any reason it
3 shouldn't have been changed by notice and comment to
4 say that?

5 MR. TURK: It could have been, it wasn't.

6 JUDGE HAWKENS: And what is the regulatory
7 basis -- I understand we have new regs, there is
8 regulatory history, which could support an argument
9 that it does continue to apply to subsequent.

10 But let's assume that 51.53(c)(3) imposed
11 an additional burden on a licensee, rather than
12 facilitating his ability to prepare the ER, and let's
13 say that it says, current language, it applies to --
14 this process applies to licensees seeking an initial.

15 And then, the NRC told licensees seeking
16 subsequent, well, this also applies to you, even
17 though it's an additional burden.

18 If they came back and said, wait, what's
19 the regulatory basis for making us do that, what would
20 you say is the regulatory basis for you expanding the
21 plain language of 51.53(c)(3) to apply to subsequent
22 licensee reviews?

23 MR. TURK: I would point to the regulatory
24 history. I would note that the Regulatory Analysis
25 for the 2013 rule specifically talks about subsequent

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1 license renewal, it mentions how many subsequent
2 license renewal applications are expected.

3 And that was part of the thinking that
4 underlies the revisions that were made to the rules
5 and to the GEIS in 2013.

6 JUDGE HAWKENS: Okay. Anything else, other
7 than that?

8 MR. TURK: Other regulatory history?

9 JUDGE HAWKENS: No. Well, any -- is that
10 the best answer to the question? That's the strongest
11 regulatory-based argument in favor of supporting it?

12 MR. TURK: As I sit here, your honor,
13 that's the strongest --

14 JUDGE HAWKENS: Okay.

15 MR. TURK: -- point I can make about the
16 regulatory history.

17 JUDGE ABREU: One thing we hadn't talked
18 about, we mentioned in the topics we submitted to you,
19 to all of you, is that, in that SECY memo 14-0016 --

20 MR. TURK: Yes?

21 JUDGE ABREU: -- there is a statement that
22 basically says, Part 51 is fine.

23 MR. TURK: Yes.

24 JUDGE ABREU: So, if Part 51 is fine, with
25 the term an initial renewed license, why would that

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1 not be fine?

2 MR. TURK: I think that shows, as the staff
3 was reading the rule, they saw nothing in the rule
4 that would not apply to subsequent license renewal.
5 I know that --

6 JUDGE ABREU: So, it's back to --

7 MR. TURK: -- that word was there, but
8 apparently, that didn't trigger any concern that, oh,
9 we would have to do something with the wording.

10 JUDGE ABREU: So, it's back to the, oops,
11 I've read it so many times, I'm kind of not really
12 seeing all the -- I'm thinking about other things and
13 that just didn't occur to me, that we needed to fix
14 it?

15 MR. TURK: One of your honor's questions
16 had to do with, what you, I believe, stated was an
17 implicit endorsement of the words initial license
18 renewal applicant.

19 And I don't see that as an endorsement at
20 all, I think it simply said that we believe the rules
21 for initial license renewal apply to subsequent
22 license renewal.

23 JUDGE ABREU: I think it may come from the
24 idea that, in some of the briefs, I believe it was
25 indicated that, well, by the SECY memo 14-0016, the

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1 Commission approved this concept that we're doing this
2 streamlined system for subsequent renewal, just like
3 for initial.

4 MR. TURK: Yes.

5 JUDGE ABREU: So, that means they're
6 blessing the whole thing. But in that memo, the staff
7 said to SECY, 51 is fine.

8 So, that in some way implies that the
9 Commission is saying 51 is fine, well, 51 is fine,
10 written as initial renewed license. But again, it may
11 be, like we talked about, that it just wasn't
12 conscious that we were talking -- that that one
13 sentence said initial renewed.

14 MR. TURK: Perhaps the word initial was not
15 in the forefront of their thinking. But --

16 JUDGE ABREU: Well, the Commission never
17 knew it was there, probably, because staff said
18 everything's fine, so one might guess that maybe they
19 never looked at 51, because --

20 MR. TURK: That's possible.

21 JUDGE ABREU: -- why look at the part
22 that's not under argument?

23 MR. TURK: That's possible. And the
24 reverse of that is, well, if the staff was not
25 thinking that subsequent license renewal should follow

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1 the same rules as initial, then what were they relying
2 on? Just 51.53(c)(2), which is so general and has no
3 specific instructions for license renewal applicants?

4 And why would they want a license renewal
5 applicant to come in with a full-blown site-specific
6 analysis, when two or three months after getting the
7 ER, or six months afterwards, the staff would issue
8 something that relies on the GEIS?

9 What's the point, then, of having the
10 license renewal applicant go through this whole
11 process of analyzing something that will be tossed
12 into the bin of history, to a wastebasket?

13 JUDGE HAWKENS: Thank you, Mr. Turk. I'm
14 afraid you've gone over your ten minutes.

15 (Laughter.)

16 MR. TURK: Thank you.

17 JUDGE HAWKENS: But we will not take away
18 from FPL's ten minutes.

19 MR. O'NEILL: Thank you, your honor. I
20 think we'd like to reserve a couple minutes for
21 possible rebuttal.

22 JUDGE HAWKENS: No, we won't be giving --

23 MR. O'NEILL: Okay.

24 JUDGE HAWKENS: -- you rebuttal. Ms.
25 Curran will be getting her rebuttal, but --

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1 MR. O'NEILL: Okay, then I'll use my ten
2 minutes. I think you know from our briefs, we are
3 fundamentally aligned with the staff's position on
4 this particular issue, that we ultimately believe
5 51.53(c)(3) Table B-1 applies to subsequent license
6 renewal.

7 In that regard, I'd just like to kind of
8 amplify on a few points. Ultimately, the Petitioner's
9 argument here hinges on the application of the plain
10 meaning rule, or plain language rule.

11 And we think, in this case, focusing so
12 myopically on the word initial does in fact trigger
13 that well known exception, that we end up with an
14 unintended, if not absurd, result here, in the sense
15 that it's very clear that, from the administrative
16 history and from the case law, that really the
17 overriding purpose of the GEIS is to facilitate
18 efficiency and focus in the NRC staff's reviews, by
19 bifurcating the site-specific and generic issues.

20 And by reading the regulation in this way
21 and not applying 51.53(c)(3) to SLRs, you lose that,
22 that goal of efficiency. And it has, over the years,
23 proven to be a very efficient process. Most plants
24 have obtained their first or initial license renewals
25 and, on the whole, done so in a very efficient way.

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1 And this principle is something that was
2 echoed by the First Circuit in Massachusetts versus
3 NRC, which was a license renewal case as well.

4 One thing I do want to push back on a
5 little bit is the notion that the 2013 GEIS was only
6 a limited update. I think it's very clear, and we've
7 explained this in our brief, that the staff revised
8 the GEIS to update and reevaluate the potential
9 environmental impacts arising from renewal of an
10 operating license for an additional 20 years.

11 And of course, that phrase is very key,
12 the GEIS consistently refers to an additional 20
13 years. Not the initial 20 years, but an additional or
14 an additional 20-year operating period. So, I think
15 that's a key point.

16 The staff actually considered the need to
17 modify, add to, consolidate, or delete any of the
18 environmental issues evaluated in the 1996 GEIS, drew
19 from Lessons Learned and knowledge gained from
20 previous license environmental reviews, along with
21 public comments.

22 And then, the GEIS also states that new
23 research findings and other information were
24 considered when the significance of impacts associated
25 with license renewal was being evaluated, and that the

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1 staff subjected those issues to detailed consideration
2 in this GEIS.

3 So, we think it was, in fact, a very
4 robust review, more than a limited update to the
5 original GEIS.

6 The Petitioners, in addition to drawing
7 heavily on the word initial in the regulation, also
8 point to the 1991 proposed rule statement of
9 considerations.

10 And that preamble or regulatory history
11 did acknowledge the possibility of multiple renewals.
12 And it did say, however, the Part 51 amendments apply
13 to one renewal of an initial license for up to 20
14 years beyond the expiration of the initial license.

15 And of course, they seize upon that
16 particular statement. But we don't view that
17 particular language as really being even relevant
18 anymore or dispositive, it was issued over 27 years
19 ago, it was a proposed rule.

20 And, significantly, that same phrase did
21 not appear in the final 1996 SOC. And our view is,
22 there was a fundamental shift in the agency's
23 thinking.

24 And I think it was tied largely to the
25 decision to incorporate the ten-year cycle update of

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1 the GEIS. And we think they recognized the
2 possibility that there could be additional renewals or
3 subsequent renewals. And of course, there was the
4 need just to keep the GEIS, the technical information
5 fresh.

6 But the bottom line there is, that that
7 statement that Petitioners rely on was excluded from
8 the final 1996 SOC.

9 And I think as the staff pointed out in
10 its brief on this issue, the NRC has not promulgated
11 any other requirements that specifically apply to the
12 ER submitted for a subsequent license renewal
13 application.

14 And I think the absence of those
15 additional requirements is not unintended and is
16 significant.

17 Again, back to the issue of the plain
18 meaning rule, we pointed out in our brief that there
19 is a well-established body of case law saying that
20 there is an exception to that, that the Commission
21 itself has noted in Millstone, CLI-0110, that in
22 construing a regulation's meaning, it is necessary to
23 examine the agency's entire regulatory scheme.

24 So, we think that's a very critical point
25 and by doing so, we can resolve this issue in a

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1 reasonable way.

2 JUDGE ABREU: Do you think when they say,
3 construing a meaning, they are referring to something
4 where there is some ambiguity in the word or words?

5 MR. O'NEILL: I would agree with that, to
6 an extent, yes. And I think I agree with the staff
7 that there is some ambiguity in 51.53(c)(3).

8 JUDGE ABREU: Do you think at the time it
9 was written, it was ambiguous? Or is it only
10 ambiguous because the world changed around it? In
11 your term, ambiguous?

12 MR. O'NEILL: I think it's a combination of
13 both, because in light of what the Commission
14 ultimately did in the 1996 final SOC, in which they
15 omitted that reference to only applying to the initial
16 renewal term, that maybe an oversight did occur then.
17 That there is reason to question why that word initial
18 was retained as early as 1996.

19 But certainly, I can't disagree with you
20 that subsequent events have definitely amplified that
21 confusion or ambiguity, especially when you look at
22 the very recent administrative histories related to
23 the 2013 Part 51 rulemaking and the 2014 SECY paper,
24 which the Commission -- the staff were talking about
25 preparations for subsequent license renewal.

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1 We do agree, or FPL agrees with the staff
2 that it would yield an unusual result here to require
3 the applicant to do full-blown site-specific reviews
4 on all the Category 1 issues, when 51.71 and 51.95(c)
5 of the regulations direct the staff to rely on the
6 GEIS analyses and the impact findings as codified in
7 Table B-1.

8 JUDGE HAWKENS: Counsel, do you have any
9 idea, if we accepted Petitioner's argument, of cost
10 and time that an applicant would have to invest in
11 satisfying the creating an ER?

12 MR. O'NEILL: I think it would greatly
13 expand the scope of the ER. If you look at the ER as
14 it is now written, it has tables --

15 JUDGE HAWKENS: Can you just approximately
16 quantify it? Would it take twice the time, twice the
17 resources?

18 MR. O'NEILL: That's difficult for me to
19 quantify, as counsel, as opposed to a licensing
20 manager or somebody who's directly involved.

21 But I guess one thing we should be mindful
22 of the fact is that SACE has only challenged selected
23 Category 1 issues, in our view. They actually haven't
24 alleged more broadly that the ER needs to be rewritten
25 to include site-specific analyses for every Category

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1 1 issue across the board.

2 JUDGE ABREU: And does that --

3 MR. O'NEILL: So, that would --

4 JUDGE ABREU: And your estimate could also
5 consider, as Ms. Curran said, you can reference the
6 GEIS and just --

7 MR. O'NEILL: Yes.

8 JUDGE ABREU: -- have your justification
9 say, hey, this part, that fits us, we're good.

10 MR. O'NEILL: Yes. That --

11 JUDGE ABREU: That just changes the pathway
12 for challenge, under her scheme.

13 MR. O'NEILL: That's true, but in our view,
14 that does kind of flip-flop the burden, if you will.
15 I mean, we think there were ample procedural
16 mechanisms available to the Petitioners, they were
17 well aware of the availability of the waiver petition.

18 And again, we recognize that is a high
19 bar, but that's by design. But certainly, if they
20 believe that significant new information has evolved
21 since or emerged since 2013, they could have used that
22 as a justification for their waiver petition, for the
23 argument on special circumstances.

24 So, I think the burden should remain on
25 the Petitioners to say why we need to depart from the

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1 conclusions in the GEIS.

2 And we did, in the Environmental Report,
3 evaluate all Category 1 issues to determine that the
4 Category 1 findings, as codified in Part 51, would
5 still apply. We did evaluate new and significant
6 information and the staff, of course, will do that
7 independently on its own.

8 JUDGE KENNEDY: Did that include
9 considering 60-year operating history in your
10 assessment of the applicability of Table B-1 Category
11 1 issues?

12 MR. O'NEILL: Yes. My understanding would
13 be, yes, your honor.

14 JUDGE KENNEDY: Okay, thank you.

15 MR. O'NEILL: I know I'm low on time here,
16 but again, we've talked about SECY-14-0016, and again,
17 we think that's indicative that the staff and the
18 Commission -- okay. Can I have another minute?

19 JUDGE HAWKENS: One more minute.

20 MR. O'NEILL: Okay. And I'm just going to
21 jump to another point. I know the Petitioners focused
22 on the 2009 scoping summary report.

23 And this is something we have in the
24 brief, but we have reviewed that document and there
25 are numerous statements that indicate that there would

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1 be no limitations on the number of times a license may
2 be renewed.

3 The NRC's current plan is to apply the
4 revised GEIS to all license renewal applications
5 submitted after the date of the record decision for
6 the revised GEIS.

7 And a site-specific Environmental Impact
8 Statement that analyzes the environmental impacts of
9 a license renewal at the particular site is prepared
10 each and every time a licensee submits an application
11 for license renewal.

12 So, we think there are statements actually
13 in that 2009 scoping summary report that support our
14 position.

15 JUDGE HAWKENS: All right.

16 MR. O'NEILL: Thank you, your honors.

17 JUDGE HAWKENS: Thank you, Counsel.

18 MS. CURRAN: Judge Hawkens, I just want to
19 -- I want to split my reply time with Mr. Rumelt.
20 He's going to take five minutes and I'll take five.

21 JUDGE HAWKENS: All right, thank you.

22 MR. RUMELT: Thank you, your honors. The
23 issue I wanted to address up front is this concept of
24 really wanting an efficient process.

25 When we look back to the 1996 rulemaking,

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1 we got a 1991 proposed rule that says very clearly,
2 initial means initial. And that is the best
3 indication, other than the plain language, of what the
4 Commission intended.

5 In addition, what we haven't addressed, at
6 all, is the fact that there's another category of
7 licensees that will eventually, potentially, seek
8 license renewal. And that's the post-1995 licensees.

9 If you look at 51.53(c)(3), it says very
10 specifically, only initial and also, only those
11 licensees who had their license as of 1995.

12 So, to the extent that there's some
13 overall extreme desire to have an efficient process,
14 it's an odd result to have two categories of licensees
15 that --

16 JUDGE KENNEDY: Doesn't it also state
17 construction permits?

18 MR. RUMELT: I'm sorry?

19 JUDGE KENNEDY: I think I'm dead.

20 (Laughter.)

21 JUDGE KENNEDY: Not -- in addition to
22 operating license, doesn't it also say construction
23 permit? And I guess I'm wondering which potential
24 plants we could be talking about here, if any? I
25 think I struggled with that language too.

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1 MR. RUMELT: Right. My understanding is
2 that there is at least one plant that has received a
3 COL, and that's Watts Bar.

4 JUDGE KENNEDY: But didn't they have a
5 construction permit before 1995?

6 MR. RUMELT: That, I'm not entirely certain
7 of.

8 JUDGE KENNEDY: It may be. It's more my
9 curiosity, because I struggled with that language too.

10 MR. RUMELT: Well, one of -- I want to go
11 back to the original point, though, which is that, if
12 there's an overall purpose here of efficiency, there
13 is clearly, again, two categories of license renewal
14 applicants that don't benefit from the Category 1,
15 Category 2 generic treatment, right?

16 There's, again, looking at the plain
17 language, initial license applicants get to, or
18 renewal applicants get to benefit from it. And then,
19 the pre-1995 initial license applicants.

20 Now, I think, if FPL was going to
21 construct their Units 6 and 7, that would be another
22 example of a licensee that received their license
23 after 1995. And if they operate for 40 years and
24 sought a 20-year extension, they would not be able to
25 take advantage of the generic treatment here.

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1 JUDGE HAWKENS: That's if we accepted your
2 argument?

3 MR. RUMELT: If you accept my argument,
4 yes. And by the plain language of the regulation.

5 And of course, as I think we discussed, as
6 black letter law, if you adopt a regulation, through
7 notice and comment rulemaking, the only way to change
8 that regulation is through notice and comment
9 rulemaking, not through after the fact policy
10 statements that we've been talking about here.

11 JUDGE KENNEDY: Since you are speaking, can
12 I address one specific question to you? And this is
13 different than what you were just addressing, but I'm
14 curious.

15 If 51.53(c)(3), if the plain language
16 holds, what happens to the requirements that are
17 subsequent to that, (ii)(A) through (B)? Are they in
18 play here?

19 MR. RUMELT: Well, what is in play is
20 (c)(1) and (2). And if we look at (c)(2), it refers
21 to 51.45. In 51.45 --

22 JUDGE KENNEDY: But didn't Friends of the
23 Earth and NRDC table a number of contentions written
24 against requirements that are embedded in (A) through
25 (B)?

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1 MR. RUMELT: Those are, if those apply. If
2 the Board determines that 51.53(c)(3) applies, then we
3 couch the arguments in those terms.

4 JUDGE KENNEDY: Okay. And if they don't
5 apply, you would go to?

6 MR. RUMELT: 51.53(c)(1) and (2). And
7 again --

8 JUDGE KENNEDY: Which doesn't provide the
9 specificity that you're pointing to in your
10 contentions.

11 MR. RUMELT: But it does reference 51.45,
12 which has a number of requirements that apply to
13 Environmental Reports by applicants.

14 This is 51.45(b), Environmental Reports
15 shall contain a description of the proposed action, a
16 statement of purpose, a description of the environment
17 affected, and discuss the following, and there's a
18 list of five items that are required.

19 JUDGE KENNEDY: All right, thank you.

20 MS. CURRAN: I have three points I'd like
21 to make. Both Counsel for the staff and FP&L talked
22 about efficiency being the most important value here.
23 And it is true that Table B-1 has made license
24 renewal, initial license renewal more efficient from
25 the NRC's point of view.

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1 But efficiency does not trump NEPA. NEPA
2 is the basis for Table B-1, an Environmental Impact
3 Statement that was written, whose findings are
4 codified in Table B-1.

5 If the Environmental Impact Statement
6 doesn't have factual findings that apply to the
7 circumstances at issue, then there's no efficiency
8 that can justify applying that rule, where there is
9 not an underlying EIS that supports it.

10 So, the question that Judge Abreu asked,
11 couldn't we just fix the rule by republishing it?, the
12 answer to that is, you do need to republish the rule,
13 but in order to make the Table B-1 findings binding in
14 the context of subsequent license renewal, the NRC
15 would also have to revise and republish the GEIS for
16 comment, making it clear that the temporal scope of
17 the GEIS had changed.

18 JUDGE KENNEDY: But isn't the temporal
19 scope 20 years? Isn't that perfectly --

20 MS. CURRAN: It's 20 --

21 JUDGE KENNEDY: -- clear?

22 MS. CURRAN: -- years past the initial
23 license renewal term. And, Judge Kennedy, I just
24 wanted to direct you to the pages of our brief, the
25 brief that we filed in response to the sur-reply.

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1 If you look at Pages 7 to 9 of our brief,
2 it cites specific places in the 2013 revised GEIS
3 where the NRC -- it doesn't use the word initial, but
4 it talks about 40 plus 20 being the basis for that
5 GEIS.

6 So, and that's -- those are not the only
7 places where the -- there isn't one place in that GEIS
8 -- or there is one place where they talk about 100
9 years, but that has to do with Table S-3 and it's kind
10 of an idiosyncratic thing. For everything else, it's
11 40 plus 20. That's what --

12 JUDGE KENNEDY: So, you're not --

13 MS. CURRAN: -- they were doing.

14 JUDGE KENNEDY: -- buying my
15 decommissioning example, which has been my favorite?

16 MS. CURRAN: I think the decommissioning
17 example is also idiosyncratic and it's not consistent
18 with the general approach.

19 JUDGE KENNEDY: You think it's an accident?
20 I mean, is it --

21 MS. CURRAN: Well, no, it makes sense for
22 decommissioning that you look -- decommissioning is
23 the very last thing that happens, so of course you're
24 going to look at the whole 60 years, because you're
25 waiting until the very end to do it.

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1 JUDGE KENNEDY: I mean, I believe I took --
2 your time frame caught my interest quite a bit and I
3 spent a lot of time looking at your pleading and
4 looking at the guidance, looking for the methodology
5 and the completeness.

6 And so, I was looking for things like,
7 what would impact the GEIS period, based on operating
8 history? Whether it's 40, 60, 80, 100? And in cases
9 where it appeared to me that the technical staff had
10 identified an area of interest, where operating
11 history would be applicable, they addressed it.

12 And areas where it did not appear that
13 operating history was applicable, they didn't address
14 it. So, I mean, again, I think I'm open to rereading
15 your briefing again, with that in mind and with what
16 you've said here today.

17 MS. CURRAN: And I would also ask you to
18 bear in mind that when this GEIS was put out for
19 public comment, they were telling people, we're
20 looking at 40 plus 20.

21 They didn't tell members of the public,
22 we're looking at an indefinite period of license
23 renewal, because people would have wanted to comment
24 on that. And --

25 JUDGE KENNEDY: But isn't that part of the

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1 confusion? I mean, when I read 40 plus 20, I
2 sometimes translate that into the operating history.

3 In other words, the GEIS period is an
4 extra 20 years on top of something, and in some cases,
5 they clearly state 40 plus 20. And then, they look at
6 the GEIS period or the renewal period.

7 So, I mean, I'm going to look at it again,
8 you've got my attention again.

9 MS. CURRAN: Okay. And when you look at it
10 again, look and see if you find anything that says 60
11 plus 20, and you're not going to find that.

12 JUDGE KENNEDY: Other than decommissioning?

13 MS. CURRAN: You're not going to find --

14 JUDGE KENNEDY: Well, you're going to find

15 --

16 MS. CURRAN: -- 60 plus 20.

17 JUDGE KENNEDY: You're going to find 60.

18 And --

19 MS. CURRAN: You're going to find --

20 JUDGE KENNEDY: -- the GEIS period --

21 MS. CURRAN: -- 60, but you're not going to
22 find 60 plus 20.

23 JUDGE KENNEDY: No, but isn't -- I thought
24 we just agreed that the GEIS period is an addition 20
25 years, on top of something. I thought we agreed on

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1 that.

2 MS. CURRAN: Well, it's -- you got to total
3 it out. For an EIS, you've got to look at the total.
4 It's not -- an EIS doesn't sort of go on indefinitely,
5 it's got a limit. Okay. Can I -- I would like to --

6 JUDGE KENNEDY: Yes.

7 MS. CURRAN: -- say one more thing.
8 There's something in the NRC staff brief that I
9 thought was a little misleading, where they said the
10 Commissioners agreed with the staff's recommendation
11 that a new rulemaking was not needed to update the
12 GEIS or to update the regulations.

13 I just want to point out that, what the
14 Commissioners agreed to in SRM SECY14-0016 was, they
15 agreed there was no need for a new Part 54 rulemaking
16 on safety issues.

17 If you look at that SRM, the only subject
18 of the SRM is the question of whether a new Part 54
19 Atomic Energy Act-based rulemaking is needed.

20 And as we know, from the Turkey Point
21 license renewal decision, I'm forgetting the CLI
22 number, but the Commissioners clearly said there, the
23 Atomic Energy Act and NEPA are two different statutes
24 and you cannot get them mixed up.

25 And so, it's really important not to mix

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1 up the Atomic Energy Act and NEPA in looking at that
2 SRM SECY-14-0016. Thank you.

3 JUDGE ABREU: Mr. Turk, the topic was
4 brought up about the pre-1995 versus post-1995 issue
5 in 51.53(c)(3).

6 Can you shed any light on why that date is
7 in there and why there is that -- so, 51.53(c)(3) says
8 it applies to an initial renewed license for things
9 pre-1995 and then lists, like, construction permits
10 and all these things.

11 So, it would not apply to post-1995 new
12 construction. Can you shed any light onto why that
13 date was picked and the significance thereof?

14 MR. TURK: Unfortunately, as I sit here, I
15 cannot, your honor. But I --

16 JUDGE ABREU: Well, if --

17 MR. TURK: -- would note a few things.

18 JUDGE ABREU: If it comes up later in the
19 day, you can fill us in.

20 MR. TURK: Okay. If I may have a moment to
21 call your attention to two things in response to the
22 rebuttal we just heard?

23 JUDGE HAWKENS: You may, then we'll give
24 Ms. Curran to have the opportunity to have the final
25 word, if she would like it.

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1 MR. TURK: Okay. Thank you, your honor.
2 First, the SECY paper, SECY-14-0016, does not limit
3 itself to the need for rulemaking on Part 54.

4 It indicates in one distinct paragraph
5 that the staff has reviewed the environmental
6 regulations and determined that there's no need for
7 any revisions. So, it does address the environmental
8 side and says, we find nothing that needs to be done.

9 And second, in the 2013 GEIS, unlike the
10 statement by Ms. Curran, it does not describe 40 years
11 plus 20.

12 The 2013 GEIS is different from the 1996
13 GEIS in that it focuses upon a 20-year increment of a
14 renewed license. Any 20-year renewal, not 20 years
15 following 40. And in that regard, the 2013 GEIS is
16 different from the 1996 GEIS that she was focused on.

17 JUDGE HAWKENS: Ms. Curran, we'll give you
18 one minute of response time, if you'd like to answer.

19 MS. CURRAN: It is correct that SECY-14-
20 0016 did discuss safety and environmental issues,
21 although the primary focus was safety. But SRM SECY-
22 14-0016 refers only to the safety rulemaking.

23 So, when you have a question, what should
24 we do with this issue?, if we -- when we decide what
25 to do next, and one of the answers is, well the

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1 Commission has not ruled on the question of whether to
2 have a rulemaking on the NEPA issues, they did address
3 it in the safety context, but not in the NEPA context.

4 And the other thing is, Mr. Turk says the
5 2013 GEIS is fundamentally different from the 1996
6 GEIS.

7 We fundamentally disagree, and this is
8 addressed in detail in our brief and we give you
9 citations to where the GEIS repeatedly talks about 40
10 plus 20. And we just went over that. You cannot find
11 any reference to subsequent license renewal and it's
12 not open-ended. Thank you.

13 JUDGE HAWKENS: Thank you. Let's take a
14 brief recess. My watch says it's about seven minutes
15 til, does Counsel need more than 12 minutes? Fifteen
16 minutes, would that satisfy you? All right, let's
17 reconvene at ten minutes after 10:00. Thank you.

18 (Whereupon, the above-entitled matter went
19 off the record at 9:52 a.m. and resumed at 10:12 a.m.)

20 JUDGE HAWKINS: Before launching into a
21 contention of admissibility for SACE's contention, we
22 had a question for Ms. Curran, again on 5153C3.
23 Assuming that we did not accept your argument - no,
24 let me go back on that.

25 Assuming we accepted your argument that

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1 5153 applies to the creation of the ER, but that it
2 does not apply to the staff's creation of the
3 supplemental EIS, how does that affect the contention
4 if we admit it and then it migrates upon publication
5 of the supplemental EIS?

6 MS. CURRAN: Well -

7 JUDGE HAWKINS: I would - the staff says
8 it has to be rejected as outside the scope, or
9 alternatively, rejected as moved, and I was just
10 wondering what your response to those arguments would
11 be?

12 MS. CURRAN: Well, then we would file a no
13 contention saying that the draft EIS is - we waived it
14 in a no contention, I think, based on the draft EIS
15 that - and I'm just thinking off the top of my head
16 here.

17 JUDGE HAWKINS: Right, but I was - if the
18 decision was that your argument did not extend to the
19 staff's creation of the supplemental EIS -

20 MS. CURRAN: Well, we -

21 JUDGE HAWKINS: - but it did apply to the
22 applicant's creation of the ER -

23 MS. CURRAN: Well, we'd probably file the
24 contention anyway and then we'd preserve it for appeal
25 because we think ultimately this issue is going to end

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1 up before the Commissioners because as Mr. Turk was
2 saying, there's multiple SOR applications either,
3 there's one, another one filed and there's more on the
4 way, and it's clearly an issue that is, has broad
5 implications.

6 So whatever we did, what we would be
7 preserving are claims so that we could bring them to
8 the Commission.

9 JUDGE HAWKINS: All right.

10 MS. CURRAN: Thanks.

11 JUDGE HAWKINS: Thank you. Let's now
12 proceed to your arguments. You have an hour and 10
13 minutes. How much, if any, would you like to preserve
14 for rebuttal?

15 MS. CURRAN: I'd like to take 45 for
16 initial and 25 for rebuttal. I'd like to talk about
17 four issues. I'll tell you what they are up front.
18 One is the presumption that FP&L and the staff argue
19 that they will comply with their permits, the NPDES
20 permit and the consent order, the consent agreement
21 that these issues aren't admissible because they're
22 covered by presumption.

23 Second, the question that you raised about
24 the baseline for impacts on crocodiles, third, I'd
25 like to just clarify what we are intended by raising

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1 the issue of tritium contamination, and then finally,
2 the question of whether FP&L legitimately incorporated
3 by reference parts of the EIS for Turkey Point 6 and
4 7.

5 And I just want to let you know that Mr.
6 Porter is sitting with me and I may consult him as we
7 go along.

8 JUDGE HAWKINS: Very well.

9 MS. CURRAN: On this issue of the
10 presumption, there's a couple of points that I would
11 like to make. One is that FP&L takes the position
12 that discharges to groundwater under the cooling canal
13 system are covered by state law, and it's kind of
14 complicated because there's an NPDES permit.

15 There's an industrial wastewater permit.
16 My understanding is the NPDES permit was issued by the
17 state as a delegate of the EPA. The industrial
18 wastewater permit was issued by the state under state
19 law. They have since been combined into a single
20 NPDES permit, but they include state and federal law.

21 And we know that SACE is involved in the
22 Clean Water Act lawsuit in Federal District Court
23 arguing that the NPDES permit covers discharges to
24 groundwater and that FP&L is violating its NPDES
25 permit by discharging to groundwater and impacting the

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1 drinking water supply in Biscayne Bay.

2 In this case, FP&L is saying to the
3 licensing board that the federal permit applies to the
4 discharges to the CCS only, and it's as if the CCS is
5 a closed system and that it's the state, it's under
6 the state purview that discharges into the
7 groundwater, which is, of course, the subject of our
8 contention.

9 We're concerned about westward flow of
10 groundwater to the drinking water supply and also
11 eastward flow towards Biscayne Bay.

12 At any rate, if there is - there is a
13 relationship between EPA and the NRC under a
14 Memorandum of Understanding in which only the EPA can
15 impose effluent limits on FP&L, but for purposes of
16 the federal permit, FP&L's position in this case is
17 that the federal permit only relates to discharges to
18 the CCS and it's the state permit, the state has
19 purview over discharges to the groundwater, and that's
20 important.

21 So what we're saying is that because these
22 are largely state issues, there's no question that
23 these are appropriate subjects for environmental
24 review.

25 There's also an argument that FP&L and the

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1 staff make that FP&L can be presumed to comply with
2 its permits and with its - there's a variety of
3 administrative enforcement orders, consent decrees out
4 relating to the groundwater discharges. There's the
5 county's consent agreement. There's the state's
6 consent order.

7 And I just want to make the point here is
8 that it is true there's a presumption that permittees
9 will comply with their permits, and that comes up a
10 lot in NRC cases where it has to do with whether the
11 licensee is going to comply with its operating
12 license.

13 You know, if it says, "You turn this
14 switch on at such and such a point," you can assume
15 that the licensee will do that, but we would submit to
16 you that these administrative orders which have been
17 worked out between the state and county authorities
18 and FP&L for things like pumping groundwater, moving
19 groundwater around, these are basically mitigation
20 measures that are being attempted in order to address
21 this longstanding problem that the CCS, saline water
22 from the CCS, and contaminated water from the CCS is
23 escaping into the groundwater.

24 Florida is just such an interesting place
25 geologically. There is so much water here. And the

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1 approach so far has been to move water around and
2 everybody keeps trying to move it around in a
3 different way.

4 Our contention is that this is the
5 appropriate time for the NRC, and of course in the
6 first instance, FP&L is supposed to do the first
7 draft, to kind of get up high over the whole picture
8 and look at all of the moving parts and look at
9 whether they work.

10 And we have, part of our contention says,
11 "Well, these measures are ineffective," and part of it
12 says, "Some of them are usually inconsistent and
13 counterproductive."

14 And instead of each little authority
15 looking at their narrow concerns, the beauty of NEPA
16 is that NEPA doesn't have jurisdictional boundaries
17 and that the NRC can kind of get up high and look at
18 the whole thing.

19 That's what we're seeking in this case is
20 a bird's-eye view of what's going wrong because it's
21 clearly not going right in terms of cleaning up the
22 groundwater contamination caused by the CCS.

23 So our first claim is that the impacts of
24 the CCS are inadequately considered, and that includes
25 the incremental impacts and accumulative impacts, and

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1 then we also say that the mitigation measures that
2 have been proposed, that are being implemented now, in
3 fact, are not adequate and they're also
4 counterproductive.

5 And then finally, we have contention two
6 which seeks consideration of an alternative mechanism
7 for cooling the plant, which would be mechanical draft
8 cooling towers which would effectively eliminate the
9 problems caused by the CCS, and nothing in life is
10 perfect, but this would be a major change and a major
11 improvement in how this nuclear plant is cooled.

12 And as we mentioned on our contention, the
13 alternative of mechanical draft cooling towers was
14 considered as early as the 1970s and rejected, but
15 we're saying it's time to look at it now that it's
16 clear the CCS is not working and is actually causing
17 significant environmental harm, that now is the
18 appropriate time to consider this alternative.

19 We have complied with all of the
20 requirements the NRC has. We have cited the
21 particular discussions in the environmental report.
22 We have expert opinion as to why those discussions are
23 inadequate. We have replied to the arguments of FP&L
24 and the staff when they disputed whether we've raised
25 a legitimate concern.

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1 Factually, I think we've covered it, and
2 I'd be glad to answer any questions that you have
3 about the adequacy of the basis for our contentions,
4 but we did a really careful job of documenting our
5 concerns and we had the advantage of having these
6 expert reports from the Clean Water Act case where
7 these experts looked at essentially the same issues
8 from the standpoint of compliance with the NPDES
9 permit.

10 So we have really good factual support for
11 our concerns, almost - like you usually don't get that
12 until you get to the hearing stage, but we happen to
13 have it now.

14 JUDGE KENNEDY: You're on a good roll
15 here. Just for my benefit, in FP&L's ER in chapter
16 three, I think the paint an improving picture of the
17 groundwater impacts. In your petition, could you just
18 cite me the pages in your petition where you have
19 challenged their view of the impacts to the
20 groundwater?

21 MS. CURRAN: Sure, if you could give me a
22 minute.

23 JUDGE KENNEDY: And you could do it at the
24 end.

25 MS. CURRAN: Oh.

1 JUDGE KENNEDY: That would be fine.

2 MS. CURRAN: Okay, why don't I -

3 JUDGE KENNEDY: I'm just curious. I just
4 want to make sure, since my reading of the GEIS
5 differs from yours, I don't want a different reading
6 of this point because this is important.

7 MS. CURRAN: I can tell you from memory -

8 JUDGE KENNEDY: That's okay.

9 MS. CURRAN: - that in our hearing
10 request, we talked about how there's a place in the
11 environmental report where FP&L talks about the
12 increasing salinity of the water in the CCS, and they
13 attribute it to a variety of factors including changes
14 in the weather.

15 There are all kinds of external factors
16 that don't really have to do with the CCS, and we see
17 this at various points in the environmental report
18 that when there's a problem, it's attributed to some
19 external factor. Like the pollution of Biscayne Bay,
20 they say, "Well, that's a little bit to the north.
21 It's not from this plant."

22 And, you know, one of the issues, I'll get
23 to this now. I can get to the issue about tritium
24 which is I want to make it clear that we are not
25 raising tritium contamination like we did in the

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1 Turkey Point 6 and 7 case where we're saying this goes
2 about regulatory limits.

3 We're saying tritium is a good tracer for
4 contaminants from Turkey Point because the only other
5 possible source of tritium would be nuclear test
6 fallout, and so this is a good indicator that the CCS
7 is communicating with Biscayne Bay to the east, and we
8 have expert opinion from qualified experts discussing
9 how or why that could be.

10 So that's an example of direct effects of
11 the CCS that are not acknowledged or not adequately
12 acknowledged by FP&L. FP&L doesn't think it's a
13 problem to continue to operate the CCS. They want to
14 operate it for another 20 years and our concern is
15 that this is unacceptable from an environmental point
16 of view because the impacts are too significant.

17 We're talking about a very limited supply
18 of drinking water to the west. We're talking about a
19 very pristine body of water, Biscayne Bay to the east,
20 that has special status under the Clean Water Act it's
21 so clean, that there is - it's not only unacceptable,
22 but there's no need to keep operating the CCS because
23 there is an available cost-effective alternative which
24 is to use mechanical draft cooling towers as are used
25 in the gas plants on the same site.

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1 I wanted to talk a little bit about the
2 crocodiles because this is kind of an unusual issue
3 where before Turkey Point was licensed, there was no
4 CCS and there were no crocodiles there apparently or
5 very few, and the particular characteristics of the
6 CCS when it was first built attracted crocodiles in
7 apparently significant numbers.

8 And they did so well that this was one of
9 the factors that caused the Fish and Wildlife Service
10 to take crocodiles, American crocodiles off the
11 endangered species, endangered list, and to reduce
12 their status to threatened.

13 But now, as discussed in our contention,
14 in more recent years, the crocodile population seems
15 to be collapsing, and so is the seagrass on which they
16 depend, and we think that this is reasonably
17 attributable to the increase salinity in the CCS.

18 You raised the question, "Well, what
19 should the baseline be?" If you look at the license
20 renewal GEIS which I think is, it's okay to take that
21 as a rule of thumb, you know, it's, "Here's how they
22 did it. Here's how they did it for initial license
23 renewal. Maybe this is a good rule of thumb for us."
24 They used the 40-year period of initial operation as
25 the baseline for incremental impacts of the first 20

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1 years.

2 It seems to me that it would be reasonable
3 to use the first 60 years of operation as a baseline,
4 but that applying NEPA's rule of reason, you'd want to
5 take into account the rise in population and then the
6 decline during that period and look at what were the
7 factors that caused that.

8 And then really I think what you have here
9 for license renewal, the subsequent license renewal
10 application is a question of whether the crocodiles
11 can continue to survive at all in the CCS if
12 subsequent license renewal is granted and the CCS is
13 allowed to continue to operate.

14 So you'd want to compare the fact that
15 there was a thriving population at one time in the
16 past with the potential that they will be completely
17 eliminated from that area, so that's what I would
18 propose using as a baseline.

19 There is also a question that was raised
20 about incorporating by reference the Turkey Point 6
21 and 7 GEIS, and this was on the question of cumulative
22 impacts.

23 When I - I have to confess that when I
24 read FP&L's summary in its response to our contentions
25 of what the Turkey Point 6 and 7 GEIS says about

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1 cumulative impacts, I didn't really think it was worth
2 looking at because they - let me just see if I can
3 find it.

4 Okay, it's on page 41 and 42 of FP&L's
5 response to our petition for a hearing and their
6 response is dated August 27, and it says, "It's
7 evident from Table 7-1 that," and this is in the EIS
8 for Turkey Point 6 and 7, which exceeds 40 pages and
9 is incorporated by reference in ER Section 41.2, "that
10 the staff perform a comprehensive assessment of other
11 projects within a large 50-mile radius region, that in
12 combination with Turkey Point SLR, could have
13 cumulative effects.

14 "That assessment makes clear that the
15 moderate cumulative impacts to surface water quality
16 and aquatic ecosystems identified by the staff are
17 largely the result of historical land use and
18 development activities within the region of interest
19 that are unrelated to Turkey Point's site operations
20 past, present, or future."

21 So in other words, the Turkey Point 6 and
22 7 EIS didn't really look at the CCS. Well, why would
23 they? Because they were going to use mechanical draft
24 cooling towers.

25 So I just thought, well, that doesn't mean

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1 much. I'm going to focus on what they say in the
2 environmental report which we took issue with, that
3 there - you know, the tendency is to attribute any
4 problems to some external factors that don't have to
5 do with the CCS and to downplay the effects of the
6 CCS.

7 So that's -

8 JUDGE KENNEDY: Ms. Curran?

9 MS. CURRAN: That's what we dispute.

10 JUDGE KENNEDY: I guess I want to go back
11 to Table 7-1 because I have a different sense of that
12 table. It's from Turkey Point 6 and 7 and so it
13 incorporated activities at Turkey Point 3 and 4, and
14 I thought it made a point that Turkey Point 6 and 7
15 will have these impacts possibly leading to even
16 moderate impacts on land use and other activities, but
17 that the Turkey Point 3 and 4 subsequent license
18 renewal would have an insignificant impact for a 20-
19 year extension of the license.

20 I'm trying to reconcile that view, and I
21 think we're going to get back to the FP&L view that,
22 you know, it's all about the effected environment.
23 It's all about Chapter 3, which is where the real meat
24 of this discussion, in my mind, occurs.

25 Because they're taking us to the present

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1 and looking at conditions on the site and its impact
2 on the environment in the present, and then looking at
3 the subsequent license renewal as an incremental
4 activity, and then having different arguments for
5 that.

6 So I - it just seemed to me to be a case
7 of it looked like it was holding together, and I'm
8 understanding now that you see it quite differently
9 than I saw it.

10 MS. CURRAN: I don't see that the Turkey
11 Point 6 and 7 EIS says anything specific about the
12 significant problems with the CCIS or really deals
13 with them, and it's - this is what we -

14 JUDGE KENNEDY: I -

15 MS. CURRAN: - took some pains to address
16 in our contention, that we took specific statements in
17 the environmental report and said, "Well, we have
18 evidence that you're understating this, or you've
19 ignored that, or" -

20 JUDGE KENNEDY: And I think I'm agreeing
21 with you. I think I put a lot of weight on the
22 Chapter 3 writeup which took us to the present -

23 MS. CURRAN: Yeah.

24 JUDGE KENNEDY: - and described the
25 conditions on the site as they begin to move forward.

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1 I mean, it does other stuff as well because they look
2 at reasonable foreseeable, but I'm trying to reconcile
3 sort of the view that comes out of Chapter 3 as we
4 enter the period of extended operation subsequent
5 license renewal period and then the sort of activities
6 that go on there and impacts that will bring to the
7 environment, and I see a big distinction there and I
8 put a large measure of importance on the material
9 that's in Chapter 3.

10 So that was my original question is, you
11 know, you have some, I think you have some citations
12 in your petition that goes after the material that's
13 in Chapter 3, and I'll give you time at the end to
14 come back to that.

15 MS. CURRAN: Thank you.

16 JUDGE KENNEDY: But I see this as a big
17 distinction and I think it also bears on Table 7-1
18 because it's the perspective they're starting from.
19 They're starting really from the perspective of what's
20 going on on the site, and they're distinguishing the
21 3 and 4 activity which is either refurbishment or the
22 renewal period, and 6 and 7 which is construction,
23 operation, and ultimately decommissioning.

24 So I'm going to listen more keenly, but,
25 I mean, to me, that's where I'm coming from is that

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1 that all seems to hang together to me, and so it would
2 be important for me to understand the challenges that
3 you would bring to what FP&L has put in the
4 environmental report for the effected environment.

5 MS. CURRAN: Okay, I'm going to -

6 JUDGE KENNEDY: That's a long soliloquy of
7 why I keep asking that question.

8 MS. CURRAN: Okay, thank you. I don't
9 think I have anything more to add to my argument, but
10 I'd be really glad to answer any more questions that
11 you may have.

12 JUDGE KENNEDY: I'm just curious, going
13 back to your original point about the groundwater
14 contamination and the, I guess the interaction of
15 state and federal law. What particular federal law
16 are we referring to in regard to groundwater
17 contamination versus - I guess it's being administered
18 through the state of Florida, but what particular
19 federal statute are we referring to there in regard to
20 groundwater contamination?

21 MS. CURRAN: The state law permit, the
22 industrial wastewater permit, imposes limits on
23 discharges to groundwater. That was issued
24 independent of the federal NPDES permit, but since
25 then, has been merged into that federal permit. So in

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1 the Clean Water Act suit, SACE is arguing that the
2 NPDES permit, the federal permit includes discharges
3 to groundwater.

4 In this case, FP&L, in this case, FP&L is
5 arguing that discharges to groundwater are not
6 governed by the federal law. They're governed by the
7 state law, and so that would take, that would take
8 FP&L out of any or disable any argument that this is
9 a federal issue that the NRC has no business getting
10 involved in.

11 JUDGE KENNEDY: Right, I guess that was
12 really my question. How do we get back? Is it the
13 Clean Water Act that really -

14 MS. CURRAN: Yes.

15 JUDGE KENNEDY: - needs to govern here?

16 MS. CURRAN: Yes, the Clean Water Act -
17 (Simultaneous speaking)

18 JUDGE KENNEDY: - disagree with you.

19 MS. CURRAN: The Clean Water Act governs
20 discharges to surface waters. The CCS is not a
21 surface water of the United States because it's an
22 enclosed basin, but there is an NPDES permit for
23 discharges to the CCS.

24 The initial NPDES permit prohibited
25 discharges to groundwater. It just said you can't do

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1 them. The state permit allowed discharges to
2 groundwater, but limited them.

3 Oh, okay, I need to clarify. The NPDES
4 permit, the federal permit, regulates discharges to
5 surface water. It prohibits discharges to
6 groundwater. No, that's - I'm sorry. I got that
7 wrong.

8 The NPDES permit prohibits discharges to
9 surface water and the CCS isn't surface water, so, and
10 it limits discharges to groundwater, but the limits on
11 the discharges to groundwater come from state law, not
12 from the Clean Water Act. Is that - I'm sorry that I
13 bungled that.

14 JUDGE KENNEDY: No, that's - yeah, no,
15 that's more helpful. I guess I'm still trying to look
16 for where the problem here is. You seem to be raising
17 an argument that this should be under federal law
18 versus state law?

19 MS. CURRAN: I'm not arguing that.

20 JUDGE KENNEDY: Okay.

21 MS. CURRAN: I mean, I am responding to
22 suggestions by FP&L and the staff that, and this comes
23 from NRC cases involving, I think, Indian Point, and
24 I'm trying to remember the other case that they cited
25 where the Commissioners said, "Well, we're going to

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1 accept whatever EPA was doing with this facility and
2 we're not going to second-guess the EPA," and I just
3 want to distinguish this case from a comparison with
4 those.

5 JUDGE KENNEDY: As we stand today, the
6 state of Florida administers the discharges to the
7 groundwater. Is that true?

8 MS. CURRAN: There's two entities, the
9 state and also the county -

10 JUDGE KENNEDY: Okay.

11 MS. CURRAN: - Miami-Dade County, so there
12 is - Miami-Dade County has a consent agreement with
13 FP&L that, where they are trying to mitigate some of
14 the discharges to or have some measures for mitigating
15 discharges to groundwater.

16 The state has a consent order with FP&L
17 that has different measures in it. So there are these
18 two entities that are regulating FP&L and working with
19 FP&L to mitigate their discharges to groundwater.

20 JUDGE KENNEDY: I mean, at this point, the
21 Agency would not really try to override the state of
22 Florida in these issues. I would presume that you
23 would agree with that.

24 MS. CURRAN: Well, there's a difference
25 between overriding the state of Florida and looking at

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1 the issues. We think that NEPA obligates the NRC to
2 look at the effectiveness of these various mitigation
3 measures that have been imposed.

4 Because FP&L is saying in their
5 environmental report, "Everything is fine because
6 we're involved in these efforts under the jurisdiction
7 of the state and the county to mitigate our
8 groundwater impacts, so things are fine."

9 And we're saying they're not fine and this
10 environmental report and ultimately the environmental
11 impact statement has to take a hard look at whether
12 these, the likelihood that these efforts will be
13 successful or possibly even be counterproductive.

14 Okay, I would like to read you a footnote
15 from 51.71, 10 CFR 51.71 which is the requirements for
16 environmental impact statements. "Compliance," this
17 is footnote three, "Compliance with the environmental
18 quality standards and requirements of the federal
19 Water Pollution Control Act imposed by EPA or
20 designated permitting states is not a substitute for
21 and does not negate the requirement for NRC to weigh
22 all environmental effects of the proposed action,
23 including the degradation of any of water quality, and
24 to consider alternatives to the proposed action that
25 are available for reducing adverse effects."

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1 JUDGE KENNEDY: But as we sit today, we're
2 assessing FP&L's environmental report.

3 MS. CURRAN: Right.

4 JUDGE KENNEDY: And so this really speaks
5 to a longer term burden on the Agency and the staff.

6 MS. CURRAN: Yeah, you know, there is
7 always this question of what does the environmental
8 report have to have in it, that sometimes there is
9 something it doesn't have to address that is later
10 addressed by the staff.

11 From SACE's perspective, we know that we
12 have to raise all of our concerns as early as possible
13 in the proceeding. If you tell us we're too early,
14 we're much happier than if you tell us we're too late.

15 JUDGE HAWKENS: Understand. Is your
16 concern the lack of an independent analysis of these
17 consent decrees or the lack of an examination of
18 alternatives to the, what the methods that are being
19 used by the consent decree? Or both?

20 MS. CURRAN: Both. Both. Some assessment
21 of what is the likelihood that these measures are
22 going to be successful, because, after all, that's
23 what FP&L is relying on to say, you know, it's one of
24 the things they rely on to say that the impacts --

25 If FP&L succeeds in getting across their

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1 view that the impacts of the CCS are insignificant,
2 then very little will ever be required of FPL or ever
3 be justifiable in the way of an alternative for
4 mitigating the impact.

5 JUDGE HAWKENS: Don't you think the state
6 and local governments in concert with FPL though get
7 a hard look to, before they entered the consent
8 decrees?

9 I mean, the state and local governments
10 had a real vested interest in ensuring minimal impact
11 on the environment.

12 MS. CURRAN: One of the things that we
13 know from Calvert Cliffs is that the NRC can't just
14 rely on the judgment of some other agency. And you
15 have to make up your own mind, or the agency has to
16 make up its own mind, as to what are the issues and
17 what are the various measures that are being used to
18 address them are adequate.

19 That's the, NEPA is kind of like the trump
20 card that has to, it requires whatever agency that's
21 preparing an EIS to make its own judgment. And unless
22 there's some statutory provision, you simply can't
23 rely on someone else's judgment. You can --

24 JUDGE HAWKENS: No, I'm just wondering if
25 the reference to these consent decrees is adequate to

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1 trigger the hard look that --

2 MS. CURRAN: It doesn't substitute --

3 JUDGE HAWKENS: -- the staff would have to
4 take.

5 MS. CURRAN: It doesn't substitute from
6 the hard look.

7 JUDGE HAWKENS: No, it does not. But
8 until the Staff is given the opportunity to give it a
9 hard look, we can't --

10 MS. CURRAN: Well, it does beg the
11 question as to whether, if you look at the general
12 language in Section 51.53(c)(ii), which is what we say
13 applies here --

14 JUDGE HAWKENS: Okay.

15 MS. CURRAN: -- does it encompass this.
16 And we should say, yes, it does. Because the language
17 is general.

18 So, there is -- and if the NRC, there has
19 been a lot of talk here about efficiency, if you want
20 to make this process efficient, you have the Applicant
21 do as thorough as possible, an environment analysis.
22 Because that will make the ultimate preparation of the
23 EIS much more efficient than to just, you know, the
24 NRC talks a lot about, we not going to waste time
25 waiting around, we're going to have the Applicant do

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1 the initial assessment of environmental impacts.

2 So it seems the way the NRC looks at this
3 whole thing is, let's make sure we get these issues
4 dealt with as quickly as possible. And the first
5 instance would be the environmental report.

6 JUDGE HAWKENS: Okay. Anything else
7 before we turn it over to FPL?

8 MS. CURRAN: No. Thanks.

9 JUDGE HAWKENS: Thank you. Well, the time
10 you have not used on your principle presentation will
11 add to your rebuttal time.

12 MS. CURRAN: Can you tell me how much that
13 is?

14 PARTICIPANT: Eleven minutes, 30 seconds.

15 MS. CURRAN: What did you say?

16 MR. MCMANUS: Eleven minutes, 30 seconds.

17 MS. CURRAN: Oh, 11 minutes. Okay.

18 JUDGE HAWKENS: That would be in addition
19 to the 25 minutes that you reserved. FPL.

20 MR. O'NEILL: Thank you, Your Honor. I'm
21 ready. This is Mr. O'Neill again. I think again, my
22 understanding is we're splitting our time with the
23 Staff.

24 JUDGE HAWKENS: Good. Thank you.

25 MR. O'NEILL: So, what is that, roughly 30

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1 minutes. Your Honor, I guess I'd like to maybe first
2 respond to some of the points Ms. Curran made, the
3 four overarching issues that she identified.

4 And I think her remarks kind of play into,
5 fairly reinforce what I had intended to emphasize at
6 the outset is that, I think fundamentally SACE is
7 seeking an opportunity to litigate or re-litigate
8 issues that are already being looked at by the federal
9 district court in the Clean Water Act suit.

10 And I think this is evidence by the fact
11 that they're raising many of the same issues. I've
12 reviewed their petition and I've reviewed some of the
13 filings in that proceeding, including the statements
14 of fact, and there is striking parallels in terms of
15 them alleging that there is an unacceptable non-
16 radiological impacts on groundwater and surface water
17 and ecological resources.

18 And they, in fact, are relying on it, and
19 I believe on the same experts and expert reports. At
20 least for the most part. So, I think that shouldn't
21 be lost on the Board.

22 But my understanding too is that in that
23 proceeding, SACE's position is, is that the Clean
24 Water Act covers not only discharges under the NPDES
25 permit to the cooling canal system, but it also, in

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1 their view, encompasses water that may be percolating
2 or infiltrating from the CCS into groundwater.

3 And I think that's FPL's point of
4 fundamental disagreement. We don't view the Clean
5 Water Act as encompassing, that alleged groundwater
6 contamination.

7 And Ms. Curran, I think, tries to draw the
8 distinction really, in my mind is without a
9 difference. She points to the fact that, okay, well,
10 maybe the NPDES portion of this falls under the Clean
11 Water Act or within the state EPA ability.

12 But because the groundwater piece, in your
13 view, is the subject to state regulation or regulation
14 by the county, that it's somehow litigable in this
15 proceeding. And that is not the case.

16 I think the Commission case level is
17 pretty clear that it's not within the NRC's purview to
18 second guess the actions, the regulations and the
19 enforcement actions of state and county regulators,
20 it's really no different in that sense.

21 To be sure, some of the case law we cited
22 for Indian Point and Oyster Creek was specific to the
23 Clean Water Act. NPDES permits issued under the Clean
24 Water Act as they relate to impingement and
25 entrainment of aquatic organisms, yes, that's

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1 different but I think the same principle applies that
2 it is not for the NRC to be kind of re-looking,
3 reexamining, second guessing the terminations of the
4 Florida Department of Environment Protection or the
5 Miami-Dade County.

6 JUDGE HAWKENS: Ms. Curran, as I
7 understood her said, there's a distinction between
8 having FPL and the NRC Staff second guessing the state
9 and municipalities versus having them comply with
10 their statutory requirement under NEPA to take a hard
11 look --

12 MR. O'NEILL: Yes.

13 JUDGE HAWKENS: -- and analyze the
14 potential effects. And the effectiveness of the
15 consent decrees that have been entered into.

16 MR. O'NEILL: I would agree that the NRC
17 undoubtedly has an independent obligation, under NEPA,
18 to examine the environment impacts of the projects, as
19 discussed really in Chapters 3 and 4 of the ER, as
20 supplemented by the Staff's independent review. So I
21 think it's certainly appropriate for them to look at
22 the current status under the CCS.

23 You know, what's in the water, what's in
24 the groundwater, what actions the state and county
25 regulators have acquired of FPL. But we do not think

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1 it is within the Staff's jurisdiction or purview to
2 recommend new mitigation measures or to really opine
3 on the efficacy or the appropriateness of the
4 mitigation ledgers that have been identified by the
5 state and the county.

6 And there's a lot of interaction between
7 FPL, in the state and local county regulators have
8 occurred, heavy expert involvement. You know,
9 groundwater modeling for instance, extensive
10 permitting processes. I think in one case, even in
11 administrative hearing.

12 So, we don't think it's appropriate for
13 the NRC to wade into that area and say, well, for
14 example, we don't think the use of the recovery well
15 system is the best alternative available under NEPA.

16 JUDGE ABREU: In the GEIS there's
17 discussion of impacts of contaminant discharges. And
18 in 4.6.1.2 it talks about, that these are considered
19 to be of small significance if water quality criteria,
20 for example, NPDES permits, are not violated.

21 From your standpoint, would you consider
22 water quality criteria to be what the base, let's say
23 state regulation says, or is it only what's in the
24 confides of the permit that you might have under some
25 consent agreement or other conditional situation,

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1 which criteria does that refer to?

2 MR. O'NEILL: Well, I think the permit
3 criteria would be controlling the day, they should be
4 based on the relevant state regulations and the, you
5 know, the mitigation ledgers that are being required
6 of FPL are ultimately aimed at ensuring that the
7 company does comply with the applicable water quality
8 criteria.

9 JUDGE ABREU: So the water quality
10 criterias would be what's in their base regulation, so
11 to speak?

12 MR. O'NEILL: Yes, that's my
13 understanding.

14 JUDGE ABREU: And then, so, you could be
15 violating those criteria and yet be allowed to proceed
16 under a permit by a consent agreement?

17 MR. O'NEILL: That's not my understanding
18 of how the consent decree or consent order work.

19 JUDGE ABREU: So --

20 MR. O'NEILL: I mean, I think. Well, let
21 me back up one step. My understanding is there has
22 only been one notice of violation that had been issued
23 several years ago, and that is what triggered the
24 consent agreement and the consent order.

25 And FPL is complying with those document

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1 requirements and those documents. And that they are
2 in operational compliance with the permits.

3 JUDGE ABREU: Right. So you could, I'm
4 trying to distinguish between water quality criteria
5 and permit compliance.

6 MR. O'NEILL: Yes.

7 JUDGE ABREU: Theoretically, one could
8 violate a criteria and then they would enter into a
9 consent agreement with the issuing organization.

10 MR. O'NEILL: Yes. I think that's
11 correct, yes.

12 JUDGE ABREU: And so --

13 MR. O'NEILL: Prior statement.

14 JUDGE ABREU: -- it could be true that a
15 licensee could be violating water quality criteria yet
16 not be violating the permits that are issued with
17 their various consent agreements, orders, et cetera?

18 MR. O'NEILL: Yes. In that circumstance
19 what they might, in that case would likely need some
20 type of waiver exception, right?

21 JUDGE ABREU: Which, yes, they can do it
22 but you might still be violating criteria.

23 MR. O'NEILL: Yes.

24 JUDGE ABREU: It could happen that way.

25 MR. O'NEILL: Yes.

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1 JUDGE ABREU: Okay.

2 MR. O'NEILL: But, I guess on that point,
3 I do want to emphasize, and I may be getting off on a
4 tangent, but there is no evidence that CCS is
5 contributing to any violations of water, surface water
6 quality standards in the Biscayne Bay. That is our
7 position in the Clean Water Act litigation --

8 JUDGE ABREU: Okay.

9 MR. O'NEILL: -- and we stand by that very
10 strongly.

11 In terms of the groundwater constituents,
12 the hyper-saline plume, at this point it has not
13 caused any impact on drinking water sources. I think
14 the nuke well field is more than four miles away from
15 the outer edge of the hyper-saline plume and there is
16 the Florida Keys Aqueduct Authority as a well field.
17 That's, I think, on the order of ten to 12 miles away.

18 And so there has been, I want to be clear
19 on that, that has not impacted these municipal
20 drinking water sources.

21 JUDGE ABREU: So, at this time, regardless
22 of what happened in the past with notices of violation
23 whatever, can you state that you're sure there are no
24 violations of water quality criteria, as opposed to
25 saying we're not violating our permits, can you state

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1 that we're sure we have no violations on water quality
2 criteria?

3 MR. BESSETTE: Your Honor, we're not quite
4 sure of what you mean by water quality criteria.
5 There's many criteria governing surface water
6 nutrients.

7 JUDGE ABREU: It's open. What I'm looking
8 at --

9 MR. BESSETTE: I think it's safe to say
10 there has been no violations, no evidence through
11 extensive testing and reporting of any surface water
12 quality standards.

13 JUDGE ABREU: Okay, so that's surface
14 water quality.

15 MR. BESSETTE: Right.

16 JUDGE ABREU: Okay. Because what I'm
17 looking at is the GEIS.

18 MR. BESSETTE: Right.

19 JUDGE ABREU: And the wording in it. And
20 it's worded specifically to say, impacts of
21 containment discharges are considered to be of small
22 significance if water quality criteria are not
23 violated.

24 So, that's the, so then we have to
25 determine, what do we mean by water quality criteria.

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1 MR. BESSETTE: Right. And with regard to
2 groundwater, with regard to tritium, any of the
3 ammonia, they are not violating any of those standards
4 --

5 JUDGE ABREU: Okay.

6 MR. BESSETTE: -- with regard --

7 JUDGE ABREU: And that's groundwater?

8 MR. BESSETTE: Groundwater.

9 JUDGE ABREU: So, this does not restrict
10 it to groundwater. The GEIS statement is not
11 restricted to that groundwater.

12 I'd have to go back and double check to
13 see if in the broader context of that section if it's
14 restricted to groundwater.

15 MR. BESSETTE: We do need to clarify with
16 one of our folks of whether, how the state is
17 classifying the saline plume.

18 JUDGE ABREU: Okay.

19 MR. BESSETTE: But with regard to other
20 constituents that they've raised, what SACE has
21 raised, we'll talk about a little on the consolidated
22 petitioners with regards to tritium, ammonia,
23 nutrients. We believe there's no violation of any
24 quality standards.

25 JUDGE ABREU: Okay. And since we're on

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1 it, how do you, as the Applicant, look at it when we
2 have, the Table B1, is a summary table but the GEIS is
3 the document it's based on, but sometimes in the GEIS
4 there is broader meaning than is in the table, like in
5 this case, the fact that the GEIS says there's this,
6 if water quality criteria are not violated, but that's
7 not in, that's not a footnote or anything in Table B1.

8 When you're doing your CAT 1
9 determination, which do you look to?

10 How did you decide which way to apply the
11 table versus the GEIS?

12 MR. O'NEILL: My understanding is that we
13 look at the actual GEIS. We consider what the
14 analysis is in the GEIS and what discussion is
15 contained there, what it looked at specifically, what
16 parameters and base our finding on that. Because we
17 do have an obligation to ensure that the Category 1
18 findings there are still bounding from our
19 perspective, still apply.

20 JUDGE ABREU: So, if I understand you,
21 basically you're looking to the big document and the
22 table is just a quick reference summary?

23 MR. O'NEILL: Yes.

24 JUDGE ABREU: Okay.

25 MR. O'NEILL: I think I'll move on and

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1 talk a little bit about the croc, okay, sorry. Go
2 ahead.

3 MR. HAMRICK: Your Honor? Your Honor,
4 this is Steven Hamrick for FPL. I just wanted to
5 clarify the question earlier with respect to water
6 quality standard violations.

7 With respect to surface water there have
8 been no violations. There has been ammonia that has
9 been identified in areas close to the plant but
10 there's not been tie back to the operations at Turkey
11 Point.

12 So that was not a water quality violation,
13 that was caused by the operation of the cooling canal
14 system.

15 With respect to groundwater, there was a
16 notice of violation that was issued a couple of years
17 by both the state and by the county. And that did not
18 involve a numeric criteria that was violated, it was
19 more of a narrative standard.

20 Something like, you're not supposed to
21 impair the regional beneficial use and so it was the,
22 the notice of violation was based on violating that
23 narrative standard not a numeric criteria.

24 MR. O'NEILL: Any further questions on
25 that subject?

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1 I'll proceed. I did want to briefly
2 address some of Ms. Curran's remarks regarding the
3 crocodile impacts.

4 I think as set forth in the environmental
5 report, FPL has identified data for nests, identified
6 nests and hatchlings going back to 2000, and I think
7 that kind of coincides, or I know it coincides with
8 the time frame that the staff looked at in the Unit 6
9 and 7. The Turkey Point Unit 6 and 7 COL EIS.

10 And I think we view that as an appropriate
11 data set for purposes of looking at the impacts on
12 crocs. And I think it's actually quite conservative
13 in the sense that we didn't really even see data on
14 our, in terms of number of successful nests and
15 hatchlings on par with today's data until the early
16 '90s probably.

17 But in terms of the crocodile impacts, the
18 ER does fully acknowledge that there was a drop off in
19 certain numbers from the, really from the kind of the
20 2015 to 2017 standpoint. And so that impact was fully
21 acknowledged.

22 And I think it's important for the Board
23 to understand that it was in fact due to a combination
24 of a number of circumstances. I think one was related
25 to the implementation of the uprates, which required

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1 some downtime in both units, which in turn impacted
2 the flow, the discharge into the canal system and the
3 amount of circulation that you had.

4 As well as inordinately dry weather
5 conditions over that span. And certainly some amount
6 of human activity associated with the implementation
7 of the recovery well system and other mitigation type
8 measures.

9 But I think as we pointed out, by
10 referencing a news article, the most recent data are
11 very encouraging. This past year we saw basically a
12 double, a doubling of the number of successful nests
13 from 2017, from roughly eight to, I think 15 or
14 perhaps 14. And the number of hatchlings have
15 increased from 46 to 225.

16 And those numbers are really kind of on
17 par with what was seen in the early 2000s and kind of
18 running up to the pre-uprate time. And from talking
19 to the environmental folks at FPL, I think it's, you
20 know, reflecting in the fact that the mitigation
21 measures they are putting in place are really proving
22 to be effective.

23 They have installed a number of freshening
24 wells that extract low salinity water on the order of
25 two to three practical salinity units, 2 PSU, from the

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1 Upper Floridan Aquifer. It's under artesian
2 conditions.

3 And they've already seen, in the past year
4 I think, reductions from kind of your average annual
5 PSU from about 61 or two PSU down to 51. And I think
6 currently we're looking at about 48 PSU. You know,
7 the ultimate goal is 34. But we're seeing very
8 significant benefits there.

9 In terms of the recovery well system, that
10 is now fully operational as of May. And of course,
11 that's aimed at extracting the hyper-saline plume, or
12 groundwater, from the shallower Biscayne Aquifer,
13 which is about 90 feet deep roughly.

14 And at this point, they've just conducted
15 the initial baseline surveys using electromagnetic
16 technics where they look at the conductivity of the
17 plume and it's supplemented by groundwater sampling.

18 And they've already extracted over four
19 and a half billion gallons of water using that system.
20 And that is being injected into the bolder formulation
21 several thousand feet below the site.

22 And that's all been appropriately reviewed
23 and permitted by the state and local agencies. So,
24 those things are taking effect.

25 With regard to crocs, they've also been

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1 required to implement a nutrient management plan,
2 which encompasses the freshening activities but also
3 sediment removal, best management practices for the
4 berms, trying to remove debris, shrubs and things of
5 that sort to make the berms more attractive for
6 nesting sites for the crocodiles. And it's proving to
7 work very, very effectively so far.

8 Ms. Curran also talked about the tritium
9 contamination, and I think a couple of points were in
10 emphasis there. One is, they don't disagree that
11 tritium levels are below the applicable limits of
12 20,000 picocurie per liter. I think that's a Safe
13 Drinking Water Act, if I recall.

14 And FPL ensures even at the discharge, or
15 the outflow point, that they're well below that limit,
16 so there is really no potential for tritium levels to
17 exceed in the applicable limits. It's enforced by EPA
18 and the NRC.

19 Ms. Curran mentioned that tritium may be
20 significant because it can serve as a tracer. And
21 that's true to the extent that if you have tritium
22 present in groundwater or even surface waters above
23 background levels that may be linked to water that
24 originated at the site.

25 But tritium is not a tracer for

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1 phosphorous or nitrogen or other nutrients or non-
2 radiological constituents. So, the fact that you may
3 see some tritium in a given location does not
4 necessarily mean that any concurrently or commonly
5 occurring phosphorous or nitrogen or chlorophyll is
6 necessarily linked to Turkey Point. I think that's an
7 important distinction to understand.

8 And the fourth point Ms. Curran raised,
9 related to incorporation by reference. And I think on
10 that issue I want to emphasize that it certainly was
11 not FPL's intent, or our intent as counsel, to
12 downplay the importance of looking at the CCS, the
13 cooling canal system impacts.

14 I think as Judge Kennedy recognized, those
15 are discussed in considerable detail in Chapters 3 and
16 4 of the ER. And even if you do look at the Unit 6
17 and 7 COL EIS, there is discussion in there of the
18 cooling canal system and related impacts.

19 But, I think fundamentally, FPL is relying
20 on the Unit 6 and 7 EIS for its analysis of past,
21 present and reasonably foreseeable future actions
22 occurring in the site vicinity or the region. Because
23 that Table 7-1 did take a very thorough look at that
24 and listed all types of actions for other facilities
25 that could have impacts that could act commutatively

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1 with Turkey Point, subsequent license removal.

2 So, again, I think that the takeaway there
3 is of, certainly was no intention to detract from the
4 review of the impacts of the CCS.

5 As far as the cooling tower system goes,
6 I think we strongly disagree. Both in the context of
7 this proceeding and the Clean Water Act litigation
8 that that really is a cost-effective alternative, or
9 even a reasonable alternative under the circumstances.

10 Because, again, you've got impacts that
11 have been fully identified by FPL and the state and
12 county regulators and related mitigation ledgers that
13 are required to be implemented by FPL, and are being
14 implemented quite aggressively, and some thoughts too.

15 In our view there is, installing a whole
16 new cooling system is just not necessary under the
17 circumstances. It's just not practicable.

18 Especially when you look at the fact that
19 the cooling canal system has been operating since the
20 '70s. And as Ms. Curran recognized, the AEC, the
21 Atomic Energy Commission, looked at the alternative of
22 cooling towers and decided it wasn't really the
23 preferred alternative, that the CCS was an appropriate
24 system.

25 It's functioning well. The thermal

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1 efficiency, I understand, is now on the order of 85
2 percent.

3 They've done berm perimeter inspections,
4 and again, they're implementing all these various
5 litigation ledgers. So we view it as an appropriate
6 system.

7 And to the extent that it has had
8 environmental impacts, we view the litigation measures
9 required by the FDEP and the Miami-Dade DERM as being
10 the reasonable measures. And they were approved by
11 those regulators.

12 We shouldn't, in this proceeding, be
13 questioning their informed judgement. I think the
14 Commission, again, and other boards, I think the we be
15 more for instance. So, it's not our position to
16 second guess the measures that are being required by
17 these other regulators.

18 Yes, and another point there is that, no
19 state or county regulator has actually recommended the
20 implementation of cooling towers as an alternative.
21 And again, that's in contrast to the Indian Point and
22 Oyster Creek license renewal proceedings where the
23 state regulators had identified that as kind of a best
24 available technical, their preferred alternative. And
25 that's not something we have here.

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1 I think that's all I want to cover for
2 now, Your Honor.

3 JUDGE KENNEDY: Do you have any sense what
4 happens to the crocodile habitat if you switched from
5 the CCS to the mechanical draft cooling towers? Get
6 better, worse? I'm just wondering.

7 MR. O'NEILL: Well, I think, the first
8 thing I would say is obviously installing cooling
9 towers is a very substantial undertaking, a major
10 construction project that would actually require
11 amendments to the license as it relates to the
12 ultimate heat sink, as well as low level radioactive
13 waste liquid discharges.

14 Very, very significant undertaking that
15 would undoubtedly have impacts of its own. But in
16 terms of the impact on the CCS, right now the CCS is,
17 again, as I understand it, does depend on discharges
18 from Units 3 and 4 for the actual kind of circulation,
19 the movement of water.

20 And I think there may be discharge from
21 another unit at the site to, I don't know if it's blow
22 down or waste discharge, but that goes to the CCS.
23 But ultimately, that would lead to more stagnate
24 conditions. That's how I understand it.

25 JUDGE KENNEDY: Yes. I guess I was

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1 thinking, it may put you in a strange position
2 because, before you built CCS there was no habitat
3 there.

4 MR. O'NEILL: Well --

5 JUDGE KENNEDY: You operate it, you have
6 a habitat, you turn it off, I don't know what you end
7 up with.

8 MR. O'NEILL: Yes. I mean, you would,
9 certainly FPL would be required to continue to comply
10 with the consent order and the consent agreement and
11 that, but it does raise very significant questions
12 about, I guess the continued viability of the CCS's
13 habitat for the crocodile.

14 I think Mr. Bessette wants to --

15 MR. BESSETTE: Yes, Your Honor. We
16 actually had some discussions on that yesterday. And
17 it would be very complex issue of what would happen to
18 the CCS if you built cooling towers, but the consensus
19 is it could essentially become a large stagnant pond.

20 And as you can imagine, with an increased
21 salinity, lack of nutrients, it doesn't take much
22 imagination to think it would not become a hospitable
23 location for the crocodiles.

24 MR. O'NEILL: I mean, the CCS environment
25 is obviously sensitive to a number of conditions,

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1 including the flow, because that's going to affect
2 tritium levels and how opaque the water is, as well as
3 the salinity itself.

4 And that's why these litigation ledgers
5 that have been put into place are starting to become,
6 or are proving to be effective because they have seen
7 a sizeable reduction that's manifested itself in with
8 the larger crocodile nesting and hatchling numbers.

9 Another thing I didn't mention is, FPL is
10 actually trying to repatriate or reintroduce seagrass.
11 And they've done it on a field scale level. I think
12 about three acres of seagrass that they've put in to
13 see how well it's going to take under the new
14 conditions. And I think the indications are fairly
15 good so far.

16 Yes, so there's quite a few steps are
17 being taken there in terms of trying to improve the
18 environment for the crocodiles. And that includes us
19 being sensitive as well to their pre-mating, mating
20 habits, nesting.

21 Where they locate the nest and the
22 hatching period. So they obviously try to minimize
23 major human activity at the site.

24 JUDGE HAWKENS: Thank you. Anything
25 further?

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1 MR. O'NEILL: No, Your Honor.

2 JUDGE HAWKENS: If not, we'll hear from
3 the NRC Staff.

4 MS. HOUSEMAN: Thank you, Your Honors. My
5 name is Esther Houseman for the NRC Staff. I will be
6 addressing SACE's Contention 1 and my colleague, Mr.
7 Turk, will be addressing SACE's Contention 2.

8 So, as you may raise questions that
9 pertain to SACE's Contention 2, I'll refer to my
10 colleague Mr. Turk.

11 Your Honors, Contention 1 appears to be
12 SACE's effort to inject its Clean Water Act litigation
13 into the subsequent license renewal proceeding. What
14 SACE has done is essentially repackage its Clean Water
15 Act claims against FPL into Contention 1 with what the
16 NRC Staff use as little regard for the Commission's
17 rules of practice and procedure and Commission case
18 law.

19 SACE raises several issues in Contention
20 1. The impact on which the NRC has addressed in the
21 license renewal GEIS and codified in Table B1.

22 As stated in the Staff's answer, six of
23 these issues are Category 1 issues, four of these
24 issues are Category 2 issues. And I'll start with the
25 Category 1 issues because there are two significant

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1 barriers that preclude admission of these portions of
2 Contention 1.

3 The first is, as my colleague Mr. Turk
4 noted earlier, SACE's failure to request, much less
5 receive, a waiver of the Commissions roles concerning
6 these Category 1 issues. SACE would need a waiver of
7 51.53(c)(iii), 51.71(d), 51.95(c) and Table B1 itself,
8 to litigate these issues.

9 And that is true even if SACE's
10 contentions pertain to allegedly new and significant
11 information.

12 The other significant barrier to admission
13 of Contention 1, concerning Category 1 issues and
14 Category 2 issues is that, the NRC presumes two
15 things. One is, administrative regulatory with
16 respect to state and local governments enforcement of
17 its programs and the other is the presumption that
18 licenses will comply with requirements in statutes,
19 regulations, licenses and their permits.

20 So, first I'll address the waiver issue.
21 SACE must apply for and receive a waiver under 10 CFR
22 2.335. SACE has neither requested nor received a
23 waiver.

24 JUDGE HAWKENS: You're talking about for
25 Category 1 issues now?

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1 MS. HOUSEMAN: The Category 1 issues, yes.

2 JUDGE HAWKENS: I, unless my colleagues
3 want a discussion of that, I think we understand the
4 waiver as it applies. You can move on.

5 MS. HOUSEMAN: Certainly, I'll move on.
6 So, I'll move on to the matter of administrative
7 regularity and compliance. And importantly, I'll
8 respond to SACES counsels discussion of its Clean
9 Water Act litigation and alleged violations of the
10 Clean Water Act.

11 For NEPA purposes, of course the NRC is
12 going to take a hard look at the impacts of operation
13 of the CCS, regardless of whether the discharge is via
14 groundwater and regardless of whether an alleged
15 discharge is violation of the Clean Water Act.

16 However, it is not for this board and for
17 the NRC to determine whether there is a Clean Water
18 Act violation. That matter is appropriately before
19 federal district court. And it is appropriate for the
20 federal district court to determine whether that is a
21 violation of the Clean Water Act.

22 The NRC looks to the several agencies in
23 Florida and in the county, that regulate surface water
24 and groundwater quality. And those are the Florida
25 Department of Environmental Protection, or FDEP,

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1 Miami-Dade County Department of Environment Resources
2 Management, or DERM as I'll refer to them, and the
3 South Florida Water Management District.

4 All of these agencies have regulatory
5 authority over the impact of operation, the CCS, on
6 surface water and groundwater.

7 And both FDEP and DERM have a consent
8 order and a consent agreement in place, prospectively.
9 And these enforcement orders direct FPL to take
10 certain actions to mitigate the impacts of the hyper-
11 saline plume.

12 Notable, the Commission itself in Turkey
13 Point CLI 16-18, I'll direct you to Note 35, Footnote
14 35, in that decision. The Commission noted that the
15 noticed of violation that DERM issued to FPL with
16 respect to the hyper-saline plume, is indicative of
17 the fact that FPL's compliance with these
18 environmental requirements is subject to ongoing
19 oversight by the appropriate authorities.

20 And in that same decision, the Commission
21 also noted that it would decline, it declines, excuse
22 me, to assume that FPL would not comply with the
23 applicable requirements imposed by DERM. The
24 Commission noted that --

25 And the Commission here was applying its

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1 presumption that licensees will comply with the terms
2 of their licenses, and also comply with the terms of
3 other licenses and permits issued by other agencies.

4 Notably, SACE raises several facts with
5 respect to compliance that are not in dispute here.
6 SACE's compliance argument rests on two assertions.

7 One is that FPL is in violation of the
8 Clean Water Act, with respect to its discharges from
9 the CCS via groundwater to surrounding surface water.
10 That matter is before the federal district court. And
11 that is the appropriate venue for litigating that
12 matter.

13 SACE also raises the fact that FPL was in
14 violation of its permit. None of the parties to this
15 proceeding dispute that fact.

16 However, what SACE does not allege that
17 FPL is currently not in compliance with the consent
18 order and with the consent agreement.

19 SACE has also provided no evidence to
20 rebut the presumption that FPL will comply with its
21 permit and it will comply with the terms of the
22 consent order and the consent argument in the future.

23 And I would also like to note that,
24 several of the mitigation measures that are required
25 under FTP's consent order and DERM's consent agreement

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1 would, if FDEP and DERM force those requirements, mean
2 that the hyper-saline plume is halted and it's
3 retracted within ten years of issuance of those
4 requirements. And that would occur years before the
5 commencement of the subsequent license renewal term.

6 JUDGE HAWKENS: Excuse me. When a consent
7 order, a consent agreement, establishes a timeline
8 like that, how hard to look, how hard an independent
9 analysis does the NRC Staff do with that consent
10 order? The analysis in the consent order.

11 MS. HOUSEMAN: Well, the NRC --

12 JUDGE HAWKENS: Or does it accept it at
13 face value? Does it defer to it?

14 MS. HOUSEMAN: Well, the NRC would presume
15 administrative irregularity with respect to FDEP and
16 DERMs ability to enforce the terms of those order, of
17 the order, and the consent agreement. And both the
18 consent agreement and the consent order, have built
19 into them certain reporting requirements and
20 requirements to revise mitigation plans if they prove
21 to be ineffective within certain periods of time.

22 So, absent rebuttal of the presumption
23 that FDEP and DERM will in fact enforce those
24 requirements, the NRC is to assume that they will be
25 effective.

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1 JUDGE HAWKENS: All right. So, you
2 presume compliance absent some evidence to the
3 contrary. So, let's assume that in the ER it contains
4 no evidence to the contrary, do you accept that at
5 face value or do you do an independent analysis to see
6 if there is any evidence to the contrary?

7 MS. HOUSEMAN: One moment, Your Honor.

8 JUDGE HAWKENS: Sure.

9 MS. HOUSEMAN: The NRC Staff would of
10 course take a hard look at the information that's
11 provided by the Applicant in its environment report,
12 and if any information was absent concerning
13 compliance matters, then the NRC Staff would request
14 that additional information.

15 JUDGE HAWKENS: That would be the extent
16 of your independent analysis, to see if there's
17 anything in the ER that would trigger a question or if
18 it's absent, it should be in there?

19 MS. HOUSEMAN: The NRC Staff would of
20 course look at any available information outside of
21 the environmental report itself and would not simply
22 take it at face value but would conduct an independent
23 analysis.

24 The NRC Staff, however, would not second
25 guess compliance if FDEP and DERM have issued, as they

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1 have here, consent order and a consent agreement that
2 imposes certain requirements and all of the
3 information available to the Staff in the case that
4 FPL is in fact in compliance with those requirements,
5 then the presumption of administrative regularity and
6 the presumption of compliance both hold true.

7 JUDGE HAWKENS: Right.

8 MS. HOUSEMAN: I'll move on to the
9 Category 2 issues that SACE raises in Contention 1.
10 SACE raises four Category 2 issues, yet it fails to
11 satisfy contention admissibility requirements with
12 respect to three of those issues.

13 The first is the matter of tritium and
14 groundwater. I won't discuss that particular issue at
15 length here. It's SACE's position that tritium is a
16 tracer that can be used to indicate the migration of
17 other pollutants.

18 But, with respect to the technical basis
19 for whether it is a tracer, I would have to defer to
20 the NRC Staff on that matter.

21 But importantly, with respect to the
22 impacts of tritium and groundwater, SACE of course
23 raised nearly a general concern that tritium and
24 groundwater may adversely affect the environment. And
25 that is merely a generalized grievance that certainly

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1 does not satisfy the NRC's contention admissibility
2 requirements.

3 Next, I'll turn to SACE's arguments
4 concerning cumulative impacts in Contention 1. It
5 appears that SACE is calling for FPL and the NRC Staff
6 to draft a comprehensive treatise on all actions and
7 environmental factors in the entire "massive South
8 Florida landscape, water scape of the Biscayne Bay and
9 the Biscayne aquifer," from the 1960's into infinity.

10 According to SACE, the CCS will have
11 indefinite impacts on the environment.

12 NEPA does not require the kind of tone
13 that SACE demands here. It requires, instead, in the
14 cumulative impacts analysis, an analysis of the
15 incremental impacts of continued operation of the
16 plant when added to past, present and reasonably
17 foreseeable future actions.

18 Secondly, the cumulative impacts issues
19 also fail with respect to rebutting the presumption of
20 administrative regularity and compliance. What SACE
21 has done here is they've essentially assumed that FPL
22 will fail to comply with the terms of FDEP's consent
23 order and DERM's consent agreement.

24 The NRC Staff itself makes no such
25 assumption. Rather, the NRC presumes compliance. And

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1 would like to point you to NUREG-1555. That's the NRC
2 Staff's environmental standard review plan.

3 It states on Page 4.12-3 that, where
4 contributions and ongoing actions within a region are
5 regulated and monitored for a permitted process, for
6 example, the NPDES permitting process, it may be
7 assumed that the cumulative impacts are managed as
8 long as these actions are in compliance with the
9 respective permits. And as I have noted earlier, and
10 as the Applicant has noted, in the NRCs Staff's view,
11 FPL is currently in compliance with its permits
12 coupled with the consent order and the consent
13 agreement.

14 As you are aware, the NRC Staff does not
15 oppose the admission of one portion of SACE's
16 contention. Pardon me, but before I move to that, I
17 do have one more Category 2 issue that I would like to
18 address very briefly, and that's the, SACE's
19 allegation that operation of the CCS will result in
20 surface water use complex.

21 SACE's portion, this portion of SACE's
22 contention rests on the assertion that FPL will use
23 water from the L 31 E Canal to freshen the CCS, but in
24 fact, in its environmental report, FPL said that it
25 did not plan to use water from the L 31 E Canal during

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1 the subsequent license renewal period to freshen the
2 CCS. And in fact, it is the NRC Staffs understanding
3 that the use of water from the L 31 E Canal actually
4 stopped sometimes around 2016.

5 So, the assertion that the L 31 E Canal is
6 going to be used to freshen the CCS and that that use
7 will result in service water use conflicts appears to
8 be peer speculation on SACEs part.

9 And I'll turn back now to SACEs concerns
10 about the impacts of the operation on the CCS on the
11 American crocodile. The NRC Staff does not oppose the
12 admission of this portion of SACE's Contention 1.

13 SACE appears to have raised a genuine
14 dispute with the environmental report on whether the
15 operation of the CCS is the cause, or significant
16 cause, of the decline in the seagrass meadow habitat
17 in the CCS. And also whether, in turn, operation of
18 the CCS has caused a corresponding decline in
19 crocodile nests and hatchlings.

20 And in the NRC Staff's view, SACE has
21 provided the expert, an expert opinion, to support
22 these assertions.

23 JUDGE HAWKENS: Both the decline of the
24 seagrass and the impact on the crocodile population?

25 MS. HOUSEMAN: Yes, but with respect to

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1 the decline in the seagrass habitat, the NRC Staff
2 does not contest the admission of that portion of the
3 contention as it effects the threatened American
4 crocodile specifically.

5 In summary, the NRC Staff opposes the
6 admission of Contention 1, with the exception of one
7 portion of the contention concerning the impacts on
8 the crocodile. The admission of the remainder of
9 SACE's Contention 1 is barred by, first, SACEs failure
10 to obtain a waiver with respect to the litigation of
11 Category 1 issues.

12 Also, even if SACE were not required to
13 obtain a waiver or SACE requested and did obtain a
14 waiver, they would still face the presumption of both
15 administrative regularity and compliance. And in the
16 NRC Staff's view, SACE has failed to rebut that
17 presumption.

18 SACE may continue to litigate its Clean
19 Water Act claims in federal district court. And SACE
20 may continue to litigate whether FPL is in fact in
21 violation of the Clean Water Act. But that litigation
22 is not appropriate, appropriately before this board
23 and before the NRC.

24 And I would like to also note that SACE is
25 not foreclosed from other opportunities to public

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1 participation. In this proceeding, SACE of course may
2 raise comments and issues. Including Category 1
3 issues and public comments on the NRC Staff's D sites.

4 If you don't have any further questions
5 concerning SACE's Contention 1, I will turn it over to
6 Mr. Turk.

7 JUDGE ABREU: A couple things to start.
8 Do you concur with the Applicant's description of
9 water quality criteria as it relates to permits, that
10 those are different though related things and that you
11 can violate criteria and yet not violate a permit?

12 That situation could occur, whether it's
13 because it's here as a different issue.

14 MS. HOUSEMAN: It's the NRC Staff's
15 position that it's within FDEP and DERMS permitting
16 authority to make the determination whether those
17 criteria are violated. And currently, with the
18 consent order and the consent agreement in place, it's
19 the NRC Staff's view that they're not in violation.

20 JUDGE ABREU: So, you're equating the two
21 in a sense that if you're -- let's say you could be
22 issued a notice of violation and then come into a
23 consent agreement and be within that permit with a
24 consent agreement bounds, even if there were a notice
25 of violation. From what I just heard you say, it

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1 sounds like that would then negate the violation in a
2 sense.

3 MS. HOUSEMAN: Well, our position is that
4 FDEP and DERM could issue a waiver or could enter,
5 yes, into those agreements. And that would bring FPL
6 into compliance pursuant to the terms of those
7 particular agreements or pursuant to the waiver.

8 And so, for NEPA purposes and the NRC
9 Staff's analysis, the NRC Staff would view compliance
10 with a waiver or compliance with a consent order,
11 compliance with a consent agreement as compliance.

12 JUDGE ABREU: I question because, if you
13 look at the GEIS statement that I previously
14 indicated, it talks about that Category 1 criteria
15 hinges on that water quality are not violated. Well,
16 under your definition then, if I violate something, I
17 have to violate it enough for them to cancel my
18 permit, for it to matter. Which means I get shutdown.

19 Which would mean that condition kind of
20 doesn't mean anything. I mean, if they're saying
21 water quality criteria are not violated, that's a
22 little different phrasing then saying that you're in
23 compliance with all your permits. But are you saying
24 that's a distinction without a difference?

25 MS. HOUSEMAN: We're not saying that

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1 that's a distinction without a difference. I would
2 like to note though that pursuant to the terms of the
3 consent order and the terms of the consent agreement,
4 the mitigation measures in place, if complied with,
5 would mean the FPL would be in compliance, not just
6 with the terms of that consent order and the consent
7 agreement and the NEPA's permit, but also water
8 quality criteria by the commencement of the subsequent
9 license renewal period. Because they are to retract
10 the hyper-saline plume within ten years.

11 JUDGE ABREU: Well, I'm not talking
12 specifically about this situation, I'm in a broader
13 context. Let's say I have a chemical and there is
14 criteria published in state regulation that says it
15 won't exceed X and I have X plus something and that's
16 bad, that would be violating the criteria, but they
17 allow me to continue to operate while I fix it.

18 So, you're saying then that situation
19 would not apply to what the GEIS is talking about, is
20 that, because the GEIS talks about the impacts of
21 contaminant discharges are small, considered small, if
22 water quality criteria are not violated.

23 You get to use the magic Category 1,
24 assuming 51.53(c)(iii) is in play, you get to use the
25 magic Category 1 designation and you kind of don't

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1 have to deal with things as long as you are meeting
2 water quality criteria.

3 And what I'm hearing you say is, well, if
4 your permits are clean, if they're letting you
5 operate, then you're okay. And that's, that I
6 couldn't be violating a criteria even though they say
7 I've violated it but they've come up with a plan.

8 And I'm trying to understand what the
9 wording in the GEIS says versus how the Staff is
10 interpreting it.

11 MS. HOUSEMAN: And I should note too, in
12 that particular section that you're quoting, it does
13 state that water quality criteria includes, for
14 example, the NEPA permit itself.

15 JUDGE ABREU: It says, for example, that
16 permit. But it doesn't state, it could state it the
17 other way, if that's what it meant. I'm trying to
18 tease out what's the meaning of that sentence. And it
19 sounds like you're saying permits are good enough.

20 JUDGE HAWKENS: Water quality criteria is
21 a flexible term and the state or locality can define
22 it and it could actually go up in value.

23 MR. TURK: May we have a moment, Your
24 Honor?

25 JUDGE HAWKENS: Sure.

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1 MS. HOUSEMAN: Thank you for moment, Your
2 Honors. As I've noted, right now FPL is operating
3 under certain mitigation measures that are required of
4 it.

5 And perhaps if you were to look at water
6 quality criteria, which I should note is, I do not see
7 as a defined term here in the GEIS, but if water
8 quality criteria is defined as only particular
9 regulatory criteria, then in a very strict sense,
10 perhaps FPL, hypothetically, may not be strictly in
11 compliance with that particular regulatory criteria.

12 But looking at the matter holistically,
13 taking into consideration not just those criteria but
14 the NPDES permit, the consent order and the consent
15 agreement, which have been issued by competent state
16 and county regulatory authorities, FPL is arguably in
17 compliance with water quality criteria. And that is
18 our reading of the Commission's note in Turkey Point
19 CLI 16-18, that in any event, FPL, if it's in
20 compliance with the applicable requirements in
21 response to a notice of violation, then the Commission
22 decline to assume otherwise.

23 JUDGE ABREU: What I am trying to look at
24 is parsing this out because a GEIS is looking at
25 environmental impact, okay, and it could be that what

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1 they mean is, hey, even if you are in compliance with
2 permits if you've violated some criteria that has been
3 established in some State's rule we would want to know
4 about that and you wouldn't get to use the Category I
5 exclusion and you would need to discuss further
6 because they are concerned about the environmental
7 impact of that exceedance of a criteria.

8 Because, one, the flip side would be, in
9 your view is, hey, if you are in compliance it's all
10 good, but then why would I need this conditional on
11 this GEIS criteria because if I am not in compliance
12 they are shutting me down, I am not operating, why am
13 I dealing with environmental impacts now.

14 I mean you're not going to be renewing a
15 license to do nothing if you have been violated and
16 they have stopped you from functioning. So it seems
17 like there could be a difference between criteria and
18 compliance with permits plus or minus some kinds of
19 consent agreements and what I am hearing you say is,
20 nope, we're going to look at them as the same.

21 MS. HOUSEMAN: Well, to clarify what I am
22 getting at is that the compliance with water quality
23 criteria is not an isolated view of strictly
24 particular regulatory criteria, but it's a view of the
25 entirety of the requirements imposed by the competent

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1 agencies on FPL and is FPL in compliance with those
2 requirements.

3 And this particular statement in the GEIS
4 appears to build into it the assumption that looking
5 forward to that license renewal term if we presume
6 administrative regularity, if we presume compliance
7 with those administrative requirements, then the
8 impacts will be small and --

9 JUDGE ABREU: Right. One of the things
10 that could be saying is that -- One of the things they
11 don't make clear is when you say you've got your
12 permit is it a clean permit or is it one with special
13 allowances for you?

14 Those are two different situations that
15 this doesn't make clear.

16 MS. HOUSEMAN: And at this time I cannot
17 provide any further clarification than what is stated
18 in the GEIS itself.

19 JUDGE ABREU: Okay. So it's a bit up in
20 the air on some of these nuances. The other question
21 was the applicant when we talked about the GEIS in its
22 broad sense versus the Table B.1 when there is a
23 difference between the two, for example, the GEIS has
24 more, like a criteria like this that is not footnoted,
25 which criteria applies as the staff is doing their

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1 EIS, is it the GEIS criteria or is it Table B.1 where
2 there is a difference?

3 MS. HOUSEMAN: Could you --

4 JUDGE ABREU: There are things where the
5 GEIS has criteria that are not, and just for example
6 this exact section, it says you get small if water
7 quality criteria are not violated.

8 That statement is not in Table B.1. There
9 is no conditional on the Table B.1 criteria. It just
10 says you get Category 1. Which do you -- Which
11 applies to the staff analysis.

12 MS. HOUSEMAN: Well, of course, both apply
13 to the staff's analysis in terms of the staff's work
14 to develop a D size simulator and F size (phonetic).
15 With respect to the need for a waiver, of course, the
16 need for a waiver is from Table B.1 itself but the
17 GEIS elaborates on those impacts as they are codified
18 in Table B.1.

19 Table B.1 is, of course, a summary of
20 those impacts. But in taking a hard look under NEPA,
21 the NRC staff is going to look at the GEIS as a whole
22 and in development of its F size (phonetic).

23 JUDGE ABREU: Okay, let me -- So let's say
24 Table B.1 does not have a conditional on making a
25 Category I determination. A challenger brings up a

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1 challenge dealing with the condition that is in the
2 GEIS.

3 You get Category I unless "x." Table B.1
4 doesn't mention "x." A petitioner says, ah, but there
5 is a problem with "x." You used Cat I even though you
6 have not met condition "x." Is that a valid challenge
7 without a waiver?

8 MS. HOUSEMAN: It's not a valid challenge
9 without a waiver because the petitioner would still be
10 challenging the Category I determination itself.

11 JUDGE ABREU: But the Category I
12 determination says you get the small significance if
13 "x," if the GEIS were to say that. So the GEIS says
14 you only get Cat I if "x" and if the challenge is not
15 "x" why would you get to use Category I?

16 Why would you need a waiver? Because you
17 are not really challenging the Category I finding, you
18 are actually going with what's in Category I. The
19 GEIS says it's Cat I if "x." Does that make sense
20 what I am saying?

21 MS. HOUSEMAN: It does make sense and
22 Table B.1 itself in the introductory paragraph states
23 that the GEIS is codified here, those impacts are
24 codified here.

25 JUDGE ABREU: It's a summary?

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1 MS. HOUSEMAN: So a challenge to the GEIS
2 is a challenge to the rule with respect to those
3 Category I issues even if the challenge is to a
4 particular nuance or explanation in the GEIS
5 underlining those Category I determinations in Table
6 B.1.

7 And that is particularly important with
8 respect to, as I noted earlier, allegedly new and
9 significant information. But to --

10 JUDGE HAWKENS: Can I interrupt for a
11 second there? And I am not clear on this, the entire
12 GEIS is, in fact, deemed codified?

13 MS. HOUSEMAN: It's Category I impact
14 determinations --

15 JUDGE HAWKENS: Right.

16 MS. HOUSEMAN: -- which are a summary of
17 that entire analysis that's in the GEIS itself.

18 JUDGE HAWKENS: Right. So all discussion
19 in the GEIS is considered, are considered regulations?

20 MS. HOUSEMAN: The discussion of Category
21 I issues. So that analysis of here is the impact on
22 this Category I issue is not challengeable in this
23 proceeding without a waiver.

24 JUDGE HAWKENS: Okay.

25 MS. HOUSEMAN: And that's particularly

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1 important with respect to allegedly new and
2 significant information because, of course, as time
3 goes on a petitioner could come into a proceeding and
4 say, oh, well this particular discussion in the GEIS
5 doesn't address this particular proceeding.

6 But the Commission has stated in Limerick,
7 it is cited Vermont Yankee, Pilgrim, and in other case
8 law that a waiver is still required even with respect
9 to allegedly new and significant information that
10 calls into question the analysis that is contained in
11 this GEIS but isn't itself verbatim codified into Part
12 51, Table B.1.

13 JUDGE ABREU: I want to come back to that
14 but I want to finish up the other discussion first
15 because I think that -- because we're getting the new
16 and significant piece which is another -- So let me
17 jump back.

18 So if the GEIS says you get small if "x"
19 but your ER never mentions "x," okay, but the criteria
20 for a Category I says if "x" is true then you can have
21 Category I.

22 And if a challenger says you never
23 mentioned "x" or your discussion -- You didn't -- I
24 don't believe -- Well maybe they say, maybe the ER
25 says "x" is true and a challenger says "x" is not

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1 true.

2 So you are not challenging how the GEIS
3 determined that something is Category I, you are
4 challenging the fact that they did not fulfill all the
5 criteria when there is a criteria.

6 Not every item that says this is Cat I is
7 unconditional. You are saying you would have to have
8 a waiver but you are not challenging the Category I
9 determination in the GEIS you're just saying they
10 didn't fill the criteria for Category I.

11 Does that make sense that there is a
12 difference between those two?

13 MS. HOUSEMAN: Let me take one moment,
14 please.

15 JUDGE ABREU: Sure. I'll turn off your
16 mic.

17 MS. HOUSEMAN: Your Honor, a waiver would
18 still be required in that case and a petitioner would
19 still need to argue that those particular facts
20 present special circumstances with respect to a
21 particular site that call for that particular Category
22 I issue that is codified in the rule to be waived for
23 this proceeding.

24 JUDGE ABREU: So in essence you are saying
25 that what's in the summary table is kind of what rules

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1 when it comes to when a waiver is required even though
2 the GEIS might have a broader criteria?

3 MS. HOUSEMAN: Regardless of whether the
4 particular analysis and conclusion appears in Table
5 B.1 in the summary of the Category I issue or it
6 appears in the GEIS itself in the longer extended
7 analysis of that Category I issue a waiver is still
8 required.

9 And if that weren't the case then
10 petitioners could come into any site-specific license
11 renewal proceeding and challenge all of the detailed
12 discussion in various sections of the GEIS and that's
13 --

14 JUDGE ABREU: Well, I'm not talking about
15 all the discussion, I'm just talking about this was a
16 very specific example of, you know, the -- Where it
17 says "the impacts are small," that's the determination
18 in the GEIS, "if," and there is the "if" part, and so
19 what I am hearing you say is that even if that "if"
20 part criteria were not met by an applicant that could
21 not be challenged without a waiver?

22 MS. HOUSEMAN: That is correct. That's
23 our position.

24 JUDGE ABREU: Okay.

25 MR. TURK: Your Honor? Oh, I have to push

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1 my button. I don't know if you are ready to turn to
2 Contention 2.

3 JUDGE ABREU: Well, we're just talking
4 about whether, the issue of new and significant you
5 brought up and just to clarify some of those points.

6 MR. TURK: If I may add a thought to the
7 questions that you had a moment ago. Table B.1 says
8 here is the finding, here is the generic determination
9 based upon the GEIS.

10 If a petitioner wanted not to have that
11 determination applied in a particular proceeding, for
12 instance because a permit is not being complied with
13 and, therefore, the underlying premise of the GEIS
14 doesn't apply then they would need to file a petition
15 for waiver of the Table B.1 conclusion and their
16 grounds can be the underlying rationale for that
17 conclusion does not apply, we have special
18 circumstances and, therefore, waive the rule, waive
19 Table B.1 in this proceeding on that issue.

20 JUDGE ABREU: Okay. So what you are
21 saying is Table B.1 is the bar you have to get passed?

22 MR. TURK: Yes.

23 JUDGE ABREU: And you have to file a
24 waiver to do that?

25 MR. TURK: Yes.

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1 JUDGE ABREU: As opposed to saying the
2 GEIS rules when it has a broader statement than the
3 B.1 summary has?

4 MR. TURK: I don't see a distinction
5 because the GEIS is the underlying basis for the rule.
6 Table B.1 has a footnote that says this rule codifies
7 the GEIS.

8 JUDGE ABREU: Right, it's a summary. It
9 says it's a summary.

10 MR. TURK: A summary.

11 JUDGE ABREU: Mm-hmm.

12 MR. TURK: But what is being waived is the
13 precise requirement in Table B.1.

14 JUDGE ABREU: So that clarifies --

15 MR. TURK: That is my understanding.

16 JUDGE ABREU: That clarifies that the
17 staff's view is Table 1 is what decides what has to
18 be, where a waiver is needed as opposed to the GEIS
19 instead of Table B.1.

20 MR. TURK: Yes, with the understanding
21 that the rules are laid out in Table B.1. There may
22 be wording in the GEIS that a petitioner may feel does
23 not apply, but Table B.1 is what is binding.

24 JUDGE ABREU: And that's what the whole
25 discussion was to try and clarify because the

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1 applicant has their view, staff has their view, we
2 just wanted to see where people are coming from in
3 this because this --

4 MR. TURK: I've come to a point where I am
5 giving you my view, Your Honor, and I hope that it is
6 consistent with what the staff behind me would agree
7 with.

8 JUDGE ABREU: Fair enough. So regarding
9 the new and significant, since you brought it up, one
10 of the questions is what is significant?

11 MS. HOUSEMAN: Well of course the --

12 JUDGE ABREU: Well in --

13 MS. HOUSEMAN: Go ahead.

14 JUDGE ABREU: In Reg Guide 4.2 there is
15 criteria laid out for what is new and significant, and
16 just as an informal summary it's, well, things that we
17 didn't think about when we did the GEIS seems to be
18 the gist of it.

19 We would want to know about stuff that we
20 didn't think about before. The applicant has taken
21 that and the ER has taken that criteria and added a
22 little bit extra in that they went on to say, well, we
23 have considered, I'd have to go find the quote, but
24 basically said for something to be significant it
25 needs to get to the moderate to large level, but if

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1 it's small we're not -- and that's how they decided
2 that there is no new and significant information that
3 needed to be declared in the ER.

4 Does staff agree that their added
5 interpretation that it needs to get to that moderate
6 to large level to be considered significant for new
7 and significant, is that how the staff sees it because
8 that is an added criteria that wasn't in the reg
9 guide?

10 MS. HOUSEMAN: The standard for new and
11 significant information is that it paints a seriously
12 different picture of the environment as compared to
13 what was previously understood and if the new
14 information does not change the impact determination
15 in the GEIS, for example to change that impact
16 determination from a small to a moderate or a moderate
17 to a large, et cetera, then, no, that information
18 would not be significant because it does not paint a
19 seriously different picture of the environment.

20 If the impact is still small that's not a
21 seriously different picture of the impacts on the
22 environment.

23 JUDGE ABREU: Okay. And does the reg
24 guide use the term "seriously different?" I just
25 don't have it in front of me.

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1 MS. HOUSEMAN: That is from Commission
2 case law.

3 JUDGE ABREU: Okay.

4 MS. HOUSEMAN: For example, Pilgrim, I
5 believe it's CLI-12-15 contains that particular quote.

6 JUDGE ABREU: So you would agree then with
7 the applicant's re-characterization of the new and
8 significant criteria from the reg guide to say it's
9 got to be nuisance to GEIS and significant enough to
10 be essentially destabilizing or beyond, which would be
11 the moderate to large category? Would that be -- So
12 you are in agreement with the applicant's ER --

13 (Simultaneous speaking)

14 MS. HOUSEMAN: That does sound like a
15 reasonable summary of the agency's regulatory guide,
16 yes.

17 JUDGE ABREU: Okay. All right.

18 MS. HOUSEMAN: I would like to add just
19 one point of clarification that the moderate impact is
20 not destabilizing. So moderate impact is not
21 necessarily, excuse me, is not a destabilizing impact.

22 JUDGE ABREU: But a destabilizing impact
23 would be, would that be enough? Let me get my --

24 MS. HOUSEMAN: Well that would be a large
25 impact.

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1 JUDGE ABREU: Right. But, you know, if
2 you were destabilizing that would be sufficient, it's
3 not the lowest bar? You could do less and still be
4 considered moderate, yes, for moderate impact, right?

5 MS. HOUSEMAN: Right.

6 JUDGE ABREU: Mm-hmm.

7 JUDGE HAWKENS: Do you have anything else?

8 MS. HOUSEMAN: I have nothing else
9 concerning Contention 1. Does my colleague, Mr. Turk,
10 have time to address Contention 2 for the Board?

11 JUDGE HAWKENS: The reason he has none is
12 principally our fault, so, yes, you do have some time,
13 Mr. Turk.

14 MR. TURK: Thank you, Your Honor. I will
15 be brief. I will be very brief. As you will note in
16 our response to contentions we do not oppose the
17 admission of a portion of this contention, Contention
18 2, insofar as the contention asserts that the ER does
19 not consider a reasonable alternative of cooling
20 towers as a means of cooling the nuclear power plant's
21 cooling water.

22 And we say that not because NEPA requires
23 us to consider alternate cooling mechanisms, but in
24 this case we are aware that there is considerable
25 interest in potential impacts of the cooling canal

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1 system.

2 NEPA gives the staff the authority, give
3 the NRC the authority to consider such information as
4 may be of interest to the public and we think because
5 this issue is of interest to members of the public we
6 will consider it under NEPA.

7 JUDGE KENNEDY: Mr. Turk, do I read that
8 to mean that FP&L should have looked at it as well in
9 their ER or just that the staff is interested in
10 looking at?

11 MR. TURK: The staff is interested in
12 looking at, Your Honor. There is no requirement --

13 JUDGE KENNEDY: So --

14 MR. TURK: First of all there is no
15 requirement to NEPA for the applicants to do anything.
16 NEPA only imposes requirements on federal agencies.
17 It's the NRC itself that developed regulations that
18 require applicants to provide information to us that
19 may help us in our evaluation.

20 JUDGE KENNEDY: Right, and those
21 requirements would be in the agency's regulations.
22 And did I hear you to say there is no agency
23 regulation that would have provided an impetus for
24 FP&L to look at the cooling towers as a reasonable
25 alternative?

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1 MR. TURK: There is nothing that would
2 tell them that they must go out and look at that
3 alternative. What is necessary is that their
4 environmental report describe the impacts of operation
5 for the 20 additional years of subsequent license
6 renewal.

7 If they find that there are no serious
8 impacts, if for instance the impacts of the cooling
9 canal system are small, then there would be no
10 litigation required, and that's the approach that FP&L
11 took.

12 We can't say that they are wrong, but NEPA
13 has a two-fold requirement. One is for us to consider
14 impacts of operation and alternatives and the other is
15 to inform the public.

16 So I would say that it is under our second
17 responsibility to inform the public that we thought it
18 would be useful to have this additional information.

19 JUDGE KENNEDY: Thank you, that's helpful.

20 MR. TURK: And I would point out as Your
21 Honor knows at Indian Point we looked at alternate
22 cooling mechanisms because there there was
23 considerable interest in what are the impacts of once-
24 through cooling.

25 We do that very rarely. There are only a

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1 few cases where we look at alternate cooling system
2 impacts and primarily we do it where there is
3 potential impact or where there is substantial public
4 interest in evaluating what are the alternatives to
5 allowing this cooling system to operate.

6 JUDGE KENNEDY: So why at that this stage
7 would we admit a contention against the environmental
8 report for not addressing cooling towers?

9 MR. TURK: That's a good question, Your
10 Honor. We don't oppose it because we don't say it's
11 an unreasonable thing to do, but you could find it's
12 not necessary.

13 JUDGE KENNEDY: Right. Thank you.

14 JUDGE HAWKENS: And your judgement it
15 satisfies contention admissibility requirements as
16 opposed to just exercising a discretion and saying
17 we're going to commit, allow it to come in due to
18 public interest?

19 MR. TURK: Yes, because it's an
20 environmental issue and there is no hard-and-fast rule
21 as to what alternatives must be considered. I would
22 say that it is not unreasonable to consider this
23 alternative.

24 JUDGE HAWKENS: I just want to make sure
25 it's your position it does satisfy contention

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1 admissibility requirements.

2 MR. TURK: In a nutshell, yes, and I say
3 that because they have been specific enough, they have
4 not been vague. They have identified what it is that
5 they want to be considered.

6 Now there is one part of the contention
7 that we oppose and that is the part that describes all
8 of the potential impacts of cooling canal system
9 operation and we don't want to get into the litigation
10 of all of those potential impacts here.

11 We think the impacts are described in the
12 GEIS and in the ER and the petitioners don't challenge
13 what the ER says about the impacts. They have their
14 own characterization of the impacts, but they don't
15 say that the ER is wrong in saying here are the --
16 but, for instance, the temperature, the gradients that
17 exists because of operation of the cooling canal
18 system. They don't say that anything the applicant
19 has said is wrong.

20 JUDGE KENNEDY: It appears that this may
21 be an omission and I guess if it is an omission why
22 wouldn't they need a regulatory basis --

23 MR. TURK: I don't --

24 JUDGE KENNEDY: -- for what needs to be in
25 the environmental report, the petitioner?

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1 MR. TURK: I'm sorry, I don't understand.

2 JUDGE KENNEDY: Well it sounds to me like
3 this is an omission from the environmental report.

4 MR. TURK: Okay.

5 JUDGE KENNEDY: So why wouldn't they need
6 a regulatory basis for why it should be in the
7 environmental report? "They" being the petitioner.

8 MR. TURK: As I understand the
9 environmental regulations some things are specifically
10 called out that they must be evaluated or things that
11 they must cite the GEIS for or that they can rely on
12 the GEIS for.

13 Alternatives are not one of them. The
14 regulation only says that they must consider
15 reasonable alternatives, but identifying cooling
16 towers or alternate cooling systems as one of things
17 that has to be considered.

18 JUDGE KENNEDY: I guess it would seem to
19 me that those were reasonable alternatives to the
20 proposed action and they are also to look at
21 reasonable alternatives to mitigate adverse
22 consequences. Did I misread that?

23 MR. TURK: No, but then the question is
24 what is a reasonable alternative. An applicant could
25 come to you and say it's not reasonable to have us

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1 consider a multi-hundred million dollar construction
2 project as an alternative to running our current
3 system when the impacts are small.

4 So the applicant here I'm sure would say
5 it's not a reasonable alternative.

6 JUDGE KENNEDY: So what you are proposing
7 is a reasonable alternative would be the proposed
8 action with a modification to the plant?

9 MR. TURK: You could consider
10 modifications to the plant as an alternative to
11 granting license renewal as requested without those
12 modifications.

13 JUDGE KENNEDY: All right. That's what I
14 was asking, okay.

15 MR. TURK: Yes. But is there a
16 requirement that alternate cooling systems be
17 addressed in an environmental report and the answer is
18 no.

19 JUDGE HAWKENS: So, Mr. Turk, what
20 regulation would you point to that requires this
21 discussion in the EIS to make it an admissible
22 contention?

23 MR. TURK: The general regulation that
24 would have this, I believe it's 5195(c) or 5171(d),
25 which would have the staff consider the environmental

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1 impacts of the operation plus reasonable alternatives
2 thereto.

3 JUDGE HAWKENS: Okay.

4 MR. TURK: Nothing more specific than
5 that.

6 JUDGE HAWKENS: It's unusual to have the
7 NRC staff defending the admissibility of a contention
8 but we thank you for your comments. Do you have
9 anything else?

10 MR. TURK: No, Your Honor.

11 MR. BESSETTE: Yes, Your Honor. We would
12 just like one point of clarification. Mr. Turk said
13 that the applicant in the discussion of cooling towers
14 didn't consider mitigation and we would like to
15 clarify, and that's noted in our pleadings, we
16 thoroughly considered mitigation for the cooling
17 system impacts through the whole discussion of the
18 consent order and the consent argument.

19 So our argument is not that mitigation
20 discussion is not required, is that we have thoroughly
21 considered mitigation and those mitigation results
22 have small impacts and, therefore, there is no
23 ancillary or extra requirement to consider another
24 completely alternate mitigation of cooling towers. We
25 just wanted to clarify that point.

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1 JUDGE HAWKENS: To the extent we would
2 admit, to the extent the NRC staff argues that this
3 should be admitted as a contention of omission you
4 would disagree with that and say it was, in fact,
5 discussed?

6 MR. BESSETTE: Yes, Your Honor,
7 respectfully we disagree.

8 MR. TURK: And I would say, Your Honor, if
9 I may, that I don't disagree. Sorry, Your Honor. I
10 don't disagree with what Mr. Bessette just said. I do
11 recognize that the environmental report does discuss
12 mitigation other than cooling towers.

13 JUDGE HAWKENS: Okay. Ms. Curran, when
14 you are ready we will hear rebuttal first. Let me
15 confirm how much time she has.

16 (Off microphone comment)

17 JUDGE HAWKENS: Thirty-six minutes, 30
18 seconds.

19 MS. CURRAN: Judge --

20 JUDGE HAWKENS: Don't take into account
21 either that when you are done we will be breaking for
22 lunch, so don't let that hurry you up.

23 MS. CURRAN: I want to make a request. I
24 would really appreciate this. I have very little left
25 to say and I would really appreciate the opportunity

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1 to break for lunch now so that I can talk to my
2 colleagues and prepare, or at the very least I need a
3 5-minute break, please.

4 JUDGE HAWKENS: If there is no objections
5 from anybody we will, consistent with Ms. Curran's
6 suggestion, take a break for lunch.

7 MS. CURRAN: Thank you very much.

8 JUDGE HAWKENS: And it's 12:15, would an
9 hour and 15 minutes be adequate time?

10 MS. CURRAN: That's great.

11 JUDGE HAWKENS: We're in reasonably good
12 time we could make an hour and a half if people would
13 prefer.

14 MS. CURRAN: An hour and 15 is fine.

15 JUDGE HAWKENS: And hour and 15 minutes,
16 all right. An hour and 15 minutes, we'll be back here
17 at 12:30, excuse me 1:30.

18 (Whereupon, the above-entitled matter went
19 off the record at 12:15 P.m. and resumed at 1:44 p.m.)

20 JUDGE HAWKENS: When we broke for lunch,
21 I believe Ms. Curran had 36 minutes and 30 seconds for
22 rebuttal. You represented you probably would not need
23 nearly all of that time.

24 MS. CURRAN: Well I better talk fast, I
25 think and get that last 30 seconds in.

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1 JUDGE HAWKENS: You may proceed.

2 MS. CURRAN: I wanted to start by giving
3 the information that Judge Kennedy asked for about our
4 references to the environmental report and you were
5 particularly interested in Chapter 6. What I found
6 was references to Chapter 3 and Chapter 4 and Chapter
7 3 has a lot of it. And I will tell you, if you like
8 the page numbers.

9 The first place Chapter 3 is referred to
10 is on page 17 under the heading Underestimated
11 Environmental Impacts on the Biscayne Bay Aquifer.
12 And we refer to the environmental report at D-91,
13 where FP&L asserts that the hyper-saline plume from
14 the CCS extends one and a half miles from the Turkey
15 Point site. And we dispute that and say, in reality,
16 it is more than two miles westward and is currently
17 influencing movement of the saline water interface
18 within the Biscayne Aquifer more than four miles
19 inland. And that goes to something that I think --
20 oh, I'm sorry. I'm tire and all I can think of is
21 Marty -- O'Neill -- Mr. O'Neill said that the hyper-
22 saline plume is nowhere near the groundwater supply.

23 This is an issue and well, whether it's
24 physically -- whether the edge of it is physically on
25 top of the groundwater supply, what we're saying is

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1 that it's pushing westward and is pushing the edge of
2 the groundwater drinking supply further westward. It
3 is basically moving things underground so that it's --
4 there's a danger, of course, bleeding of the plume
5 into the fresh water but also kind of pushing on the
6 fresh water so that it no longer is where it was.

7 So this is a factual dispute we've raised
8 and it seemed to us that there was a significant
9 amount of testifying in FP&L's oral argument that this
10 is the way it is but in fact, we present FP&L
11 statements, our expert statements showing a dispute.
12 At this stage of the proceeding, that is our
13 obligation. We don't have to prove our case on the
14 merits. That should come later.

15 So -- I'm sorry. Go ahead.

16 JUDGE KENNEDY: I was going to say I think
17 FP&L used the word drinking water and you're using the
18 word groundwater.

19 MS. CURRAN: I'm sorry. I should have
20 said the drinking water supply, the G2 drinking water
21 supply is being impacted by the hyper-saline plume.

22 JUDGE KENNEDY: Okay.

23 MS. CURRAN: I think I misspoke.

24 JUDGE KENNEDY: Okay.

25 MS. CURRAN: The next place that we

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1 mention the environmental report is on page 18 under
2 the header Underestimated Environmental Impacts on
3 Biscayne Bay. We represent -- oh, but actually that's
4 not Chapter 3. That's Chapter 4, where the FP&L said
5 that the groundwater pathway is having no discernable
6 influence on Biscayne Bay. And we have a number of
7 statements there where we dispute that but that's
8 Chapter 4.

9 On page 19 under header Underestimated
10 Impacts on the American Crocodile Habitat, we refer to
11 page 3-195, where FP&L reported on the decline in the
12 number of successful nests between 2013 to 2014 and
13 2015. So the year 2013 to 2014 compared with the year
14 2015 there was a decline from 25 nests. The tagged
15 hatchlings declined from 429 in 2013 to 409 in 2014,
16 to 119 in 2015. And then they say by 2016, FP&L had
17 located only eight successful nests and 127
18 hatchlings.

19 Again, I just want to mention as we're
20 going through these that Mr. O'Neill did quite of bit,
21 I thought, testifying on the issue of the crocodiles.
22 Are they okay? Are they not okay? But again, what we
23 need to do here is to create -- to show enough
24 evidence that there is a dispute. And I think that's
25 what we've done.

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1 And a newspaper article, which is the main
2 thing that FP&L relied on to support its assertion
3 that we are complaining about a tempest in a teapot is
4 not the equivalent of an environmental study.

5 The next place where we represent -- where
6 we reference the Chapter 3 of the ER is on page 20
7 under the heading The Environmental Report Violates
8 NEPA by Overstating the Beneficial Effects of Existing
9 and Proposed Mitigating Measures and Ignoring Their
10 Negative Effects. I'm sorry, I misspoke. That is --
11 delete that.

12 This actually is on page 20 we mention
13 Figure 3.7-4, which I think represents something about
14 critical seagrass habitat with the American crocodile.
15 And we raised the concern that that habitat would be
16 destroyed.

17 JUDGE KENNEDY: When you say would be as
18 opposed to is, I mean this is in the effected
19 environment.

20 MS. CURRAN: Yes, well it's really -- it's
21 in very critical condition and we're concerned that it
22 would be pushed over the brink and not be able to be
23 restored --

24 JUDGE KENNEDY: Okay.

25 MS. CURRAN: -- unless something

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1 significant -- some significant change was made to the
2 operation of the CCS. It's basically pushing it over
3 the edge to continue operating the CCS.

4 JUDGE KENNEDY: I guess where I keep
5 getting caught in this is the applicant appears to set
6 the stage in the Affected Environment Section. And
7 then in Chapter 4, it does an assessment moving
8 forward. And I'm really struggling with trying to see
9 where the petition is relative to that perspective of
10 we're here and this is our perception of -- our
11 analysis of what the condition is of the affected
12 environment. And then they move forward to say okay,
13 given this and what's going on, we think the next 20
14 years will be here.

15 And it may be me. I'm getting confused
16 between your petition and how you're pleading the
17 state of the environment either going forward or today
18 and which the petitioner is really challenging.

19 MS. CURRAN: Well I think the petition is
20 challenging the characterization of the condition
21 which I guess is really the baseline condition. If
22 they represent it to be better than it is, then
23 continuing -- this is a situation where there's not a
24 proposed change to the operation. It's the same. So
25 maybe the ultimate result of that is that the

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1 description of the existing conditions becomes more
2 important because they're saying we're not changing
3 anything. Things are just going to go on the way they
4 are and this is how they are.

5 JUDGE KENNEDY: But part of what they're
6 not changing is the fact that they're going to
7 continue to implement the mitigation measures that
8 they're talking about.

9 MS. CURRAN: Right.

10 JUDGE KENNEDY: So I mean I guess I see a
11 picture being painted in Chapter 3 that things have
12 taken a turn for the better. They're not where
13 they're supposed to be but they've turned a corner and
14 they're going to continue to perform certain actions.

15 And I know you disagree with some of the
16 actions and I'm hearing you may actually disagree with
17 the actual condition of the environment. Maybe it's
18 not turning the corner. So they've got some specific
19 analysis within Chapter 3 that sort of paints a
20 picture which, I guess as I reread that, it kind of
21 looked a little more promising than I had expected to
22 find.

23 MS. CURRAN: Yes, and we are contesting
24 that. We are asserting that what FP&L presents as the
25 existing situation, the existing measures that they

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1 are in the course of implementing are not adequate.
2 And if FP&L continues in the same vein, which as they
3 are proposing, that the adverse environmental effects
4 of the CCS will continue, will not be abated.

5 And while we're talking about that, I also
6 wanted to address what I see as the difference between
7 on this issue of the presumption that permittees will
8 comply with their permit. I think it's reasonable to
9 say that if somebody is told to do X, they are going
10 to do X. They are not going to be scofflaws. That's
11 reasonable. But it begs the question is X adequate
12 and that's what we're challenging.

13 We're not saying FP&L is going to move off
14 and not pump the water or not pump it in, not pump it
15 out. We're saying when you look at the volume of the
16 hyper-saline plume and you look at the volume of water
17 they're proposing to pump out of it, it's minuscule in
18 relation to the plume and, therefore, it's not going
19 to be effective. And that when you look at the volume
20 of water, that FP&L, under the -- I don't remember if
21 it's the consent order or the consent agreement is
22 going to pump into the CCS that there is a significant
23 risk that that will depress the hyper-saline plume and
24 drive it further into the groundwater.

25 So we're not questioning whether FP&L is

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1 going to do it. We're questioning whether these
2 measures ultimately will be effective.

3 And if you look at the footnote I read
4 earlier in 10 CFR 51.71(d), footnote 3, that talks
5 about the independent obligation of the agency to
6 evaluate. What is the situation? What are the
7 proposed measures? What's current? What's proposed?
8 Are these things taken together going to address the
9 problem, mitigate the environmental impact?

10 JUDGE KENNEDY: So if I revisit -- you've
11 given me at least three references to Chapter 3 and so
12 if I revisit that, I should take away from that -- I
13 could take away from that that you've identified some
14 challenges to the current affected environment
15 condition and now you've raised an additional concern
16 that the consent orders and mitigation plans that have
17 come out of these consent orders are not effective?

18 MS. CURRAN: Right. And you know they
19 exist in current time but they go into the future. So
20 these are things that -- as a matter of fact, we were
21 looking at one of the orders and it says let's do this
22 for a couple of years and see how it works.

23 So in a way, this is an experiment that
24 everyone is making to see if it's going to work.

25 JUDGE KENNEDY: FP&L testified this

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1 morning that the saline content in the canal has been
2 coming down.

3 MS. CURRAN: Well it was pretty recent
4 data. And I think, as I recall -- but again, this is
5 testimony by Mr. O'Neill. And what we identified was
6 we identified places in the environmental report where
7 it talks about the salt level. We identified expert
8 reports that talked about the salt level. And we
9 described the problems that our experts see with this.

10 So at some point, we have to get to a
11 merits hearing and put all this information together.

12 JUDGE KENNEDY: I don't want to belabor it
13 too much but are you suggesting what Mr. O'Neill said
14 this morning isn't in the environmental report now?

15 MS. CURRAN: I don't -- I don't --

16 JUDGE KENNEDY: You don't think so?

17 MS. CURRAN: I don't know for sure but it
18 seemed to me that he was talking about some very
19 recent -- this is my recollection of what he said.

20 JUDGE KENNEDY: Okay. I do -- sure. All
21 right.

22 MS. CURRAN: And you know they -- so
23 something like this is complicated. And if you --
24 supposing we were just outside where it was raining so
25 hard and I'm sure that right now, after this

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1 rainstorm, the CCS is less salty for the next hour or
2 so. I'm just guessing. I'm testifying here but these
3 are complex issues that you can't -- it's not for the
4 Licensing Board to make a merits determination here.

5 And the salinity of the CCS is an ongoing
6 issue. We know that the seagrass beds and the CCS are
7 just virtually gone and that is because and our
8 experts say it's too saline. So if it gets a little
9 better for a while, it doesn't address the long-term
10 issue, which is if we allow FP&L to operate the CCS
11 for an additional 20 years after the first 60 years,
12 what will the ultimate result be?

13 I think the NRC staff made a comment about
14 the L 31 Canal. And the question is whether in the
15 past FP&L did take water out of the L 31 Canal. And
16 it was a temporary order and I think the staff made
17 the argument you haven't shown that FP&L is going to
18 continue to do this.

19 In our reply, we -- I just wanted to point
20 your attention to -- okay, we say on page 18 and 19 of
21 our reply, the staff argues that SACE has no factual
22 basis to claim that FP&L may use surface water from
23 the L 31 Canal to reduce salinity levels in the CCS
24 but the staff does not deny that FP&L has used L 31
25 Canal water in the past for this very purpose and the

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1 environmental report does not rule it out in the
2 future but, rather, keeps the option open.

3 Then we quote the environmental report at
4 page 3-195, where they basically say it is anticipated
5 that other wells will be sufficient. But that's
6 different from saying we're never going to take water
7 out of the L 31 Canal and we raised that because it
8 creates issues of conflict with other uses of the L 31
9 Canal for restoring the Everglades.

10 And then finally, one more issue. In his
11 argument, Mr. Turk said that he doesn't think that
12 consideration of the alternative of mechanical-draft
13 towers is required by the regulations. And
14 technically, that's true. The regulations don't
15 mention mechanical-draft cooling towers. They talk
16 about reasonable alternatives.

17 And you'll see that or at least the word
18 alternatives in 50.53(c)(2) and you will also see it
19 in 51.45, which also has general requirements for
20 environmental reports.

21 So we would submit that there is a
22 requirement to consider alternatives. It appears in
23 these two regulations.

24 JUDGE KENNEDY: I want to go back to the
25 L 31 Canal.

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1 MS. CURRAN: Okay.

2 JUDGE KENNEDY: Can FP&L just start
3 drawing water from the canal without the State of
4 Florida being involved?

5 MS. CURRAN: I think the answer is no but
6 it begs the question as to whether that could -- you
7 know it's reasonably foreseeable if that was done in
8 the past, it was done as an emergency measure.

9 So as long as the CCS continues to be
10 used, our observation is that there's these continual
11 problems. There is kind of a proliferation of issues
12 that go on and we talk about that in our contention
13 and in our reply. It's just over and over again. It
14 varies from time to time but it's always robbing Peter
15 to pay Paul because there's -- because if you are
16 trying to -- if you're trying to deal with these water
17 contamination issues by moving water around, then it
18 gets difficult. It gets complicated. It gets kind of
19 messy. And this is one reason why we are urging the
20 admission of a contention that would allow the
21 consideration of whether another alternative could be
22 considered.

23 The CCS could be looked at well, this is
24 one alternative for cooling this plant. And another
25 alternative is mechanical-draft cooling towers. One

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1 of them happens to be in use a long time. It's
2 probably marginally less expensive because they've
3 already built it but it's really problematic and it
4 may cause significant adverse impacts. That's our
5 concern. The other one is more expensive but it would
6 virtually or maybe completely eliminate the
7 environmental impacts with the first one. That's a
8 reasonable array of alternatives that ought to be
9 looked at.

10 You know originally the impact that FP&L
11 was told to avoid was direct discharges into Biscayne
12 Bay. That was the original plan and then they came up
13 with the CCS. Well here we are in 2018 and I think
14 this is one of the benefits of periodic license
15 renewal and environmental impact statement is take
16 another look, time to reexamine the effectiveness of
17 this particular alternative and consider other
18 alternatives of which you're aware.

19 And somebody said well, they rejected the
20 mechanical-draft cooling towers in 1971 but it doesn't
21 mean that you shouldn't have another look now that the
22 one you picked didn't work so well, plus it was chosen
23 for Turkey Point 6 and 7. So that's a good sign.

24 We just really -- you know ultimately the
25 reason SACE is here is because we want FP&L to

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1 implement these mechanical-draft cooling towers. SACE
2 is not opposing the continued operation of Turkey
3 Point 3 and 4 per se, but we want it to be done in a
4 way that protects the fragile ecosystem, and the
5 groundwater, the drinking water, and Biscayne Bay.
6 And the mechanical-draft cooling towers appear to us
7 to be the answer to that problem.

8 And that's all I have.

9 JUDGE KENNEDY: So did the CCS ever work?
10 We're almost 35 years out.

11 MS. CURRAN: Right.

12 JUDGE KENNEDY: I guess you had made a
13 comment about some folks think that this is a
14 temporary problem caused by environmental -- what's
15 the right word -- climate conditions, you know the dry
16 summers, the lack of -- and the higher temperatures.

17 MS. CURRAN: Well why -- I guess -- and
18 I'm not a scientist but I ask myself why do you have
19 a plume of saline water that is that big under the
20 ground that has traveled that far, unless this has
21 been a problem for some time. And I think it's
22 getting worse and it's partly because there has been
23 at least two power uprates at Turkey Point. That
24 makes the cooling canal system hotter. So you know
25 that's part of the cumulative impact.

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1 Okay and I want to -- do I have any time
2 left that I saved? Do I have 30 seconds?

3 MS. MAYHALL: We're at like 13 minutes
4 right now.

5 MS. CURRAN: Okay. Well, if something
6 else comes up --

7 JUDGE HAWKENS: You need not take all of
8 them, though.

9 MS. CURRAN: Well I promise I won't. No,
10 I just I'll stop now but in case something else comes
11 up, I have a few minutes left. Thank you.

12 JUDGE HAWKENS: All right, thank you.

13 We'll now hear from joint petitioners.
14 They have a total of 50 minutes to make their
15 presentation. How much time would you like to save
16 for rebuttal?

17 MR. AYRES: Ten minutes.

18 JUDGE HAWKENS: Okay.

19 MR. AYRES: Your Honor, my name is Richard
20 Ayres. I represent Friends of the Earth and next to
21 me is Professor Ken Rumelt of Vermont Law School, who
22 also does.

23 We're prepared to answer your questions
24 that you sent to us, as well as with some things that
25 we would like to talk about.

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1 We think that the best way to handle this
2 would be for us to function as kind of a panel because
3 we've each prepared on different ones of the
4 contentions.

5 So if it's all right with you --

6 JUDGE HAWKENS: That's fine. We have
7 precedent for doing it that way.

8 MR. AYRES: Okay, good. Good. Thank you.

9 I think the place that I'd want to start
10 would be on the fundamental question that you face
11 here, which is what are the -- what is the applicable
12 law on the question of admissibility. You know your
13 decision here is which of these contentions to admit.

14 And I think there's been a lot of
15 briefing, some of it, essentially pressing a much
16 higher bar for admissibility than is in your law, in
17 your precedents. So I want to come back and start
18 there and point out a couple of things and then we can
19 go from there to other topics.

20 First of all, the Commission has said in
21 the past that the cornerstone of the process is that
22 it be open, understandable, and accessible to all. So
23 we think you begin with a fundamental commitment to
24 hearing and letting people describe contentions that
25 they have about proposed changes.

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1 What we've heard is -- in response is the
2 phrase strict by design and that comes from one
3 decision of the I think it was a Board decision --

4 JUDGE HAWKENS: No, it was a Commission
5 decision.

6 MR. AYRES: It was a Commission decision.
7 Okay.

8 But if you look at the cases that address
9 this issue, what you find is that strict by design
10 doesn't mean we reject 90 percent. Indeed, what it's
11 been used for and I think what the Commission meant
12 for it to be used for is to reject admissibility for
13 really poorly thought out or not thought out attempts
14 to get a process going and see what will happen.

15 And I would submit that this case clearly
16 falls on the far end away from that. We have
17 submitted very detailed contentions, significant
18 briefing, and a lot of expert affidavits as well. And
19 we've tried, as one of the cases instruct us, to focus
20 on the key issues that we want to raise and discuss
21 and make sure that they are ones that can be handled
22 in this process.

23 So I think underlying all this process
24 that you are undertaking, you need to begin with the
25 idea that you know if the contentions are, quote,

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1 sufficient to prompt a reasonable mind to inquire
2 further, that's from the Commission Rules of Practice,
3 then they should be admitted and hearings should be
4 held to explore them.

5 I particularly emphasize that in light of
6 what Ms. Curran was referring to earlier about quite
7 a bit of testifying that seemed to be going on in the
8 morning session. And I think the Board should hear
9 that testimony. It should hear from real experts, not
10 lawyers quoting experts. But this is not the
11 proceeding for that. This is the proceeding to decide
12 whether there is enough here to go forward. And we
13 submit that we've met that standard, certainly for all
14 five of our contentions, and that we believe it would
15 be very much worthwhile to go forward to explore them
16 in factual detail because we think there are important
17 issues that should be addressed here.

18 So that's kind of an opening underlying
19 factor. And with that, I mean I think the question of
20 ours for you is would you like us to go through the
21 questions that you've raised? Would you like us to go
22 through the contentions as we've outlined them? What
23 would please the Board on that?

24 JUDGE HAWKENS: Do you have a preference?
25 I'm content to let him decide or to go --

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1 JUDGE ABREU: Whatever you think would
2 clarify any points that haven't been fully clarified
3 up to now. We are familiar with the brief.

4 MR. AYRES: So you can tell us if you have
5 already done that.

6 All right well, let me start with the
7 cooling tower alternatives, since that was one of our
8 major contentions and it's one which the staff
9 apparently doesn't object to, although it was a little
10 hard to tell this morning.

11 You had asked a question about relevance
12 to mitigation. You know is this -- are cooling towers
13 relevant to mitigation? Do they meet a threshold that
14 would make them meet the legal obligation or the
15 applicant to analyze?

16 I want to respond on the relevant to
17 mitigation point first. That appears, that phrase
18 appears in 10 CFR 51.45(c). It says that
19 environmental reports prepared at the license renewal
20 stage do not need to discuss the economic or technical
21 benefits and costs of the proposed action or
22 alternatives, except if the cost and benefits are
23 relevant to mitigation.

24 So the phrase is applicable to the
25 question whether economic and technical analysis

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1 should be considered in the ER for a subsequent
2 renewal, not to whether mitigation should be
3 considered.

4 In other words, we think that that phrase
5 doesn't really apply here. What is the crucial
6 standard is is the alternative a reasonable
7 alternative that addresses the environmental impacts
8 of the plant and that obligation flows from NEPA and
9 from 51.45 -- and the rest of 51.45, which says that
10 the staff and the ER must consider alternatives.

11 We pointed to two authorities on the
12 authorities point -- I'm sorry -- on the alternatives
13 point. One was 10 CFR 51.45(c), which says the ER
14 must contain a consideration of alternatives for
15 reducing or avoiding adverse environmental effects,
16 and 10 CFR 51.53(c)(3), which says the ER must include
17 an analysis that considers and balances alternatives
18 available for reducing or avoiding adverse
19 environmental effects.

20 The applicants' attempt to distinguish
21 between mitigation measures and project alternatives
22 has no basis in NEPA, CEQ regulations, NRC's Part 51
23 regulations, or the case law applying these
24 authorities. 51.45(c) uses the word alternatives in
25 both sentences. It uses alternatives to the proposed

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1 action and it uses alternatives available for reducing
2 or avoiding adverse environmental effects. So this
3 attempt to distinguish between alternatives and
4 mitigation is a lot of word chopping and doesn't have
5 any basis in the regulations or in NEPA.

6 Our position is simple and supported by
7 NEPA, CEQ regulations, and the NRC's regulations. The
8 ER is required to analyze alternatives that would
9 reduce the environmental impacts of continuing to
10 operate the plant for another 20 years. Replacing the
11 canals with cooling towers would reduce a variety of
12 adverse environmental impacts over that period and,
13 therefore, they should have been analyzed. It's a
14 very simple syllogism, I think.

15 Petitioners -- this is an omission and
16 petitioners' obligation in the case of an omission is
17 to address the issue and point it out so that the
18 applicant can then deal with it. The applicant is the
19 one who bears the burden for actually doing the
20 analysis.

21 The applicants' own actions, as well as a
22 number of others, have shown that cooling towers are
23 reasonable. So we think that that is essentially
24 established at this point. The only serious argument
25 against it is the recovery well system, which is now

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1 in the experimental stage, and I believe at one point
2 those words were used, that that will eliminate most
3 of the environmental impacts from the CCS.

4 As I look at this, it seems to me what the
5 applicant is saying is buy this pig in the poke. It
6 might work. We're trying it. We're experimenting
7 with it. And we have this consent decree that says go
8 ahead and experiment and if it doesn't work in five
9 years, we'll try something else. So one side, you
10 have that alternative.

11 On the other, you have a reasonable known
12 alternative that essentially eliminates 100 percent of
13 the impacts that are there with the canal system.
14 Obviously, we'd like the applicant to choose the
15 cooling tower alternative but at this stage, the point
16 is did they have an obligation to examine that as part
17 of their environmental impact analysis. And we think
18 the answer is clearly yes.

19 So are there questions that we need to
20 answer on that? I'm sure we're getting into
21 repetition here and I'll try to spare you as much of
22 that as possible.

23 Judge Kennedy.

24 JUDGE KENNEDY: I was just -- I mean I
25 sound like a -- on one hand, again I'm stuck on

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1 Chapter 3, things are getting better. There's a
2 mitigation plan in place. One could argue why would
3 you need an alternative to something that is working.
4 And I don't disagree with you; it could stop working
5 tomorrow.

6 MR. AYRES: Right.

7 JUDGE KENNEDY: But we have no -- nothing
8 that says that's a foreseeable outcome.

9 MR. AYRES: No, I think -- I think our
10 view and the view of the state and county, for that
11 matter, is that the cooling -- the canal system with
12 the wells and all these measures might work. I don't
13 think you would find much of anybody, except maybe
14 FP&L who says it will work.

15 And given that that's the circumstance,
16 and analysis of an alternative that we pretty well
17 know will work, although obviously costs some money,
18 it seems like a reasonable thing to do.

19 JUDGE KENNEDY: Is there anything in the
20 petition that supports the might work, other than an
21 assertion that it might work? I mean do you have an
22 expert, expert opinion, a report to point to?

23 MR. AYRES: Yes, we have.

24 MR. RUMELT: Well the way -- I want to go
25 back to the issue of groundwater contamination because

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1 -- and I'm getting into Contention 2 here, where we
2 focus on the cumulative impacts on the continued
3 operation of the plant under conditions where the
4 temperature is going to be significantly hotter and
5 the sea levels are going to be significantly higher.
6 In that cumulative impacts analysis, which is Section
7 4.12.4.2, the applicant relies on this presumption of
8 regulatory compliance.

9 And the point that we do rely on is that
10 that presumption presumes more than the consent
11 agreement does. It goes farther. You're presuming
12 compliance but the consent agreement isn't assuming
13 compliance. It's presuming that we're going to take
14 a shot at it and if it doesn't work, we'll try
15 something new. And this could end up being decades of
16 whack-a-mole, where you're trying to try this
17 solution, try this solution, try this solution.

18 So we think as a matter of law to presume
19 that something is going to work, even when that
20 something doesn't make that same presumption is an
21 error.

22 Now the other issue with groundwater --
23 cumulative impacts on groundwater, is that there is no
24 indication that this plant is taking into account 1)
25 the subsequent license renewal time frame; and 2) the

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1 increases in temperature in sea level rise that are
2 impacting both the rate and amount of
3 evapotranspiration. So if more water is leaving the
4 canal system, it will necessarily require additional
5 water inputs.

6 And then in addition, as far as the hyper-
7 saline plume goes, the NRC's EIS for Unit 6 and 7
8 recognizes this, as sea levels rise, it is going to
9 shift the groundwater, the groundwater-saline water
10 interface to the west.

11 And the problem is, as everybody in the
12 room is far more aware than I am living up north,
13 water is a huge issue in Florida. It is an incredibly
14 important resource. And as, again, the NRC has
15 recognized, we can have an increase in scarcity of
16 that resource and competition.

17 So if we don't account for those things
18 and if the consent agreement doesn't account for those
19 things, and if the consent agreement doesn't presume
20 as much as this NRC guidance says the staff and
21 applicant can, then that's not going to be sufficient.

22 JUDGE KENNEDY: Okay, I still don't
23 understand why this isn't an issue really with the
24 State of Florida, who seems to think this is a plan to
25 go forward and why it should be appropriate to be in

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1 front of us or the agency.

2 MR. AYRES: I think the answer is NEPA.
3 NEPA, as Diane said earlier, is kind of an overriding
4 statute. And the regulation here, the actual measures
5 included in the consent agreement are state and local
6 responsibility. But the question under NEPA is what
7 alternatives are there to reduce the environmental
8 impact of the continued operation of the plant. And
9 one, obviously, is the CCS, if the mitigation measures
10 work. The other is the one we've mentioned.

11 JUDGE KENNEDY: Yes, and I think that's --
12 I mean I hear you and I don't think the staff is going
13 to disagree with you, when it gets to their
14 environmental statement.

15 The path forward, at this point, is trying
16 to deal with the contents of the environmental report
17 and the obligations on FP&L at this stage and how --
18 I mean I think I'm getting better clarity on how it
19 all works at the NEPA level and maybe the regulations
20 aren't clean enough on how this all works.

21 I mean I just keep going back and I'm kind
22 of stuck with you know we're sitting here trying to
23 admit contentions against an environmental report that
24 I don't think too many people disagree may not have to
25 contain, I mean other than voluntarily, some of the

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1 issues that you're addressing here in terms of
2 alternatives or some of these more overarching water
3 issues.

4 MR. AYRES: Well one of the key objectives
5 of NEPA, maybe even the most important, is
6 information. It was passed to tell the public what
7 was the implication of various kinds of projects and
8 what commitments were being made of the environment in
9 approving those projects.

10 This is an example, I think, where the job
11 of the state and local authorities who run the permits
12 and make the consent agreements is a different job
13 from the job of the NEPA preparer, which is to explain
14 to the public what the options are here.

15 And I guess our argument is the option of
16 the cooling tower seems so much more certain, and we
17 know it can be done because it's been done repeatedly,
18 that it is at least worth a full development and
19 analysis by the applicant and the staff.

20 What happens after that, you know you
21 prepare this kind of information, it goes out into the
22 world. And I think one of the other sort of
23 fundamental things underlying NEPA is if you inform
24 people, good policy will result from that.

25 JUDGE KENNEDY: I mean you know I hear

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1 you. I mean I think at the end of the day, it sounds
2 like we all get to the right place. But sitting from
3 where we're sitting, looking at a document that's
4 prepared in accordance with current agency
5 regulations, which doesn't really address where you're
6 trying to get to, I keep -- you know we're back to
7 gosh, maybe you should have asked for a waiver and put
8 this in front of everybody. That ship sailed this
9 morning.

10 It's just we're kind of stuck here. I
11 mean I think if we were -- to me because it sounds
12 like this is an omission and we go back to the
13 discussions we had with the staff this morning. I
14 mean I hear it clearly as an omission and the question
15 is why should it be in there, other than it's probably
16 a good idea and will complete the record.

17 MR. AYRES: Well, I referred to two
18 regulations.

19 JUDGE KENNEDY: Right.

20 MR. AYRES: And that's most directly why
21 it should be there, because the NRC's regulations say
22 alternatives have to be analyzed. And of course
23 behind that is NEPA and the regulations that were
24 written under NEPA that say the same thing.

25 So I don't think we're reaching. I think

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1 this is what the law requires.

2 JUDGE KENNEDY: Yes, that's a fair
3 comment. To me, it's always been interpreted those
4 are alternatives to the proposed action. And we heard
5 from the staff this morning that you could have
6 considered the proposed action in accordance with the
7 cooling towers instead of the CCS. And I guess I
8 hadn't quite ever thought of it that way. It seems
9 like a --

10 MR. AYRES: Yes, if you look at 51.45(c),
11 what you'll see is both that are there. It says
12 alternatives to the action and alternatives to reduce
13 the environmental impact.

14 MR. RUMELT: If I can make another point
15 on the issue you're raising, and that's that if we
16 don't raise the contentions now, we're barred.

17 JUDGE KENNEDY: But you could have asked
18 for a waiver.

19 MR. RUMELT: This is another avenue.

20 JUDGE KENNEDY: I know. I don't want to
21 -- yes.

22 MR. RUMELT: Right.

23 JUDGE KENNEDY: I get that whole problem.

24 MR. RUMELT: Well, I can continue speaking
25 to cumulative impacts. I do want to address I think

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1 an issue that the Board has asked but there is I think
2 a disagreement between petitioners and the applicants,
3 and the NRC staff, and that is what is the applicants'
4 legal requirement to address climate-related issues in
5 the environmental report.

6 And I think there's two ways that it comes
7 in. One is, as a cumulative impact. I think even the
8 Board's questions recognize that these are cumulative
9 impacts on affected resources. And I'm going to quote
10 from the environmental report at 4-62 and it says,
11 looking at cumulative impacts analysis, quote -- or
12 I'm sorry, must address, quote, the cumulative
13 significance of other factors affecting the resource.
14 So here, among the other factors that should be
15 considered, particularly at the FP&L site, is this
16 increase in temperature and increase in sea levels
17 that I don't think anybody disputes is reasonably
18 foreseeable. The staff has recognized that. FP&L has
19 recognized that in other context. And through
20 cumulative impacts analysis, they can address climate-
21 related issues.

22 I think the other area, and this moves
23 over to Contention 4, where there's a legal
24 requirement is that when you're describing the
25 affected environment, here we're talking about an

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1 environment that is going to exist or that the plant
2 is going to be operating in an environment that
3 doesn't exist today. It's going to be related but
4 it's going to be significantly different during the
5 subsequent license renewal period. This is many years
6 from now and we are talking about operations at a
7 time, again, where there is no reasonable dispute over
8 there being higher temperatures and higher sea levels.

9 And if you don't look at either the
10 cumulative impacts associated with the climate change
11 on the affected resources or describe the affected
12 environment, then you're not taking a hard look at
13 what the impacts of this plant are going to be during
14 the subsequent license renewal period. You're looking
15 at a fiction and NEPA certainly doesn't allow that.

16 So and again, whether the Board agrees
17 that these requirements address the applicants' legal
18 requirements for the environmental report, we still
19 need to preserve that argument and, again, the waiver
20 issue but we want to preserve that argument for the
21 next round, when there's an environmental impact
22 statement, a draft to deal with.

23 And the staff has rung the bell on the
24 change issues in its Appendix I for Units 6 and 7. It
25 has said and acknowledged it will be a new environment

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1 during the subsequent relicensing. There will be air
2 surface temperature changes, sea levels will rise and
3 push the fresh water interface inland, and further
4 stress that resource. There's greater risks of
5 extreme flooding and increased evaporation in the
6 cooling tower. And all these things are likely the
7 most significant issues facing the future of this
8 plant from 2030 -- you know from the early 2030s to
9 the early 2050s. And to ignore those is really
10 ignoring the call of NEPA and, frankly, the
11 regulations applying NEPA for the NRC.

12 So --

13 MR. AYRES: I think I'd just like to
14 underline that by strongly recommending, if you
15 haven't already, that you read Dr. Kopp's affidavit
16 that we included with our petition which is the
17 predictions, in a very subtle way, of one of the
18 world's great sea level rise experts. And again, it
19 would seem to us, at least, certainly to have provided
20 enough information. I mean we want to take the next
21 step and learn more about it, I think. I think
22 testimony in that respect would be very, very helpful
23 to the Board.

24 JUDGE KENNEDY: The environmental report
25 the applicant has pointed to the work that was done

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1 for 6 and 7 as, as you would say, answering that bell.

2 MR. AYRES: Yes.

3 JUDGE KENNEDY: Is there something wrong
4 with what's there or did it not go far enough? I mean
5 it seems like it's there. So is it an inadequacy or
6 an omission?

7 MR. AYRES: I think there are useful
8 things in those analyses, particularly with respect to
9 cooling towers, their costs, their reasonableness,
10 their use of resources but a great deal of those EIS
11 are about a completely different situation with very
12 different factors involved and I will just cite one to
13 make the point.

14 Six and seven don't have to compare
15 cooling towers against a canal system. Your review of
16 3 and 4 had to start with a canal system and you can
17 compare cooling towers to them. And you might take
18 some of that analysis from 6 and 7, from that EIS, but
19 it's a different analysis when you're doing a
20 comparative than when you're doing a new plant where
21 you made that choice already.

22 JUDGE KENNEDY: Yes, my sense is that --
23 let's take the cumulative effects one -- that what 6
24 and 7 EIS contains is a look at what's going on in the
25 site. And relative to this case, the site subsequent

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1 license renewal for Turkey Point 3 and 4 is identified
2 in there as an action that the EIS in 6 and 7 took a
3 look at.

4 So there's an assessment there of exactly
5 the issue that you're talking about.

6 MR. AYRES: Yes, I think what we're saying
7 is there is certainly useful information in that but
8 you can't wholesale take the analysis for 6 and 7 and
9 say that resolves the issues for 3 and 4.

10 JUDGE KENNEDY: And see that's where I
11 guess maybe I'm misreading it because what I see in
12 the EIS for 6 and 7 is an assessment of other actions.
13 One of the actions which is not relevant to this
14 proceeding is the Turkey Point 3 and 4 subsequent
15 license renewal, where you get into the groundwater
16 impacts of the CCS and then climate change impacts.

17 And so it seemed to me to be directly
18 relevant.

19 I've got to stop?

20 (Laughter.)

21 JUDGE HAWKENS: You're supposed to raise
22 that up when you're talking, not when they're talking.

23 JUDGE KENNEDY: I don't think I like this
24 new layout.

25 (Laughter.)

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1 JUDGE KENNEDY: I mean that's a little bit
2 of where -- it seems to me that they've answered some
3 of the concerns that you've raised and yet, I haven't
4 heard any discussion of inadequacy of what they've
5 proposed for assessment.

6 MR. RUMELT: So I think -- I do want to
7 begin with the issue of whether the environmental
8 report adequately cited to the Unit 6 and 7 EIS. I
9 mean it was -- you're mentioning things here that are
10 not mentioned.

11 JUDGE KENNEDY: Yes, I'm not sure I didn't
12 get those citations from the answers. So I'll grant
13 you that one.

14 MR. RUMELT: Right. So and to the extent
15 that the response to our petition raised various
16 issues that applicant and the staff felt we
17 overlooked, we addressed those issues and
18 demonstrated, I think, that they were insufficient and
19 they really didn't address the issues that we were
20 raising.

21 JUDGE HAWKENS: I think the red stop sign
22 was raised prematurely. I believe you asked for ten
23 minutes for rebuttal?

24 MR. AYRES: Yes.

25 MS. MAYHALL: Okay, I'm sorry.

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1 JUDGE HAWKENS: So you have an additional
2 ten minutes. Please revise and we'll endeavor to show
3 restraint with our questioning but because we're
4 getting toward the end of the afternoon, we're going
5 to have to more strictly apply the time constraints.

6 MR. AYRES: If you have -- if you don't
7 have further questions, we can stop there.

8 JUDGE HAWKENS: You can roll the
9 additional time --

10 MR. AYRES: For comments at the end, yes.

11 JUDGE HAWKENS: We'll leave that
12 additional 20 minutes rebuttal will be available to
13 you.

14 And now we'll hear from --

15 MR. O'NEILL: Mr. Lighty has this one.

16 JUDGE HAWKENS: All right.

17 MR. LIGHTY: Thank you, Your Honor. Ryan
18 Lighty appearing for Florida Power & Light Company.
19 As noted in our brief, we do not oppose Joint
20 Petitioner standing, but we believe that each of the
21 five proposed contentions suffer from multiple defects
22 that render them inadmissible. But --

23 JUDGE HAWKENS: Can I interrupt for one
24 second? Are you going to be taking half of the time
25 and --

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1 MR. LIGHTY: Yes.

2 JUDGE HAWKENS: -- the rest will be --

3 MR. LIGHTY: Yes. We've agreed to split
4 the time 50/50, Your Honor.

5 JUDGE HAWKENS: All right. Thank you.

6 MR. LIGHTY: We would like to focus our
7 limited time today just looking at three overarching
8 issues regarding these contentions.

9 First, as to proposed contention 1E,
10 Petitioners failed to demonstrate that FPL has a duty
11 to consider cooling towers as a separate and
12 additional mitigation measure. In fact, the petition
13 ignores the relevant threshold criteria which you
14 asked about in your proposed questions for the oral
15 argument.

16 Second, as to proposed contentions 2E
17 through 4E, as a matter of law, Part 51 simply does
18 not require the environmental report to consider the
19 effects of climate change on the proposed actions, and
20 those contentions must fail as a matter of law.

21 And, third, as to proposed contention 5E,
22 even assuming the Category 1 issue of cooling system
23 impact on terrestrial resources can be challenged
24 here, Petitioners ignored the GEIS treatment of this
25 issue, which is dispositive to their purported

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1 challenge. And for these reasons, which I will
2 address in turn, and the many others discussed in our
3 brief, we believe the petition should be rejected.

4 So as to the first contention, proposed
5 contention 1E, Petitioners claim that the
6 environmental report is deficient because it doesn't
7 discuss cooling towers. But based on case law and
8 applicable NRC guidance, there appear to be two
9 primary threshold considerations, which if both are
10 satisfied give rise to such a duty.

11 First, there must be an unmitigated impact
12 identified. And, second, the given measure must be a
13 proportional response thereto. And Petitioners have
14 not satisfied either of these threshold criteria in
15 their pleadings.

16 So, first, there must be a reasonably
17 likely environmental impact from the proposed action
18 that is not otherwise mitigated by other alternatives
19 or by actions that are part of the proposed action
20 itself, such as actual implemented operational
21 mitigation programs discussed in the ER.

22 NEPA only requires consideration of a
23 reasonable range of alternatives, and we think that is
24 important. There is no duty under NEPA to conduct an
25 academic exercise to think about every permutation of

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1 mitigation measures that one could conjure up. There
2 is a rule of reason that limits what must be
3 considered in NEPA documents.

4 And this is a key reason that contention
5 1E must fail. Petitioners don't even purport to
6 identify some unmitigated impact. They identify no
7 gaps in the existing mitigation measures, and as you
8 read their petition, you can see they seem to think
9 the only mitigation discussion is contained in two
10 paragraphs in Section 7.3.

11 Obviously, they misread the document. The
12 mitigation discussion is contained throughout Chapter
13 4, which is even titled the impacts of the proposed
14 action and mitigation.

15 But we identified this flaw in our answer
16 pleading, and Petitioners' response and reply at
17 page 17 and 18 was simply to assert that reliance on
18 existing measures cannot satisfy NEPA's requirement to
19 consider alternatives to taking a future action.

20 But here they simply missed the point.
21 The mitigation measures discussed in Chapter 4 are not
22 merely past actions. These are ongoing actions.
23 Petitioners point to no requirement to come up with a
24 new mitigation measure to renew a license, and there
25 is no such requirement as a matter of law. So now on

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1 top of misreading the ER, they also misinterpret the
2 law.

3 But as to each of the --

4 JUDGE HAWKENS: Your arguments you are
5 directing to Joint Petitioners also are being directed
6 to the NRC staff, I take it, many of them.

7 MR. LIGHTY: Certainly. We believe that
8 there has not been a demonstration that the threshold
9 criteria have been satisfied to require a duplicative
10 consideration of mitigation measures, because there is
11 already a reasonable range of mitigation discussed in
12 the ER, and there is no deficiency that has been
13 identified as to that.

14 And this morning I did not hear anything
15 from the staff that would -- that would contradict my
16 assertion in that regard, that the mitigation
17 discussion is somehow deficient.

18 So specifically to the three resource
19 areas or three topical issues that they raise in
20 contention proposed 1E, endangered species,
21 groundwater use conflicts, and radionuclides released
22 to groundwater, they just don't discuss the mitigation
23 measures that are provided in the ER, and identify
24 some deficiency that would create a duty to consider
25 something else. And we think that's an important

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1 factual observation.

2 The second component here, assuming that
3 there was -- even assuming that there was some
4 unmitigated impact, the given mitigation measure has
5 to be a proportional response thereto. And here the
6 petition is utterly silent regarding the
7 proportionality consideration.

8 FPL explained this positive oversight in
9 its answer pleading, and Petitioners' reply was,
10 again, silent on this point. There simply could be no
11 affirmative duty to consider a given mitigation
12 measure unless this element is satisfied. And so
13 their failure to acknowledge this requirement, much
14 less to demonstrate that it's somehow satisfied, is
15 dispositive to the admissibility of proposed
16 contention 1E.

17 And, finally, a duty to consider cooling
18 towers in an ER can arise if the cooling towers are
19 part of the proposed action itself. That was the case
20 in Indian Point and Oyster Creek, the only two times
21 that the NRC staff has considered cooling towers as
22 part of the license renewal.

23 But in both cases the state regulators
24 there had identified cooling towers as essentially a
25 condition to their renewal of the NPDES permits. This

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1 was going to have to be a part of the proposed action
2 going forward with license renewal. Of course it had
3 to be considered in the -- in the EIS.

4 We simply don't have that situation here,
5 and so it's not part of the proposed action, and the
6 Indian Point and Oyster Creek precedents are not
7 instructive out there.

8 Moving on to proposed contentions 2E
9 through 4E, these are Petitioners' variants on their
10 overarching argument that the ER was required to
11 evaluate environmental impacts caused by climate
12 change. This is sometimes referred to as a reverse
13 EIS because it focuses on the impact of the
14 environment on the proposed project instead of as NEPA
15 normally does, the impact of the proposed project on
16 the environment.

17 Now, CEQ had briefly provided guidance to
18 agencies recommending they include a reverse EIS in
19 NEPA documents, and the NRC has done this in the past,
20 Appendix I to the Turkey Point 6 and 7 EIS being the
21 prime example. But that guidance from CEQ reflected
22 an administration policy preference, not an
23 interpretation of the NEPA statute.

24 To our knowledge, no Circuit Court has
25 ever held that NEPA requires a reverse EIS. So if the

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1 Board were to do so here, it would -- it would be
2 creating new law on this point. But NEPA itself is
3 not the key issue for this contention. Rather,
4 Part 51 controls what must go into an environmental
5 report.

6 The NRC has explicitly declined to impose
7 a corollary requirement on applicants, to include a
8 reverse EIS in an ER. Specifically, in 2013, when the
9 NRC amended Part 51, several commenters recommended
10 including a reverse EIS in ER documents.

11 The Commission did not adopt those
12 suggestions. So the Commission considered and
13 rejected exactly what petition -- Joint Petitioners
14 are requesting here. The Commission decided not to
15 revise Part 51 to align with CEQ's policy guidance.

16 Now, notably, that guidance has been
17 withdrawn by CEQ in 2017 and, therefore, no longer
18 applies to the NRC or any other agency at this point.
19 But the key takeaway here is that these three
20 contentions fail to identify a material issue
21 appropriate for an adjudicatory hearing.

22 The only non-climate change issue raised
23 in these three contentions is a brief assertion that
24 the ER's analysis of cumulative impacts regarding
25 groundwater is inadequate because FPL purportedly

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1 cannot rely on its FDEP permit to assume cumulative
2 impacts will be adequately managed during the SLR
3 term, but that's not what the ER does.

4 FPL does not merely rely on its permit.
5 Rather, it reaches the conclusion as to cumulative
6 impacts to groundwater in light of the further
7 extensive activities conducted under the CO and the
8 CA.

9 Here Petitioners offer no critique of
10 those efforts, which were determined to be reasonable,
11 appropriate, effective, after extensive modeling,
12 administrative proceedings, regulatory findings based
13 on the informed technical judgment of the cognizant
14 regulators, none of which Petitioners challenge here.

15 At bottom, they simply fail to demonstrate
16 a genuine material dispute with the ER's conclusion on
17 this issue, and, therefore, that remaining portion of
18 proposed contention 2 should also be rejected.

19 And, finally, as to proposed contention
20 5E, Petitioners claim that the ER is deficient because
21 it purportedly does not consider how the salinization
22 of freshwater wetlands caused by the CCS will impact
23 threatened or endangered species and otherwise harm
24 important plant and animal habitats.

25 As a preliminary matter, Petitioners also

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1 refer to speculative ammonia releases from the site,
2 but they don't explain how that relates to or forms
3 some basis for the contention, which as framed by
4 Petitioners and their counsel, relates only to
5 salinization. But, nevertheless, both salinity and
6 ammonia have been generically considered by the NRC
7 and codified in Part 51 as the Category 1 issue of
8 cooling system impacts on terrestrial resources.

9 The GEIS explicitly considered the flow of
10 hypersaline groundwater from Turkey Point to the
11 canals towards the Everglades. And I think that bears
12 repeating. The GEIS specifically considered not just
13 this issue but this plant, this hypersaline plume
14 moving in this direction, and the staff determined
15 still that for this issue the impacts would be small.

16 The GEIS also acknowledged that CCS
17 contaminants could percolate from ground waters to
18 wetland areas, but that impacts would remain small
19 "due to the low concentrations of contaminants in
20 cooling system effluents."

21 But Petitioners failed to acknowledge,
22 much less challenge, these conclusions in the GEIS.
23 And so even assuming that the GEIS analysis could be
24 -- could be challenged here, the Petitioners do not
25 actually challenge them in the petition, and that's an

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1 important distinction.

2 I know that the Board raised some portions
3 of the GEIS in their questions, but those were issues
4 identified by the Board and not the Petitioners, and
5 I think that's an important distinction when we're
6 talking about contention admissibility.

7 JUDGE HAWKENS: Do you have page cites for
8 the GEIS discussion you just mentioned?

9 MR. LIGHTY: Yes. So these are in
10 Sections 4.6.1 of the -- of the GEIS. Specifically,
11 I believe these are at GEIS pages 4-64 to 4-69, with
12 those general discussions.

13 But taking it one step further, even
14 assuming that their vague and general statements on
15 these subject matters could be read as a challenge to
16 the GEIS, they failed to identify a sufficiently
17 supported material dispute.

18 When we look at ammonia concentrations in
19 the CCS, they are orders of magnitude below regulatory
20 levels. Orders of magnitude below regulatory levels,
21 and that's entirely consistent with the GEIS
22 conclusion that -- that there is a determination of
23 small impacts based on assumed low concentrations
24 related to ammonia.

25 So, in other words, the GEIS considered

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1 the possibility of de minimis contributions of
2 contaminants to wetlands from the process of
3 groundwater percolating somewhere else and concluded
4 that if those contaminants are of low concentrations
5 in the canals themselves, then the impact of that
6 de minimis contribution is going to be small.

7 JUDGE KENNEDY: And that's in the
8 environmental report where?

9 MR. LIGHTY: That's the environmental
10 report adopting the GEIS conclusions on the Category 1
11 issue of cooling system impacts on terrestrial
12 resources.

13 JUDGE KENNEDY: What about plants and
14 animal habitats?

15 MR. LIGHTY: So that's part of the same
16 Category 1 issue, discussing terrestrial resources.
17 It's wetlands, it's wildlife in wetlands, and that is
18 what that conclusion in the GEIS pertains to.

19 Here Petitioners don't connect their
20 assertions about salinity to any effects in wetlands
21 west of the cooling canals to some adverse impact to
22 endangered species. There is simply no support for
23 that assertion.

24 To the extent they assert that there is
25 some deficiency in the ER because it didn't -- it

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1 didn't look at this issue, they are merely
2 speculating. They offer no support that there are in
3 fact some impacts that should be considered, and
4 that's a pleading defect. That's not -- you know,
5 that's not a battle of the experts. It's just a
6 dispositive deficiency in the pleading itself.

7 There must be something more than a
8 suggestion that there is a deficiency. You know,
9 Petitioners certainly don't have to prove their case
10 at this point, but they have to provide some support
11 that there is some there, and they just haven't done
12 that here.

13 And one final point that I would make
14 regarding the applicability of 51.53(c)(3) here.
15 Assuming that that provision does not apply to the SLR
16 proceeding, contentions 2E and 3E must be rejected
17 outright because Joint Petitioners' backup argument
18 that Regulation 10 CFR 51.45 Charlie applies. That
19 regulation doesn't require consideration of new and
20 significant information, and that's the basis for one
21 of their contentions.

22 And the cumulative impacts that are
23 required to be discussed, I think as the Board pointed
24 out in its proposed questions, in 51.45 Charlie, is
25 limited to limited work authorizations, construction

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1 permits, COL proceedings. So there simply would be no
2 basis for contentions 2E or 3E outright.

3 And we think, more broadly, the petition
4 doesn't advance specific arguments regarding alleged
5 non-compliance with Section 51.45 Charlie. It is
6 referenced in a footnote as sort of a throwaway
7 argument that, well, if our arguments regarding
8 51.53(c)(3) aren't applicable here, then -- then we
9 rely on this.

10 But they really marshalled no substantive
11 arguments as to how those requirements are somehow not
12 met. And their brief reference in a footnote can't be
13 -- can't be adequate support for an admissible
14 contention here. And so we think as an overarching
15 issue, none of these contentions are admissible for
16 these many reasons.

17 I would like to just respond to a couple
18 of comments from Petitioners earlier regarding the
19 suggestion that the CO or CA activities just might
20 stop working somehow. The CO and the CA both have
21 built into them a belt-and-suspenders approach that
22 says if this approach doesn't work, we're going to
23 require some additional effort.

24 So it's not that, well, if these efforts
25 don't work we're all just out of luck. The order and

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1 the consent agreement are flexible. They are designed
2 that way, so that if these efforts don't work as
3 expected that there is something else that will impose
4 further requirements to mitigate impact.

5 And the idea that nobody but FPL believes
6 that these will work is simply unsupported. Again,
7 these requirements came out of administrative
8 proceedings. These were well-reasoned technical
9 judgments by the informed regulators that are
10 responsible for these issues.

11 There was extensive modeling done. This
12 is not guesswork. This is -- this is -- these are
13 actions that have been found to be reasonably likely
14 to be effective through a regulatory process.

15 But, again, the Applicant can rely on
16 reasonable assumptions here. NEPA is forward-looking,
17 but a crystal ball inquiry is not required. It is
18 reasonable to assume that regulator-approved actions
19 will be effective, but Petitioners apparently read
20 into Part 51 a duty for FPL to disagree with state
21 regulators that the -- that the efforts will be
22 effective, but there is -- there is no such duty for
23 an applicant in Part 51.

24 Of course, the NRC will conduct its
25 independent analysis to verify that the assumptions

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1 are reasonable, but there is no duty in Part 51 for
2 the applicant to engage in an academic exercise to
3 disagree with a state regulator's conclusion that
4 actions are going to be effective here.

5 The staff will cover that as part of its
6 independent analysis, and there is no further duty on
7 applicants here further to Part 51.

8 JUDGE HAWKENS: So just mentioning the
9 existence of the consent agreements and consent orders
10 discussing them briefly is sufficient to satisfy your
11 ER obligation?

12 MR. LIGHTY: I wouldn't say just
13 mentioning them, but what the ER does here is it
14 discusses them extensively. It talks about the
15 process, the administrative process, that FPL engaged
16 in with the regulators to get there. I think the --
17 Chapter 9 of the ER discusses the status of those
18 activities, and it's embedded throughout the
19 discussions in Chapters 3 and 4.

20 It is extensive throughout the --
21 throughout the ER, and I certainly think that that's
22 sufficient. It is more than just saying we have an
23 order; we think that's enough. There is -- there is
24 discussion throughout the ER of this issue.

25 JUDGE HAWKENS: That's fine.

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1 MR. BESSETTE: Your Honors, I would like
2 to just add one comment. We were reminded we were
3 talking about the NRC staff review of cooling towers
4 for other license renewal applicants. We understand
5 the NRC also considered cooling towers for Seabrook in
6 response to EPA comments, but EPA is a 316(b)
7 regulator for New Hampshire.

8 JUDGE HAWKENS: Do you have anything
9 further? You have a little bit more time, I believe.

10 MR. BESSETTE: In the interest of moving
11 things along, we are going to --

12 JUDGE HAWKENS: We're grateful. Thank
13 you.

14 MR. TURK: We might cede some of our time.
15 They can rebut us later, Your Honor.

16 So I will be speaking on behalf of the
17 staff for the first contention from the Joint
18 Petitioners, which deals with the cooling tower issue.

19 Mr. Wachutka will address climate change
20 and sea level rise contentions. Those are Joint
21 Petitioners' contentions 2, 3, and 4. And Ms.
22 Houseman will address our contention 5 dealing with
23 CCS impacts.

24 And so let me start by apologizing to you
25 if there is any confusion on your part as to whether

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1 the staff believes that the Applicant should have done
2 an analysis of cooling towers. We don't believe that.
3 And let me clarify any confusion as to what the
4 staff's position is here.

5 To date, 91 licenses have been renewed by
6 the NRC; 59 supplemental environmental impact
7 statements were issued. In all of that time, the
8 staff evaluated alternative cooling systems on only
9 three occasions -- Indian Point, Seabrook, and Oyster
10 Creek. That's it. We normally do not look at
11 alternative cooling systems. In part, that is
12 probably because it is not necessarily a reasonable
13 alternative. It is an expensive, substantial
14 modification of the plant, and that is typically not
15 going to be deemed to be proportionate -- of
16 proportionate benefit to the impacts of whatever the
17 cooling tower would be designed to mitigate.

18 In the instances where the staff has
19 looked at cooling tower as an alternative it is
20 because of public interest. In the case of Seabrook,
21 because of EPA comments in response to the draft EIS,
22 that's my understanding.

23 For Indian Point, because there was strong
24 opposition by the state and members of the public to
25 the plant on the renewal on the grounds that there is

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1 substantial aquatic impacts. And Oyster Creek, I was
2 not involved, so I couldn't give you the specific
3 reason, but, again, it's because of public interest,
4 not because there was an impact so great that some
5 mitigation alternative was deemed to be necessary to
6 mitigate those impacts.

7 When we begin our reviews, we don't know
8 what the impacts are that would need mitigation. We
9 don't know the extent of the impact. So we may
10 commence to do an alternative analysis, and then later
11 we say, "Okay. Here is the impact of the alternative.
12 Here is the need for it." And we find that, no, it's
13 not really necessary. It doesn't mitigate something
14 that is of great importance.

15 So the fact that we are doing the
16 alternative analysis here to look at an alternative
17 cooling system method does not mean that we have
18 decided that the impacts of Turkey Point Units 3 and
19 4 are so significant that another mitigation measure
20 must be considered beyond what was in the ER. So we
21 do not fault the applicant for not looking at this
22 alternative.

23 JUDGE HAWKENS: So it's not an improper
24 omission from the ER, but it would be an improper
25 omission from the supplemental EIS?

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1 MR. TURK: No. It would not even be an
2 improper omission from the supplemental EIS. We are
3 doing it because of public interest, not because we
4 have determined that the impacts are so great that
5 another mitigation alternative must be considered.

6 Remember what I said earlier. We have two
7 purposes in our NEPA review. One is to consider
8 impacts, to make sure that we are taking the hard look
9 that NEPA requires; and, second, the requirement to
10 inform the public, so that they are aware of what the
11 impacts are and what we are considering.

12 JUDGE HAWKENS: Okay. Maybe I -- maybe I
13 misstated my inquiry, or maybe I just misunderstood
14 you. But it sounds like you're just saying you do
15 have an obligation in the supplemental EIS to include
16 an assessment in the public interest, and that's why
17 it's going to be included in supplemental EIS.

18 MR. TURK: We have the discretion, rather
19 than the obligation, to consider cooling towers as an
20 alternative. We are not required to. If the --

21 JUDGE HAWKENS: So this will be a
22 discretionarily admitted --

23 MR. TURK: Contention?

24 JUDGE HAWKENS: -- contention.

25 MR. TURK: Your Honor, I do not want to be

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1 in a position, and the staff did not want to be in a
2 position, of telling you to reject a contention
3 asserting the need to look at cooling towers, and next
4 month give you an EIS that says, "Here is the cooling
5 tower analysis."

6 So we're not opposing the admission of the
7 contention because it is consistent with the fact that
8 the staff itself will be looking at the alternative,
9 but we do not deem the contention to be -- we do not
10 deem it necessary for you to admit the contention to
11 avoid being remiss in your duties.

12 JUDGE HAWKENS: All right. Thank you.

13 MR. TURK: There was some question about
14 the impact of the cooling system operation, and I --
15 as I heard that discussion, I was reminded that in the
16 EIS for the initial operating license renewal for
17 Turkey Point, there was a discussion of the impacts.
18 And in the -- let me come to that one first.

19 This is in -- what I'm reading from now
20 will be the 2002 Supplement 5 to the generic
21 environmental impact statement for license renewal.
22 Turkey Point's license renewal initially came early in
23 the process. This was a 2002 document.

24 At page 4-31 of the supplemental EIS for
25 initial license renewal, the staff reviewed what the

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1 groundwater impacts are, and we said that the GEIS has
2 addressed this. For plants using less than 100
3 gallons per minute, they are not expected to cause any
4 groundwater use conflicts.

5 For saltwater intrusion, the GEIS
6 concluded that nuclear power plants do not contribute
7 significantly to saltwater intrusion, and the staff,
8 after reviewing what the GEIS provided, concluded the
9 staff has not identified any significant new
10 information during its independent review of the FPL
11 ER, the staff's site visit, the scoping process, or
12 its evaluation of other available information.
13 Therefore, the staff concludes that there are no
14 groundwater quality degradation impacts associated
15 with groundwater -- with saltwater intrusion during
16 the renewal term beyond those discussed in the GEIS.

17 And the same thing for groundwater quality
18 degradation for cooling ponds in salt marshes. We
19 reviewed the GEIS conclusion, the Category 1
20 determination, and we reviewed our own assessment, or
21 we summarized our own assessment and concluded that we
22 have not found any significant new information that
23 would alter the GEIS conclusions for initial license
24 renewal of Turkey Point.

25 The same sort of process will be followed

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1 here in the draft SEIS for subsequent license renewal.
2 We expect to look at what the GEIS concluded and
3 conclude whether we have identified any new and
4 significant information that might cause us to vary
5 from the GEIS conclusion. And in a month or two, we
6 hope to see what that EIS states.

7 In the GEIS, in the June 2013 GEIS that
8 Mr. Lighty referred to, at page 4-50, the GEIS reviews
9 the issue of groundwater quality degradation for
10 plants with cooling ponds and salt marshes. And the
11 GEIS there discusses the fact that two nuclear plants,
12 South Texas and Turkey Point, have cooling systems
13 located relatively near or constructed in salt
14 marshes.

15 And the GEIS goes on to evaluate what
16 impact those plants, that subset of plants, Turkey
17 Point and South Texas, what is the impact on
18 groundwater quality degradation, and they conclude
19 that because these are brackish or saltwater sites,
20 there is no impact on -- or there is a small impact on
21 groundwater quality.

22 And it notes that this is the same
23 conclusion reached in the 1996 GEIS. No new
24 information has been identified in plant-specific
25 SEISs or associated literature that would alter this

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1 conclusion. And the GEIS then goes on to reach the
2 same conclusion for the 2013 analysis.

3 So, in summary, Your Honor, the staff is
4 not urging you to admit the contention, but we are not
5 going to oppose it because we will be doing the same
6 analysis that the Intervenors allege the Applicant
7 should have conducted.

8 And with that, I would turn to Mr.
9 Wachutka.

10 MR. WACHUTKA: Thank you. May it please
11 the Board, my name is Jeremy Wachutka. I am counsel
12 for the NRC staff, and I will be presenting the
13 staff's position that Joint Petitioners' contentions
14 2E, 3E, and 4E are not admissible.

15 I will start with contention 4E.
16 Contention 4E is a contention of omission that
17 generally faults the environmental report for not
18 discussing climate change as part of its discussion of
19 the affected environment. This contention is not
20 admissible because, one, climate change is required to
21 be discussed as a cumulative impact rather than as
22 part of the affected environment; and, two, the
23 environmental report does discuss climate change as a
24 cumulative impact.

25 First, consistent with NEPA, the NRC

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1 practice is to discuss climate change as a cumulative
2 impact and not as part of the affected environment.
3 This is stated in the 2013 Part 51 rulemaking and is
4 demonstrated by the organization of the license
5 renewal GEIS.

6 Specifically, Chapter 3 of the license
7 renewal GEIS discusses the affected environment as the
8 currently existing environment. Chapter 4 of the
9 license renewal GEIS then discusses the impacts of
10 this currently existing environment from the effects
11 of the proposed action, including the effects of the
12 proposed action in combination with the effects of
13 reasonably foreseeable future actions.

14 Climate change is considered one such
15 reasonably foreseeable future action. Therefore, the
16 NRC process is to, one, describe the current
17 environment as a baseline in Chapter 3; two, determine
18 which specific resource areas of this environment
19 could be affected by both the proposed action and
20 climate change; and, three, analyze these resource
21 areas for reasonably foreseeable future cumulative
22 impacts.

23 This same process is applied to
24 environmental reports by NRC Regulatory Guide 4.2,
25 Supplement 1, at pages 48 and 49. This process is

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1 consistent with NEPA because it ensures that the
2 impacts of the proposed action, including the impacts
3 of the proposed action combined with the effects of
4 reasonably foreseeable future actions, such as climate
5 change, are described.

6 Therefore, contrary to contention 4E, a
7 discussion of climate change does not have to be part
8 of the discussion of the affected environment.

9 Second, contention 4E is not admissible
10 because the environmental report does discuss climate
11 change through its incorporation by reference of the
12 cumulative impacts chapter of the EIS for Turkey Point
13 Units 6 and 7. This chapter states that the effects
14 of climate change are discussed in Appendix I, and
15 Appendix I, in turn, essentially contains all of the
16 information that the -- of the future environment as
17 affected by climate change that the Joint Petitioners
18 argue is missing from the environmental report.

19 It describes the future environment in the
20 vicinity of Turkey Point and during a similar time
21 period as a subsequent license renewal period. It
22 incorporates, by reference, the 2014 third national
23 climate assessment report as compared to Joint
24 Petitioners' use of the 2017 version of this report.

25 It discusses an air temperature increase

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1 of five to six degrees Fahrenheit, as compared to the
2 Joint Petitioners' discussion of an air temperature
3 increase of four degrees Fahrenheit. And it discusses
4 a sea level rise of one to four feet as compared to
5 Joint Petitioners' discussion of a sea level rise of
6 one to two feet.

7 So based on this information, contention
8 4E does not show that a genuine dispute exists with
9 the environmental report on the third issue, and,
10 therefore, it is not admissible.

11 Are there any questions on contention 4E?

12 Essentially, as Judge Hawkens was saying,
13 the affected environment, Chapter 3, then we look at
14 climate change as a cumulative impact, and that has
15 been done.

16 Next, I will address contentions 2E and
17 3E. These contentions generally fault the
18 environmental report for not discussing certain
19 cumulative impacts. These contentions, though, are
20 not admissible because they do not provide any support
21 that demonstrates that these cumulative impacts are in
22 fact reasonably foreseeable, which is the NEPA
23 standard.

24 For instance, the Joint Petitioners argue
25 that new higher sea levels of approximately one to two

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1 feet will lead to overtopping or breaching of the
2 Turkey Point cooling canals, and resulting in
3 environmental impact from cooling canal water being
4 discharged to surface waters.

5 The Joint Petitioners, though, do not
6 demonstrate that this occurrence is reasonably
7 foreseeable as they are required to do. They do not
8 discuss the relative heights of the cooling canals and
9 future sea levels. They do not discuss FPL's proposed
10 aging management program for the cooling canals or the
11 requirements of the consent order, both of which
12 address the continuing maintenance of the cooling
13 canals.

14 Moreover, they do not demonstrate that
15 such a discharge would have a significant impact on
16 surface waters, given that the consent order requires
17 FPL to minimize the salinity and nutrient content of
18 the cooling canal water. Therefore, the alleged valor
19 of the environmental report to discuss cooling tower
20 overtopping is not an admissible contention.

21 Joint Petitioners also argue that new
22 higher sea levels will lead to flooding of the site
23 that will reduce power output and that will affect
24 decommissioning. Again, though, the Joint Petitioners
25 do not demonstrate that this occurrence is reasonably

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1 foreseeable, given that the NRC regulates the
2 potential for site flooding as a current operating
3 issue and has affirmed this position as part of its
4 response to the Fukushima accident.

5 Similarly, the Joint Petitioners argue
6 that a new higher air temperature of approximately
7 four degrees Fahrenheit will increase salinity levels
8 in the cooling canals, which will impact groundwater.
9 The Joint Petitioners' support for this argument is
10 limited to the statement that this is a "basic
11 scientific principle."

12 However, the issue is not whether an
13 increase in air temperature will impact salinity, the
14 issue is whether the asserted four-degree increase in
15 air temperature, when considering other factors, will
16 actually have a noticeable impact on the cooling canal
17 water and groundwater, such that this impact must be
18 discussed in the environmental report.

19 The Joint Petitioners, though, do not
20 provide any support that this is the case. They also
21 do not discuss the consent order's requirement that
22 FPL achieve and maintain an average annual salinity in
23 the cooling canals of at or below 34 practical
24 salinity units, regardless of what the air temperature
25 may be. Therefore, this, too, is not an admissible

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1 contention.

2 The Joint Petitioners also claim that
3 higher air temperatures will reduce the heat exchange
4 capacity of the cooling canals, and thus reduce power
5 output. This claim, though, is directly contradicted
6 by the consent order, which requires FPL to develop,
7 submit, and implement a plan for cooling canals to
8 achieve a minimum of 70 percent thermal efficiency.

9 The Joint Petitioners argue that the terms
10 of the consent order should not be credited because in
11 the past FPL has violated its permits and relevant
12 regulations. This argue, though, is not persuasive
13 because, as we discussed previously, consistent with
14 Commission case law, the NRC staff presumes that the
15 licensee will follow its licenses and that government
16 agencies will enforce their laws and regulations.

17 Additionally, there is no indication that
18 FPL is not complying with the consent order or consent
19 agreement.

20 Another argument raised by the Joint
21 Petitioners is that the environmental report's
22 discussion of groundwater use conflicts is
23 insufficient because during the subsequent license
24 renewal period it is "highly probable" that
25 groundwater resources will be inadequate.

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1 The Joint Petitioners, though, do not
2 provide any support for this conclusory statement,
3 and, therefore, it too is not an admissible
4 contention.

5 So, in summary, Your Honors, for
6 contentions 2E and 3E, they are not admissible because
7 they are not supported by any alleged facts or expert
8 opinions. And contention 4E is not admissible because
9 it does not show that a genuine dispute exists with
10 the environmental report on a material issue.

11 Are there any outstanding questions on
12 contentions 2E, 3E, or 4E?

13 JUDGE HAWKENS: Not at this point.

14 MR. WACHUTKA: Okay. With that, I will
15 turn it over to Ms. Houseman.

16 JUDGE HAWKENS: Thank you.

17 MS. HOUSEMAN: Thank you very much. I
18 will address contention 5E, and I would like to first
19 respond to one of the Joint Petitioners' arguments
20 concerning the consent order and consent agreement,
21 which they describe as an experiment, and they
22 describe as a matter of trial and error.

23 That is certainly not the NRC staff's view
24 of these enforcement actions. Of course, the NRC
25 staff will apply the presumption of administrative

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1 regularity that these agencies are going to endorse
2 these requirements.

3 Moreover, these -- this order and this
4 consent agreement represent these agencies' technical
5 judgments. After a significant review of the issues,
6 this agency has crafted specific mitigation measures
7 that they have determined in their technical judgment
8 will be effective to halt and retract the migration of
9 the hypersaline plume.

10 And these agencies have built in measures
11 to require FPL to report and provide status updates on
12 the effectiveness of these measures. If these
13 measures are not effective, there are requirements in
14 the consent order and in the consent agreement to
15 revisit the plans to reach the targets imposed upon
16 FPL.

17 The consent order, the consent agreement
18 provide specific targets that FPL must meet by
19 particular dates; most importantly, that the
20 hypersaline plume must be retracted to within the L31E
21 canal within 10 years.

22 And Commission case law is clear that the
23 NRC does not second-guess other agencies' technical
24 and enforcement judgments. For example, in Vermont
25 Yankee, CLI-07-16, at page 377, the Commission

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1 specifically declined to second-guess the State of
2 Vermont's NPDES permit decisions.

3 Joint Petitioners argue -- just as SEIS
4 argues -- that the NRC staff must analyze both the
5 beneficial and the negative impacts of mitigation
6 measures. The NRC staff certainly agrees with this
7 position. However, that is not what Joint Petitioners
8 are asking the NRC staff and this Board to do in this
9 proceeding.

10 What Joint Petitioners are asking that we
11 do is to entirely second-guess these administrative --
12 these other agencies and to -- and to apply the
13 presumption that the mitigation measures they have
14 imposed will utterly fail. And the NRC staff under
15 Commission case law, is not required to do that.

16 JUDGE HAWKENS: Ms. Houseman, just to be
17 clear, Joint Petitioners have brought to your
18 attention some evidence or factual assertion that some
19 fact underlying the methodology in the consent
20 agreement was incorrect. Would that be enough for the
21 NRC staff to look at that methodology?

22 MS. HOUSEMAN: The NRC staff will
23 certainly review it, and we'll need to review that
24 information and determine -- I should -- I should note
25 that the NRC still will not second-guess the technical

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1 judgment of FDEP and DERM. Of course, the NRC staff
2 is going to review all information available to it.

3 And, of course, if the NRC staff has any
4 questions or concerns for these state agencies with
5 respect to these mitigation measures, the NRC staff
6 could reach out to these agencies and raise these
7 questions. And if, in the NRC staff's judgment, there
8 would be negative impacts, then they could consider
9 those. But, otherwise, the NRC staff is not going to
10 second-guess their technical judgments.

11 Next, with respect to the various Category
12 1 issue that Joint Petitioners raise, as we have
13 argued previously, a waiver is required to litigate
14 those issues. Joint Petitioner has purported to raise
15 certain Category 2 issues, one being thermal
16 impingement and entrainment impacts on applied
17 organisms and applied resources, the other being non-
18 cooling system impacts on terrestrial resources.

19 They did this in citing 51.53(c)(3)i, B
20 and E. But, in fact, what Petitioners argued in their
21 petition is actually several Category 1 issues for
22 which they would be required to obtain a waiver.

23 And, importantly, they are required to
24 obtain a waiver even if they purport to raise new and
25 significant information. For example, I direct your

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1 attention to the 2013 GEIS, page 4-68, and this is the
2 discussion of the impacts of cooling systems on
3 terrestrial resources. This is a Category 1 issue.

4 In the middle of that page, the discussion
5 states that mitigation may also be implemented where
6 sensitive resources could be effective. At the Turkey
7 Point plant in Florida, for example, the flow of
8 hypersaline groundwater from the cooling canals toward
9 the Everglades to the west is prevented by an
10 interceptor ditch located along the west side of the
11 canal system from which groundwater inflow is
12 expected.

13 And the citation is NRC 2002B. I don't
14 have the cross-reference on me, but I believe that
15 that is the supplemental EIS with the initial license
16 renewal for Turkey Point.

17 JUDGE HAWKENS: Yes.

18 MS. HOUSEMAN: Now, even if the Joint
19 Petitioners have raised new and significant
20 information with respect to analyses like this, they
21 still must seek and obtain a waiver from the
22 Commission to litigate those issues.

23 JUDGE KENNEDY: To litigate what issue?

24 MS. HOUSEMAN: The Category 1 issues.

25 JUDGE KENNEDY: Well, I mean, give me a

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1 specific. I mean, how about the plume, can they not
2 -- I mean, clearly, an interceptor ditch does not stop
3 the plume. I mean, I think -- hasn't it gone past the
4 ditch?

5 MS. HOUSEMAN: Well, the impacts that the
6 Joint Petitioners raised with respect to the plume are
7 largely Category 1 issues. As we explained in our
8 answer, they raised --

9 JUDGE KENNEDY: Yeah. I think we're
10 getting -- I'm getting -- I think I'm getting more
11 confused by how this new and significant information
12 in this process works. Certainly, there is a section
13 that deals with new and significant information. And
14 the adequacy of that information or the completeness
15 of that information could be challenged without a
16 waiver. Is that true?

17 So Chapter 5. Petitioners could raise a
18 challenge to the information in Chapter 5 without a
19 waiver.

20 MS. HOUSEMAN: Well, specifically, in the
21 Vermont Yankee decision, Vermont Yankee/Pilgrim
22 decision, the Commission stated that even if the
23 contention is with respect to new and significant
24 information, a waiver is still required.

25 And, again, in Limerick, the Commission

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1 revisited that question, and did not reverse its
2 holding in Vermont Yankee/Pilgrim, and in fact
3 reiterated it.

4 JUDGE KENNEDY: Right. But didn't, in
5 Limerick, they allow the Petitioner to submit
6 additional new and significant information?

7 MS. HOUSEMAN: In Limerick, the Commission
8 allowed the Petitioner to seek a waiver with respect
9 to the same analysis, which was a de facto Category 1
10 issue.

11 JUDGE KENNEDY: So don't you -- is what
12 you're telling me that this contention -- Category 1
13 need for a waiver extends to the adequacy of the new
14 and significant information as well?

15 MS. HOUSEMAN: That is the NRC staff's
16 understanding of Commission case law. Yes.

17 JUDGE KENNEDY: Okay.

18 JUDGE ABREU: What about the -- in the
19 topics we mentioned that in the Limerick case in 2012
20 the CLI said, "In our view, NRDC may challenge the
21 adequacy of the new information provided in the
22 Limerick environmental report." You're saying that's
23 true only if they submit a waiver? Is that your --

24 MS. HOUSEMAN: Yes.

25 JUDGE ABREU: Is that what you're saying?

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1 MS. HOUSEMAN: That is our understanding,
2 because in that decision, the Commission goes on,
3 after that statement, to say, "However, based on the
4 circumstances present here, and given that our rules
5 expressly provide that a supplemental SAMA analysis
6 need not be performed in this case, the proper
7 procedural avenue for NRDC to raise its concerns is to
8 seek a waiver of the relevant provision in Section 18
9 51.53(c)(3), Roman numeral IIL."

10 So my reading of that statement is that,
11 even in the face of allegedly new and significant
12 information, the Commission's position is a waiver is
13 required to litigate it.

14 JUDGE KENNEDY: Right. The waiver there
15 was to performing the SAMA analysis. They would have
16 had to submit a waiver to institute a new SAMA
17 analysis, but the Commission did allow a petitioner to
18 interject new information as an omission from the list
19 of new and significant pieces of information.

20 So they -- they could make an insertion
21 into Chapter 5, for argument's sake, but it stops
22 there. So, I mean, new and significant information
23 could be added as an omission, I think under the
24 Commission case law. What you couldn't do is take
25 that information without a waiver and institute a new

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1 SAMA analysis.

2 Now, I don't know exactly how that all
3 fits to this whole thing, but this Limerick case just
4 keeps being used as a way to say you really can't
5 challenge anything if it relates to Category 1. And
6 I don't believe that's true.

7 JUDGE HAWKENS: Could I also hear if the
8 staff agrees with Judge Kennedy's assessment of a
9 petitioner's ability to challenge new and significant
10 information?

11 MR. TURK: No, we do not.

12 JUDGE HAWKENS: Could we hear from you on
13 that, please?

14 MR. TURK: If Ms. Houseman doesn't mind,
15 let me see if I can add one or two sentences.

16 MS. HOUSEMAN: Please do.

17 MR. TURK: What the Commission said in
18 Limerick is consistent with what it said previously in
19 Turkey Point back in 2001, and in Vermont
20 Yankee/Pilgrim in 2005, I believe. I could be wrong
21 on the date. 2009.

22 What it said was if a petitioner wishes to
23 raise new and significant information that would alter
24 the finding of a GEIS, it may do so, but only if it
25 files a petition for waiver.

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1 JUDGE HAWKENS: Okay.

2 MR. TURK: It cannot simply say, "Here is
3 new and significant information, and we want to
4 challenge the adequacy of an ER or an EIS because it
5 omits it." They would have to say to the Board, "Here
6 is new and significant information. We believe this
7 is a prima facie showing that the GEIS should not be
8 applied, the GEIS conclusion should not be applied in
9 this proceeding."

10 If you agree, you are then referred up to
11 the Commission, and they would decide whether or not
12 to waive the conclusion in the Table B1 and the GEIS
13 as to the impacts for that issue. And then that would
14 allow the litigation of the new information to
15 proceed.

16 JUDGE ABREU: Let me perhaps ask it a
17 different way. The quote you gave referenced sub IIL;
18 is that correct?

19 MS. HOUSEMAN: Uh-huh.

20 JUDGE ABREU: Which is one part of
21 51.53(c)(3).

22 MS. HOUSEMAN: Yes.

23 JUDGE ABREU: The requirement to include
24 new and significant information is Part IV, Part 4,
25 lower case Roman numeral four. So those are two

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1 distinctly separate sections of -- and a GEIS
2 determination -- so now they want to step back to the
3 GEIS. The GEIS has its logic for determining a
4 generic impact of small based on various criteria and
5 historical references and whatnot.

6 But separate from the GEIS criteria for
7 that initial determination is this letter -- is this
8 Section 4 of 51.53 that says, "But you must add new
9 and significant -- you must let us know about new and
10 significant information."

11 So it seems like those are two separate
12 things, that you can say we agree that the GEIS made
13 its determination based on reasonable discussion, that
14 the GEIS Cat. 1 discussion is just fine. But that
15 Cat. 1 discussion is based on certain information.
16 The reg says, "But let us know about anything that is
17 new and significant because that is stuff we didn't
18 consider before."

19 So you are not challenging the Cat. 1 --
20 one could say that one is not challenging the Cat. 1
21 determination. Instead, they could challenge the fact
22 that there was new and significant information. And
23 what I'm hearing you say is, sorry, all of it requires
24 a waiver, even though those are separate -- could be
25 separate arguments from a Petitioner, they are not

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1 challenging the GEIS determination. They are just
2 saying, "But you didn't tell us about new and
3 significant stuff."

4 MS. HOUSEMAN: Well, we are certainly not
5 aware of any Commission case law that has -- that has
6 changed its holding in Vermont Yankee/Pilgrim, and
7 that holding is very clear that if the challenge
8 concerns new and significant information a waiver is
9 required.

10 Otherwise, to raise a hypothetical,
11 Petitioners could come in with a host of what they
12 purport to be new and significant information that
13 could maybe even satisfy all of the contention and
14 admissibility requirements.

15 And at each site-specific license renewal
16 proceeding, we could be litigating the findings in the
17 GEIS over again with respect to any Category 1 issue
18 for which a petitioner has gathered allegedly new and
19 significant information that has either occurred since
20 the last publication of the GEIS or that --

21 JUDGE ABREU: But is that really --

22 MS. HOUSEMAN: -- perhaps wasn't
23 explicitly considered in the GEIS.

24 JUDGE ABREU: But is that really
25 relitigating the GEIS, or is it only litigating the

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1 fact that, hey, there was extra info you should have
2 told us about, so that -- with the idea that, so the
3 staff could consider that as they do the EIS, because
4 that's the idea is we want to make sure the staff has
5 -- the point of the ER is information for the staff to
6 help them do the EIS. Right? Isn't that the basic
7 concept? And so --

8 MS. HOUSEMAN: Yes.

9 JUDGE ABREU: -- you've got the
10 determinations in the GEIS, and then staff would
11 probably want to know about anything new and
12 significant which you have agreed is, like FPL says,
13 it has got to be at least moderate or large. So it's
14 got to be at least a noticeable impact or further or
15 more.

16 So that could be thought of as a kind of
17 separate icing on the cake of the GEIS. You are not
18 -- they are not saying the GEIS was wrong. They are
19 just saying this was the extra info that item little
20 four wants us to tell you about.

21 MS. HOUSEMAN: If I could take a step back
22 for a moment and make a note on the bigger picture of
23 the purpose of the GEIS and that's for the NRC or any
24 agency to have the opportunity to conduct a bounding
25 analysis that will apply to an entire program or that

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1 will apply to a series of very similar credible
2 actions. So that is the goal here in developing some
3 of these Category 1 issues.

4 And although they cannot be relitigated in
5 each site-specific proceeding in which a petitioner
6 alleges, "Well, that GEIS didn't cover this particular
7 discrete issue at this site," that's not the end of
8 the petitioner's opportunities for public engagement
9 in this process.

10 They are not entitled to a right -- to a
11 hearing on every particular concern that they may
12 have. They are, of course, under NEPA afforded the
13 opportunity to provide public comment, both on the
14 scoping process and also on the draft supplemental
15 environmental impact statement. They will certainly
16 have that opportunity, and they can raise Category 1
17 issues in those processes.

18 Additionally, even if the applicant does
19 not consider a particular piece of information the
20 staff may believe is potentially new and significant
21 in their environmental report, and even if an
22 applicant considers that information but its
23 conclusion is that the information perhaps is new but
24 is not significant, that does not preclude the NRC
25 staff from reaching a different determination in its

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1 independent NEPA analysis.

2 So although Petitioners may not get the
3 hearing that they want on this Category 1 issue, that
4 does not mean that the NRC staff will not do its job
5 at taking a hard look under NEPA and that the
6 Petitioners cannot continue to engage in this process.

7 JUDGE ABREU: But for practical purposes,
8 it means that at the stage where they submit
9 contentions to be considered, you essentially cannot
10 challenge anything that is about anything that has
11 been called Cat. 1 without a waiver.

12 MS. HOUSEMAN: That's correct.

13 JUDGE ABREU: So everything about that
14 topic is off limits, even though it might be in this
15 little separate new and significant category.

16 MS. HOUSEMAN: That's right.

17 JUDGE ABREU: That's what you're saying.
18 Okay.

19 MS. HOUSEMAN: If a Category 1 --

20 JUDGE ABREU: Basically, they are left
21 with the Cat. 2 issues.

22 MR. TURK: No. Your Honor, they have the
23 Cat. 1 issue, too, if they file for a waiver.

24 JUDGE ABREU: Right. But the
25 supposition was --

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1 MR. TURK: And they can base that on --

2 JUDGE ABREU: -- without the waiver, you
3 could -- you are left with Cat. 2's.

4 MR. TURK: If I can add one thought. The
5 Commission addressed the very question that you raise
6 in Turkey Point back in CLI-01-17. The Commission
7 said at page 12 of 54 NRC that "The Commission
8 recognizes that even generic findings sometimes need
9 revisiting in particular contexts. Our rules provide
10 a number of opportunities for individuals to alert the
11 Commission to new and significant information that
12 might render a generic finding invalid, either with
13 respect to all nuclear power plants or for one plant
14 in particular."

15 In the hearing process, for example,
16 Petitioners with new information showing that a
17 generic rule would not serve its purpose at a
18 particular plant may seek a waiver of the rule. And
19 I'm going to omit citations.

20 It goes on to say, "Such petitioners may
21 also use the SEIS notice and comment process to ask
22 the NRC to forego use of the suspect generic finding
23 and to suspend license renew proceedings pending a
24 rulemaking or updating of the GEIS." But they -- if
25 they want to challenge significant new information,

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1 they have to seek a waiver, and that's a paraphrase.

2 The Commission said, "In the hearing
3 process, Petitioners with new information showing a
4 generic rule would not serve its purpose. A
5 particular plant may seek a waiver -- a waiver of the
6 rule."

7 The Commission said the same thing in
8 Limerick, issue in CLI-12-19, and this is the decision
9 as 76 NRC page 77.

10 The Licensing Board in that proceeding
11 admitted a contention because the petitioner said this
12 is new and significant information, so we're not
13 challenging the GEIS, but they're saying here is new
14 information that should be litigated, and the Board
15 agreed; the Commission reversed.

16 And the Commission said, and they are
17 quoting from an earlier decision in Vermont
18 Yankee/Pilgrim, they say, "As we explained,
19 adjudicating Category 1 issues site by site based
20 merely on a claim of new and significant information
21 would defeat the purpose of resolving generic issues
22 in the GEIS. Therefore, we determined that a waiver
23 was required to litigate any new and significant
24 information relating to a Category 1 issue."

25 Because the Petitioner had not requested

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1 a waiver, we affirmed the Board's rejection of the
2 contention in that proceeding. So that's a clear aim.
3 If a petitioner wants to raise new and significant
4 information that would undercut the GEIS
5 determination, there is a simple process. They file
6 a petition for waiver, and then they can get the
7 Commission to agree, yes, we are going to set aside
8 the GEIS determination and we go forward into
9 litigation.

10 JUDGE HAWKENS: Any other questions?
11 Anything else from the NRC staff?

12 MR. AYRES: Nothing. No, Your Honor.

13 JUDGE HAWKENS: I believe Joint
14 Petitioners have as much as 20 minutes left to them
15 for rebuttal.

16 MR. RUMELT: We will do better than that.

17 JUDGE HAWKENS: Thank you. You may use
18 the full amount, though, if you wish.

19 MR. RUMELT: Okay.

20 JUDGE HAWKENS: We do have time.

21 MR. RUMELT: So I'd like to first address
22 this issue of the CEQ guidance, and the status of the
23 law with respect to what the gentleman down the table
24 from me referenced as a reverse EIS. And, you know,
25 I'll share that we briefed this issue in our September

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1 10th reply, specifically at page 46 and 47, and it's
2 the Aqualiance case.

3 But I think the takeaway from that case
4 with respect to the CEQ guidance is that, as the
5 government admitted there, that guidance never changed
6 any responsibilities under NEPA. It remained the same
7 both before and afterwards.

8 So the issue is, what does NEPA require,
9 not what does the CEQ guidance say, and NEPA says take
10 a hard look at environment impacts. You can't look at
11 -- you can't take a hard look at environmental impacts
12 without fully understanding the affected environment
13 and cumulative impacts.

14 Another thing we just heard is, well, it
15 seems like it's a bit of a moving target. You know,
16 in one sense, climate change is one reasonably
17 foreseeable future action. We heard that from the NRC
18 staff's attorneys. But if it's -- and that's for
19 purposes of contention 4E.

20 But then, if I understood correctly, it is
21 not a reasonably foreseeable future action with
22 respect to contention 2E, which is the cumulative
23 impacts. So I think the correct answer here is that
24 it is reasonably foreseeable that there will be an
25 impact on the affected resources at issue in this --

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1 in this relicensing case. Again, Florida Power &
2 Light's plant sits just, you know, basically on the
3 bay, a couple, you know, matter of feet above sea
4 level. And as the sea rises, it is going to push the
5 saltwater up, and we have already discussed a lot of
6 those issues.

7 We heard that contention 2E should fail
8 because we didn't provide the height of the barrier
9 that protects the cooling canal system. But as we
10 mentioned in our brief, obviously, as Florida Power &
11 Light did in their safety review, they addressed
12 concerns about flooding impacts to areas higher than
13 the cooling canal system, and necessarily higher than
14 the barriers.

15 You wouldn't reach these higher levels if
16 you wouldn't overtop the canals. This is pretty
17 simple stuff. I don't think our contention should
18 fail for that kind of flyspecking argument.

19 JUDGE HAWKENS: I'm just wondering, were
20 you as specific in your pleadings as you are with us
21 right now, factually?

22 MR. RUMELT: Factually, yes.

23 MR. AYRES: Yeah.

24 MR. RUMELT: We cited to their -- their
25 safety analysis report and our expert report as far as

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1 where -- how high sea levels would go. There was a
2 prediction in the safety analysis that sea levels
3 would rise I believe it was .39 feet during the
4 current license term, and that the safety measures to
5 protect against flooding impacts, including from
6 natural weather phenomenon, were insufficient. And
7 these are areas that are located above the cooling
8 canal system, and necessarily wouldn't be impacted
9 unless there was overtopping of the barrier that
10 protects the cooling canals.

11 And my colleague here is reminding me to
12 reference Dr. Cobb's report, so Dr. Cobb, again, one
13 of the foremost experts on sea level rise, has
14 provided testimony that sea levels will rise
15 significantly and impact the rate of flooding and the
16 occurrence of flooding at the plain.

17 And so these are all things that are,
18 again, reasonably foreseeable and need to be
19 evaluated.

20 Let's see, there was the issue of air
21 temperature and whether or not that is going to impact
22 a plant's efficiency. Well, we have had several
23 uprates at the plant that were required because the
24 plant -- the cooling water wasn't cool enough in the
25 canals. In order to run at maximum efficiency, the

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1 cooling canals have to be at a certain temperature.
2 And if those -- if the air temperatures rise by X
3 number of degrees, and I believe, if I remember
4 correctly, we are looking at a three to four or higher
5 increase in temperature, that necessarily is going to
6 increase the temperature of the cooling canals.

7 And if -- and when that temperature
8 increases, it is going to reduce the efficiency of the
9 plant, or they are going to have to get some other
10 kind of uprate or draw more resources and freshen the
11 canal to cool it off more. So there are impacts that
12 need to be considered that haven't been considered.

13 Let's see. Okay.

14 MR. AYRES: I have just two points I
15 wanted to -- at this late hour -- mention. The first
16 has to do with the Commission staff's view of how they
17 are supposed to view state and local requirements, and
18 they have offered us today repeatedly the kind of
19 blanket statement that we just defer, we just assume
20 or -- we assume that the consent agreements and
21 permits will be carried out, and whatever they say is
22 going to happen is what is going to happen.

23 On the other hand, they have argued that
24 even a little break in that rule would destroy the
25 whole edifice and they would be questioning every

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1 single permit on them. Well, I think that's really
2 not right.

3 The general rule about deferring to
4 situations where the state has required something and
5 the applicant is in compliance with it makes a lot of
6 sense. In this case, however, the applicant did not
7 comply. The applicant was, in fact, subject to a
8 consent agreement, which is an enforcement measure,
9 not a permit, and the enforcement measure exists
10 because they were not complying with the permit.

11 So under those circumstances, we are
12 saying the Commission should look with less deference
13 toward the likelihood that the results that are
14 predicted in the consent agreement will actually
15 occur. And in this case, the fact that the consent
16 agreement is kind of vague, you know, it says, "Here
17 is the measures that we are going to do; if that
18 doesn't achieve the goal, we will do something else,"
19 but it doesn't say what, and this is a very open-ended
20 consent agreement.

21 And under those circumstances, it seems to
22 us the staff ought to look carefully and make its own
23 assessment, when it's considering what alternatives
24 exist, about the probability that the goal of the
25 consent agreement will actually be achieved.

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1 End of comments on that.

2 A final point. The Commission staff has
3 done quite a dance today about exactly why they
4 endorse the idea of accepting the admissibility of the
5 alternatives proposal that we made. And all of you
6 have tried to pin them down with some success, but not
7 entire success.

8 I want to read to you a statement from
9 their brief, their response brief, to our initial
10 petition. On page 68 of their brief it says, "As
11 stated in the staff's response to the Joint
12 Petitioners' contention 1E, NEPA requires the NRC to
13 consider reasonable alternatives to the proposed
14 federal action."

15 And the Commission's regulations in 10 CFR
16 Part 51 require the staff's SEIS for license renewal
17 to consider "the environmental impacts of alternatives
18 to the proposed action and alternatives available for
19 reducing or avoiding adverse environment effects."

20 Accordingly, the NRC staff does not oppose
21 the admission of SEIS contention 2 as a contention of
22 omission.

23 Now, even that is --

24 JUDGE HAWKENS: Is that 51.45 there?

25 MR. AYRES: Yes. So even that statement

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1 is slightly unclear. But it seems to us very clear
2 that the Commission has now taken a very different
3 position here from what it took in the briefing that
4 we did.

5 And we believe that the Commission staff
6 should be required to make a statement on this, and we
7 should be allowed the chance to respond to it, because
8 they are now resting their conclusion on an entirely
9 different grounds from the one they cited in their
10 brief.

11 So we would request that the Board require
12 the staff to provide such a statement and give us the
13 opportunity to respond to it.

14 MS. CURRAN: I just want to add that the
15 staff said verbatim the same thing in response to our
16 contention, and actually the regulation they cited,
17 there is two, 51.71(d), 51.95(c) (1) and (2). And we
18 just -- we haven't -- the argument that was made today
19 we just haven't seen before, and we're responding off
20 the cuff, and it just seems fair that if the staff is
21 going to take a different position on our contentions
22 that we have a chance to respond in writing. This is
23 -- this is new to us, that the staff has basically
24 changed its view between writing the response to our
25 contentions and coming up to this.

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1 JUDGE HAWKENS: Excuse us.

2 (Pause.)

3 MR. TURK: Your Honor, I don't know if I'm
4 being invited to respond, but I would --

5 JUDGE HAWKENS: Of course we will invite
6 you to respond. We wouldn't take any action without
7 hearing your response.

8 MR. TURK: I don't see an inconsistency.
9 On page 30 of the staff's response to the Petitioners'
10 contentions, there is a footnote in which we cited
11 51.71(d) and 51.95(c). The text stated, as the
12 Petitioners' counsel said before me, that the staff is
13 required to consider reasonable alternatives. And,
14 accordingly, we don't oppose -- oh, and the staff's
15 SAS will do that. Accordingly, we don't oppose the
16 admission of the contention.

17 In footnote 112, we stated, "In
18 undertaking an evaluation of a cooling tower
19 alternative, the staff expresses no position regarding
20 the environmental impacts of CCS operation or the need
21 for further mitigation of those impacts beyond the
22 measures currently in place or mandated by state or
23 local regulatory authorities."

24 Perhaps I could have been more clear. My
25 position today is the same as the position that I

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1 thought we were expressing in the brief, which is
2 consideration of cooling towers as an alternative is
3 not required.

4 We will be doing so, but we're not saying
5 that it's necessary to consider that beyond the
6 mitigation measures already considered in the ER. And
7 that has been our position, perhaps not as
8 articulately stated as Ms. Curran or other counsel
9 would prefer.

10 JUDGE HAWKENS: All right. Any response
11 to that?

12 MR. AYRES: No, Your Honor.

13 JUDGE HAWKENS: All right. Mr. Turk, we
14 would be grateful if you could provide a clarification
15 of your position on the issue. And if you could limit
16 it to 10 pages, and tell me what a reasonable time
17 would be to ask you to file it.

18 MR. TURK: We certainly can limit it to 10
19 pages. Hopefully, it will be far less. I will be
20 away from the office until next Monday, but I could
21 turn to it then and perhaps get it to you a week
22 afterwards. So if we can say two weeks from today, or
23 sooner, if you'd prefer.

24 JUDGE HAWKENS: We'll say no later than
25 two weeks from today.

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1 MR. TURK: Okay.

2 JUDGE HAWKENS: And after that has been
3 filed, we'll give all of the other parties and
4 participants an opportunity to respond, limiting it to
5 10 pages, and tell me when -- assuming we get the
6 filing two weeks from today, how would you like to
7 switch?

8 MS. CURRAN: We're trying to figure out if
9 our response time falls over the holiday.

10 JUDGE HAWKENS: That's fair. If somebody
11 has a calendar, maybe you can look at it.

12 MR. WACHUTKA: Two weeks is January 1st.

13 JUDGE HAWKENS: Say again?

14 MR. WACHUTKA: Two weeks after that is
15 January 1st.

16 JUDGE HAWKENS: We probably don't want to
17 -- yours will be January 14th; is that --

18 MR. WACHUTKA: December 18th.

19 JUDGE HAWKENS: Excuse me. December 18th.

20 MR. WACHUTKA: 18th, 14 days.

21 JUDGE HAWKENS: Okay. I'm with you. So
22 14 days will be January 1st. Do you want to do
23 January 7th or -- would that work?

24 MS. CURRAN: We could do January 7th.
25 That's -- we appreciate that. Thank you.

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1 MR. AYRES: We wouldn't ask under any
2 other circumstances.

3 JUDGE HAWKENS: Limit it to 10 pages?

4 MS. CURRAN: Yes.

5 JUDGE HAWKENS: And if that's -- you're
6 agreeable with that as well. Good.

7 At this point, do counsel have any other
8 issues they'd like to raise?

9 MR. LIGHTY: None from FPL, Your Honor.

10 MS. CURRAN: No.

11 JUDGE HAWKENS: All right.

12 MR. AYRES: Thank you, Your Honors.

13 JUDGE HAWKENS: Thank you for the filings.
14 Thank you for the oral presentations. They will be
15 helpful to all of us in considering and resolving the
16 issues presented. Thank you for accommodating the
17 unexpected events today of the school's lockdown and
18 evacuation. I commend all of you for working through
19 it.

20 Thank you to the audience for your
21 indulgence, and we are adjourned.

22 (Whereupon, the above-entitled matter went
23 off the record at 3:58 p.m.)

24

25