

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alex S. Karlin, Chairman  
Dr. Anthony J. Baratta  
Dr. William M. Murphy

In the Matter of

PROGRESS ENERGY FLORIDA, INC.

(Combined License Application for Levy County  
Nuclear Power Plant, Units 1 and 2)

Docket Nos. 52-029-COL, 52-030-COL

ASLBP No. 09-879-04-COL-BD01

February 2, 2011

MEMORANDUM AND ORDER  
(Admitting Contention 4A)

This proceeding involves the application of Progress Energy Florida, Inc. (PEF) for a combined license (COL) to construct and operate two AP1000 nuclear power reactors at its Levy Nuclear Plant (LNP) site in Levy County, Florida.<sup>1</sup> On November 15, 2010, the Nuclear Information and Resource Service, the Ecology Party of Florida, and the Green Party of Florida (collectively, Intervenors), filed a motion to amend Contention 4, which the Board previously admitted for hearing.<sup>2</sup> Intervenors allege in their proposed amended Contention 4, hereinafter referred to as Contention 4A or C-4A, various inadequacies in the NRC Staff's draft environmental impact statement (DEIS) relating to the discussion of environmental impacts resulting from dewatering and salt drift that Intervenors assert will occur during construction and

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<sup>1</sup> [PEF]; Application for the Levy County Nuclear Power Plant Units 1 and 2; Notice of Order, Hearing, and Opportunity to Petition for Leave to Intervene, 73 Fed. Reg. 74,532, 74,532 (Dec. 8, 2008).

<sup>2</sup> Ecology Party of Florida, Green Party of Florida, Nuclear Information and Resource Service Motion for Leave to Amend Contention 4 (Nov. 15, 2010) (Motion); An Amended Contention 4 (Nov. 15, 2010) at 1-2 (Motion Addendum); LBP-09-10, 70 NRC 51, 106, 147 (2009).

operation of the LNP. Motion Addendum at 1-2. PEF opposes admission of C-4A.<sup>3</sup> The NRC Staff does not oppose the admission of several portions C-4A, but states that these parts of C-4A should be deemed to supersede the corresponding sections of the originally-admitted Contention 4.<sup>4</sup>

For the reasons stated below, we narrow and admit several portions of C-4A. The admitted portions of C-4A are set forth in Attachment A to this decision.<sup>5</sup>

## I. BACKGROUND

On December 8, 2008, the NRC published a notice of hearing and opportunity to petition for leave to intervene in the PEF combined license application (COLA) proceeding. 73 Fed. Reg. 74,532 (Dec. 8, 2008). This Board was established on February 23, 2009. 74 Fed. Reg. 9,113 (Mar. 2, 2009). On July 8, 2009, we granted Intervenors' petition to intervene, finding that they had demonstrated their standing to participate as a party in this proceeding and admitting three of their proffered contentions. See LBP-09-10, 70 NRC at 147 (2009).

One of the three admitted contentions, Contention 4 (C-4), addressed various issues relating to the potential environmental impacts to surface and groundwater resources resulting from operation of the LNP. C-4 challenged the adequacy of the environmental impacts analysis discussion in PEF's ER as it relates to salt drift and dewatering activities during the construction

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<sup>3</sup> Progress Answer Opposing Joint Intervenors' Amended Contention 4 (Dec. 10, 2010) at 1 (PEF Answer).

<sup>4</sup> NRC Staff Answer to Joint Intervenors' Motion to Amend Contention 4 (Dec. 10, 2010) at 6-7 (Staff Answer).

<sup>5</sup> In addition to the instant motion, two other motions concerning the subject matter of C-4 are currently pending before this Board. On September 30, 2010, PEF filed a motion to dismiss as moot certain aspects of C-4 (relating to active dewatering). See Motion to Dismiss as Moot the Aspects of Contention 4 Related to Active Dewatering During Levy Nuclear Plant Operations (Sept. 30, 2010). On October 4, 2010, PEF filed a motion for summary disposition concerning certain other aspects of C-4 (relating to salt drift and passive dewatering). See Progress Energy's Motion for Summary Disposition of Contention 4 (Environmental Impacts of Dewatering and Salt Drift) with Regard to Salt Drift and Passive Dewatering (Oct. 4, 2010). These two pending motions and the instant motion relate to similar issues. Thus, we are issuing our rulings on these motions simultaneously.

and operation of the LNP. See id. at 104, 149. The Commission affirmed the admission of C-4. CLI-10-02, 71 NRC \_\_\_, \_\_\_ (slip op. at 3-18) (Jan. 7, 2010).

On August 5, 2010, the NRC Staff issued its DEIS regarding PEF's COLA for LNP Units 1 and 2.<sup>6</sup> On November 15, 2010, Intervenors submitted their motion to admit proposed Contention 4A, in which they submit essentially the same challenges as were raised in Contention C4 with regard to the discussion of environmental impacts relating to dewatering and salt drift activity during construction and operation of the LNP. Motion Addendum at 1-2. Contention C-4A, however, challenges the adequacy of the impacts discussion in the NRC Staff's DEIS, rather than the impacts discussion in PEF's ER. Id.

Both the NRC Staff and PEF filed answers to C-4A on December 10, 2010. In its answer, PEF opposes admission of the entirety of C-4A. PEF Answer at 1. The NRC Staff opposes some but not all portions of C-4A. Staff Answer at 6-7. Intervenors filed their reply briefs on December 17, 2010.<sup>7</sup>

## II. LEGAL FRAMEWORK FOR ADMISSION OF NEW OR AMENDED CONTENTIONS

Three regulations address the admissibility of additional contentions once an adjudicatory proceeding has been initiated. These are: 10 C.F.R. § 2.309(f)(2), which deals with the admission of new or amended contentions; 10 C.F.R. § 2.309(c), which deals with the admission of new contentions that are nontimely; and 10 C.F.R. § 2.309(f)(1), which establishes the basic admissibility criteria that all contentions must satisfy.

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<sup>6</sup> See Status Report (Aug. 5, 2010) at 2; Nuclear Regulatory Commission; Notice of Availability of the Draft Environmental Impact Statement for the Combined Licenses for Levy Nuclear Plant Units 1 and 2, 75 Fed. Reg. 49,539, 49,540 (Aug. 13, 2010); see Nuclear Regulatory Commission, Office of New Reactors, Draft Environmental Impact Statement for Combined Licenses (COLs) for Levy Nuclear Plant Units 1 and 2, Draft Report for Comment, NUREG-1941 (Aug. 2010) (DEIS).

<sup>7</sup> Intervenors' [sic] Reply to PEF Answer to Amended Contention 4 (Dec. 17, 2010); Intervenors' [sic] Reply to Staff Answer to Amended Contention 4 (Dec. 17, 2010).

NRC regulations under 10 C.F.R. § 2.309(f)(2) allow a petitioner or intervenor to file timely new or amended National Environmental Policy Act (NEPA) contentions “if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant’s document.” 10 C.F.R. § 2.309(f)(2).

If data or conclusions in the DEIS do not differ significantly from the data or conclusions in the ER, then new or amended contentions may be admitted, with leave of the Board, if the contention meets the following requirements:

- (i) The information upon which the amended or new contention is based was not previously available;
- (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
- (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

10 C.F.R. § 2.309(f)(2)(i)-(iii) (emphasis added). The regulations do not specify the number of days within which a new or amended contention must be filed in order to be “timely.”

If a proposed contention is not timely under 10 C.F.R. § 2.309(f)(2)(iii), then it is deemed “nontimely” and the proponent of the contention must address the eight criteria of 10 C.F.R. § 2.309(c)(1) for “nontimely filings.” The first of the eight criteria, “good cause” for failure to file on time, is the most important factor in the 10 C.F.R. § 2.309(c) analysis.<sup>8</sup> If good cause is not shown, the Board may still permit the late filing, but the petitioner or intervenor must make a strong showing on the other factors.<sup>9</sup>

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<sup>8</sup> See Crow Butte Resources, Inc. (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 549 n.61 (2009); Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 261 (2009); see also Initial Scheduling Order, LBP-09-22, 70 NRC 640, 647 (2009).

<sup>9</sup> See Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-1, 67 NRC 1, 5-8 (2008).

Finally, it is appropriate to note that if the relevant portion of the DEIS (or FEIS) is sufficiently similar to the ER and a contention has been admitted challenging that portion of the ER, then the intervenor does not need to file a new contention alleging the same defect in the DEIS. In these circumstances, the original contention challenging the ER remains valid and is deemed to “migrate” to be a challenge to the similar portion of the DEIS (or FEIS). This “migration tenet” applies to C4 in this case, and is discussed in greater length in our ruling, issued simultaneously herewith, denying PEF’s motion to dismiss certain portions of C4 as moot. LBP-11-01, 73 NRC \_\_, \_\_ (slip op. at 7-8) (Feb. 2, 2011).

### III. CONTENTION 4A

We now turn to Intervenor’s proposed C-4A. As previously stated, it raises many of the same objections and concerns against the DEIS that the Intervenor previously raised, and the Board admitted, against the ER. Proposed C-4A reads as follows:

The Draft Environmental Impact Statement (DEIS) and its reliance upon State of Florida Department of Environmental Protection Conditions of Certification (COC, Conditions, also FDEP 2010) to inform the NRC licensing action for Progress Energy Florida’s (PEF’s) proposed Levy County Units 1 and 2 fails to comply with 10 C.F.R. Part 51 and the National Environmental Policy Act because it fails to specifically and adequately address, and inappropriately characterizes as SMALL, certain direct, indirect, and cumulative impacts, onsite and offsite, of constructing and operating the proposed LNP facility:

A. Impacts to wetlands, floodplains, special aquatic sites, and other waters, associated with dewatering, specifically:

1. Impacts resulting from active and passive dewatering;
2. Impacts resulting from the connection of the site to the underlying Floridan aquifer system;
3. Impacts on Outstanding Florida Waters such as the Withlacoochee and Waccasassa Rivers;
4. Impacts on water quality and the aquatic environment due to alterations and increases in nutrient concentrations caused by the removal of water; and
5. Impacts on water quality and the aquatic environment due to increased nutrients resulting from destructive wildfires resulting from dewatering.

B. Impacts to wetlands, floodplains, special aquatic sites, and other waters, associated with salt drift and salt deposition resulting from cooling

towers (that use salt water) being situated in an inland, freshwater wetland area of the LNP site.

C. As a result of the omissions and inadequacies described above, the Draft Environmental Impact Statement also failed to adequately identify, and inappropriately characterizes as SMALL, the proposed project's zone of:

1. Environmental impacts,
2. Impact on Federally listed species,
3. Irreversible and irretrievable environmental impacts, and
4. Appropriate mitigation measures.

Motion Addendum at 1-2.

#### IV. POSITIONS OF THE PARTIES

In C-4A, Intervenor proffer several arguments that challenge the accuracy and sufficiency of the DEIS analysis of hydro-ecological impacts resulting from construction and operation of the LNP. Their arguments fall into three general categories. First, they argue that the NRC Staff in the DEIS inappropriately relies on the Florida Department of Environmental Protection (FDEP) Conditions of Certification (COC) in determining that certain environmental impacts to water resources are "small". Id. at 3-8. Second, Intervenor argue that the DEIS does not resolve various hydro-ecological impacts resulting from dewatering and salt drift that remain extant in C-4, and which Intervenor reiterate in C-4A. Id. at 8-19. Finally, Intervenor argue in C-4A that the inadequacies in the ER analysis of "consequential" environmental impacts are also not resolved in the DEIS. Id. at 19-21. They support C-4A primarily with the Affidavit of Dr. Sidney Bacchus.<sup>10</sup>

Specifically, Intervenor argue that the NRC Staff's "sidesteps" its duty to make an independent determination in the DEIS by relying on the COC and the environmental monitoring plan (EMP) that the COC requires PEF to develop. Id. at 5. Intervenor assert that the NRC,

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<sup>10</sup> Id., Attachment 3 to Intervenor's [sic] Response to Progress Energy's Motion for Summary Disposition of Contention 4 (Environmental Impacts of Dewatering and Salt Drift) with Regard to Salt Drift and Passive Dewatering (Nov. 15, 2010), Affidavit of Sydney T. Bacchus in Support of Joint Intervenor's [sic] Responses to Environmental Impacts of Proposed Levy Nuclear Plant Units 1 and 2 (Nov. 15, 2010) ¶¶ E-14 to E-16 (Bacchus Affidavit).

not a state agency, has the ultimate responsibility to comply with NEPA, and that the NRC failed to meet this obligation and instead

punts to the Florida [COCs] which at this point in time provide absolutely no assurance whatsoever on many of the matters of C-4 since the key “Environmental Monitoring Plan” (EMP) required by the Conditions does not yet exist, may not for some time and much of the data required for such a plan to be credible also does not exist.

Id. at 5-6 (citing Calvert Cliffs’ Coord. Com. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971)).

Intervenors further argue that “monitoring does not preclude harm, it detects it,” and that the “after the fact” mitigation mandated in the COC does not eliminate an environmental impact. Id. at 8.

Intervenors then point out numerous alleged deficiencies that contribute to the DEIS’s improper assessment of hydro-ecological impacts deriving from activities occurring during construction and operation of the LNP. Id. at 8-17 (C-4A subsection A). First, Intervenors claim that the DEIS fails to identify correctly the underlying karst geology, possible sinkholes, and fracture issues in the vicinity of the LNP. Id. at 9. As a result, Intervenors argue that the DEIS improperly addresses dewatering and aquifer flow issues. Id. at 9-10. Intervenors also state that the DEIS determinations are based upon “wide-area recharge” while only considering “localized discharge.” They argue that this methodology is “illogical cherry-picking,” because it calculates the drawdown from active dewatering within three miles of the well sites while the recharge is “obviously over the entire regional aquifer.” Id. at 10 (citing DEIS at 5-5).

Intervenors next assert that the DEIS is inadequate because it lacks “fundamental” input and information that is allegedly required by State law – namely the South West Florida Water Management District’s (SWFWMD) collection of certain recharge level calculations and a water resource availability inventory. Id. at 11. Intervenors then argue that the groundwater modeling information in the DEIS is “fatally flawed,” because it assumes maximum daily usage conditions will last for only one week and assumes “normal” precipitation conditions that do not account for possible dry periods. Id.

Intervenors further allege that the DEIS fails to consider, beyond “cursory” and “incomplete” treatment, the cumulative effects of water use drawdown at the LNP together with drawdown occurring at the nearby Tarmac mine. Id. at 16 (citing DEIS at 4-12). Intervenors maintain that this mine will be a huge factor in the area water supply, given its location relative to groundwater movement into local and offshore (in the Gulf of Mexico) springs. Id. Intervenors argue that because the Tarmac mine and the LNP will contribute to the decline of the same nearby water resources, their respective hydro-ecological impacts should be addressed together (cumulatively). Id.

Intervenors also assert that the DEIS fails to accurately assess cumulative impacts of dewatering on surface water and groundwater in the vicinity of the LNP. Id. at 12. Intervenors argue that the DEIS improperly “lumps” its analysis of surface water near the Gulf of Mexico together with site surface water, and fails to assess loss of freshwater inputs to the Cross Florida Barge Canal (CFBC), which flows into coastal waters. Id. at 13. They then argue that the DEIS fails to account for water quality impacts that will ensue in the coastal estuary system (including Withlacoochee Bay) due to the LNP’s consumption of substantial freshwater and groundwater that would otherwise flow into the estuary through the CFBC. Id. at 13-14. Intervenors also allege that the DEIS fails to appropriately consider impacts of increased salination in the nearby Crystal River Energy Complex (CREC). Id. at 14.

Intervenors also claim that the DEIS “overstates the ability of the ponds to recharge the aquifer” by improperly calculating aquifer recharge, which is “not merely a mathematical formula, it is a complex process made up of interlocking features that will be irreparably changed by the LNP.” Id. at 15. According to Intervenors, the DEIS also fails to properly account for severe evaporative dewatering during drought periods, which will cause large, not small, impacts to wetlands surrounding the LNP. Id. at 16.

Intervenors also assert that the DEIS fails to address exacerbation of nutrient levels that will result from the LNP’s withdrawal of huge quantities of water from the aquifer and from



controlled burning. Id. at 16-17. They aver that the “appropriate stewardship” the DEIS assumes PEF will conduct is too “nebulous” to properly determine the impacts on water quality. Id. at 17.

Intervenors then allege several additional deficiencies that contribute to the DEIS’s improper assessment of hydro-ecological impacts deriving from salt drift and salt deposition during construction and operation of the LNP. Specifically, Intervenors argue that the DEIS confuses the wind directions, and therefore, the computer modeling in the DEIS inaccurately portrays salt deposition rates, drought conditions, and vulnerability of the aquifer, and resulting wetlands damage. Intervenors argue that corn is a poor indicator of vegetative harm from salt drift, because there is no corn on the project site, and that CREC vegetation is different from that which would be impacted by construction and operation of the LNP. Id. at 17-18.

Intervenors conclude that, due to the above-described inadequacies, the DEIS incorrectly characterizes the environmental impacts of the LNP as “small” (instead of “large”). Lastly, they argue that the environmental impacts analysis in the DEIS is at best indeterminate, because the PEF computer models have not yet been made available for review.

PEF opposes C-4A in its entirety. PEF Answer at 1. PEF first claims that the DEIS references to the Florida COC are appropriate under NEPA. Id. at 9-13. PEF claims that the NRC need not duplicate a state agency analysis when NRC conducts its independent NEPA review, and may assess environmental impacts therein assuming that PEF will abide its state licenses and permits, which require compliance with the COC. Id. at 9-10. PEF references the Council on Environmental Quality (CEQ) regulations and NRC regulations and case law that “expect that the NRC will rely on competent local agency reviews.”<sup>11</sup> PEF also opposes

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<sup>11</sup> Id. at 10 (citing 10 C.F.R. § 51.70(c); Public Service Co. of Oklahoma Associated Electric Cooperative, Inc. (Black Fox Station, Units 1 and 2), LBP-78-28, 8 NRC 281, 282 (1978); Public Service Co. of New Hampshire, et al. (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 527 (1977); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), DD-84-13, 19 NRC 1137, 1147-48 (1984)).

Intervenors' untimely "critique of the COC," given the COC's availability since August 26, 2009. Id. at 11, 13.

PEF next complains that Intervenors in C-4A make a "chain of implausible assumptions," that are not reasonably foreseeable, when concluding that the COC would not "preclude disastrous effects." Id. at 12. Specifically, PEF opposes Intervenors' assumptions that the COC requirements will fail to predict adverse effects, that those adverse effects will occur, that they will occur too rapidly to be detected by COC-required monitoring, and that adverse effects will irreversibly alter environmental resources. Id.

PEF claims that Intervenors support C-4A with legal conclusions "masquerading as expert opinion and couched as alleged facts," and that Intervenors insufficiently support their claims in C-4A. Id. at 13. PEF notes Intervenors' failure to cite specific sections of the Bacchus Affidavit, and states that the Board is not required to sift through it to find sufficient support for Intervenors' allegations in C-4A. Id. at 9 n.10. PEF also alleges that C-4A is not timely because it was not completely filed by November 15, 2010. Id. at 5 n.8.

PEF argues that groundwater use and salt drift currently taking place near the LNP site has not induced noticeable change to the ecosystem, and, therefore, that construction and operation of the LNP cannot plausibly cause a series of "large" impacts that lead to the "collapse" of the surrounding ecosystem. Id. at 13-14 (citing Motion Addendum at 9). PEF then asserts that "salt drift impacts are limited to the local area of the cooling towers; and therefore, region-wide impacts are not foreseeable." PEF Answer at 14 (citing DEIS at 7-23 to 7-24).

PEF references the Board's previous ruling that alleged impacts from excavation of fill or aggregate from the nearby Tarmac mine for use in construction of the LNP is "too speculative" to be an admissible challenge to the DEIS. Id. PEF argues that nothing in the DEIS indicates a change regarding the source of fill material, and thus, impacts related to excavation at the Tarmac mine is not an admissible issue in C-4A. Id. at 15.

PEF claims that Intervenor couch conclusory legal arguments as facts supporting admissibility of C-4A that the Board cannot infer on behalf of Intervenor in determining admissibility of C-4A. Id. at 15. Specifically, PEF argues that Intervenor improperly allege as fact the following statements:

- 1) decreased water levels will not be a small impact;
- 2) lateral saltwater intrusion into the aquifer will not be a small impact;
- 3) direct, indirect, and cumulative impacts of dewatering and salt deposition will cause large impacts;
- 4) overall environmental impacts (including those that are irreversible and irretrievable) will cause large impacts;
- 5) evaporative dewatering will cause large impacts;
- 6) salt drift on vegetative communities will cause large impacts;
- 7) hydro-ecological impact to the Levy and Citrus County area will not cause small impacts; and
- 8) nutrient concentrations resulting from dewatering and salt drift will cause large impacts.

Id. at 15-16.

According to PEF, Intervenor also assume that a non-fluctuating two-foot water level draw down will occur to stop spring flow, that there is no plan for an alternative water supply when needed, and that there will be a drawdown of up to 5.8 mgd depleting the surficial aquifer at the LNP site. Id. at 18. PEF opposes these assumptions, claiming that they would constitute violations of PEF's state permits.

PEF then references the DEIS discussion of surface water drainage into the Gulf of Mexico in opposition to Intervenor's argument that the DEIS fails to accurately estimate effects of dewatering at the LNP on surficial waters. Id. at 19. PEF acknowledges that the SWFWMD has not yet set minimum flows and water levels or issued a water resource inventory for the LNP area. However, according to PEF, the lack of this information does not render the DEIS deficient, because it will not affect the DEIS analysis of surface and groundwater impacts resulting from operation of the LNP. PEF notes that the COC requires PEF to comply with these levels once they are set by SWFWMD. Id. at 19. In response to Intervenor's argument that corn is an inappropriate indicator of salt drift impact on vegetation in the vicinity of the LNP,

PEF argues that the DEIS assesses impacts by vegetation damage “above the suggested threshold” for a given species. Id.

NRC Staff does not oppose admission of some portions of C-4A that are within the scope of the Board’s previous admission of C-4. Staff Answer at 1. Now that the NRC Staff has issued its DEIS for the LNP COLA, NRC Staff maintains that those portions of C-4 which are still in dispute remain viable. Id. at 6-7 (“Some portions of [C-4A] need not have been pleaded again because a contention initially framed as a challenge to the substance of the ER analysis of an issue does not necessarily require an amendment to constitute a litigable challenge to the Staff’s DEIS analysis on that same issue.”) However, given that C-4 is essentially re-submitted in C-4A, the NRC Staff reads those portions of C-4A as superseding their corresponding equivalents in C-4. Id. at 7.

Specifically, the NRC Staff does not oppose admission of the following aspects of C-4A:

- Active and passive dewatering
- Connection to the Floridan Aquifer
- Impacts to the Withlacoochee and Waccasassa Rivers
- Impacts on water quality due to increases in nutrient concentration
- Impacts on water quality due to increases in nutrients from wildfires
- Salt drift
- Additional issues raised in the Bacchus affidavit:
  - Failure to identify/evaluate affected area of the proposed LNP
  - Unpermitted “taking” of endangered and threatened (Federally listed) species
  - No bona fide comprehensive cumulative effects analysis conducted or compliance with other NEPA and Federal Requirements
  - Challenging adequacy of the DEIS discussion of appropriate mitigation measures

See id. at 17-18, 22-23.

The NRC Staff opposes aspects of C-4A as follows. First, the NRC Staff opposes admission of any portion of C-4A where Intervenor allege an improper reliance on the Florida COC in the DEIS. According to the NRC Staff, Intervenor fail to indicate what part of the DEIS actually shows an improper reliance on the COC or an abdication of the NRC Staff’s duty to

evaluate environmental impacts under NEPA.<sup>12</sup> The NRC Staff cites Commission precedent indicating that the NRC “is entitled to presume that an applicant will comply with applicable laws and regulations.”<sup>13</sup> On this basis, the NRC Staff argues that it is appropriate for it to use the COC to “inform its discussion of what environmental impacts would reasonably result from the proposed project,” and that this aspect of C-4A, therefore, fails to raise a genuine dispute on a material issue of fact or law as required under 10 C.F.R. § 2.309(f)(1)(vi) for admissible contentions. NRC Staff Answer at 9.

Staff argues that Intervenors dispute the adequacy of the COC, which is immaterial to the findings the NRC must make in the instant case, goes beyond the scope and jurisdiction of this proceeding, and fails to show a genuine dispute on a material issue of fact or law. As such, the NRC Staff argues that this aspect of C-4A contradicts 10 C.F.R. § 2.309(f)(1)(iii) and (iv) and is inadmissible. Id. at 10, 11. The NRC Staff notes that NEPA requires it to take a “hard look” at environmental impacts resulting from the proposed action in the EIS, but that there is no legal requirement to take a “hard look” at the COC (and the associated EMP) as it relates to the Florida licensing process. Id. at 12.

Next, the NRC Staff argues that Intervenors could have raised a dispute regarding dewatering and the possible presence of karst geology and sinkholes at the LNP site in their initial intervention petition. The NRC Staff claims that in this regard, C-4A fails to raise any new and significant information, and that Intervenors fail to justify their late filing under 10 C.F.R. § 2.309(c)(1). Id. at 14 (citing 10 C.F.R. § 2.309(c), (f)(2)). It argues further that Dr. Bacchus’ arguments on this topic neglect the DEIS discussion of karst formations in Florida generally and the low likelihood of karst geology at the LNP site. Id. at 14 (citing DEIS at 2-25, 2-175). The

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<sup>12</sup> NRC Staff Answer at 7, 8, 11 (citing DEIS at 4-12, 4-15, 4-16; 4-26, 5-37, 5-42 to 5-43; Motion Addendum at 6-7).

<sup>13</sup> Id. at 9 (citing GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 207 (2000); Curators of the University of Missouri, CLI-95-8, 41 NRC 386, 400 (1995)).

NRC Staff therefore argues that there is no genuine dispute with regard to a material issue of fact or law on the issue of impacts relating to karst geology and sinkholes at the LNP site. Id.

The NRC Staff also argues that Intervenors fail to explain how the DEIS is unreliable or inadequate in its analysis of water consumption drawdown and recharge, which includes groundwater modeling information. Id. at 15. It argues that Intervenors incorrectly claim that the DEIS analysis uses different scales when analyzing drawdown and recharge. Id. at 16. Also, the NRC Staff argues that the state water resource inventory that Intervenors claim is necessary in C-4A, is actually not necessary, given the extensive site-specific groundwater modeling recalculations that the NRC Staff analyzed in the DEIS. Id. at 16, 17. Intervenors in C-4A challenge some of the assumptions underlying the groundwater modeling information (5.8 mgd for only 1 week, normal precipitation conditions), but the NRC Staff counters that assuming otherwise would contravene the COC, which the State of Florida requires PEF to follow. The NRC Staff therefore argues that this portion of C-4A fails to demonstrate a genuine dispute of fact or law as required under 10 C.F.R. § 2.309(f)(1)(vi). Id. at 17.

The NRC Staff does not oppose admission of those aspects of C-4A challenging the DEIS analysis of passive dewatering impacts, except as it relates to impacts from LNP-related excavations from the Tarmac mine. Id. at 18. Staff argues that this aspect of C-4A is inadmissible, because the Board already determined this issue to be an uncertain and thus remote and speculative issue, and concluded that it was inadmissible. Nonetheless, the NRC Staff notes that the DEIS did consider impacts of water use at the Tarmac mine to groundwater levels and wetlands. Id. at 19 (citing DEIS at 4-21 to 4-23). It argues that Intervenors have not shown why this discussion is insufficient, or presented any specific impacts from the mine that should have been considered but were not. Id. at 20.

The NRC Staff argues that Intervenors fail to cite any part of the DEIS that is inadequate with regard to consideration of cumulative impacts from water use at the Tarmac mine along with impacts from water use at the LNP. Id. at 20 (DEIS at 7-14 to 7-15). Also, Staff argues

that they are not “connected actions” so not required under NEPA to be in a single EIS. Id. at 20 (citing 40 C.F.R. § 1508.25).

The NRC Staff also opposes Dr. Bacchus’ allegations that the DEIS fails to adequately discuss impacts of deposition of components other than salt from cooling tower drift on the surrounding environment. Staff argues that this information was available in PEF’s ER and is therefore not new and significant information admissible under 10 C.F.R. § 2.309(f)(2)(i). Id. at 24. Staff also calls untimely Dr. Bacchus’ assertions that the DEIS fails to consider alternatives that would avoid all adverse environmental impacts while still providing affordable energy. The Staff notes that the Board previously rejected C9, C10, C11, and C4O, which challenged PEF’s alternatives analysis. See Staff Answer at 25-26; LBP-09-10, 70 NRC at 78-79, 85, 88, 91, 94-95.

#### V. ANALYSIS AND RULING

We conclude that the majority of C-4A is timely under 10 C.F.R. § 2.309(f)(2) and admissible under 10 C.F.R. § 2.309(f)(1). Many of the challenges raised in C-4A (relating to alleged hydro-ecological impacts of the LNP) are the same challenges that were raised and admitted in C-4. The only distinction is that C-4 challenges the adequacy of various sections of the ER, whereas C-4A challenges similar discussions in the DEIS. In this respect, we agree with the NRC Staff that these parts of C-4A simply migrate from and supersede the C-4 challenges to the ER.<sup>14</sup> Accordingly, where the DEIS and the ER are sufficiently similar, C-4A can be seen as unnecessary, because it restates, and is a continuation of the issues we found admissible earlier in this proceeding in LBP-09-10.

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<sup>14</sup> Louisiana Energy Servs., L.P. (Caiborne Enrichment Center), CLI-98-3, 47 NRC 77, 84; Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382, 383 & n.44 (2002) (quoting Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-02-2, 55 NRC 20, 30 (2002)); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-23, 54 NRC 163, 172 n.3 (2001); Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-08-2, 67 NRC 54, 63-64; Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-22, 54 NRC 155, 161 (2001).

The Board first concludes that, except as specified below concerning matters that could and should have been raised with regard to the ER, the motion to file C-4A and challenge the DEIS is timely. The motion was filed on November 15, 2010. Thus, it met the timeliness deadline established by the Board. See Order (Granting Motion for Extension of Time) (Sept. 29, 2010) (unpublished). We reject PEF's complaint that C-4A was not timely because it was not completely filed by November 15, 2010. PEF Answer at 5 n.8. Specifically, the Intervenor apparently had difficulty in the electronic transmission of one or more of the attachments to its motion. Tr. at 622. Counsel for PEF raised this issue during our November 17, 2010 oral argument (on another issue) and we suggested that if a party thought that it was warranted or necessary, the party could submit an appropriate motion. Tr. at 623-624. No such motion was filed.<sup>15</sup> PEF has not alleged that it was prejudiced in any way by the short delay in several minor attachments. Upon review of the situation, the Board concludes that the Motion and Motion Addendum filed on November 15, 2010 was substantially complete because it includes virtually all of the important attachments and therefore timely.

Further, we reject the proposition that because the COC has been available since August 26, 2009, this aspect of C-4A should have been filed at that time. PEF Answer at 11, 13. As we see it, the Intervenor is not attacking the adequacy of the COC, but rather is challenging NRC's over-reliance on the COC. Thus, the date of the DEIS, not the date of the COC, is the relevant trigger event.

Turning to the admissibility of C-4A under 10 C.F.R. § 2.309(f)(1), we conclude that it is generally admissible. C-4A, similar to C-4, provides a "specific statement of the issue of law or fact to be raised or controverted." 10 C.F.R. § 2.309(f)(1)(i); see LBP-09-10, 70 NRC at 101-03.

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<sup>15</sup> Note, however that, on November 15, 2010, the Intervenor filed another new contention (C-12) which used the same affidavits and exhibits as the motion to add C-4A) and that this too, was apparently missing attachments. Tr. at 622; see Intervenor's [sic] Motion For Leave to File a New Contention and Contention 12 (Nov. 15, 2010) (Contention C-12). On December 2, 2010, PEF filed a Joint Motion for Establish Deadline for Answers to Contention 12 and, on that day, the Board granted the requested extension. See Order (Establishing Deadline for Answers to Proposed Contention 12) (Dec. 2, 2010) (unpublished).



C-4A states Intervenor's claim that the DEIS fails to satisfy 10 C.F.R. Part 51 and NEPA, because it does not adequately address certain direct, indirect and cumulative environmental impacts relating to hydroecology that would result from certain aspects of the proposed LNP project. Intervenor also provide a "brief explanation of the basis" or theory underlying C-4A by explaining why the LNP allegedly falls short of the NEPA requirement to discuss all significant environmental impacts associated with a proposed project. 10 C.F.R. § 2.309(f)(1)(ii). Like C-4, the issues raised in C-4A are "within the scope" of this COL proceeding because they allege deficiencies in the DEIS analysis of the environmental impacts of the LNP. 10 C.F.R. § 2.309(f)(1)(iii). Further, C-4A raises issues that are "material" to this proceeding in that the NRC must make NEPA findings with regard to the LNP as required under 10 C.F.R. Part 51. 10 C.F.R. § 2.309(f)(1)(iv). Also, by citing primarily to the affidavit of Dr. Bacchus as support for C-4A, Intervenor have provided "alleged facts or expert opinion which supports the requestor's/petitioner's position" with "references to the specific sources and documents" that Intervenor intend to rely upon to support its position." C-4A therefore states a genuine dispute regarding material issues of law and fact, and is admissible. 10 C.F.R. § 2.309(f)(1)(vi).

Our conclusion that C-4A is admissible, is not without limits however. Specifically, we conclude that the Intervenor's assertions (found in Dr. Bacchus's Declaration, but not in C-4A itself) that the DEIS fails to consider alternatives that would avoid all adverse environmental impacts, is not timely and not admissible. To a certain extent, these issues were raised in Intervenor's original contentions C9, C10, C11, and C40, and were rejected. LBP-09-10, 70 NRC at 131-138.<sup>16</sup>

We also agree with PEF and the Staff that the portion of C-4A that alleges that the DEIS fails to adequately assess the environmental impacts of drift and deposition of chemicals (other than salt) from the proposed LNP cooling towers is untimely. The Intervenor raised the spectre

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<sup>16</sup> In addition, it appears that this portion of Dr. Bacchus's Declaration is being used to support another contention that Intervenor filed on the same day as proposed C-4A. We will address that contention, C-12, in a subsequent ruling. See Contention C-12.

of salt drift and deposition in 2009 and we admitted it as part of C-4. Likewise, today, they say that the DEIS fails to adequately assess salt drift and deposition. And we are admitting that portion of C-4A. However, now they also assert that there are additional chemicals in the drift that may cause environmental damage and that have not been adequately assessed. If this is true, it has been so since the beginning of this proceeding and is untimely now. Intervenors have provided no reason why this is a new issue or why there is good cause for filing it out of time.

Before turning to the specific subparts of C-4A, we address the status of the Intervenors' allegation that the DEIS reflects an "inappropriate reliance on [the] State of Florida Department of Environmental Protection Conditions of Certification [COC]" Motion Addendum at 2. Contention C-4A, as we understand it, alleges that the DEIS is defective in three ways: (1) inadequate assessment of impacts associated with dewatering (C-4A(A)); inadequate assessment of impacts associated with salt drift and deposition (C-4A(B)); and the resulting underestimation of several other impacts associated with the LNP (C-4A(C)). The allegation that the NRC Staff has inappropriately relied on the COC is part of the introductory clauses of C-4A and not a separate component of the contention. Essentially, the alleged over-reliance on the COC is simply a supporting reason for the three inadequacies listed above.

In this respect, it is clear that, in the DEIS, the NRC is entitled to refer to "data, analyses, or reports prepared by . . . competent and responsible state authorities" so long as the NRC Staff conducts an independent evaluation and takes responsibility for that information before relying on it in an EIS.<sup>17</sup> Neither NEPA nor Part 51 require the NRC Staff to duplicate a current and sound environmental analysis issued by an authorized governmental agency.

Nevertheless, the NRC is required to make its own independent assessment of the

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<sup>17</sup> Louisiana Energy Services, L.P. (National Enrichment Facility), LBP-06-8, 63 NRC 241, 259 (2006) (citing Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), LBP-78-28, 8 NRC 281, 282 (1978); 10 C.F.R. § 51.70(b)); see also Calvert Cliffs' Coordinating Committee, Inc. v. AEC, 449 F.2d 1109, 1123 (DC Cir. 1971); 10 C.F.R. § 51.71(d) n.3.

environmental impacts of a proposed project. The issue, which appears to be fairly raised in C-4A is whether the NRC Staff relied too heavily on the COC (and the associated, yet to be developed, Environmental Monitoring Program) and/or failed to independently assess the environmental impacts of the LNP in its DEIS.

We decline to determine the merits of this issue at this stage in the proceeding and thus decline to exclude consideration of whether the NRC Staff relied too heavily on the State of Florida COC in the DEIS with regard to C-4A(A), (B) and (C).<sup>18</sup> The DEIS references and relies on the COC and this constitutes new and material information that Intervenors have timely raised. See 10 C.F.R. § 2.309(f)(2); DEIS.

Turning to the three major subparts of C-4A, we conclude that they are admissible, as follows:

1. Impacts Related to Dewatering at the LNP Site:

The Board has already admitted those aspects of C-4 challenging the discussion of impacts resulting from dewatering activities at the LNP. We examined these issues in some detail in LBP-09-10 and need not parse out all of those details again here. But several aspects of C4A (and C4) warrant note. For example, the possible presence of sinkholes and karst at the LNP site was an issue that was discussed when we admitted C-4, see LBP-09-10, 70 NRC at 90 (“relict sinkholes”), these issues are relevant to C-4A. These allegations (e.g., impacts resulting from the connection of the site to the underlying Floridan aquifer) are neither new or untimely. Intervenors claim that the DEIS fails to adequately address this issue, and PEF and the NRC Staff claim otherwise. We admit this issue in C-4A, and will hear the parties’ competing experts on this subject and reserve judgment until our merits decision.

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<sup>18</sup> Thus, although our restatement and narrowing of C-4A (Attachment A) does not include the phrase concerning over-reliance on the COC, clearly, questions as to the nature and extent of NRC’s reliance on the COC can be considered in the merit analysis as to whether the DEIS adequately considered the environmental impacts in question.

As we discuss in today's concurrent ruling denying PEF's motion for summary disposition of C-4 with regard to passive dewatering,<sup>19</sup> we believe that this issue raises genuine issues of material fact and is admissible as a component of C-4A. Disputes regarding the adequacy of the DEIS discussion of passive dewatering impacts are admissible. Dr. Bacchus raises legitimate issues, similar to those that were raised in C-4, e.g., whether there will be net dewatering, and even if not, the impacts of non-net dewatering. Further, we rule that the merits evaluation of the cumulative impacts of dewatering in the local area need not exclude the Tarmac mine and that this portion of C-4A is admissible.<sup>20</sup> However we deny C-4A regarding the argument that the LNP DEIS must incorporate the Tarmac EIS. We know of no basis in law for such a position. Furthermore, allegations regarding the adequacy of the groundwater model recalibration, and the DEIS reliance thereon, are admitted. Finally, we note that while we do not assume that PEF will violate its state permits, the existence of such permits does not relieve NRC of the duty to assess adequately environmental impacts under NEPA. LBP-09-10; 70 NRC at 100. We also note that failure of SWFWMD to set minimum flow does not necessarily render the DEIS inadequate, but it is a relevant factor that may be considered when we reach the merits of C-4A.

We also admit the portions of C-4A relating to the LNP site connection to the Floridan aquifer, relating to impacts to outstanding Florida waters such as the Withlacoochee and Waccasassa Rivers, relating to impacts to water quality and aquatic resources due to nutrient loads due to water removal, and impacts to water quality and aquatic resources due to increases in nutrients due to wildfires. The Bacchus affidavit provides sufficient support for

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<sup>19</sup> Memorandum and Order (Denying Motion for Summary Disposition of Aspects of Contention 4) (Feb. 2, 2011) at 8-9 (unpublished).

<sup>20</sup> This is not inconsistent with our earlier denial of the "excavation" portion of subparts C4B, C4C and C4D to the original contention C4. See LBP-09-10, 70 NRC at 103. Those (somewhat dissimilar) subparts were rejected because the Intervenor had failed to provide any support for them at that time, not because they were outside of the scope of 10 C.F.R. Part 51 or NEPA. To the contrary, we stated at the time that "various portions of C4, such as dewatering, raise issues such as 'construction within the floodplain.'" Id. at 103 n.39.

these issues under 10 C.F.R. § 2.309(f)(1)(v), and we have previously determined these issues to raise disputes regarding material issues of fact that are within the scope of this proceeding. See LBP-09-10, 70 NRC at 149.

2. Impacts Related to Salt Drift:

The sections of C-4A relating to salt drift are also admissible and migrate from the original C-4. However we reject the portion of C-4A that complains about drift of components other than salt. We agree with PEF and the Staff that this issue is untimely, because Intervenor could have addressed this issue in their original petition challenging the ER.

3. “Consequential” Inadequacies in the DEIS:

The “consequential” inadequacies that were alleged in C-4 migrate into C-4A, and are admissible. We admit the portion of C-4A challenging the DEIS’s identification of, and characterization as “small,” the LNP’s zone of 1) environmental impacts; 2) impact on Federally listed species; 3) irreversible and irretrievable environmental impacts; and 4) appropriate mitigation measures.

In sum, we rule that, properly narrowed, C-4A presents an admissible contention. It is a contention alleging that the DEIS fails to comply with 10 C.F.R Part 51 and NEPA, because it fails to adequately address the following direct, indirect, and cumulative environmental impacts of constructing and operating the proposed LNP project: (a) onsite and offsite dewatering impacts associated with the connection of the site with the underlying Floridan aquifer system, impacts on Outstanding Florida Waters, impacts to water quality resulting from increased concentrations of nutrients resulting both directly from dewatering and indirectly via additional wildfires that will be caused by dewatering; (b) impacts of salt drift from the saltwater cooling towers into the freshwater aquatic environment; and (c) the underestimation of the zone of environmental impact and areal extent of impact on listed species, irreversible and irretrievable impacts, and mitigation measures associated with (a) and (b).

## VI. CONCLUSION

For the reasons set forth above, the Board finds that certain aspects Intervenor's proposed Contention 4A satisfy the general admissibility requirements of 10 C.F.R. § 2.309(f)(1) and the standard for new contentions of 10 C.F.R. § 2.309(f)(2). We therefore admit C-4A, as restated and narrowed in Attachment A hereto. The admitted portions of Contention 4A supersede their previously admitted counterparts of Contention 4.

It is so ORDERED.

THE ATOMIC SAFETY  
AND LICENSING BOARD

*/RA/*

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Alex S. Karlin, Chairman  
ADMINISTRATIVE JUDGE

*/RA/*

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Dr. Anthony J. Baratta  
ADMINISTRATIVE JUDGE

*/RA/*

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Dr. William M. Murphy  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
February 2, 2011

## ATTACHMENT A

CONTENTION 4A: The Draft Environmental Impact Statement (DEIS) fails to comply with 10 C.F.R. Part 51 and the National Environmental Policy Act because it fails to specifically and adequately address, and inappropriately characterizes as SMALL, certain direct, indirect, and cumulative impacts, onsite and offsite, of constructing and operating the proposed LNP facility:

- A. Impacts to wetlands, floodplains, special aquatic sites, and other waters, associated with dewatering, specifically:
  1. Impacts resulting from active and passive dewatering;
  2. Impacts resulting from the connection of the site to the underlying Floridan aquifer system;
  3. Impacts on Outstanding Florida Waters such as the Withlacoochee and Waccasassa Rivers;
  4. Impacts on water quality and the aquatic environment due to alterations and increases in nutrient concentrations caused by the removal of water; and
  5. Impacts on water quality and the aquatic environment due to increased nutrients resulting from destructive wildfires resulting from dewatering.
- B. Impacts to wetlands, floodplains, special aquatic sites, and other waters, associated with salt drift and salt deposition resulting from cooling towers (that use salt water) being situated in an inland, freshwater wetland area of the LNP site.
- C. As a result of the omissions and inadequacies described above, the Draft Environmental Impact Statement also failed to adequately identify, and inappropriately characterizes as SMALL, the proposed project's zone of:
  1. Environmental impacts;
  2. Impact on Federally listed species;
  3. Irreversible and irretrievable environmental impacts; and
  4. Appropriate mitigation measures.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
 )  
PROGRESS ENERGY FLORIDA, INC. ) Docket Nos. 52-029-COL  
 ) and 52-030-COL  
 )  
(Levy County Nuclear Power Plant )  
Units 1 and 2) )  
 )  
(Combined License) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (ADMITTING CONTENTION 4A) have been served upon the following persons by Electronic Information Exchange.

Office of Commission Appellate  
Adjudication  
U.S. Nuclear Regulatory Commission  
Mail Stop: O-16C1  
Washington, DC 20555-0001  
E-mail: [ocaamail@nrc.gov](mailto:ocaamail@nrc.gov)

Office of the Secretary of the Commission  
U.S. Nuclear Regulatory Commission  
Mail Stop O-16C1  
Washington, DC 20555-0001  
Hearing Docket  
E-mail: [hearingdocket@nrc.gov](mailto:hearingdocket@nrc.gov)

Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Mail Stop T-3F23  
Washington, DC 20555-0001

Pillsbury Winthrop Shaw Pittman, LLP  
2300 N. Street, N.W.  
Washington, DC 20037-1122  
Counsel for Progress Energy Florida, Inc.  
John H. O'Neill, Esq.

Alex S. Karlin, Chair  
Administrative Judge  
E-mail: [ask2@nrc.gov](mailto:ask2@nrc.gov)

Robert B. Haemer, Esq.  
Ambrea Watts, Esq.  
Alison Crane, Esq.  
Michael G. Lepre, Esq.  
Jason P. Parker, Esq.  
Stefanie Nelson George, Esq.  
Stephen Markus

Anthony J. Baratta  
Administrative Judge  
E-mail: [Anthony.baratta@nrc.gov](mailto:Anthony.baratta@nrc.gov)

E-mail:  
[john.oneill@pillsburylaw.com](mailto:john.oneill@pillsburylaw.com)  
[robert.haemer@pillsburylaw.com](mailto:robert.haemer@pillsburylaw.com);  
[ambrea.watts@pillsburylaw.com](mailto:ambrea.watts@pillsburylaw.com)  
[alison.crane@pillsburylaw.com](mailto:alison.crane@pillsburylaw.com)  
[michael.lepre@pillsburylaw.com](mailto:michael.lepre@pillsburylaw.com)  
[jason.parker@pillsburylaw.com](mailto:jason.parker@pillsburylaw.com)  
[stefanie.george@pillsburylaw.com](mailto:stefanie.george@pillsburylaw.com)  
[stephen.markus@pillsburylaw.com](mailto:stephen.markus@pillsburylaw.com)

William M. Murphy  
Administrative Judge  
E-mail: [William.murphy@nrc.gov](mailto:William.murphy@nrc.gov)

Joshua A. Kirstein, Law Clerk  
E-mail: [josh.kirstein@nrc.gov](mailto:josh.kirstein@nrc.gov)

Ann Hove, Law Clerk  
E-mail: [ann.hove@nrc.gov](mailto:ann.hove@nrc.gov)



Docket Nos. 52-029-COL and 52-030-COL  
 LB MEMORANDUM AND ORDER (ADMITTING CONTENTION 4A)

Office of the General Counsel  
 U.S. Nuclear Regulatory Commission  
 Mail Stop O-15D21  
 Washington, DC 20555-0001  
 Marian Zabler, Esq.  
 Sara Kirkwood, Esq.  
 Jody Martin, Esq.  
 Michael Spencer, Esq.  
 Kevin Roach, Esq.  
 Lauren Goldin, Esq.  
 Joseph Gilman, Paralegal  
 E-mail:  
[marian.zabler@nrc.gov](mailto:marian.zabler@nrc.gov)  
[sara.kirkwood@nrc.gov](mailto:sara.kirkwood@nrc.gov)  
[jody.martin@nrc.gov](mailto:jody.martin@nrc.gov)  
[michael.spencer@nrc.gov](mailto:michael.spencer@nrc.gov)  
[kevin.roach@nrc.gov](mailto:kevin.roach@nrc.gov)  
[laura.goldin@nrc.gov](mailto:laura.goldin@nrc.gov)  
[jsq1@nrc.gov](mailto:jsq1@nrc.gov)

OGC Mail Center : [OGCMailCenter@nrc.gov](mailto:OGCMailCenter@nrc.gov)

Alachua County Green Party, Green  
 Party of Florida  
 P.O. Box 190  
 Alachua, FL  
 Michael Canney, Co-Chair  
 E-mail: [alachuagreen@windstream.net](mailto:alachuagreen@windstream.net)

Nuclear Information & Resource Service  
 P.O. Box 7586  
 Asheville, NC 28802  
 Mary Olson,  
 NIRS Southeast Regional Coordinator  
 E-mail: [maryo@nirs.org](mailto:maryo@nirs.org)

Nuclear Information Resource Service  
 6390 Carroll Avenue, #340  
 Takoma Park, MD 20912  
 Michael Mariotte, Executive Director  
 E-mail: [nirsnet@nirs.org](mailto:nirsnet@nirs.org)

Ecology Party of Florida  
 641 SW 6<sup>th</sup> Avenue  
 Ft. Lauderdale, FL 33315  
 Cara Campbell, Chair  
 Gary Hecker  
 E-mail: [levynuke@ecologyparty.org](mailto:levynuke@ecologyparty.org)

[Original signed by Evangeline S. Ngbea]

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Office of the Secretary of the Commission

Dated at Rockville, Maryland  
 this 2<sup>nd</sup> day of February 2011