

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, 2010

MEMORANDUM AND ORDER

(Denying Motion to Dismiss Portions of Contention 4 as Moot)

Before the Board is a motion by Progress Energy Florida, Inc. (PEF) to dismiss as moot the aspects of Contention 4 (C-4) that relate to the adequacy of PEF's Environmental Report with regard to its analysis of active dewatering during operation of the proposed Levy Nuclear Plant (LNP) in Levy County, Florida.¹ The Ecology Party of Florida, the Green Party of Florida, and the Nuclear Information and Resource Service (collectively, Intervenors) oppose the motion.² The NRC Staff agrees with PEF that this portion of C-4 is moot, but notes that Intervenors still have an opportunity either to amend Contention 4 to challenge the Staff's draft environmental impact statement (DEIS), or to file a new contention on this topic.³

¹ Motion to Dismiss as Moot the Aspects of Contention 4 Related to Active Dewatering During Levy Nuclear Plant Operations (Sept. 30, 2010) at 1 (Motion).

² Co-Intervenors' [sic] Answer to Progress Energy Florida Motion to Dismiss as Moot the Aspects of Contention 4 Related to Active Dewatering During Levy County Units 1 & 2 Nuclear Operations (Nov. 15, 2010) at 1 (Intervenors Answer).

³ NRC Staff Answer to Progress Energy Florida's Motion to Dismiss as Moot Certain Aspects of Contention 4 (Oct. 12, 2010) at 1 (Staff Answer).

For the reasons set forth below, the motion is denied.⁴

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 ruled that the Intervenors had demonstrated standing and had submitted three admissible contentions. LBP-09-10, 70 NRC 51, 147 (2009). We therefore granted their petition to intervene. Id.

One of the three admitted contentions, Contention 4 (C-4), addressed the issue of environmental impacts to surface and groundwater resources resulting from the construction and operation of the LNP. C-4 states, in pertinent part, as follows:

Progress Energy Florida's (PEF's) Environmental Report fails to comply with 10 C.F.R. Part 51 because it fails to 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[.]

Id. The Commission affirmed the admission of C-4. See CLI-10-02, 71 NRC __, __ (slip op. at 3-18) (Jan. 7, 2010).

⁴ In addition to the instant motion, two other motions concerning the subject matter of C-4 are currently pending before this Board. On October 4, 2010, PEF moved 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). On November 15, 2010, the Intervenors sought admission of a new contention, C-4A, alleging that the NRC's recently issued DEIS, suffers from many of the same deficiencies as alleged in C-4 concerning PEF's Environmental Report (ER). See Ecology Party of Florida, Green Party of Florida, Nuclear Information and Resource Service Motion for Leave to Amend Contention 4 (Nov. 15, 2010); An Amended Contention 4 (Nov. 15, 2010). We are issuing our rulings on these motions simultaneously.

On August 5, 2010, the NRC Staff issued its DEIS regarding PEF's COLA for LNP Units 1 and 2.⁵ In the DEIS, the NRC Staff discusses environmental impacts to surface and groundwater resources resulting from the proposed LNP construction and operation. The discussion refers to information not included in PEF's Environmental Report (ER), including certain groundwater modeling analyses and a Site Certification Order with associated conditions of certification (COC) issued by the State of Florida.⁶

On September 30, 2010, PEF filed the instant motion to dismiss the portions of C-4 that relate to active dewatering activities during LNP operations, arguing that three fundamental changes have taken place since its submission of the ER for the LNP Units 1 and 2 that moot the active dewatering portions of C-4. Motion at 1. First, PEF states that it changed the proposed location of the four groundwater production wells (which would draw water from the upper Floridan aquifer when the LNP is in operation) by moving these wells off the LNP site to an adjacent PEF-owned property. Id. Second, PEF notes that the DEIS is different from the ER because the DEIS relies, in part, on the COC (and associated Site Certification Order). Id. Third, PEF points to alleged differences in the DEIS and ER with regard to groundwater modeling and the reliance on the COC. Id.

The NRC Staff filed its response to the motion on October 12, 2010, in which it expresses its view that the active dewatering aspects of C-4 are now moot, but notes that intervenors have an opportunity to amend C-4 or submit a new contention based on this issue

⁵ 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 (Aug. 13, 2010).

⁶ 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, at 2-24 to 2-29, 4-15 to 4-26, 5-5 to 5-9, 5-43, 5-57, 5-122 to 5-124, 7-13 to 7-19 (Aug. 2010) (DEIS); Motion, Attachment B, Florida Department of Environmental Protection Orders of January 12, 2010 and February 23, 2010, Revised Conditions of Certification (Feb. 23, 2010).

as it is discussed in the DEIS. On November 15, 2010, Intervenor submitted their answer opposing the motion.⁷

II. ANALYSIS

There are circumstances under which the NRC Staff's publication of a DEIS can render moot a contention challenging the adequacy of the applicant's ER. The instant proceeding is not such a case. We therefore deny PEF's motion to dismiss portions of C-4 related to active dewatering during operations at the LNP.

The Board concludes that PEF (the movant) has not established that the relocation of production wells at the LNP, the State of Florida's imposed conditions on groundwater use at the LNP, or the differences between the DEIS and the ER, establish a change in circumstances significant enough to render the active dewatering portions of C-4 moot. First, relocation of production wells to PEF property that is immediately adjacent to the LNP site does not alter Intervenor's allegation in C-4 that the environmental impacts of active dewatering are inadequately assessed. PEF states that the production wells "have been relocated off-site to minimize environmental impacts," and that this effects a "fundamental change in how active dewatering will support operation of Levy." Motion at 6. Yet these wells were merely moved to "adjacent Progress properties." *Id.* (citing DEIS, Figure 2-12). While PEF alleges that the well relocation will "minimize" environmental impacts to wetlands resulting from groundwater drawdown, *id.*, PEF fails to articulate precisely how relocation to adjacent property causes a change sufficient to moot Intervenor's challenge of the adequacy of the impacts analysis relating to active dewatering at the LNP site. C-4 refers specifically to the environmental impacts "onsite and offsite." LBP-09-10, 70 NRC at 149.

⁷ Intervenor Answer at 1. On October 7, 2010, the Board granted Intervenor a 40-day extension in which to submit their answer to the instant motion. See Licensing Board Order (Granting Motions for Extensions of Time) (Oct. 7, 2010) at 2 (unpublished). The October 12, 2010 filing deadline for answers to PEF's motion was otherwise established under 10 C.F.R. § 2.323 and the Board's initial scheduling order for this proceeding. See Initial Scheduling Order, LBP-09-22, 70 NRC 640, 648 (2009).

Intervenors argue, and we agree, that PEF has not sufficiently explained how movement of the wells across a property boundary effects a substantial alteration, either to minimize or to increase, the groundwater impacts resulting from active dewatering during LNP operations.⁸ A dismissal of the portions of C-4 addressing active dewatering merely because four active dewatering production wells were moved “off-site” would assume that the resulting groundwater impacts are only relevant if initiated at a location strictly within the LNP site property boundary. See id. at 4. As we stated when we admitted C-4, the “requirement of Part 51 that the ER cover all significant environmental impacts associated with the project is not limited to onsite environmental impacts.” LBP-09-10, 70 NRC at 99. The same holds true for the DEIS. The movement of the groundwater production wells from one section of PEF’s property to an adjacent section, does not moot C-4.

Second, the NRC Staff’s reference to, and reliance in its DEIS on, the State of Florida’s issuance of its site certification order and associated COC on groundwater use does not dispense with the NRC’s duty under NEPA to conduct adequately an independent “hard look” analysis of environmental impacts related to active dewatering during operations at the LNP.⁹ Certainly the NRC may reference the COC and need not duplicate a prior state analysis, but the

⁸ See Intervenors Answer at 3-4. In their answer, Intervenors argue that “the concern about hydrological impacts . . . is based on the fact that while boundaries may be drawn on the surface of the ground, such boundaries have no relationship . . . to waters under those boundaries.” Id. at 3. Intervenors further argue that PEF’s movement of the four production wells “may, in fact increase the impact of dewatering,” and that “the necessary analysis to make the case either way has not been provided by PEF. . . . It simply assumes that such relocation settles the matter.” Id. We agree.

⁹ See 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)) (“[I]n conducting its environmental review, an agency may, in its discretion, rely on data, analyses, or reports prepared by persons or entities other than agency staff, including competent and responsible state authorities . . . provided, however, that the Staff independently evaluates and takes responsibility for the pertinent information before relying on it in an EIS. In other words, the Staff need not replicate the work completed by another entity, but rather must independently review and find relevant and scientifically reasonable any outside reports or analyses on which it intends to rely.”).

NRC also cannot over-rely on that state analysis in conducting its independent assessment. See id. PEF argues, inter alia, that unlike its ER, the NRC Staff's DEIS considers the COC in its discussion of environmental impacts related to active dewatering. Motion at 9. Therefore, PEF argues, the aspects of C-4 related to active dewatering are now moot. Id. However, whether the analysis of environmental impacts resulting from active dewatering during operations at LNP is adequate under NEPA, even recognizing the NRC Staff's consideration in its DEIS of the COC, remains at issue in this proceeding. Merely considering additional state-imposed conditions does not dispose of the issue of whether the analysis as a whole is adequate under NEPA.¹⁰

Third, although the NRC Staff's DEIS reflects an analysis differing in certain respects from that in PEF's ER (e.g., the DEIS incorporates different groundwater modeling analyses and consideration of the State of Florida's COC conditions), it does not moot the issue that is at the heart of this part of C-4 – the adequacy of the assessment of environmental impacts resulting from active dewatering during operations at the LNP. Merely conducting an alternative analysis, which Intervenors have not yet had the opportunity to review,¹¹ does not obviate the need to ensure that the relevant entity (either PEF or the NRC Staff) has conducted a proper assessment of environmental impacts resulting from active dewatering activity during LNP operations. Intervenors continue to contest PEF's position that a sufficient assessment of the active dewatering impacts has been conducted, and PEF has not shown that the aspects of the NRC Staff's DEIS that differ from PEF's ER sufficiently resolve the issue of adequacy of the impacts assessment.

¹⁰ See LBP-09-10, 70 NRC at 100 (citing Tr. at 97) (“[T]he fact that an agency (other than NRC) has jurisdiction to issue a permit concerning a certain environmental impact of the PEF project does not mean that the subject may be excluded from the ER or EIS.”).

¹¹ As of the briefing of this matter, PEF had not yet made its new groundwater modeling analysis available to Intervenors for review. See LBP-10-23, 72 NRC __ (slip op.) (Dec. 22, 2010).

Commission precedent specifies that, once the NRC Staff issues the DEIS, a contention that was originally admitted as a challenge to the ER may be treated as a challenge to the similar section of the DEIS.¹² This has been referred to as the “migration tenet,”¹³ and we find that it is applicable here. The migration tenet obviates the requirement to file the same contention (and litigate its admissibility) three times – once against the ER, once against the DEIS, and once against the final environmental impact statement (FEIS). The migration tenet applies where, as here, the information in the DEIS is sufficiently similar to the information in the ER.¹⁴ This is not a case where the information in the DEIS is so different from the information in the ER that the DEIS dispenses with and moots the issues raised in the original contention and

¹² See Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 84 (1998) (“In this proceeding, CANT filed most of its environmental contentions on the basis of LES’s ER. But by the time the various NEPA issues came before the Board on the merits, the NRC Staff had issued its FEIS. In LBP-96-25 and LBP-97-8, therefore, the Board appropriately deemed all of CANT’s environmental contentions to be challenges to the FEIS.”); see also 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) (“While a contention contesting an applicant’s environmental report generally may be viewed as a challenge to the NRC Staff’s subsequent draft EIS, *new* claims must be raised in a new or amended contention. . . . In contrast, as the PFS Board explained, a contention ‘initially framed as a challenge to the substance of an applicant’s ER analysis of particular matters would not necessarily require a late-filed revision or substitution to constitute a litigable issue statement relative to the substance of the Staff’s DEIS (or final environmental impact statement) analysis of the same matter.’”).

¹³ Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-23, 54 NRC 163, 172 n.3 (2001) (citing Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 84 (1998) (“[T]he Commission has recognized that a contention contesting an applicant’s ER may be viewed as a challenge to the Staff’s subsequently issued DEIS/EIS. This ‘migration’ tenet does not, however, change the basic form of the contention, *i.e.*, whether it challenges the soundness of the information provided or claims that necessary information has been omitted (or some combination of the two).”).

¹⁴ See Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-08-2, 67 NRC 54, 63-64 (2008) (citing Duke Energy, CLI-02-28, 56 NRC at 383) (“The Board may consider environmental contentions made against an applicant’s ER as challenges to an agency’s subsequent DEIS. . . . This is appropriate, however, only so long as the DEIS analysis or discussion at issue is essentially *in para materia* with the ER analysis or discussion that is the focus of the contention. If it is not, an intervenor attempting to litigate an issue based on expressed concerns about the DEIS may need to amend the admitted contention or, if the information in the DEIS is sufficiently different from that in the ER that supported the contention’s admission, submit a new contention.”).

requires (if the intervenor wishes to continue) that the intervenor file a new or amended contention against the DEIS.¹⁵ Therefore, we conclude that the aspects of C-4 challenging the adequacy of the ER analysis of the environmental impacts of active dewatering activities during LNP operations migrate to, and remain as viable challenges to the adequacy of the DEIS, and are not moot.¹⁶

¹⁵ See Duke Energy, CLI-02-28, 56 NRC at 383; Private Fuel Storage (Independent Spent Fuel Storage Facility), LBP-01-22, 54 NRC 155, 161 (2001); Vogtle, LBP-08-2, 67 NRC at 63-64; 10 C.F.R. § 2.309(f)(2); 42 U.S.C. § 4321 (2006).

¹⁶ The fact that the Intervenor, out of an abundance of caution, filed a new and amended contention C-4A challenging the DEIS, does not alter our ruling here – that these aspects of C-4 were not mooted by the issuance of the DEIS. While C-4 (challenging the ER) is not dismissed as moot, as we stated in our ruling admitting parts of C-4A (challenging the DEIS), for purposes of the evidentiary hearing and merits decisions, the admitted portions of C-4A will supersede the previously admitted counterparts of C-4. Memorandum and Order (Admitting Contention 4A) at 22 (Feb. 2, 2011) (unpublished).

III. CONCLUSION

Progress Energy Florida, Inc. has failed to show that the aspects of Contention 4 in the instant proceeding relating to active dewatering activities during operation of the LNP are now moot by virtue of 1) relocation of four production wells to an immediately adjacent PEF-owned property; 2) consideration in the NRC Staff DEIS of State of Florida imposed conditions associated with the COC; or 3) differences in the DEIS from the ER. These portions of Contention C-4, which focused on the ER, migrate and will now be treated as challenges to the DEIS as well. We therefore deny PEF's motion to dismiss.¹⁷

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Alex S. Karlin, Chairman
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Dr. Anthony J. Baratta
ADMINISTRATIVE JUDGE

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Dr. William M. Murphy
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 2, 2010

¹⁷ Our ruling, that the C-4 challenges to the ER migrate to serve as challenges to the DEIS, does not mean that the same will necessarily hold true with regard to the FEIS. Any such determination will depend, in significant part, as to whether the FEIS is, in pertinent parts, substantially the same as the DEIS.

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 (DENYING MOTION TO DISMISS PORTIONS OF CONTENTION 4 AS MOOT) (LBP-11-01) have been served upon the following persons by Electronic Information Exchange.

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Docket Nos. 52-029-COL and 52-030-COL
 LB MEMORANDUM AND ORDER (DENYING MOTION TO DISMISS PORTIONS OF
 CONTENTION 4 AS MOOT) (LBP-11-01)

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