



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4
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JUN - 5 2009

Colonel Paul Grosskruger
District Commander
U.S. Army Corps of Engineers – Jacksonville District
Attn: Mr. Gordon A. Hambrick
1002 West 23rd Street, Suite 350
Panama City, Florida 32405-3648

Subject: Progress Energy Florida; SAJ-2008-490 (IP-GAH)

Dear Colonel Grosskruger:

This letter is in response to Public Notice SAJ-2008-490-(IP-GAH) for Progress Energy Florida. The applicant, Progress Energy Florida, is requesting authorization to impact various waters of the United States, including wetlands located within Central Florida. The basic project purpose is to meet the public's need for electric energy and the overall project purpose is to meet the public's need for increased electrical baseload generating capacity in the Central Florida area. The proposed project includes the construction of the Levy Nuclear Plant electrical generation facility, and various associated, integral project components, including: electrical transmission lines and substations; access roads; a barge slip at the Cross Florida Barge Canal (CFBC); cooling tower make-up water pipeline (approximately 3 miles long) with an intake structure at the CFBC; and water pipelines (approximately 13 miles long) with discharge at the Crystal River Energy Complex. There are approximately 765 acres of wetlands or other surface waters to be impacted by the proposed project consisting of 355 acres for the transmission line right-of-ways, 54 acres for the railroad right-of-way, 41 acres for the blowdown pipelines, and 1.1 acres for the connection of the barge slip/boat ramp access to the CFBC. The project is located in the following counties: Levy, Citrus, Marion, Sumter, Lake, Hernando, Pinellas, Hillsborough, and Polk Counties.

It is the Environmental Protection Agency's (EPA) understanding that the U.S. Nuclear Regulatory Commission (NRC) is the lead agency for preparing an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA) and for determining the purpose and need of the energy project under NEPA. The U.S. Army Corps of Engineers (COE), is a cooperating agency for the preparation of the EIS and is to ensure that the purpose and need, the suite of alternatives, and the overall evaluation presented in the EIS meet the requirements of the Clean Water Act (CWA) Section 404 (b)(1) Guidelines (Guidelines), including defining the project purpose and determining the least environmentally damaging practicable alternative (LEDPA). The COE permit decision will be made following the issuance of the Final EIS; however, the proposed project has been public noticed, thereby triggering the Section 404(q)

Memorandum of Agreement between EPA and the COE prior to the availability of the information needed in order to complete our Guideline review.

In addition, according to the public notice, two “No Permit Required” letters have been issued by the COE to the applicant for construction projects which are located in uplands and not regulated by the COE. EPA has concerns with regard to the completion of site work that presumes the site is the preferred alternative prior to receiving the necessary environmental permits, as this could compromise the validity of the alternatives analysis and LEDPA demonstrations that are required under the Guidelines.

The purpose of the CWA Guidelines is to restore and maintain the chemical, physical, and biological integrity of waters of the United States. These goals are achieved, in part, by prohibiting discharges of dredged or fill material that would result in avoidable or significant adverse impacts on the aquatic environment. The burden to demonstrate compliance with the Guidelines rests with the permit applicant. The Guidelines contain four main requirements each of which must be complied with to obtain a Section 404 permit.

Code of Federal Regulations, Title 40, § 230.10(a), prohibits a discharge if there is a LEDPA to the proposed project. Identification of the LEDPA is achieved by performing an alternatives analysis that estimates the direct, secondary, and cumulative impacts to jurisdictional waters resulting from each alternative considered. Project alternatives that are not practicable and do not meet the project purpose are eliminated. The LEDPA is the remaining alternative with the fewest impacts to aquatic resources, so long as it does not have other significant adverse environmental consequences. A LEDPA is presumed for a non-water dependent activity in special aquatic sites as defined in Subpart E of the Guidelines. A project is considered non-water dependent if the basic project purpose does not require access or proximity to or siting within a special aquatic site. Water dependency relies on the basic purpose of the proposed discharge and not on activities associated with, or secondary in purpose to, the proposed discharge. The basic project purpose is “to meet the public’s need for electric energy” which is not a water-dependent activity; therefore, the existence of alternatives which do not involve special aquatic sites is presumed under the Guidelines. Practicable alternative sites that meet the project purpose need to be considered and the site with the least potential impacts selected. In order to clearly demonstrate compliance with the Guidelines, the applicant must document their consideration of alternatives to the proposed project and the rationale that led them to select the LEDPA. EPA understands that the NRC and the COE are working to complete the draft EIS for this proposed project; however, EPA is unable to determine if the requirements of Code of Federal Regulations, Title 40, § 230.10(a), have been met since this document is not available at this time.

Code of Federal Regulations, Title 40, § 230.10(b), prohibits discharges that will result in a violation of the water quality standards or toxic effluent standards, jeopardize a threatened or endangered species, or violate requirements imposed to protect a marine sanctuary. As stated in the public notice, the NRC is the lead federal agency and responsible for consultation with the U.S. Fish and Wildlife Service pursuant to Section 7 of the Endangered Species Act. To EPA’s knowledge, this process has not been completed at the date of this letter.

Code of Federal Regulations, Title 40, § 230.10(c), prohibits discharges that will cause or contribute to significant degradation of the waters of the United States. The applicant should address compliance with state water quality standards and measures taken to ensure that state water quality standards will not be violated. We understand that the NRC is working with the Florida Department of Environmental Protection to obtain the required Section 401 Water Quality Certification. The proposed project will directly and permanently destroy approximately 765 acres of wetlands and their associated functions. The applicant should address measures taken to avoid significant degradation of aquatic resources. Once this is complete, EPA will be able to determine if the requirements of Code of Federal Regulations, Title 40, § 230.10(b) and (c) have been met.

Code of Federal Regulations, Title 40, § 230.10(d), prohibits discharges unless appropriate and practicable steps have been taken to minimize potential adverse impacts of the discharge on the aquatic ecosystem. Subpart H of the Guidelines, Actions to Minimize Adverse Effects, describes many actions which can be undertaken to minimize the adverse effects of discharges of dredged or fill material including the choice of the disposal site. Minimization includes all reasonable actions to reduce the adverse impacts of a proposed discharge at a particular site. Possible actions to consider include but are not limited to: alternatives to the project configuration or size; avoidance of impacts to more valuable wetlands on site; construction methods; and timing of discharge activity. All projects that are non-water dependent need to clearly demonstrate that there are no LEDPA in order to be in compliance with the Guidelines. If the resulting site still involves impacts to waters of the U.S. or special aquatic sites, alternative site configurations need to be considered. Documentation of the rationale for choosing the preferred alternative site configuration must be presented to demonstrate minimization of adverse effects on special aquatic sites. Documentation of the alternatives considered need to include the location and assessment of the impacts associated with each site configuration including the current ecological function of all aquatic systems using the Uniform Mitigation Assessment Method. EPA is unable to complete our review of the Code of Federal Regulations, Title 40, § 230.10(d) requirements, as this information is not available at this time.

Lastly, according to the Guidelines, compensatory mitigation is required for any unavoidable impacts that may occur after avoidance and impact minimization have been demonstrated. It is premature to consider mitigation at the present time; however, if the applicant meets the sequencing requirements of the Guidelines it would then be appropriate to consider compensatory mitigation for any remaining unavoidable impacts. In order to obtain reasonable assurances that the proposed mitigation will replace lost wetland functions that result from the proposed project, all of the relevant requirements of Title 33 CFR § 325 and 332 Compensatory Mitigation for Losses of Aquatic Resources; Final Rule, effective June 9, 2008. EPA is interested in working closely with the applicant and relevant Federal and State regulatory agencies to ensure that the siting of the mitigation occurs within the 8 digit Hydrologic Unit Codes (HUC) where wetland impacts occur. In addition, since the proposed wetland acreage impacts are significant, it is important to approach mitigation at a landscape level and target mitigation on sensitive lands that may have already been identified for future acquisition.

The predominant wetland types that will be affected by both the proposed plant and associated facilities are cypress swamps, mixed forested wetlands, bottomland swamp, and freshwater marshes. Cypress swamps are shallow, forested depressions typically vegetated by pond cypress, dahoon holly, swamp bay and red maple. Mixed forested wetlands are vegetated by a variety of hardwood conifer tree species. Bottomland forested wetlands occupy low-lying flatlands and floodplains, with wetland hardwood species dominating the canopy. Freshwater marshes are characterized by mostly herbaceous emergent vegetation. The areas proposed to be impacted include bottomland, hardwood forested wetlands; and freshwater marshes. These wetlands filter nutrients and other pollutants out of the water column; attenuate flood flows; serve as a source of water and organic matter for downstream waters; and are valuable habitat for aquatic and terrestrial species. For the aforementioned reasons, and the potential for threatened, endangered, or candidate species to be present in these waters, EPA believes the waters located on the project site are Aquatic Resources of National Importance (ARNI). In addition, because of the removal of these ecological functions and services, the proposed project will likely have direct and indirect impacts on adjacent downstream waters in the Waccasassa (03110101) and Withlacoochee (03011208) HUC's.

Since the necessary information is not available for review, EPA finds this project, as currently proposed, has not met the requirements of the Guidelines, and will have substantial and unacceptable adverse impacts on ARNI because of the direct loss of the functioning wetlands. Therefore, EPA recommends denial of the project, as currently proposed. This letter follows the field level procedures outlined in the August 1992, Memorandum of Agreement between EPA and the Department of the Army, Part IV, paragraph 3(b) regarding Section 404(q) of the CWA.

Thank you for the opportunity to comment on this request for authorization. If you have any questions regarding EPA's comments, please contact Ms. Cecelia Harper at (404) 562-9418 or by e-mail at harper.cecelia@epa.gov.

Sincerely,



A. Stanley Meiburg
Acting Regional Administrator

cc: United States Fish and Wildlife Service
National Marine Fisheries Service
Florida Department of Environmental Management