LBP-10-20

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 No. 52-029-COL, 52-030-COL ASLBP No. 09-879-04-COL-BD01 November 18, 2010

MEMORANDUM AND ORDER
(Denying Motion for Summary Disposition of Contention 8A)

Before the Board is a motion by Progress Energy Florida, Inc. (PEF) for summary disposition of Contention 8A (C-8A), which challenges the adequacy of PEF's plan for onsite management of low level radioactive waste (LLRW).[1] For the reasons stated below, we conclude, as a matter of law, that PEF's LLRW plan does not satisfy 10 C.F.R.§ 52.79(a) because it does not provide a level of information sufficient to enable the Commission to reach a final conclusion, before the issuance of the proposed combined license, to resolve whether PEF's means for controlling and limiting radioactive effluents and radiation exposures (beyond the initial storage period specified in the AP1000 Design Control Documents) will be within the limits set forth in 10 C.F.R. Part 20. Accordingly, the motion for summary disposition is denied.

[1] Motion for Summary Disposition of Contention 8A (Aug. 27, 2010) (PEF Motion).

I. BACKGROUND – PROCEDURAL POSTURE

On July 28, 2008, PEF filed a combined license application (COLA), pursuant to 10 C.F.R. Part 52, to construct and to operate two nuclear power reactors in Levy County, Florida.[2] On July 8, 2009, we granted the petition to intervene of the Nuclear Information and Resource Service, the Ecology Party of Florida, and the Green Party of Florida (collectively, Joint Intervenors), finding that they had demonstrated standing and had proffered three admissible contentions. See LBP-09-10, 70 NRC 51, 147 (2009).

One of the contentions that we admitted was Contention 8. Id. This was a contention of omission alleging that the COLA was inadequate under 10 C.F.R. § 52.79(a) because it failed to address the management of LLRW for a longer term than envisioned in the COLA. Specifically, Contention 8, as admitted, alleged that the COLA

> [I]s inadequate because the Safety Analysis Report assumes that the class B, C, and greater than C low-level radioactive waste [LLRW] generated by proposed Levy Units 1 and 2 will be promptly (e.g., within two years) shipped offsite and fails to address compliance with Part 20 and Part 50 Appendix I (ALARA) in the event that PEF will need to manage such [LLRW] on the Levy site for a more extended period of time.

Id. at 150. The rationale for Contention 8 was that the COLA assumed that PEF would manage its LLRW by promptly shipping it offsite and thus only provided for a limited amount of onsite storage capacity (approximately two-years' worth), but that the viability of this plan is questionable given that, since July 1, 2008, there has been no facility in the United States to which such wastes could legally be shipped and disposed. See id. at 117 & n.54, 124. This was based on the factual allegation that, as of July 1, 2008, the LLRW disposal facility in Barnwell, South Carolina, was closed to wastes other than wastes generated in South Carolina, New Jersey, and Connecticut. Id. at 117 n.54.

[2] Progress Energy Florida, Inc.; 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).

The Board reasoned that "[g]iven the closure of Barnwell, the current absence of any alternative disposal facility for [Levy Nuclear Plant LLRW], and the large length of time often required for the licensing of new [LLRW] facilities, we conclude that Petitioners have raised a legitimate and material safety issue." Id. at 124. We stated that the "Petitioners have fairly alleged that . . . the COLA does not confront the plausible looming scenario whereby the [LLRW] 2-year storage capacity [specified in the COLA] will be reached and exceeded." Id.

PEF appealed the admission of Contention 8, arguing that the Board had "effectively 'created a new regulatory requirement' that PEF's [COLA] must 'confront the plausible problem of longer term management of [LLRW] onsite.'" CLI-10-02, 71 NRC __, __ (slip op. at 1-8, 24) (Jan. 7, 2010).

The Commission affirmed the admission of Contention 8. Id. at __ (slip op. at 24-25). First, the Commission acknowledged that "[d]ue to the closing of the land disposal facility at Barnwell, South Carolina to states outside the Atlantic Compact, there currently is no licensed disposal facility in the United States that will accept LLRW from a nuclear power plant located in Florida." Id. at __ (slip op. at 18). In addition, the Commission agreed with the Board that "[a]bsent a licensed LLRW disposal facility that will accept waste from the Levy County facility, it is reasonably foreseeable that LLRW generated by normal operations will be stored at the site for a longer term than is currently envisioned in [PEF's] COL application."[3] Id. at __ (slip op. at

[3] The Commission noted that the problem arises from the lack of any currently (2010) licensed disposal facility in the U.S. and that PEF acknowledged that its COLA only provides for approximately two years accumulation of LLRW. CLI-10-02, 71 NRC at __ (slip op. at 24-25 n.101). As a practical matter, however, it is well understood that the two-year waste accumulation clock does not start to run until the PEF nuclear power reactors actually commence operation, which will be at least several years hence. For example, if it takes two years for NRC to issue the license to construct and operate the reactors, and an additional three years for PEF to commence and complete construction of the reactors, then PEF might not exceed its initial onsite LLRW storage capacity for at least 7 years (2+3+2 years), e.g., not until 2017. Issues related to this point (e.g., the likelihood that an additional offsite LLRW disposal facility would be available within this longer time frame) were litigated when the Board admitted Contention 8 and the Commission affirmed. For purposes of Contention 8A, however, no party has raised this issue. To the contrary, PEF specifically denies that there is any factual dispute concerning this issue: "[A]ny potential difference of opinion between Progress and Joint

24). The Commission noted that 10 C.F.R. § 52.79(a)(3) requires the COLA "to describe the 'means for controlling and limiting the radioactive effluents and radiation exposures'" from the proposed nuclear reactors. Id. at __ (slip op. at 25) (citing 10 C.F.R. § 52.79(a)(3)). In these circumstances, the Commission affirmed the admission of Contention 8, concluding that "the Board reasonably interpreted [10 C.F.R. § 52.79(a)(3)] to find that Progress must address, in its COL application, how it intends to handle an accumulation of LLRW" for a longer term than currently envisioned in the COLA.[4]

Meanwhile, the NRC Staff and PEF took steps that would result in the dismissal of Contention 8 as a contention of omission. Specifically, the NRC Staff issued two requests for additional information (RAIs) asking PEF, inter alia, to "submit the details of any proposed onsite storage facility" for "low-level waste [that] has been identified beyond that provided in [the] AP1000 Standard Design because of unavailability of offsite storage."[5] PEF responded to the two RAIs submitting, inter alia, its plan for managing LLRW for a term longer than currently anticipated in the COLA. Id. at 5-6.

On April 14, 2010, PEF and Joint Intervenors jointly moved for settlement and dismissal of Contention 8, apparently because they agreed that Contention 8, a contention of omission, had been cured by PEF's responses to the NRC Staff's RAIs.[6] The proposed settlement specified that the Contention 8 would be dismissed and that the Joint Intervenors would have

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Intervenors regarding the current or future availability of offsite storage for LLRW generated by Levy is irrelevant to C-8A, because Progress's LLRW plans address that contingency. Therefore, there are no material facts in dispute, and the Board can grant summary disposition as a matter of law." PEF Motion at 15.

[4] CLI-10-2, 71 NRC at __ (slip op. at 24-25). The Commission narrowed Contention 8 to exclude any issues regarding the storage of greater than Class C waste. Id. at __ (slip op. at 27).

[5] PEF Motion, Attachment B, RAI Responses to NRC Dated 12/4/2009 at 4 (Dec. 4, 2009) (Attachment B).

[6] Joint Motion for Approval of Settlement and Dismissal of Contention 8 (Apr. 14, 2010) at 1-2. See infra at Section IV.B.3.a for an explanation of these RAI responses.

thirty days within which to submit a new contention challenging the adequacy of the LLRW plan that had been submitted by PEF in response to the RAIs. Id. at 2. The Board approved the settlement agreement and dismissed Contention 8.[7]

On May 14, 2010, pursuant to the settlement agreement, the Joint Intervenors moved for the admission of C-8A, alleging that PEF's plan for managing LLRW for the period beyond the term specified in the AP1000 Standard Design, failed to provide sufficient information to satisfy the relevant legal requirements.[8]

On August 9, 2010, the Board admitted C-8A.[9] This contention alleges that the plan submitted by PEF in response to the RAIs is inadequate under NRC regulations. It reads as follows:

> Progress Energy Florida's (PEF's) COL application is inadequate to satisfy 10 C.F.R. 52.79 because it assumes that class B and C radioactive waste generated by proposed Levy Units 1 and 2 will be promptly (e.g., within two years) shipped offsite, while currently there is an absence of access to a licensed disposal facility or capability to isolate the radioactive waste from the environment. The proposed amendment to the Levy County COL also fails to offer sufficient information to demonstrate the adequacy of PEF's plans for storing Class B and C radioactive waste on the Levy site if offsite disposal capacity is not available within two years. PEF's plan to postpone most of its decisions regarding how and where to store the waste (including "minimizing" the volume of the waste) until sometime after issuance of the license for Levy violates Section 52.79 and also the Atomic Energy Act's requirement that safety findings must be made before the license is issued.

Id. at 5 (quoting Joint Intervenors' Motion to Amend Contention 8 at 3).

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[7] Licensing Board Order (Approving Settlement and Dismissal of Contention 8) (Apr. 21, 2010) at 1 (unpublished).

[8] Motion by Joint Intervenors to Amend Contention 8 on So-Called "Low-Level" Radioactive Waste and Safety Issues Associated with Extended On-Site Storage (May 14, 2010) at 1-3 (Joint Intervenors' Motion to Amend Contention 8); see also id., Declaration of Diane D'Arrigo in Support of Interveners' [sic] Amended Contention 8 on So-Called "Low-Level" Radioactive Waste Safety Issues ¶ 19 (May 14, 2010) (D'Arrigo Decl.).

[9] Licensing Board Memorandum and Order (Ruling on Joint Intervenors' Motion to File and Admit New Contention 8A) (Aug. 9, 2010) at 17 (unpublished) (Order Admitting C-8A).

On August 27, 2010, pursuant to 10 C.F.R. § 2.1205, PEF filed the instant motion for summary disposition of C-8A. PEF Motion at 1.

II. APPLICABLE LEGAL STANDARDS

In a Subpart L proceeding, such as this one, the Board must apply the summary disposition standard set forth in Subpart G. 10 C.F.R. § 2.1205(c). In general, the Commission applies the same standard that the federal courts apply when ruling on motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Advanced Med. Sys., Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993).[10] Under the Subpart G standard, summary disposition is proper:

> if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.

10 C.F.R. § 2.710(d)(2). Thus, there are two criteria. First, the movant must show that there is no genuine issue as to any material fact. Second, the movant must establish that its legal position is correct.

As to the first criterion, the moving party bears the burden of demonstrating that there is no genuine issue as to any material fact. 10 C.F.R. § 2.325; Advanced Med. Sys., CLI-93-22, 38 NRC at 102. Summary disposition may be granted only if the truth is clear. Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 467 (1962). Any doubt as to the existence of a genuine issue of material fact is resolved against the moving party. Advanced Med. Sys., CLI-93-22, 38 NRC at 102. Because the burden is on the moving party, the Board must examine the record in the light most favorable to the non-moving party and give the non-moving party the

[10] Advanced Medical Systems construes the prior version of the summary disposition regulation, 10 C.F.R. § 2.749 (2004). The current regulations, 10 C.F.R. §§ 2.1205 and 2.710, are substantially similar. See also Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC __, __ (slip op. at 11-12) (Mar. 26, 2010).

benefit of all favorable inferences that can be drawn from the evidence. Id. Summary disposition "is not a tool for trying to convince a Licensing Board to decide, on written submissions, genuine issues of material fact that warrant resolution at a hearing."[11]

III. POSITIONS OF THE PARTIES

PEF's motion asserts that it meets the two basic criteria for summary disposition. PEF asserts both "that no genuine issue of material fact exists with respect to" C-8A, and that the motion presents a purely legal issue, i.e., whether the COLA includes "information regarding the means by which it will manage [LLRW] at Levy that is sufficient to satisfy the requirements set forth in 10 C.F.R. § 52.79(a)(3)." PEF Motion at 1. According to PEF, the "resolution of Contention 8A requires a legal, rather than a factual, determination." Id. at 4 (capitalizations omitted).

With regard to the first criterion for the granting of summary disposition – no genuine issue as to any material fact – PEF attaches its December 4, 2009, responses to NRC RAIs 11.04-1 and 11.04-2 and asserts that there is no dispute that these RAI responses constitute PEF's plan for managing LLRW "including its plans in the event that more than a two-year accumulation of such waste would have to be stored at Levy." Id, at 2. PEF's statement of material facts on which no genuine dispute exists includes the statement that PEF's "RAI responses provide [PEF's] plan, if needed, for controlling exposures from storage of more than a two-year accumulation of LLRW."[12]

PEF says that the alleged facts that were in dispute when the Board originally admitted C-8A, i.e., whether PEF will ever actually need to manage LLRW for a term longer than

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[11] Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-39, 54 NRC 497, 509 (2001) (emphasis omitted).

[12] PEF Motion, Attachment C, Statement of Material Facts Not in Dispute ¶ 9 (Attachment C).

contemplated in the original COLA (approximately two years), are no longer material. PEF Motion at 14.

> These alleged facts [that no offsite facility will be available and PEF needs more than two years of onsite waste management capacity], even if assumed to be true, are not material to the matter in dispute. If Levy's initial LLRW storage capacity is inadequate, Progress's LLRW plan as described above and in its RAI Responses sets forth the means through which Progress would increase that capacity.

Id. at 14-15. PEF states that, under its LLRW plan, "at least two years of storage is available within the facilities described in the DCD [Design Control Document]." Id. If an offsite facility is not available within that time period, then PEF "will implement a waste minimization plan," and if additional onsite storage capacity is needed for LLRW, then PEF "would develop further temporary storage in accordance with NUREG-0800." Id. at 15. Thus, PEF says that "any potential difference of opinion between Progress and Joint Intervenors regarding the current or future availability of offsite storage for LLRW generated by Levy is irrelevant to C-8A, because Progress's LLRW plan addresses that contingency." Id.

PEF further asserts that, because it has now submitted a plan for managing LLRW in the event that offsite facilities are not available and onsite management will be needed for more than the term originally contemplated in the COLA (approximately two years), the only issue is whether the plan for managing LLRW for the period beyond the initial two years satisfies 10 C.F.R. § 52.79(a)(3). Id. at 4-7 & n.8.

PEF notes that this regulation requires two things. First it specifies that the Final Safety Analysis Report (FSAR), which is part of the COLA, "must describe the kinds and quantities of radioactive materials that Levy is expected to produce." Id. at 5. Second, the FSAR "must describe the 'means' by which radioactive effluents and radiation exposures will be controlled and limited to meet the Part 20 requirements." Id.

PEF argues that its plan complies with these regulatory requirements, and therefore that PEF is entitled to summary disposition in its favor as a matter of law. Id. at 6-14. PEF says that

the FSAR satisfies the first requirement because the COLA incorporates the information contained in the AP1000 Design Control Document (DCD) (both the codified Revision 15 and the pending revisions submitted by Westinghouse[13]), and that "[t]he AP1000 DCD describes the kinds and quantities of radioactive materials expected to be generated" by an AP1000 nuclear power plant. PEF Motion at 5-6. PEF notes that the Board has found that PEF has satisfied this portion of 10 C.F.R. § 52.79(a)(3). Id. at 6 (citing Order Admitting C-8A at 17-18 n.22).

PEF argues that the only legal issue presented in its motion for summary disposition concerns the second part of 10 C.F.R. § 52.79(a)(3), i.e., "whether [PEF] has satisfied the requirement in 10 C.F.R. § 52.79(a)(3) that the FSAR identify the 'means' for controlling and limiting radioactive effluents and radiation exposures within the limits set forth in 10 C.F.R. Part 20." Id. PEF notes that "the Commission has stated in this proceeding that 'the LLRW storage information required by 10 C.F.R. § 52.79(a)(3) is tied to the COL applicant's particular plans for compliance through design, operational organization, and procedures.'" Id. at 8 (citing CLI-10-02, 71 NRC at __ (slip op. at 24)) (emphasis in original). PEF interprets the regulation to require that the FSAR specify "the method or plan by which [PEF] will meet its commitment to satisfy Part 20, not the specific construction details, design, or location of the precise facilities that would be utilized." Id.

PEF argues that its RAI responses describe its plans for addressing LLRW storage at a sufficient level of detail to satisfy 10 C.F.R. § 52.79(a)(3). First, PEF says that, for the initial time frame, the onsite storage facilities described in the AP1000 DCD are adequate, because

[13] See 73 Fed. Reg. at 74,532. PEF's COLA originally referenced Revisions 15 and 16 of the Westinghouse Electric Company, LLC AP1000 certified design. Id. Revision 15 has been certified by the NRC and Revision 16 is the subject of an ongoing rulemaking. Id.; see Design Certification Rule for the AP1000 Design, 10 C.F.R. Part 52, App. D, § III(A). In 2009, PEF updated its application to reference Revision 17 of the AP1000 design, which is also the subject of a pending rulemaking. See Letter from Garry D. Miller, General Manager, Nuclear Plant Development, Progress Energy Florida, Inc., to U.S. Nuclear Regulatory Commission (Oct. 2, 2009) (ADAMS Accession No. ML092860397). We note that an applicant that "reference[s] in its application a design for which a design certification application has been docketed but not granted" does so "at its own risk." 10 C.F.R. § 52.55(c).

they "provide for storage capability onsite 'for greater than two years.'" Id. (citing Attachment B at 5) (hereinafter referred to as the Initial LLRW Plan). PEF cites to the DCD statement that the AP1000 "waste storage room is approximately 3900 cubic feet, which accommodates more than one full tractor-trailer truckload of storage/shipping containers." Id. at 8 n.9.

As the next part of its LLRW plan (dealing with the more extended time frame, and hereinafter referred to as the Extended LLRW Plan), PEF says that "in the event that an offsite facility is not available . . . [PEF] will evaluate reducing the amount of LLRW the Levy plant generates by implementing a waste minimization plan." Id. at 8-9 (citing Attachment B at 3, 5). PEF explains that the waste minimization plan "will consider the strategy of 'reducing the in-service run length of resin beds, as well as resin selection, short-loading, and point-of-generation segregation' techniques." Id. at 9 (citing Attachment B at 3, 5).

As a further part of its Extended LLRW Plan, PEF says that "if additional onsite storage capacity . . . is required despite implementation of these strategies, Progress will expand the capacity of Levy's licensed storage facilities, consistent with NRC guidance and regulations." Id. PEF contemplates that "such additional onsite storage would be designed and built 'utilizing the design guidance provided in NUREG-0800.'" Id. If it needs to build such additional onsite storage, PEF says that the plan specifies that it will "conduct written safety analyses under 10 C.F.R. § 50.59," which would allow it to "'make changes in the facility as already described in the final safety analysis report,' such as expanding the capacity of the LLRW storage facility already described in the FSAR, without a license amendment if certain conditions are satisfied.'" Id. (citing 10 C.F.R. § 50.59(c)(1)). If such conditions are not satisfied, then PEF says it "could add on-site storage capacity through the NRC's license amendment process." Id. (citing Attachment B at 4).

PEF asserts that the foregoing LLRW "plan provides the Commission with adequate assurance that radiation exposures from LLRW stored onsite at Levy will at all times be within

the limits set forth in 10 C.F.R. Part 20, including ALARA (10 C.F.R. § 20.1101(b)),” as is required by 10 C.F.R. § 52.79(a)(3). Id.

PEF argues that the Joint Intervenors are asking for too much detail in the LLRW plan, citing the recent decision by the Vogtle Board which concluded that “[w]e find nothing in the rule or the cited Commission statements regarding LLRW that indicate section 52.79(a)(3) requires the detailed design, location, and health impacts information outlined in amended contention SAFETY-1.”[14]

Finally, PEF asserts that the “Joint Intervenors’ assertion that 10 C.F.R. § 52.79(a) requires detailed plans for expanded LLRW storage capacity to be included in the COLA, if true, would make that regulation inconsistent with NRC guidance . . . .” Id. at 14 (emphasis added). PEF states that the NRC’s Regulatory Issue Summary 2008-32, “Interim Low Level Radioactive Waste Storage at Reactor Sites” (RIS 2008-32) and NUREG-0800 expressly prefer offsite storage. Id. at 13-14. PEF argues that “RIS 2008-32 endorses the 10 C.F.R. § 50.59 process described in Progress’s RAI Responses.” Id. at 13. Further, says PEF, “RIS 2008-32 . . . explain[s] that if the criteria of 10 C.F.R. § 50.59 are not met, the licensee would be required to seek a license amendment . . . [which] would include all of the required details regarding the expanded storage capacity.” Id. (emphasis added). PEF concludes that including such details in a COL would be inconsistent ‘with . . . the availability of the mechanisms under 10 C.F.R. . . . § 50.59 . . . for obtaining authorization to construct additional onsite LLRW storage facilities.” Id. at 14 (quoting Vogtle, LBP-10-08, 71 NRC at __ (slip op. at 13)).

In conclusion, PEF claims there are no issues of material fact in dispute and that it is entitled to judgment of C-8A as a matter of law because it has fulfilled the requirements of 10 C.F.R. § 52.79(a)(3). Id. at 14-15.

[14] PEF Motion at 11 (citing Southern Nuclear Operating Co. (Vogtle Electric Generating Plants, Units 3 and 4), LBP-10-08, 71 NRC __, __ (slip op. at 13) (May 19, 2010) (Vogtle)).

Joint Intervenors oppose the motion for summary disposition on two grounds. First, Joint Intervenors assert that there are genuine issues of material fact in dispute.[15] In addition, they argue that PEF's interpretation of the law is incorrect. Id. at 10-14.

Joint Intervenors assert that a number of material issues of fact are in dispute. First, they assert that there is a dispute concerning the "operational status of LLRW disposal sites" and when and whether PEF will be able to ship wastes to them. Id. at 5-6 (capitalizations omitted). Next, Joint Intervenors argue that there is an issue presented by the fact (as they assert it) that it is "more likely than not" that, during start-up, the Levy site will generate LLRW at a rate greater than projected in the AP1000 DCD due to the so-called "bathtub curve" effect,[16] and thus the onsite storage capacity (two years) will be insufficient. Id. at 6-7. Joint Intervenors assert that there is a dispute concerning the workability of the "trigger" and "timelines" for PEF's LLRW plan. Id. at 7. Joint Intervenors argue that PEF's LLRW plan – which contemplates that PEF will, if necessary, implement a waste minimization plan, and, if that does not work, will then perform an analysis under 10 C.F.R. § 50.59, and then, if necessary, will apply for and obtain an amendment to its COL, and then build the additional onsite waste storage facilities – cannot be implemented within two years and will thus require that the operating reactors "pause" their production of LLRW until the additional capacity is built. Id. at 7. Joint Intervenors say that the plan "does not provide [sufficient time] for the safety review required by NRC regulations" and/or

[15] Intervener's [sic] Response to Applicant's Motion for Summary Disposition of Contention 8A (Sept. 15, 2010) at 1, 4 (Joint Intervenors Answer).

[16] The "bathtub curve," as described in Attachment D to the Joint Intervenors' Answer, asserts that during the life cycle of any given facility, there are three stages: the break-in phase, the middle life phase, and the wear-out phase – and that the risks (and waste generation rates) will generally be higher during the break-in phase and the wear-out phase. Shown graphically, with time on the X-axis and failure rate on the Y-axis, this would show high levels at the beginning and end of the graph, and low levels in the long middle. Hence a "bathtub" shaped curve. Id., Attachment D, Union of Concerned Scientists, U.S. Nuclear Plants in the 21st Century: The Risk of a Lifetime (May 2004).

is founded on the "illusion" that PEF will somehow be able to pause its production of LLRW once the reactors commence operation. Id. Joint Intervenors argue that now "is the appropriate moment for the 50.59 process to occur . . . instead of supporting PEF kicking the can down the road." Id. at 8.

Turning to the issue of legal disputes, Joint Intervenors acknowledge that they are relying primarily on 10 C.F.R. § 52.79(a) as a whole and 52.79(a)(3) in particular, but disagree with PEF's interpretation of these regulations. Id. at 10. Joint Intervenors argue that, under these regulations, "the issue is demonstration of compliance with radiation protection standards" and that "PEF's proposed plan does not deliver any certainty whatsoever about demonstration of compliance with Part 20." Id. at 11. Joint Intervenors quote the regulations as requiring that the FSAR describe "the means for controlling and limiting radioactive effluents and radiation exposures within the limits set forth in part 20" (10 C.F.R. § 52.79(a)(3)) and that this must be "at a level of information sufficient to enable the Commission to reach a final conclusion on all safety matters that must be resolved by the Commission before issuance of a combined license." Id. (quoting 10 C.F.R. § 52.79(a)(3)). Joint Intervenors say that "it is incumbent upon NRC to make a finding as to whether 10CFR20 [sic] and ALARA have been met, for workers and the public prior to granting the COL" and assert that, under PEF's LLRW plan as submitted, it is not clear how this determination can be made. Id. at 12.

Next, the Joint Intervenors argue that it is "premature" to rule on this motion for summary disposition, because the NRC Staff has not yet issued its Advanced Final Safety Evaluation Report (AFSER) and the Advisory Committee for Reactor Safeguards (ACRS) has not yet studied it. Id. at 13-14. Therefore, they urge that we decline to rule on the motion until these events have occurred. Id.

The NRC Staff takes the position that PEF's motion for summary disposition should be granted "[b]ecause there are no material facts in dispute, and because the Applicant

demonstrated that it is entitled to a decision as a matter of law."[17] The NRC Staff agrees with PEF that the issues raised by C-8A are legal and not factual. Id. at 6-7. In addition, the NRC Staff agrees with PEF's interpretation of 10 C.F.R. § 52.79 and asserts that PEF's LLRW plan satisfies the regulation. Id. at 7-10.

The NRC Staff asserts that C-8A presents "two legal questions, (1) whether the Applicant must provide the level of detail sought by the Joint Intervenors to meet section 52.79, and (2) whether the Applicant can meet 52.79 by 'postponing most of its decisions' regarding how [LLRW] will be managed in the future." Id. at 6 (quoting Order Admitting C-8A at 5). As to the first point, the NRC Staff asserts that "section 52.79(a)(3) does not require more specific detailed information." Id. at 8. The NRC Staff notes that "'the LLRW storage information required by 10 C.F.R. § 52.79(a)(3) is tied to the COL applicant's particular plans for compliance through design, operational organization, and procedures." Id. (quoting CLI-10-02, 71 NRC at __ (slip op. at 24)). The NRC Staff states that

> [t]here is nothing in the Commission's rulings, or in the regulation itself, that implies that the "means" for controlling LLRW in the FSAR must include construction level information or that it cannot include a plan that sets forth what actions will be taken should the existing LLRW storage prove insufficient.

Id. The NRC Staff says that "the COLA is not deferring compliance with section 52.79(a)(3) . . . [because it] commits to a known regulatory process should any future construction become necessary." Id. (emphasis added)

The Staff notes that the Vogtle Board "concluded that the detailed design information sought by the Intervenors in that case was not required to meet section 52.79(a)(3), and that there was no prohibition on an applicant using a plan for compliance that included contingent plans should future LLRW storage become necessary." Id. at 9 (citing Vogtle, LBP-10-08, 71 NRC at __ (slip op. at 13-14)) (emphasis added). The Staff concludes that "it is acceptable to

[17] NRC Staff Answer in Support of Progress Energy Florida's Motion for Summary Disposition of Contention 8A (Sept. 16, 2010) at 1 (Staff Answer).

meet the regulation with a plan that includes a process for adding LLRW capacity" and that therefore PEF "is entitled to a decision as a matter of law." Id. at 10 (emphasis added).[18]

IV. ANALYSIS AND RULING

Two principal regulations govern our analysis of PEF's motion for summary disposition of C-8A. The first, 10 C.F.R. § 2.1205(c), through its reference to 10 C.F.R. § 2.710(d)(2), sets the two criteria that must be met in order for such a motion to be granted. Under this regulation, the movant must show that (1) the matter entails "no genuine issue as to any material fact" and (2) that it "is entitled to a decision as a matter of law." See 10 C.F.R. §§ 2.1205(c); 2.710(d)(2). The second key regulation is 10 C.F.R. § 52.79. C-8A asserts that PEF's LLRW plan is "inadequate to satisfy 10 C.F.R. § 52.79." PEF's motion asserts that it is adequate. Thus, in order to rule on PEF's motion, we must determine whether PEF's LLRW plan satisfies 10 C.F.R. § 52.79.

For the reasons set forth below, we rule that there is no genuine issue of material fact in dispute and that, as a matter of law, PEF's LLRW plan does not satisfy 10 C.F.R. § 52.79.

A. No Genuine Issue as to Any Material Fact

If the resolution of C-8A requires the resolution of disputed issues of material fact, then summary disposition cannot be granted. 10 C.F.R. §§ 2.1205(c), 2.710(d)(2). The first step in determining whether or not C-8A requires the resolution of disputed issues of material fact is to identify the issues that are raised in the contention.

Contention 8A, as quoted in full in Section I above, makes three assertions that are essentially factual in nature. The Joint Intervenors assert that:

1. PEF's plan assumes that LLRW "will be promptly (e.g., within two years) shipped offsite;"

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[18] The NRC Staff places a strange caveat on its position. First, it states that it agrees that PEF's LLRW plan satisfies the requirements of 10 C.F.R. § 52.79. Id. at 8-9. But then the Staff states that it "does not take a position at this time on whether the Applicant in fact satisfies these requirements." Id. at 5.

2. "Currently there is an absence of access to [a LLRW] licensed disposal facility;" and

3. "PEF's plan postpone[s] most of its decisions regarding how and where to store the" LLRW.

After studying the contention, and the briefs of the parties, we conclude that that there is no genuine dispute between the parties concerning any factual issue that is material to the resolution of Contention 8A. In this respect, we agree with PEF and the NRC Staff.

First and foremost, there is no dispute as to what constitutes PEF's plan for managing LLRW. For purposes of the motion for summary disposition, PEF's LLRW plan can be divided into two parts – the Initial LLRW Plan and the Extended LLRW Plan. The Initial LLRW Plan covers LLRW management for the initial term (approximately two years) and is found in Attachment D to the motion. PEF Motion, Attachment D, AP1000 DCD Excerpts (Attachment D). The Extended LLRW Plan covers LLRW management for the period of time after the initial time-frame and is found in Attachment B to the motion. Attachment B.

The Initial LLRW Plan, as laid out in Attachment D to the Motion, is section 11.4 of Revision 17 to the AP1000 Design Control Document and is entitled "Solid Waste Management." It covers over fourteen pages of material and includes a description of the functional and safety design bases of the onsite LLRW management system; the system description including a general description and descriptions of all significant components (such as spent resin tanks, pumps, filters, and sampling devices); system operational information (such as spent resin handling, spent filter processing, dry waste processing, and mixed waste processing); a description of the waste processing facilities, auxiliary building, and radwaste building; and a description of PEF's programs for testing, inspection, and quality assurance relating to LLRW management. Attachment D, Section 11.4 at 11.4-1 to 11.4-13. The Initial LLRW Plan also specifies, by multiple categories, the expected and maximum amounts of LLRW that the Levy plant will generate per year (Id. Table 11.4-1) and the expected and maximum annual curie content (for approximately sixty different isotopes) of the primary

influents and shipped primary wastes and secondary wastes (Id. Table 11.4-2 to Table 11.4-10). There is no material factual dispute that the Initial LLRW Plan, as found in Attachment D, is PEF's plan for the initial operating period of the Levy plant.[19]

Likewise, there is no material factual dispute about what constitutes PEF's Extended LLRW Plan (i.e., plan for managing LLRW for a longer term than is currently envisioned in Attachment D). The Extended LLRW Plan is found in Attachment B, which is PEF's response to two RAIs. In RAI 11.04-2, the NRC Staff notes that "because of [the potential] unavailability of offsite storage" PEF may be required to store LLRW onsite for time period "beyond that provided in the AP1000 Standard Design." Attachment B at 4. Thus, the NRC Staff instructed PEF to "submit the details of any proposed onsite storage facility" for such extended time period. Id. (emphasis added). Attachment B is PEF's response to that RAI (and to RAI 11.04-1). There is no material factual dispute that PEF's RAI Responses constitute its plan for managing LLRW onsite for the term beyond that provided in the AP1000 DCD, i.e., its Extended LLRW Plan.

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[19] PEF asserts that the initial onsite storage capacity is "for greater than two years at the expected rate of radwaste generation and greater than one year at the maximum rate of radwaste generation." PEF Motion at 8 (citing Attachment B at 5) (emphasis added). We are not sure how PEF reaches this conclusion. PEF notes that the AP1000 DCD states that the onsite storage facility will have a capacity of "approximately 3900 cubic feet, which accommodates more than one full tractor-trailer truckload." Id. at 8 n.9 (citing Attachment D at 11.4-6). However, the AP1000 DCD also estimates that the expected generation of "wet and dry wastes" combined, and treated as a "shipped solid," will be 1,964 cubic feet per year. Attachment D at 11.4-15. Thus, in two years, the expected amount would be 3,928 cubic feet (1,964 x 2), an amount that exceeds 3,900 cubic feet.

In any event, for purposes of the instant motion for summary disposition, it is not material whether the initial onsite storage capacity will last precisely two years, two and one-half years, or even slightly more. Even PEF agrees that there is no material factual dispute here. PEF Motion at 14-15. The point of C-8A (as was the point of Contention 8) is that "[a]bsent a licensed LLRW disposal facility that will accept waste from the Levy County facility, it is reasonably foreseeable that LLRW generated by normal operations will be stored on site for a longer term than is currently envisioned in [PEF's] COL application." CLI-10-02, 71 NRC at __ (slip op. at 24).

Although Joint Intervenors identify several factual issues that they contend are in dispute, we conclude that none of these potential factual disputes are material to the resolution of C-8A. As PEF has stated, any disputes as to whether an offsite LLRW disposal facility will be licensed and available within the initial time period (two to three years) "are not material" because even "[i]f Levy's initial LLRW storage capacity is inadequate, Progress's [Extended] LLRW plans as described . . . in its RAI Responses sets forth the means through which Progress would increase that capacity." PEF Motion at 14-15. Likewise, any dispute about the rates at which Levy will generate LLRW (e.g., the "bathtub curve" effect raised by the Joint Intervenors Answer at 6) is not material, because PEF's Extended LLRW Plan addresses this contingency by specifying what PEF intends to do if its initial onsite storage capacity is insufficient. Similarly, even a factual dispute concerning the precise amount of onsite storage capacity included in the Initial LLRW Plan (e.g., whether the AP1000 DCD covers two years of storage capacity, or somewhat more capacity, see PEF Motion at 8) is not material. The RAI, the RAI Responses, and the Extended LLRW Plan all assume (as the Joint Intervenors assert) that the initial AP1000 onsite storage capacity (whatever it is) is insufficient. Thus, there is no material factual dispute on this point.

We note that the Joint Intevernors have raised an interesting factual question as to the workability of the triggers and timelines specified in PEF's Extended LLRW Plan. As we will discuss below, PEF's plan spells out the expected and maximum amount of LLRW that the AP1000 will generate per year and assumes that all such waste will be promptly shipped offsite. PEF provides only a limited amount of onsite storage (enough to store approximately two to two and one half years worth of LLRW). PEF says that, if this initial onsite storage capacity is not enough, then PEF will build more. However, as we discuss in Section IV.B.3.a below, PEF's Extended LLRW Plan provides for a series of actions that precede the construction and operation of any additional onsite storage. The Joint Intervenors assert, as a factual dispute, that these steps cannot be accomplished in two to two and one half years. Under PEF's

Extended LLRW Plan, the following events will occur: (a) the Levy plant starts operating; (b) PEF implements a waste minimization plan to try to extend the life of its initial storage capacity; (c) as the Levy plant generates LLRW, PEF evaluates the effectiveness of the waste minimization plan; (d) PEF decides that it needs to construct additional storage capacity; (e) PEF conducts the analysis required under 10 C.F.R. § 50.59 to determine whether the management of a greater amount of LLRW onsite requires a license amendment; (f) PEF applies for the necessary license amendment; (g) NRC evaluates the license amendment application, makes a determination and grants the amendment; and (h) PEF constructs the additional storage capacity.[20] The Joint Intervenors assert that these steps and this timeline cannot be completed before the initial storage capacity runs out. Meanwhile, the Joint Intervenors assert that there is no way that PEF can "'pause' the production of this waste once [the Levy reactors] commence" operation. Joint Intervenors Answer at 7.

We agree with the Joint Intervenors that PEF's Extended LLRW Plan raises a timing problem that presents a potential factual dispute. But, under our reading of the law, any such factual dispute is not "material" because, regardless of how that dispute is resolved, it would not change our determination that PEF's LLRW plan does not satisfy 10 C.F.R. § 52.79(a).[21] As we explain below, PEF's Extended LLRW Plan fails to provide a level of information sufficient to make the 10 C.F.R. Part 20 determinations required by 10 C.F.R. § 52.79.[22] This is true,

[20] See Section IV.B.3.a. below. Depending on the results of the 10 C.F.R. § 50.59 analysis, steps (f) and (g) may not be necessary.

[21] The Dissent incorrectly asserts that the "majority's analysis also assumes, without justification, that PEF will not take action to expand its LLRW storage capacity . . . sufficiently in advance to avoid NRC enforcement action that would result from a shortage of onsite LLRW storage capacity at the culmination of the two to three year period stated in PEF's initial LLRW plan." Dissent at 7-8. We make no such assertion. To the contrary, we only state that the Joint Intervenors have alleged that this may be a problem, and we state, flatly, that we do not make any determination, as to the validity of any such factual assertion at this juncture.

[22] The Dissent argues that it is "conceivable that PEF could commence [waste minimization] measures before, as opposed to after, commencing operation of the Levy Plant." Dissent at 8.

regardless of whether or not, as a factual matter, PEF could actually implement all of the steps specified in its plan, and construct additional LLRW storage capacity, within the approximately two-year period (even if extended by waste minimization) contemplated in the Extended LLRW Plan.[23] In short, the resolution of any such factual dispute does not change our determination that the Extended LLRW Plan does not satisfy 10 C.F.R. § 52.79(a).[24]

In sum, we conclude that there is no genuine issue as to any material fact raised by PEF's motion for summary disposition of C-8A.

B. Adequacy of PEF's LLRW Plan as a Matter of Law

We now turn to the second criterion for a successful motion for summary disposition – a showing that the movant is "entitled to a decision as a matter of law." 10 C.F.R. §§ 2.1205(c), 2.710(d)(2). In this context, the "matter of law" is whether PEF's LLRW plan satisfies 10 C.F.R. § 52.79. Specifically, C-8A asserts that PEF's LLRW plan "fails to offer sufficient information to demonstrate the adequacy of PEF's plans" and that its "plan to postpone most of its decisions . . . until sometime after issuance of the license for Levy violates Section 52.79 and the Atomic Entergy Act." Order Admitting C-8A at 5. PEF denies that its plan suffers from any such deficiencies and contends that it meets the requirements of this regulation.

It is always conceivable that a licensee will do more than is required by its license or the regulations. Our focus, however, is what PEF has committed to do.

[23] The Board need not, and does not, take a position regarding this factual dispute, i.e., whether the timing and triggers in the Extended LLRW Plan can be achieved before the initial storage capacity at the LNPs is exceeded.

[24] We note that if PEF's interpretation of the law (10 C.F.R. § 52.79(a)) is correct (e.g., that the level of information provided by PEF is sufficient), then the factual dispute raised by the Joint Intervenors would indeed be a material factual dispute. In such a situation, the motion for summary disposition would need to be denied because the movant would not have shown that there is "no genuine issue as to any material fact." Specifically, an evidentiary hearing would be required to allow the parties to present evidence, and the Board to assess whether, as a factual matter, there is reasonable assurance that the various steps prescribed in the Extended LLRW Plan could be achieved, and the additional capacity constructed, within the timeframe contemplated by PEF.

We start with the words of 10 C.F.R. § 52.79. As relevant here, the regulation specifies the specific topics that must be covered in the FSAR and the level of information that is sufficient for each topic. In the case of LLRW, the regulation mandates, inter alia, that the FSAR include two related topics – (1) "the kinds and quantities of radioactive materials expected to be produced in the operation" and (2) "the means for controlling and limiting radioactive effluents and radiation exposures within the limits set forth in part 20 of this chapter." 10 C.F.R. § 52.79(a)(3). Turning to the level of information, the regulation mandates that the FSAR "shall include the . . . information, at a level of information sufficient to enable the Commission to reach a final conclusion on all safety matters that must be resolved by the Commission before issuance of a combined license." 10 C.F.R. § 52.79(a).

We now apply these regulatory requirements to the three main components of PEF's LLRW plan – the description of the LLRW, the Initial LLRW Plan, and the Extended LLRW Plan.

1. Adequacy of Description of Kinds and Quantities of Radioactive Materials

Applying the foregoing regulatory requirements to PEF's LLRW plan, we find that it clearly provides sufficient information concerning "the kinds and quantities of radioactive materials expected to be produced in the operation." 10 C.F.R. § 52.79(a)(3). As discussed above, Revision 17 to the AP1000 DCD provides ample and specific information concerning the "kinds and quantities" of LLRW "expected to be produced" by each of Levy's proposed nuclear power plants. PEF's LLRW plan specifies the types and categories of LLRW, the amounts that will be generated per year (expected and maximum), and the annual curie content (for approximately sixty different isotopes) of the primary influents and shipped primary wastes and secondary wastes. See Attachment D. This portion of Revision 17 of the AP1000 DCD covers nineteen pages. Id. at 11.4-15 to 11.4-33. Accordingly, this portion of the FSAR provides a level of information that is sufficient under 10 C.F.R. § 52.79(a).

2. Adequacy of Initial LLRW Plan

Next, we turn to PEF's Initial LLRW Plan, which is the portion of PEF's LLRW plan for the initial period of time that is covered by Revision 17 to the AP1000 DCD. See Attachment B at 2. The Initial LLRW Plan covers over fourteen pages. It specifies the structures, systems, and components of PEF's onsite LLRW management program, including system descriptions, component descriptions, and waste processing and storage buildings and facilities. See Attachment D, Section 11.4 at 11.4-1 to 11.4-13. C-8A does not dispute that the level of information in the Initial LLRW Plan satisfies 10 C.F.R. § 52.79(a).

3. Adequacy of Extended LLRW Plan

The key legal dispute raised in C-8A is whether the PEF's Extended LLRW Plan (i.e., PEF's RAI Responses, which constitute the portion of PEF's LLRW plan for the period of time longer than envisioned in Revision 17 to the AP1000 DCD), satisfies 10 C.F.R. § 52.79(a). We agree with the NRC Staff that this presents two related legal questions: (1) is the level of information contained in the RAI Responses sufficient to satisfy the regulatory requirement, and (2) "whether [PEF] can meet 52.79 by 'postponing most of its decisions' regarding how LLRW will be managed in the future." Staff Answer at 6.

a. Contents of Extended LLRW Plan

In order to answer the foregoing questions, we must review the Extended LLRW Plan (i.e., the RAI Responses) to determine precisely what "information" PEF has provided and whether it is at a "level" that is "sufficient" to make the determinations required by 10 C.F.R. § 52.79(a).

The RAI Responses in Attachment B to PEF's Motion consist of PEF's responses to two related RAIs - RAI 11.04-1 and RAI 11.04-2. See Attachment B. Each response is two pages long and has a tri-partite structure. First, the response repeats the text of the RAI (RAI Text). Second, each response provides a short discussion and explanation of PEF's position and plans. This is referred to as the "PGN Response." The third section of each RAI Response is

titled "Associated LNP COL Application Revisions" and sets forth the specific words by which PEF is amending the FSAR section of the COLA (hereinafter FSAR Revision). The FSAR Revision becomes part of the FSAR and is a formal commitment by PEF. Given that 10 C.F.R. § 52.79(a) prescribes the mandatory "content of the FSAR," the FSAR Revision portion of PEF's RAI Response is the portion most critical to determining whether the FSAR (as amended) satisfies the regulation.

RAI 11.04-1 and PEF's response provide part of the Extended LLRW Plan. The RAI Text notes that PEF has stated that "no additional onsite radwaste storage is required beyond that described in the DCD" and instructs PEF to either "explain why this statement is included [in the FSAR] or remove it." Attachment B at 2. In the PGN Response section, PEF discusses and explains its position and plans. For example, it states that

> In the event that an offsite facility is not available [for LLRW] a waste minimization plan will also be implemented. This plan will consider strategies to reduce generation of [LLRW], including reducing the in-service run length of resin beds, as well as resin selection, short-loading, and point-of-generation segregation techniques. . . . If additional storage capacity . . . is required, further temporary storage would be developed in accordance with NUREG-0800, Standard Review Plan 11.4, Appendix 11.4-A.

Id. (emphasis added).

Turning to the FSAR Revision portion of RAI 11.04-1, PEF amends the FSAR by adding the following to it:

> All packaged and stored radwaste will be shipped to offsite disposal/storage facilities and temporary storage of radwaste is only provided until routine offsite shipping can be performed. Accordingly, there is no expected need for permanent on-site storage facilities at LNP 1 & 2.
>
> If additional storage capacity for Class B and C waste is required, further temporary storage would be developed in accordance with NUREG-0800, Standard Review Plan 11.4, Appendix 11.4-A. To the extent that additional storage could be needed sometime in the future, the existing regulatory framework would allow Progress Energy to conduct written safety analyses under 10 C.F.R. § 50.59. If the additional storage does not satisfy 10 C.F.R. § 50.59, a license amendment would be required.

Id. at 3 (emphasis added). This constitutes the formal FSAR revision and commitment.[25]

The second part of the Extended LLRW Plan is found in PEF's response to RAI 11.04-2. The RAI Text notes that NUREG-1793 "states that if a need for onsite storage of [LLRW] has been identified beyond that provided in AP1000 Standard Design because of unavailability of offsite storage, the applicant should submit the details of any proposed onsite storage facility." Id. at 4. Based on that statement, the NRC requests PEF to "provide any arrangements for offsite storage for [LLRW] or submit plans for onsite storage." Id. In essence, this is NRC's request that PEF submit a LLRW plan for the period "beyond that provided in the AP1000 Standard Design."[26]

The FSAR Revision section of PEF's response to RAI 11.04-2 adds the following provision to its FSAR:

> 11.4.2.4.3 Temporary Storage of Low-Level Radioactive Waste
>
> In the event that off-site shipping is disrupted or facilities are not available to accept radwaste when LNP Units 1 & 2 become operational, as described in DCD Section 11.4.2.1 paragraph ten, temporary storage capability on-site is available for greater than two years at the expected rate of radwaste generation and greater than one year at the maximum rate of radwaste generation. During this period, the implementation of additional waste minimization strategies could extend the duration of temporary radwaste storage capability. Since there are no facilities currently licensed by the NRC for disposal of Greater Than Class C (GTCC) LLRW, storage of GTCC would be similar to the methodology used for storage of spent fuel.
>
> If additional temporary radwaste storage is eventually required, then on-site facilities could be constructed utilizing the design guidance provided in NUREG-0800, Standard Review Plan Chapter 11 Radioactive Waste Management Appendix 11.4-A, Design Guidance for Temporary Storage of Low-Level Radioactive Waste.

Id. at 5 (emphasis added).

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[25] We note that while the PGN Response states that PEF will implement a waste minimization plan, the actual FSAR Revision does not.

[26] The PGN Response section of RAI 11.04-2 is substantially similar to the discussion found in the PGN Response to RAI 11.04-1 and/or the FSAR Revision section of RAI 11.04-2.

Based on the RAI Responses, PEF's Extended LLRW Plan can be summarized into the following five statements:

i. If offsite shipping is disrupted or not available, then "temporary storage capability on-site is available for greater than two years." Id. at 4.

ii. "During this period, the implementation of additional waste minimization strategies could extend the duration of temporary radwaste storage capability." Id.

iii. "If additional storage capacity for [LLRW] is required, further temporary storage would be developed in accordance with NUREG-0800, Standard Review Plan 11.4, Appendix 11.4-A." Id. at 3.

iv. If such additional storage capacity is needed, "the existing regulatory framework would allow Progress Energy to conduct written safety analyses under 10 C.F.R. § 50.59." Id.

v. "If the additional storage does not satisfy 10 C.F.R. § 50.59, a license amendment would be required." Id.

It is incumbent upon this Board to examine PEF's statements carefully. Of course, we assume that PEF will abide by its promises and commitments to the agency.[27] But what are they? It is crucial that we read PEF's statements and promises with a critical eye to determine what enforceable commitments, if any, they contain. What, concretely and specifically, has PEF committed to do?[28]

Statement (i) listed above provides nothing useful. It specifies that there is onsite storage, and that it might last for greater than two years. This is not material, because C-8A challenges the adequacy of PEF's LLRW plan for the period of time beyond that covered by the AP1000 DCD storage capacity. Quibbles about whether the AP1000 capacity will cover two

[27] Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-09, 53 NRC 232, 235 (2001) ("[I]n the absence of evidence to the contrary, the NRC does not presume that a licensee will violate agency regulations wherever the opportunity arises.").

[28] The Dissent incorrectly asserts that "this Board . . . presume[s] that PEF will violate the terms of its licenses and NRC regulations." See Dissent at 1 n.1. Quite the contrary, we assume that PEF will comply with the terms of its FSAR commitments (and license provisions and regulatory requirements). See supra n.27 and accompanying text. But what are they? The purpose of our critical analysis of the RAI Responses is to assess what, if anything, the FSAR commitments, mean, i.e., if they contain anything that is concrete and enforceable. To the extent that PEF makes enforceable commitments, we assume that PEF will comply with them.

years, or two and one-half years, or three, are not material. As the Commission has stated, we are dealing with the "reasonably foreseeable" scenario "that LLRW generated by normal operations [at Levy] will be stored at the site for a longer term than is currently envisioned in [PEF's] COL application." CLI-10-02, 71 NRC at __ (slip op. at 24).

Statement (ii) is simply a factual statement and is not an enforceable commitment. It states that "[i]mplementation of additional waste minimization strategies could extend the duration of temporary radwaste storage capability." Attachment B at 5 (emphasis added). Yes, perhaps it could. But statement (ii) makes no promise or commitment to do so. Nothing in this FSAR Revision says that, if the AP1000 initial storage capacity is insufficient, then PEF will, in fact, implement a waste minimization strategy.

We note that PEF's PGN Response to RAI 11.04-1 does state that "a waste minimization plan will also be implemented." Id. at 2 (emphasis added). This is a commitment, but it is not part of the FSAR Revision. Assuming arguendo that this PGN Response is an enforceable part of the FSAR, we note that it still does not describe, or make any commitment as to the content of any such minimization plan. At most, PEF states that the waste minimization plan "will consider strategies to reduce generation of [LLRW], including reducing the in-service run length of resin beds, as well as resin selection, short loading, and point-of-generation aggregation techniques." Id. at 2 (emphasis added). Consideration is not commitment. Although PEF will consider several approaches, it commits to none of them. Thus, NRC would have no legal basis to complain, even if PEF implemented a waste minimization plan that contained none of the listed strategies. In sum, statement (ii) in PEF's Extended LLRW Plan, at most, commits PEF to implement a waste minimization plan, with no enforceable statements as to its content.

Statement (iii) includes a commitment. It states that "if additional storage capacity . . . is required, [then] further temporary storage would be developed." Id. at 3. This is an affirmative statement as to what PEF will do. So far so good. But again, there is no information about the

storage facility and/or its operation. How much? Where? The phrase "would be developed" makes clear that PEF has not, at this point, actually determined what it will do. Thus, again, PEF has not committed to any specifics on any of these issues, and is keeping all of its options open.

Statement (iii) goes on to specify that PEF will develop the additional LLRW storage "in accordance with NUREG-0800, Standard Review Plan 11.4, Appendix 11.4-A." Id. at 3. Appendix 11.4-A, is included as part of Attachment E to PEF's Motion.[29] Appendix 11.4-A, which is titled "Design Guidance for Temporary Storage of Low-Level Radioactive Waste," provides guidance from the NRC Staff to licensees concerning the design of temporary onsite LLRW storage. Examples of the Appendix 11.4-A Guidance include:

1. "The duration of the intended storage, the type and form of the waste, and the amount of radioactive material present will dictate the . . . level of complexity required to assure public health and safety." Id. at 11.4-25.

2. "The specific design and operation of any storage facility will be significantly influenced by the various waste forms." Id.

3. "Before implementing any additional onsite storage capacity, licensees should conduct substantial safety review and environmental assessments to assure adequate public health and safety protections." Id.

4. "Design and operational acceptability will be based on minimal requirements, which are defined in existing SRPs, regulatory guides, and industry standards for proper management of radioactive waste." Id.

5. "The quantity of radioactive material allowed and the shielding configurations will be dictated by the dose rate criteria for both the site boundary and unrestricted areas of the site. . . . 10 CFR 20.1302 limits the exposure rates in unrestricted areas. Offsite doses from onsite storage must be sufficiently low . . . not likely to cause the 40 CFR Part 190 limits, as implemented under 10 CFR 20.1301(e) to be exceeded. Onsite dose limits associated with temporary storage will be controlled per 10 CFR part 20, including the ALARA principle of 10 CFR 20.1101." Id. at 11.4-26.

6. "If possible, the preferred location of the additional storage facility is inside the plant's protected area." Id. at 11.4-27.

[29] PEF Motion, Attachment E, Standard Review Plan, NUREG-0800, Chapter 11.4 at 11.4-25 to 11.4-32 (Attachment E).

7. "The facility should include design features, in accordance with 10 CFR 20.1406, that would minimize, to the extent practicable, contamination of the waste facility and environment; facilitate eventual decommissioning; and minimize, to the extent practicable, the generation of extraneous radioactive waste. This requirement applies to storage facilities . . . ." Id.

Appendix 11.4-A goes on to provide design criteria and/or objectives for various LLRW dry waste, wet waste, and stabilized LLRW. Id. at 11.4-2-27 to -31.

We have no reason to doubt that most, if not all, of this guidance is sound. Statement (iii) indicates that whatever additional storage PEF develops, it will be "in accordance with" this guidance.

Turning to statement (iv) in PEF's Extended LLRW Plan, we conclude that it is a statement of law but not a commitment. PEF says that if additional LLRW storage capacity is needed, then "the existing regulatory framework would allow Progress Energy to conduct written safety analyses under 10 C.F.R. § 50.59." Attachment B at 3. No doubt the regulations would allow this. But PEF has made no promise to do anything.

Even assuming, arguendo, that statement (iv) implies a promise by PEF to follow the "existing regulatory framework" under 10 C.F.R. § 50.59, the value of such a commitment is nil. All licensees are required to follow the law all of the time. Indeed, we generally assume that they will do so. Thus, a promise to comply with the law is a given. It adds nothing. And it is certainly not a plan.

The final part of PEF's Extended LLRW Plan, statement (v), is similarly empty. Statement (v) says that "If the additional storage does not satisfy 10 C.F.R. § 50.59, a license amendment would be required." Id. Again, this is a statement of law. It is not a commitment.

In sum, PEF's COLA states that the Levy nuclear power plants will generate a certain amount of LLRW per year (expected and maximum). The FSAR contains an Initial LLRW Plan, which specifies that PEF will build and operate onsite storage facilities to handle approximately two years worth of LLRW (the initial period). The FSAR then contains the Extended LLRW Plan, which can be summarized as follows: During the initial two year period PEF will consider,

and if it deems it appropriate, implement, a waste minimization plan that might extend the lifespan of the initial storage capacity.[30] The waste minimization plan has not been provided and PEF makes no commitment as to what it will include. If PEF concludes that the initial onsite storage capacity plus the waste minimization plan is insufficient, then PEF will use the change procedure specified in 10 C.F.R. § 50.59 to develop further temporary storage. No information or commitment is provided regarding the nature or content of this "further temporary storage" except the commitment that it will be in accordance with the NRC Guidance in Appendix 11.4-A of NUREG-0800. Once PEF has developed its plan for such additional storage, then PEF will conduct an analysis under 10 C.F.R. § 50.59 to determine whether the construction and implementation of such "further temporary storage" can be done without a license amendment. If a license amendment is required, then PEF will apply for such a license amendment.

b. Adequacy of Extended LLRW Plan under 10 C.F.R. § 52.79(a)

The issue in this case is a purely legal one: whether PEF's Extended LLRW Plan, as summarized in the preceding paragraph, satisfies the requirements of 10 C.F.R. § 52.79(a). The key part of this regulation states that the FSAR must provide information concerning "the means for controlling and limiting radioactive effluents and radiation exposures within the limits set forth in [10 C.F.R.] part 20," 10 C.F.R. § 52.79(a)(3), and that this information must be provided "at a level of information sufficient to enable the Commission to reach a final conclusion on all safety matters that must be resolved by the Commission before the issuance of a combined license." 10 C.F.R. § 52.79(a).

The Board concludes that PEF's FSAR (as amended by the RAI Responses) for the onsite management of LLRW for the period of time beyond the initial period specified the AP 1000 DCD (i.e., its Extended LLRW Plan) does not satisfy 10 C.F.R.§ 52.79(a) because it does

[30] As we see it, PEF is making two contradictory statements. On the one hand, the AP1000 DCD states how much LLRW the PEF nuclear power plants are expected to generate per year. Meanwhile, PEF's RAI Responses say that PEF will implement a waste minimization plan and that it will NOT generate that amount of LLRW per year.

not provide "a level of information sufficient to enable the Commission to reach a final conclusion . . . before the issuance of" the COL, to resolve whether PEF's "means for controlling and limiting radioactive effluents and radiation exposures" during the extended period will be "within the limits" set forth in 10 C.F.R. Part 20. The regulation requires that the NRC make a Part 20 safety determination now.

The Part 20 determination is: whether or not PEF has the "means for controlling and limiting radioactive effluents and radiation exposures" arising from the onsite storage of LLRW at Levy (beyond the initial AP 1000 DCD period) "within the limits set forth in Part 20." The law requires that the Commission make this decision "before issuance of the combined license." Part 20 requires, inter alia, that PEF (1) have a program "to achieve occupational doses and doses to members of the public that are as low as is reasonably achievable (ALARA)," 10 C.F.R. § 20.1101(b); (2) "shall conduct operations so that . . . [t]he total effective dose equivalent to individual members of the public does not exceed [100 millirems per] year," 10 C.F.R. § 20.1301(a)(1); and (3) "provide reasonable assurance that . . . [t]he annual dose equivalent" to members of the public from planned discharges not exceed 25 millirems to the whole body, 10 C.F.R. § 20.1301(e) and 40 C.F.R. § 190.10.

It is clear to us that the Extended LLRW Plan lacks "sufficient information" for the NRC to "reach a final conclusion," now, on the Part 20 determination. The "level of information" provided in the Extended LLRW Plan is far too general and vague to make a final safety determination, now, as to whether PEF has "the means for controlling and limiting . . . radiation exposures within" the Part 20 limits.

Even the most specific element in the Extended LLRW Plan – PEF's commitment to develop its extended storage capacity "in accordance with NUREG-0800, Standard Review Plan 11.4, Appendix 11.4-A," Attachment B at 3 – does not provide a level of information sufficient to make the Part 20 determination now. The design guidance contained in Appendix 11.4-A, sound as it might be, provides broad and general principles for designing an appropriate waste

storage facility. For example, as quoted above, Appendix 11.4-A states that the design of the LLRW storage facility will be influenced by the storage duration, the type of waste, the waste form, and the amount of radioactive material present. Attachment E at 11.4-25. The "shielding configurations will be dictated" by the criteria of Part 20 and that "if possible, the preferred location for the additional storage is inside the plant's protected area." Id. at 11.4-26 to -27. All well and good. But committing to follow these general principles does not provide sufficient information for the Commission to make a final safety determination, now, as to whether PEF has the "means for controlling and limiting . . . radiation exposures within the" Part 20 limits.

The Board believes that the level of information found in PEF's Initial LLRW Plan provides a useful benchmark for assessing the adequacy of the level of information in the Extended LLRW Plan. The contrast is stark. As we discussed above, PEF's Initial LLWR Plan (the AP 1000 DCD Solid Waste Management Plan), covers fourteen pages. See Attachment D. Meanwhile, the FSAR Revisions that constitute PEF's Extended LLRW Plan together consume less than one page. Both the quality and quantity of concrete information in the Extended LLRW Plan are much lower than for the Initial LLRW Plan. The contrast between the level of information that PEF has provided for the Initial LLRW Plan and the Extended LLRW Plan confirms that the latter fails to provide sufficient information to satisfy 10 C.F.R. § 52.79(a).

PEF and the NRC Staff argue that, if we conclude that the Extended LLRW Plan is inadequate, then we are holding that 10 C.F.R. § 52.79 requires the submission of "details," PEF Motion at 13, "detailed plans," Id. at 14, "construction level information," Staff Answer at 8, or "detailed design information," Id. at 9. We reject this dichotomy. PEF's motion for summary disposition focuses us on PEF's Extended LLRW Plan and asserts that, as a matter of law, it satisfies 10 C.F.R. § 52.79(a). Our ruling is limited to that issue. We only find that the Extended LLRW Plan does not provide sufficient information to make the necessary Part 20 determination before the COL is issued. That is what C-8A asserts, and that is what we are deciding. We reject the proposition that 10 C.F.R. § 52.79 requires detailed plans or detailed construction or

design information. As we have stated, we find that the level of information provided in the Initial LLRW Plan is a good benchmark for assessing what constitutes a sufficient level of information for the Extended LLRW Plan. The information in the Initial LLRW Plan is concrete and meaningful, but it is not "detailed design information." Neither the Initial LLRW Plan nor the Extended LLRW Plan requires "details" or "detailed design information." [31]

The use of the term "details" is a distraction. The word "details" has a pejorative connotation, i.e., that the Joint Intervenors or the Board are asking for "minutiae" or matters that "relate[] to minute points . . . small and subordinate part[s] . . . [or] minor part[s]."[32] We do not need to use the term "details" nor does it help advance our analysis. Instead, we focus on the words of the regulation, which specifies that the FSAR must contain a "level of information" that is "sufficient" to make the necessary safety determination. Does the Extended LLRW Plan contain that level of information? This is the relevant question.

We also reject the proposition that our ruling creates an impossible or impractical standard. The regulation requires that the Extended LLRW Plan provide a "level of information sufficient" that will allow the Commission "to reach a final conclusion on all safety matters" now. This is entirely reasonable. PEF has already met this standard for the initial time period, and there is no reason why it cannot do so for the more extended time period. For example, one option, which is followed by COL applicants that use some of the other certified designs, is simply to provide onsite storage capacity for a longer initial period.[33] A second example of a

[31] Again, the Dissent mischaracterizes our position by stating that the "majority essentially asks PEF to state now how many years' worth of material it will likely need to store in the future, at the end of approximately two years' worth of operation at the Levy plant, and for how long this material must likely be stored." Dissent at 6. We do no such thing. We merely hold that PEF has not provided a level of information that is sufficient to make the required safety determination before the COL is issued.

[32] Webster's Third New International Dictionary (Unabridged) 616 (1976).

[33] See Virginia Elec. & Power Co. d/b/a Dominion Virginia Power & Old Dominion Elec. Coop. (North Anna Power Station, Unit 3), LBP-09-27, 69 NRC __, __ (slip op. at 3) (Nov. 25, 2009) (FSAR configured to accommodate at least ten years of onsite storage); Detroit Edison Co.

simple, but concrete option would be for PEF to commit to construct, as needed, additional onsite storage buildings, identical to the one for the initial two-year period, immediately adjacent to that initial building. A commitment to build and to operate such additional modules is concrete and specific. Either of the foregoing options could provide a level of information sufficient for the Commission to assess, now, whether PEF has the means to limit exposures to be within the Part 20 limits. Neither of the foregoing approaches is necessarily onerous or requires inordinate "details."[34]

The Extended LLRW Plan is primarily a procedural plan with little or no information by which NRC can make the required Part 20 determination. PEF says that it will follow the relevant legal procedures. Under the plan, if the initial storage capacity is insufficient, then PEF will implement an unspecified waste minimization plan, and if that is not enough, then PEF will develop unspecified additional onsite storage by conducting a safety analysis under 10 C.F.R. § 50.59, applying for a license amendment if necessary, and constructing additional storage capacity in accordance with NUREG-0800 Appendix 11.4-A. The NRC Staff asserts this is

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(Fermi Nuclear Power Plant, Unit 3) Licensing Board Order (Granting Motion for Summary Disposition of Contention 3) (July 9, 2010) at 3 (unpublished) (Applicant provided at least ten years of onsite LLRW storage).

[34] The Dissent's reliance on the ruling in PPL Bell Bend, LLC (Bell Bend Nuclear Power Plant), LBP-09-18, 70 NRC 385 (2009) is misplaced. First, the Bell Bend decision dealt with the issue of contention admissibility. See id. at 411, 424. In the instant proceeding, we are far past that issue. Here, we have already admitted Contention 8 and 8A. In addition, in this case the Commission confirmed the admission of Contention 8, flatly rejecting arguments that the Bell Bend Board found persuasive. CLI-10-02, 71 NRC __ (slip op.). Specifically, the Board in Bell Bend, in rejecting the contention, noted that the "regulations do not dictate the duration" of onsite LLRW storage capacity, Bell Bend, LBP-09-18, 70 NRC at 424, whereas the Commission, in this case, rejected PEF's argument that there is "no regulatory basis" for requiring the applicant to confront the plausible problem of longer term management of LLRW onsite and affirmed the admission of such a contention. CLI-10-02, 71 NRC at __ (slip op. at 24). Second, Bell Bend held that the LLRW contentions were not admissible due, inter alia, to technical defects in the pleadings such as failure to satisfy 10 C.F.R. § 2.309(f)(1)(vi), (i) or (ii). Bell Bend, LBP-09-18, 70 NRC at 410-11. That regulation, 10 C.F.R. § 2.309(f)(1), is not in issue here. Third, and most importantly, Bell Bend dealt with NEPA contentions and never even mentioned 10 C.F.R. § 52.79(a), which is the regulation that is absolutely central to the instant decision. Given these significant differences, the Bell Bend decision is unhelpful to the Dissent's analysis, and as such is irrelevant to the disposition as a matter of law of C-8A.

sufficient under 10 C.F.R. § 52.79(a) because PEF "commits to a known regulatory process should any future construction be necessary." Staff Answer at 8. PEF agrees, noting that 10 C.F.R. § 52.79 only requires the FSAR to describe "the 'means' by which Levy will control and limit radioactive effluents and radiation exposures within the limits established by 10 C.F.R. Part 20" and that, in this context, it is sufficient if PEF simply describes "[a] method [or] course of action . . . by which [compliance with Part 20] can be . . . achieved." PEF Motion at 8 (citations omitted).

In our opinion, committing to follow a process or a method by which compliance can be achieved does not, by itself, satisfy 10 C.F.R. § 52.79(a) because the regulation requires a level of information sufficient to make the Part 20 determination now, before the COL is issued. While the Commission has ruled procedures can be a part of a LLRW plan required by 10 C.F.R. § 52.79(a)(3), we do not think that PEF's Extended LLRW Plan, which is entirely procedural, is sufficient. Speaking of 10 C.F.R. § 52.79(a)(3), the Commission has held: "[t]he rule pertains to how the COL applicant intends, through its design, operational organization, and procedures, to comply with relevant substantive radiation protection requirements in 10 C.F.R. Part 20."[35] The Commission noted that Part 20 imposes a number of radiation protections requirements and specifies that the COL licensee "must comply with these requirements regardless of the amount of LLRW stored on site – be it 1 cubic foot or 1000." Id. Thus, the Commission repeated that the level of information required by 10 C.F.R. § 52.79(a)(3) "is tied to the COL applicant's particular plans for compliance through design, operational organization, and procedures." Id. (emphasis added); see also CLI-10-02, 71 NRC at __ (slip op. at 24).

PEF would have us substitute the word "or" for the term "and" in the Commission's rulings quoted in the preceding paragraph. Twice, the Commission has said that compliance with 10 C.F.R. § 52.79(a)(3) entails compliance through "design, operational organization and

[35] Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), CLI-09-16, 70 NRC 33, 37 (2009) (emphasis added).

procedures." But PEF quotes this statement by the Commission and claims that a purely procedural plan suffices, i.e., that compliance may be achieved through a plan consisting solely of design, operational organization, or procedures. This is not what the Commission has stated.

If a plan that consists merely of a promise to develop additional onsite storage for LLRW pursuant to the relevant legal procedures (10 C.F.R. § 50.59) in accordance with the relevant NUREG, is all that it takes to provide a "level of information sufficient" to satisfy 10 C.F.R. § 52.79(a) and (a)(3) and make the Part 20 determination before the COL is issued, then the regulatory requirement is meaningless.[36]

On a different point, the fact that the Extended LLRW Plan relies on 10 C.F.R. § 50.59 establishes, almost per se, that the level of information in PEF's current FSAR is not sufficient to enable the Commission to reach a final conclusion on all safety matters now. This is because the function of 10 C.F.R. § 50.59 is to deal with changes to a nuclear power plant, and the regulation requires, as a pre-requisite to any such change, that the licensee perform additional safety analyses, i.e., analyses in addition to those contained in the FSAR.[37] The Extended

[36] This case is analogous to the situation in Natural Resources Defense Council, Inc. v. EPA, 22 F.3d 1125 (D.C. Cir 1994), where the Court of Appeals for the District of Columbia assessed whether a compliance plan submitted by a State satisfied the relevant Clean Air Act (CAA) requirements. The court noted that the State was required to submit "'the information necessary to enable [EPA] to determine whether the plan submission complies with the provisions of [the CAA].'" Id. at 1134 (citations omitted). The court rejected EPA's approval of the State submission, stating that the required "determination cannot reasonably be made unless the . . . submittal contains something more than a mere promise to take appropriate but unidentified measures in the future." Id. See also Sierra Club v. EPA, 356 F.3d 296, 298 (D.C. Cir. 2004) ("We agree with Sierra Club's principal contention that EPA was not authorized to grant conditional approval to plans that did nothing more than promise to do tomorrow what the Act requires today.").

[37] As a general rule, 10 C.F.R. § 50.59 establishes that a licensee must apply for a license amendment and obtain NRC's approval before it can implement any proposed change. 10 C.F.R. §§ 50.59(c)(2), 50.90. However, if the licensee conducts an analysis of the proposed change and determines that it would not result in a more than minimal increase in (a) the frequency of accidents previously evaluated in the FSAR, (b) the likelihood of a malfunction important to safety previously evaluated in the FSAR, (c) consequences of an accident or malfunction previously evaluated in the FSAR, or (d) create a possibility for a type of accident or malfunction with a result different than previously evaluated in the FSAR, then the licensee may implement the change without obtaining a license amendment. 10 C.F.R. § 50.59(c)(1) and

LLRW Plan acknowledges that if additional storage is needed in the future, then "the existing regulatory framework would allow Progress Energy to conduct written safety analyses under 10 C.F.R. § 50.59." Attachment B at 4 (emphasis added).[38]

Thus, the Extended LLRW Plan, by relying on the 10 C.F.R. § 50.59 process for any additional onsite storage, acknowledges that PEF must perform safety analyses, in addition to those contained in the FSAR, before it can be determined whether or not such additional storage satisfies the regulations. This is problematic, if not fatal, because under 10 C.F.R. § 52.79(a) and CLI 10-02 at 24-25, PEF must submit, now, its plans for managing LLRW for a period of longer than the original AP1000 capacity, and PEF's FSAR must contain "information sufficient to . . . reach a final conclusion on all safety matters . . . before the issuance of the combined license." 10 C.F.R. § 52.79(a) (emphasis added). While 10 C.F.R. § 50.59 is certainly a legitimate mechanism for making changes to a licensed facility, in this context, reliance on the 10 C.F.R. § 50.59 process confirms that PEF's current FSAR (including the RAI Responses) does not analyze the risk and safety consequences of any such additional LLRW storage facility.[39]

Turning to a different point, the recent decision of the Board in Vogtle dealt with a significantly different contention and is certainly not dispositive here. In this case, C-8A asserts that PEF's FSAR fails to offer "sufficient information to demonstrate the adequacy of PEF's plans" for storing LLRW for more than two years, and is defective because it "postpone[s] most

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(2)(i)–(viii). Even if a license amendment is not required, the licensee must still conduct such a safety analysis (in addition to the original FSAR analysis), to assess the effect of the proposed amendment. 10 C.F.R. § 50.59 (d)(1) and (c)(2).

[38] Although the analysis required by 10 C.F.R. § 50.59 is not the same as the "final safety analysis," it is, nevertheless, an formal, written, analysis involving safety issues (accident probabilities and/or consequences). PEF itself characterizes the 10 C.F.R. §50.59 analysis as a "safety analysis." We agree.

[39] While the 10 C.F.R. § 50.59 analysis might confirm that the risk presented by the proposed change to the nuclear power plant is bounded by the original FSAR, it does not change the fact that the current FSAR does not analyze the risks associated with the construction of the currently unspecified additional storage capacity.

of its decisions regarding how and where to store" the LLRW. Order Admitting C-8A at 5. In contrast, the contention at issue in Vogtle, SAFETY-1, listed specific "details" that it asserted must be in the FSAR. SAFETY-1 stated that the FSAR failed to provide "adequate detail as to how SNC will comply with NRC regulations" and that the FSAR must contain "a design plan for the LLRW storage facility . . . which must include information regarding building materials and high-integrity containers . . . a specific description of where . . . the storage facility will be located; and . . . a discussion of the health impacts on SNC employees." Vogtle, LBP-10-08, 71 NRC at __ (slip op. at 3-4). The Vogtle Board concluded that the motion for summary disposition posed the "legal question of whether the items listed in contention SAFETY-1 are required in [an applicant's] FSAR." Id. at __ (slip op. at 12). Vogtle held that there is

> no requirement in section 52.79(a)(3) for [an applicant's] FSAR to include, as contention SAFETY-1 maintains, details regarding 'building materials and high-integrity containers,' exact location, or health impacts on employees for the . . . contingent onsite long-term LLRW storage facility. Thus, we conclude that, as a matter of law, SNC's FSAR need not include the details listed in contention SAFETY-1.

Id. at __ (slip op. at 14) (emphasis added).

Our decision is consistent with Vogtle. For example, C-8A does not demand, as SAFETY-1 did, that the FSAR contain "details regarding 'building materials and high-integrity containers.'" Id. at __ (slip op. at 14). Instead, C-8A asserts that the level of information in the FSAR is insufficient to make the determination required in 10 C.F.R. § 52.79(a) and postpones the concrete decisions needed to make that determination. PEF moves for summary disposition, asserting that C-8A is wrong as a matter of law. We disagree. But our ruling deals with a contention different than the one addressed in Vogtle.

As in Vogtle, we recognize that PEF's FSAR must comply with both 10 C.F.R. § 52.79(a)(3) (specify "the means for controlling and limiting . . . radiation exposures within the limits set forth in part 20") and 10 C.F.R. § 52.79(a)(4) (specify "the design of the facility" and provide "information relative to materials of construction, arrangement, and dimensions

sufficient to provide reasonable assurance that the design will conform to the design bases with adequate margin for safety"). The Board in Vogtle seems to concede that subsection (a)(4) applies to the initial (two year) storage facility specified in the AP1000 DCD, but rules that it does not apply to the additional/extended storage facilities because such additional facilities are contingent. See Vogtle at 12-13. Given the introductory clause of 10 C.F.R. § 52.79(a) (that the FSAR must provide a "level of information sufficient . . . to reach a final conclusion on all safety matters . . . before issuance of a combined license"), we do not necessarily agree with this parsing of the regulation. Nevertheless, the issue is not presented to us, because the Joint Intervenors in this case do not base their argument on 10 C.F.R. § 52.79(a)(4). We need not address the meaning of 10 C.F.R. § 52.79(a)(4) or how it compares to (a)(3). Instead, this case focuses on the meaning of the introductory clause of 10 C.F.R. § 52.79(a) (sufficient information) as it applies to 10 C.F.R. § 52.79(a)(3). As to that regulation, the Board in Vogtle stated that nothing in 10 C.F.R. § 52.79(a)(3) "requires the detailed design, location, and health impacts information outlined in amended safety contention SAFETY-1." Vogtle at 13. We do not disagree. We focus here, on a different contention and hold that PEF's Extended LLRW Plan does not provide the level of information required by 10 C.F.R. §52.79(a).

Likewise, our decision is consistent with NRC's Regulatory Information Summary 2008-32 (RIS 2008-32).[40] This RIS articulates the NRC Staff position regarding the "long-term, interim storage" of LLRW at licensed nuclear power plants. Id. at 1 (emphasis added). The NRC notes that as of the closure of Barnwell, "LLRW generators in 36 States are no longer able to ship . . . LLRW to a disposal facility" and that therefore those facilities will need to store their wastes for an "indeterminate" amount of time. Id. The RIS goes on to note that the NRC no longer requires reactor licensees to obtain a Part 30 materials license for the extended onsite storage of LLRW produced under their operating licenses. Id. at 3. It specifies that NRC has "also eliminated the five-year limit for on-site storage of LLRW." Id.

[40] PEF Motion, Attachment F, Regulatory Issue Summary 2008-32.

The foregoing elements of RIS 2008-32, which repeatedly acknowledge that the onsite storage of LLRW at reactors such as PEF may be for a long and indefinite term, serve to emphasize that onsite storage of LLRW must be carefully and fully reviewed now, before the COL is issued. No Part 30 license will be required. No five-year review will be conducted. Thus, it is all the more important that the FSAR provide a level of information sufficient to make the necessary Part 20 determination now, as is required by 10 C.F.R. § 52.79(a).

Before closing, we address four points: Contingency, Postponement, Flexibility, and Timing.

First, the fact that the Extended LLRW Plan is contingent does not mean that it does not need to comply with 10 C.F.R. § 52.79 or that it is subject to a relaxed standard. The "level of information sufficient" to satisfy 10 C.F.R. § 52.79(a) is the same, whether the plan is for the first two years and non-contingent, or it is for the second two years, and is contingent. In either case, the level of information must be sufficient for the Commission to be able to make the necessary Part 20 determination before the COL is issued.

Second, the fact that a LLRW plan postpones some decisions does not necessarily mean that it does not provide sufficient information. For example, a LLRW plan could specify that if, after two years, additional storage is needed, then the licensee will build an additional storage building with a capacity of 3,900 cubic feet, or 7,800 cubic feet, or 11,700 cubic feet. If each of these three options is described with a level of information sufficient for NRC to make the necessary safety determinations now, then postponing the decision between them would not violate 10 C.F.R. § 52.79(a). The problem with PEF's Extended LLRW Plan is not postponement, but is its utter lack of content. The Extended LLRW Plan keeps all options open to PEF and does not provide sufficient information to make the necessary Part 20 determinations now.

Third, requiring PEF to provide a level of information sufficient to meet 10 C.F.R. § 52.79(a) does not rob it of the flexibility necessary to deal with changes in circumstances (e.g.,

if Levy generates more LLRW per year than expected, or less LLRW, or different types of LLRW). Requiring PEF to provide sufficient information, now, to allow the NRC to make the necessary safety determinations, now, does not prevent PEF from changing these plans, as circumstances warrant, via the 10 C.F.R. § 50.59 and/or license amendment processes. Under our reading, PEF has all the flexibility it needs to deal with future contingencies.[41]

Finally, as discussed above, the Joint Intervenors have raised a factual dispute as to whether PEF's Extended LLRW Plan can be successfully implemented, given the limited amount of onsite storage capacity specified in PEF's Initial LLRW Plan. Under our reading of the law, PEF's plan is facially deficient, and therefore this factual dispute is immaterial (i.e., it does not change the result). However, if PEF's reading of 10 C.F.R. § 52.79(a) is correct (i.e., that the level of information contained in the Extended LLRW Plan is sufficient), then the workability of the plan becomes a material fact that is in dispute. In this situation, the motion for summary disposition would need to be denied for failure to show that there is "no genuine issue as to any material fact," 10 C.F.R. § 2.710(d), and an evidentiary hearing would be required concerning whether the additional storage facility could be constructed and operational within the initial time frame specified in the FSAR.

V. CONCLUSION AND ORDER

In conclusion, the Board denies PEF's motion for summary disposition of C-8A. We agree that the motion satisfies the first criterion for a summary disposition – that the resolution of the contention raises no genuine issue as to any material fact. However, we disagree that PEF meets the second criterion - that it is entitled to a decision as a matter of law. PEF contends that its plan for the onsite management of low-level radioactive waste for the time

[41] The Dissent says that "the majority essentially denies PEF the flexibility to perform instead a 10 C.F.R. § 50.59 analysis." Dissent at 7. To the contrary, we would allow PEF all the future flexibility is wants (i.e., to change its licensed facility later), provided that it first comply with 10 C.F.R. § 52.79(a) now, i.e., provide sufficient information now to allow NRC to make the Part 20 safety determination before the COL is issued.

period beyond the initial period specified in the AP1000 Design Control Document (i.e., its Extended LLRW Plan) satisfies the requirements of 10 C.F.R. § 52.79(a). This we reject.

We conclude, as a matter of law, that PEF's Extended LLRW Plan (in its FSAR as amended by the RAI Responses) does not satisfy 10 C.F.R.§ 52.79(a) because it does not provide a "level of information sufficient to enable the Commission to reach a final conclusion," before the issuance of the COL, to resolve whether PEF's means for controlling and limiting radioactive effluents and radiation exposures during the extended period will be "within the limits" set forth in 10 C.F.R. Part 20. In light of this ruling, PEF may wish to revise and resubmit this part of its application. In the meantime, PEF's motion for summary disposition of C-8A is denied.

Petitions for review of this order may be filed with the Commission pursuant to 10 C.F.R. § 2.341. Such petitions must be filed within fifteen (15) days of the service of this order.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. William M. Murphy
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 18, 2010

Dissenting Opinion of Judge Anthony J. Baratta:

While I agree with the majority of this Board that no genuine issue of material fact remains regarding Contention 8A (C-8A),[1] I dissent from the Board's analysis regarding the adequacy of PEF's (Progress Energy Florida, Inc.) revised low level radioactive waste (LLRW) management plan. I would find that PEF has provided a sufficient level of information in its LLRW management plan to satisfy 10 C.F.R. § 52.79(a) and (a)(3), and is thus entitled to a ruling in its favor as a matter of law on its Motion for Summary Disposition of C-8A.[2] Unlike the majority, I would also find that PEF has more than adequate time to seek a license amendment should one be needed to construct additional storage facility should one be needed.[3] As this

[1] However, I do not agree with the majority that if PEF has provided a sufficient level of information in PEF's LLRW management plan, an issue of material fact must necessarily remain regarding whether there is reasonable assurance that PEF's LLRW plan could be implemented in a two year time frame. See supra at 19 n.20, 38. It is possible that PEF may initiate those aspects of its "extended" LLRW plan that address expansion of onsite LLRW storage capacity before it has commenced operation of the plant, thereby providing greater than two years to undergo such an expansion. However, under my reading of 10 C.F.R. § 52.79(a) and (a)(3), PEF need not affirmatively state at this time precisely when it will undergo onsite LLRW storage expansion, because that expansion is merely a contingency at this time. Under Commission precedent, it is my view that this Board should not presume that PEF will violate the terms of its license and NRC regulations by generating more LLRW than PEF can store onsite at the Levy plant or ship to an offsite location. See Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), CLI-01-9, 53 NRC 232, 235 (2001) (citing GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 207 (2000)).

[2] Motion for Summary Disposition of Contention 8A (Aug. 27, 2010) (PEF Motion).

[3] At present, the Staff schedule for completing their review of PEF Levy's COLA calls for issuance of the final EIS in July 2011. See Status Report (Oct. 7, 2010) at 1. Once the final EIS is issued, it will likely be another ten to twelve months before the hearings are concluded and the license granted. Assuming construction begins immediately, the Levy plant is likely not to be completed until sometime late in 2016 at the earliest. Thus the applicant would have until 2018 at a minimum to seek a license amendment and construct additional LLRW storage if needed. Since LLRW disposal is in a state of flux at this time, it simply is not prudent or required for PEF to do more at this time than develop a contingency plan for something so far off in the future. See also 31 TAC §§ 675.21-24 – 13 November 2010 Meeting Draft, Texas Low Level Radioactive Waste Disposal Compact Commission, Public Meetings & Information, Proposed New Rule 675.21-24 to be captioned "Exportation and Importation of Waste" (Nov. 13, 2010) http://www.tllrwdcc.org/information.html (last visited Nov. 18, 2010). On November 13, 2010, the Texas Low Level Radioactive Waste Disposal Compact Commission of the Texas Legislature received public comment and held discussion regarding a draft rule addressing "Importation of Waste from a Non-Compact Generator for Management." Id. While the Texas

decision involves a significant and novel issue regarding LLRW management, the resolution of which would materially advance the orderly disposition of this proceeding, I would also refer this ruling to the Commission pursuant to 10 C.F.R. §§ 2.323(f) and 2.341(f)(1).

My analysis of this issue begins with a discussion of the relevant portions of the regulations at issue regarding C-8A: 1) the introductory language of 10 C.F.R. § 52.79(a); and 2) the "means" language of 10 C.F.R. § 52.79(a)(3). In my view and in the circumstances presented, PEF has provided a sufficient level of information in its LLRW management plan to satisfy these two portions of 10 C.F.R. § 52.79. Accordingly, I would find that PEF is entitled to a decision in its favor as a matter of law regarding C-8A, and would thus grant PEF's motion for summary disposition of C-8A.

I. Level of Detail Required to Satisfy the "Means" Requirement of 10 C.F.R. § 52.79(a)(3)

The introductory language in 10 C.F.R. § 52.79(a) requires a COL applicant to include required information in its FSAR "at a level of information sufficient to reach a final conclusion on all safety matters that must be resolved by the Commission before issuance of a combined license." 10 C.F.R. § 52.79(a). Under 10 C.F.R. § 52.79(a)(3), applicants must describe in an FSAR the "kinds and quantities of radioactive materials expected to be produced in the operation and the means for controlling and limiting radioactive effluents and radiation exposures within the limits set forth in part 20 of this chapter." 10 C.F.R. § 52.79(a)(3) (emphasis added). As this Board stated in its August 9, 2010 decision admitting C-8A, PEF's COLA incorporates the description of the "kinds and quantities" of radioactive waste from the AP1000 Design Control Document (DCD), and, therefore, to the extent C-8A raised a challenge to the Levy COLA based on the "kinds and quantities" portion of 10 C.F.R. § 52.79(a)(3), it was

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Legislature has not given public notice of any final action on this draft rule, I note that the uncertain status of this draft rule in turn impacts the according uncertainty of the future LLRW status at the Levy plant – specifically regarding PEF's ability to ship an excess of LLRW offsite after two years' worth of plant operation.

inadmissible.[4] Thus, the specific provision of 10 C.F.R. § 52.79(a)(3) at issue for C-8A is the "means" language.

Dictionary definitions of the term "means" state that a "means" either consists of or includes a "method" or "strategy" for achieving an end.[5] Thus, a plain language reading of this term indicates that the "means" required under 10 C.F.R. § 52.79(a)(3) can be a plan or procedure such as that posited by the applicants in this instance.[6] In contrast, 10 C.F.R. § 52.79(a)(4) requires that an applicant provide a higher level of detail by describing "[t]he design of the facility" to be constructed under the COL, including "principal design criteria," "design bases," and "[i]nformation relative to materials of construction, arrangement, and dimensions."[7]

Applicable to this issue of regulatory construction is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their

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[4] See Licensing Board Memorandum and Order (Ruling on Joint Intervenors' Motion to File and Admit New Contention 8A) at 17-18 n.22 (Aug. 9, 2010) (unpublished).

[5] See, e.g., American Heritage Dictionary of the English Language (4th ed. 2010) ("A method, a course of action, or an instrument by which an act can be accomplished or an end achieved.); MacMillan English Dictionary (American English Ed.) (2010) ("a method for doing or achieving something"); Collins English Dictionary – Complete and Unabridged (2003) ("the medium, method, or instrument used to obtain a result or achieve an end"); Cambridge Dictionary of American English (2d ed. 2010) ("a method or way of doing something"); Oxford Dictionaries Online, http://oxforddictionaries.com/view/entry/m_en_us1266773#m_en_us1266773 ("an action or system by which a result is achieved; a method") (last visited Nov. 18, 2010).

[6] Joint Intervenors appear to argue that the FSAR for Levy Units 1 and 2 must contain more specific design-related information. See, e.g., Intervenors' Answer to Summary Disposition, Attach. B, Decl. of Marvin Resnikoff, Ph.D., in Support of Intervenors' Contention 8 ¶ 11 (Sept. 15, 2010) ("There is no discussion for the processing of these materials for indefinite storage in terms of containers, buildings, locations.").

[7] 10 C.F.R. § 52.79(a)(4); see also Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), LBP-10-8, 71 NRC __, __ (slip op. at 12-13) (May 19, 2010) (contrasting the language of 10 C.F.R. § 52.79(a)(4), "which might well require the type of design features" sought by the intervenors in that proceeding but "governs only those structures that are 'a component of the facility to be constructed under the COL'" with the "means" language of 10 C.F.R. § 52.79(a)(3)).

place in the overall statutory scheme."[8] Accordingly, I interpret 10 C.F.R. § 52.79(a)(3) in the context of 10 C.F.R. § 52.79 as a whole, and in connection with the larger scheme of the applicable regulations.

Looking to 10 C.F.R. § 52.79 as a whole, the information required under 10 C.F.R. § 52.79(a)(4), unlike 10 C.F.R. § 52.79(a)(3), exacts more detailed showing, requiring the applicant to describe a high level of specific information about the facility to be built under the COL. See supra note 3 and accompanying text. By comparison, 10 C.F.R. § 52.79(a)(3) is a simpler statement requiring only the level of information necessary to provide "the means for controlling and limiting radioactive effluents and radiation exposures within the limits set forth in part 20 of this chapter." 10 C.F.R. § 52.79(a)(3) (emphasis added).

I would thus find that a COL applicant need not provide the high level of information that is required under 10 C.F.R. § 52.79(a)(4) for a merely contingent, or only potentially necessary, additional LLRW storage facility, like that at issue in the instant proceeding. In such a case, where an applicant does not plan to build, and need not necessarily build, the additional LLRW storage facility as part of a COL facility under the terms of its COLA and the associated DCD, only the 10 C.F.R. §52.79(a)(3) level of information is necessary. Joint Intervenors themselves admit that 10 C.F.R. § 52.79(a)(4) "is clearly about the reactor structure itself" and thus not applicable here.[9] Therefore, I would not equate the level of detail required under 10 C.F.R. § 52.79(a)(3) with that which is needed to satisfy 10 C.F.R. § 52.79(a)(4). I would find that PEF has provided sufficient information in its LLRW management plan to satisfy the "means"

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[8] See FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (internal citation omitted).

[9] Intervenors' Answer to Summary Disposition Motion at 10 (Joint Intervenors Answer). In addition, the guidance discussed in Regulatory Issue Summary 2008-32 on the 10 C.F.R. § 50.59 process and the potential need for a license amendment to expand onsite LLRW storage further supports this conclusion. PEF Summary Disposition Motion, Attach. F, Regulatory Issue Summary 2008-32 at 2-3 (Dec. 30, 2008) (RIS 2008-32).

language of 10 C.F.R. § 52.79(a)(3) and to enable the Commission to make a final safety determination as required under the introductory language of 10 C.F.R. § 52.79(a).

There is further support for my reading of 10 C.F.R. § 50.79(a) and (a)(3) in Part 20, Standards For Protection Against Radiation, in which 10 C.F.R. § 20.1101(b) states, "[t]he licensee shall use, to the extent practical, procedures and engineering controls based upon sound radiation protection principles to achieve occupational doses and doses to members of the public that are as low as is reasonably achievable (ALARA)." 10 C.F.R. § 20.1101 (emphasis added). Thus, the controlling regulation regarding radiation exposure recognizes that plans or procedures are also a valid "means" by which radiation exposure may be controlled, and does not specify that facility design is somehow implicated.

II. Adequacy as a Matter of Law of PEF's LLRW Plan Under 10 C.F.R. § 52.79(a)(3)

In its motion, PEF contends that section 11.4.2.1 of the AP1000 DCD associated with its COLA satisfies the "means" requirement of 10 C.F.R. § 52.79(a)(3) by providing a three-pronged plan or procedure that incorporates PEF's initial LLRW management plan and its subsequent revisions that address the extended time period following the initial time-frame (two to three years) into one LLRW management plan.[10] This revised LLRW plan consists of: 1) onsite storage for at least two years;[11] 2) implementation of a waste minimization plan that is in accord with SRP 11.4 app. 11.4-A (NUREG-0800); and 3) in the event that additional offsite storage is needed, expansion of onsite storage capacity either a) by conducting safety analyses under 10 C.F.R. § 50.59, as described in RIS 2008-32, to make changes already described in

[10] The majority's analysis artificially divides PEF's LLRW management plan into two parts: an "initial" and an "extended" LLRW plan. See supra section IV.A. at 16. PEF's current LLRW plan is instead a revision of its initial plan that incorporates all processing and storage requirements from the original plan and extends them to cover the time period after the initial two to three years.

[11] See PEF Motion at 6-7 n.8.

the FSAR without a license amendment, or b) by license amendment in accordance with the guidance of NUREG-0800/SRP 11. PEF Motion at 8-9.

I would find that this showing satisfies the 10 C.F.R. § 52.79(a)(3) "means" requirement at issue in C-8A. Given that the 10 C.F.R. § 52.79(a)(3) requirement does not demand the same level of specificity as 10 C.F.R. § 52.79(a)(4), PEF's LLRW management plan states a sufficient level of information. Therefore, PEF is entitled to a decision in its favor regarding its motion for summary disposition of C-8A as a matter of law.

According to the majority, PEF must under 10 C.F.R. § 52.79(a) and (a)(3) provide more specific information in their LLRW management plan, than they have so far submitted. In so doing, the majority essentially asks PEF to state now how many years' worth of material it will likely need to store in the future, at the end of approximately two years' worth of operation at the Levy plant, and for how long this material must likely be stored. This requirement translates simply into a question of the size of the facility that will be used to store the LLRW. Since the storage time period is at present unknown, the size of the facility is indeterminate and contingent on whether and when an offsite LLRW disposal site will become available.[12] Because of this uncertainty, it is unreasonable, as part of a contingency plan, to expect specificity regarding such a building.

Despite this uncertainty, PEF does describe its LLRW management plan in further detail in its response to Staff RAI. In its response, PEF states that if an offsite facility is not available to accept Class B and C waste, PEF will evaluate reducing the amount of LLRW the Levy plant generates by implementing a waste minimization plan. See PEF Motion at 9, Attachment B at 3, 5. Specifically, that waste minimization plan will consider the strategy of "reducing the in-service run length of resin beds, as well as resin selection, short-loading, and point-of-generation segregation" techniques. Id. The RAI responses go on to specify that if, despite the

[12] See supra note 3 and accompanying text.

implementation of these strategies, additional onsite storage capacity for Class B and Class C waste is required, PEF will expand the capacity of the licensed storage facilities at the Levy plant consistent with NRC guidance and regulations. Such additional onsite storage would be designed and built "utilizing the design guidance provided in NUREG-0800, Standard Review Plan Chapter 11 Radioactive Waste Management Appendix 11.4-A, Design Guidance for Temporary Storage of Low-Level Radioactive Waste." Id. Attachment B at 5.

PEF explains that, in lieu of invoking NRC's license amendment process, RIS 2008-32 provides for written safety analyses under 10 C.F.R. § 50.59 for such additional storage facilities without license amendment, provided certain conditions are met. Id. Attachment B at 4. If, however, the conditions set forth in the 10 C.F.R. § 50.59 are not satisfied, as PEF explains in its RAI Responses and associated COLA revisions, PEF can still seek to expand on-site storage capacity through the license amendment process. Id. Given this information, I would find that PEF has provided a plan consistent with the regulations and thus sufficient to enable the Commission to reach a final conclusion on safety matters as required under 10 C.F.R. § 52.79(a) and (a)(3).

Under the majority's interpretation, 10 C.F.R. § 52.79(a) and (a)(3) require PEF to provide more detail in their safety analysis regarding potential additional LLRW storage capacity that may not need to be constructed. In so doing, the majority essentially denies PEF the flexibility to perform instead a 10 C.F.R. § 50.59 analysis to expand LLRW storage capacity (assuming it is necessary), which is a fully acceptable process to support construction of such a facility under the regulations for COL licensees.

The majority's analysis also assumes, without justification, that PEF will not take action to expand its LLRW storage capacity, either by 10 C.F.R. § 50.59 analysis or by license amendment in accordance with NUREG-0800 before the Levy plant commences operation – enabling PEF a timeframe of greater than two years in which it may complete the contingent

LLRW storage capacity expansion measures it states in its revised LLRW management plan.[13] Thus, PEF may undertake these expansion measures sufficiently in advance to avoid NRC enforcement action that would result from a shortage of onsite LLRW storage capacity at the culmination of the two to three year time period stated in PEF's initial LLRW plan. Even Joint Intervenors state in their answer that there is neither a "'trigger' point" nor "any timeline for obtaining a license amendment in order to expand waste storage" stated in PEF's revised LLRW management plan. Joint Intervenors Answer at 7. It is therefore just as conceivable that PEF could commence these measures before, as opposed to after, commencing operation of the Levy plant.

However, the factual issues of precisely when PEF may actually begin a onsite LLRW storage expansion effort, whether that effort will involve a license amendment application, and whether PEF could obtain such license amendment in a two-year time period are immaterial to the resolution of the remaining legal issue regarding C-8A. Under my reading of 10 C.F.R. § 52.79(a) and (a)(3), PEF need not affirmatively state at this time precisely when it will begin an effort for onsite LLRW storage expansion or whether it can complete that expansion effort in two years, because that expansion is now merely a contingent possibility. Thus, PEF need not provide any more information than it has already provided on LLRW expansion measures that may not be necessary.

In sum, the majority's ruling assumes that PEF would generate greater than two years worth of LLRW prior to determining whether it may either ship it offsite or obtain the necessary regulatory authorization to store that amount of LLRW onsite at the Levy plant. In my view, this ruling contradicts the Commission's statement that "in the absence of evidence to the contrary, the NRC does not presume that a licensee will violate agency regulations wherever the

[13] The majority reads PEF's "extended" LLRW plan as a series of events, and states the first of these events as: "the Levy plant starts operating." See supra at 18.

opportunity arises."[14] If an applicant receives a license, it "will be expected to meet all NRC rules and all safety commitments, subject to Commission oversight and enforcement." Id. Thus, absent evidence to the contrary, which the Joint Intervenors certainly have not presented, the Board should not presume that PEF will violate its commitment to follow NUREG-0800 and the agency's regulations regarding onsite LLRW storage capacity expansion at the Levy plant, or that the Staff either cannot or will not enforce that commitment.

Additionally, I note that PEF has provided sufficient detail to determine how the waste will be stored onsite should a disposal site not be available after two years of operation at the Levy site. PEF states "[t]he design of the storage/shipping containers is specified in Attachment D, § 11.4.1.3 at 11.4-3." PEF Motion at 7. Section 11.4.1.3 references 49 C.F.R. Part 173, Shippers—General Requirements for Shipments and Packagings, which contains the governing regulations for shipment and packaging of radioactive material. These requirements are included by reference in the DCD and thus the application provides a sufficient level of specificity regarding the storage of the LLRW.

Lastly, at least one licensing board has rejected a contention challenging a LLRW plan similar to the one provided by PEF for failure to raise a genuine dispute with the application. See PPL Bell Bend, LLC (Bell Bend Nuclear Power Plant), LBP-09-18, 70 NRC 385, 408-11 (2009). Specifically, the Bell Bend board noted that applicant's COLA discussion of LLRW management contained no omission where the applicant addressed the closure of the Barnwell LLRW disposal facility, discussed "in detail . . . additional waste minimization measures," and committed to "build an additional storage facility in accordance with NRC guidelines" if further additional storage became necessary. Id. at __ (slip op. at 27). In its reasoning the board stated that petitioners failed to show that the material in its COLA regarding LLRW storage was insufficient to enable the necessary findings in that proceeding, and that the board "fail[ed] to

[14] Private Fuel Storage, CLI-01-9, 53 NRC at 235 (citing Oyster Creek, CLI-00-6, 51 NRC at 207).

see any omission on the LLRW issue" with regard to the COLA in that proceeding. Id. (internal quotations omitted).

In contrast to the instant proceeding, the Bell Bend board dealt with admissibility of a contention alleging an ER omission in a COLA regarding LLRW management, whereas this Board is now addressing the legal merits determination on C-8A, which claims an inadequacy with the LLRW management plan in PEF's FSAR. Nonetheless, I find the decision in Bell Bend to be persuasive on the instant issue of whether PEF must provide more information in its LLRW plan. Joint Intervenors here allege that PEF's LLRW management plan is inadequate because it lacks, or omits, a sufficient level of information to satisfy 10 C.F.R. § 52.79(a)(3). Although the board in Bell Bend did not address this regulation specifically, its holding addressed the issue of whether a COLA required additional detail in its LLRW management plan, which is the focus of the instant Contention 8A. See id. at __ (slip op. at 26, 27).

III. Conclusion

I agree with the ruling of the majority of this Board that the motion satisfies the summary disposition requirement that C-8A no longer raises a genuine issue of material fact. Under the majority's ruling, PEF's COLA cannot be granted at this time, as a matter of law, because PEF's COLA does not comply with the regulations. However, contrary to the majority, I would find that PEF's plan, stated in its FSAR as amended by its RAI Response, for the onsite management of LLRW for the time period beyond the initial time period specified in the AP1000 DCD provides sufficient detail to satisfy the legal requirements of 10 C.F.R. § 52.79(a) and (a)(3). I therefore conclude that PEF is entitled to a decision in its favor on its motion, as a matter of law. Accordingly, I would grant PEF's motion for summary disposition of C-8A.

/RA/

_____

Dr. Anthony J. Baratta
ADMINISTRATIVE JUDGE

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 for Summary Disposition of Contention 8A) (LBP-10-20),** have been served upon the following persons by Electronic Information Exchange.

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Docket Nos. 52-029-COL and 52-030-COL
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[Original signed by Linda D. Lewis]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 18th day of November 2010