UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF PETITION FOR REVIEW OF THE LICENSING BOARD'S DECISION IN LBP-10-20 DENYING THE APPLICANT'S MOTION FOR SUMMARY DISPOSITION

Jody C. Martin
Counsel for NRC Staff

December 10, 2010

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Commission Decisions

Atomic Safety and Licensing Appeal Board

Atomic Safety and Licensing Board Decisions

Regulations

Miscellaneous

December 10, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF PETITION FOR REVIEW OF THE LICENSING BOARD'S DECISION IN LBP-10-20 DENYING THE APPLICANT'S MOTION FOR SUMMARY DISPOSITION

INTRODUCTION

Pursuant to 10 C.F.R. § 2.341(b), the NRC staff (Staff) hereby petitions the Commission for review of the Atomic Safety and Licensing Board's (Board) decision denying Progress Energy Florida's (Applicant) Motion for Summary Disposition of Contention 8A. *Progress Energy Florida, Inc*. (Levy County Nuclear Power Plant, Units 1 and 2), LBP-10-20, 72 NRC __ (Nov. 18, 2010) (slip op.). The Commission should take review of, and overturn, LBP-10-20 because the Board decision makes a necessary legal conclusion that is a departure from or contrary to established law, and because it raises an important question of law and policy. 10 C.F.R. § 2.341(b)(ii), (iii).

STATEMENT OF THE CASE

On July 28, 2008, the Applicant filed an application for a combined license (COL) for two new reactors in Levy County, Florida. On February 6, 2009, the Ecology Party of Florida, the Nuclear Information and Resource Service, and the Green Party of Florida ("Joint Intervenors") collectively filed a petition to intervene and several contentions.[1] On July 8, 2009, the Board

[1] Petition to Intervene and Request for Hearing by the Green Party of Florida, the Ecology Party of Florida and Nuclear Information and Resource Service (February 6, 2009).

issued a Memorandum and Order, granting the hearing request and admitting, among others, Contention 8 as a contention of omission. *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 121-25 (2009). As originally admitted, Contention 8 alleged that the COL was inadequate because it assumed that LLRW would be promptly shipped offsite, and "fails to address compliance with Part 20 and Part 50 Appendix I in the event that PEF will need to manage such [LLRW] on the Levy site for a more extended period of time." *Id*. The Commission affirmed the admission of Contention 8. *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-02, 71 NRC __ (Jan. 7, 2010) (slip op. at 27).

On December 8, 2009, the Applicant filed a response to two Staff Requests for Additional Information ("RAI Responses") that provided the Applicant's plan for managing Class B and C low level radioactive waste (LLRW).[2] Because the RAI Responses cured the omission alleged in Contention 8, the Applicant and Joint Intervenors entered into a settlement agreement, whereby they asked the Board to dismiss Contention 8 as moot, and to provide the Joint Intervenors an opportunity to file an amended contention regarding the Applicant's plan.[3] The Board approved the parties' settlement agreement. *Progress Energy Florida, Inc*. (Levy County Nuclear Power Plant, Units 1 and 2), at 1 (LBP Apr. 21, 2010) (unpublished order) (Approving Settlement of and Dismissal of Contention 8). On May 14, 2010, the Joint Intervenors filed a motion to amend Contention 8, and on June 8, 2010, both the Staff and

[2] The RAIs and responses are included as Attachment B to the Applicant's Motion for Summary Disposition of Contention 8A. The Staff RAIs were issued on November 4, 2009, and can be found in the NRC's Agencywide Document Access Management System (ADAMS) at accession number ML093080633. The RAI Responses were sent on December 4, 2009, and can be found at accession number ML093450353.

[3] Joint Motion for Approval of Settlement and Dismissal of Contention 8 (April 14, 2010).

Applicant filed answers opposing admission of Amended Contention 8 ("Contention 8A").[4] On August 9, 2010, the Board admitted Contention 8A 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.

Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), (LBP Aug. 9, 2010) (slip op. at 5) (unpublished order) (Ruling on Joint Intervenors' Motion to File and Admit New Contention 8A). On August 27, 2010, the Applicant filed its Motion for Summary Disposition of Contention 8A.[5] The Joint Intervenors filed an Answer opposing the Motion for Summary Disposition on September 15, 2010, and on September 16, 2010, the Staff filed an Answer supporting the Applicant's Motion for Summary Disposition.[6] The Board issued LBP-10-20 on November 18, 2010, and on November 26, 2010, the Secretary of the Commission granted the Staff's unopposed Motion for Extension of Time to file this Petition for Review on December 10, 2010. *Progress Energy Florida, Inc*. (Levy County Nuclear Power Plant, Units 1 and 2), (SECY Order November 26, 2010) (unpublished order).

---

[4] 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); NRC Staff Answer to Motion by Joint Intervenors to Amend Contention 8 (June 8, 2010); Progress Answer Opposing Joint Intervenors' Motion to Amend Contention 8 (June 8, 2010).

[5] Progress Energy Florida, Inc.'s Motion for Summary Disposition of Contention 8A (August 27, 2010) ("Applicant's Motion for Summary Disposition").

[6] Intervener's Response to Applicant's Motion for Summary Disposition of Contention 8A (September 15, 2010); NRC Staff Answer in Support of Progress Energy Florida's Motion for Summary Disposition of Contention 8A (September 16, 2010).

SUMMARY OF THE BOARD'S DECISION

In LBP-10-20 the Board found no material facts in dispute regarding Contention 8A, and found that as a matter of law the COL application (COLA) does not satisfy the requirements of 10 C.F.R. § 52.79. First, the Board found that there were no material facts in dispute. *Levy County*, LBP-10-20, 72 NRC _ (slip op. at 15-20). After finding no material facts in dispute, the Board ruled as a matter of law 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 in the AP 1000 DCD (i.e., its Extended 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 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." *Id.* at 29-30. In reaching this conclusion, the Board analyzed the FSAR commitments in the RAI Responses, found them to lack content, and found that "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)." *Id*. at 34 (emphasis omitted).

Additionally, the Board stated that if the Applicant's interpretation of section 52.79(a) is correct, then a factual dispute remains on whether "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." *Id*. at 20, n. 24. In such a situation, the Board stated that "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." *Id*. at 20, n. 24.

There was also a dissenting opinion in LBP-10-20. The Dissent agreed with the majority there were no material facts in dispute; however, the Dissenting opinion stated that it would find

as a matter of law that the Applicant's LLRW plan contained sufficient information to satisfy section 52.79(a). *Id*., Dissent at 1. The Dissent stated that the majority erred by "artificially" dividing the Applicant's LLRW plan into two parts, and found that the plan contained sufficient information to meet section 52.79(a)(3). *Id*., Dissent at 5-10. Additionally, because it thought that this decision "involves a significant and novel issue regarding LLRW management, the resolution of which would materially advance the orderly disposition of this proceeding," the Dissent stated that it would refer LBP-10-20 to the Commission pursuant to sections 2.323(f) and 2.341(f)(1). *Id*., Dissent at 2. Finally, the Board Dissent held that if its reading of section 52.79(a)(3) is correct, there is no material dispute of fact remaining, because any hearing would inappropriately focus on whether the Applicant would violate its commitments. *Id*., Dissent at 9.

ISSUE PRESENTED

In LBP-10-20 the Board erroneously concludes that the Applicant's plan for storing LLRW beyond the period provided in the DCD does not satisfy section 52.79(a). *Id*. at 41. The Board erroneously split the Applicant's plan into an "Initial LLRW Plan" and an "Extended LLRW Plan" and it interpreted section 52.79(a)(3) incorrectly. Further, LBP-10-20 raises a legal policy issue because its ruling is inconsistent with another Atomic Safety and Licensing Board decision. This creates uncertainty regarding what standard applies to the review of LLRW plans. These errors raise the following issue for Commission review:

1. Whether the Board erred in its analysis of section 52.79(a) and in its conclusion that the LLRW plan submitted by the Applicant does not satisfy section 52.79(a).

DISCUSSION

I. Legal Standards

A. Standards Governing Petitions for Review

Appeals of partial initial decisions must be filed under 10 C.F.R. § 2.341(b). While the Board did not caption LBP-10-20 as a partial initial decision, the decision is a de facto partial initial decision because the Board decided on the merits of a contention, finding as a matter of

law that the COLA does not contain sufficient information to meet 10 C.F.R. § 52.79(a). *Levy County*, LBP-10-20, 72 NRC _ (slip op. at 41). While some cases have held that denials of summary disposition motions are interlocutory, and not immediately appealable, those decisions are inapposite because they did not involve a Board ruling on a contention as a matter of law. Rather, the results of those cases were that the merits of the contention remained for litigation at a hearing. *See, e.g., Louisiana Power and Light Co.* (Waterford Steam Electric Generating Station, Unit 3), ALAB-220, 8 AEC 93 (1974). Here, the Board's decision is equivalent to a partial initial decision, because the Board ruled as a matter of law that the COLA cannot be granted unless it is amended. Even if LBP-10-20 were not a partial initial decision, section 2.341(b) is also the appropriate standard when a decision "disposes of a major segment of a case." *Boston Edison Co.* (Pilgrim Nuclear Power Station, Unit 2) ALAB-632, 13 NRC 91, 92, n. 2 (1981) (citing *Houston Lighting and Power Co.* (Allens Creek Station, Units 1 and 2), ALAB-301, 2 NRC 853, 854 (1975)). Because Contention 8A was the only admitted safety contention, LBP-10-20 disposes of a major segment of this case[7] and section 2.341(b) is the appropriate appellate standard.[8]

A petition for review filed under section 2.341(b) may be granted "in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to the following considerations:

---

[7] By disposing of the only remaining safety contention, a contested hearing could now commence upon issuance of the Staff's final Environmental Impact Statement regardless of whether the final Safety Evaluation Report has been issued. See *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-22, 70 NRC 640, 654 (2009).

[8] The Applicant filed a Motion for Reconsideration of LBP-10-20 on November 19, 2010. Progress Energy Florida, Inc.'s Motion for Reconsideration of LBP-10-20 (Motion for Reconsideration). In its Motion for Reconsideration, the Applicant seeks, *inter alia*, clarification from the Board on the appropriate appellate standard; however, as noted, the Staff believes that section 2.341(b) is the correct standard. The Motion for Reconsideration also argues several issues that are similar to the ones raised in this Petition for Review. The Staff does not believe that section 2.341(b)(6) prohibits the filing of this Petition because the Staff did not file a Motion for Reconsideration, and the Staff's arguments are not identical to the Applicant's. However, in the interest of adjudicative economy, the Commission may wish to delay ruling on this Petition until after the Board rules on the Applicant's Motion for Reconsideration.

i. A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
ii. A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
iii. A substantial and important question of law, policy, or discretion has been raised;
iv. The conduct of the proceeding involved a prejudicial procedural error; or
v. Any other consideration which the Commission may deem to be in the public interest"

10 C.F.R. § 2.341(b)(4). This regulation does not require the Commission to take review; the Commission retains full discretion on whether to grant review of initial board decisions. *Private Fuel Storage* (Independent Spent Fuel Storage Facility), CLI-06-10, 61 NRC 129, 132 (2004). The Commission has stated that "review is particularly appropriate where the Board's ruling may have made a clear error as to a material fact, where the ruling turns on a legal conclusion that is without precedent or conflicts with existing precedent, or where the ruling raises an important policy issue that the Commission itself should consider." *Id*. (internal citations omitted).

B. Regulatory Requirements for the Contents of a COLA

The requirements applicable to COLs are primarily in 10 C.F.R. Part 52, Subpart C. COLAs must contain the information specified in 10 C.F.R. § 52.79, including a final safety analysis report (FSAR). Section 52.79(a) requires an FSAR to contain the information listed in that section, "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). Section 52.79(a)(3) requires the FSAR to include "[t]he 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).

II. Argument

The Commission should take review of, and reverse, LBP-10-20 because it makes a necessary legal conclusion that is a departure from established law, and because it raises substantial questions of law and policy. 10 C.F.R. § 2.341(b)(4)(ii), (iii). Specifically, (1) the

Board erroneously ruled that the Applicant's LLRW plan does not meet Section 52.79(a); and, (2) the Board misinterpreted the Applicant's reference to section 50.59.

A. The Board Erroneously Ruled That the Applicant's LLRW Plan Does Not Contain Sufficient Information to Meet Section 52.79(a)

The Board erroneously held that the Applicant's plan for storing LLRW contains insufficient information to meet section 52.79(a)(3). In so doing, the Board erred by segregating the Applicant's plan for storing LLRW into an "initial plan" and an "extended plan," and by misinterpreting the requirements in section 52.79(a). LBP-10-20 also raises a legal policy issue because its findings are inconsistent with the Atomic Safety and Licensing Board's findings in the *Vogtle* COL proceeding, which creates uncertainty regarding the correct standard of review.

1. Prior Rulings Regarding Section 52.79(a)

Specifically at issue in this case is the introductory text to section 52.79(a) and section 52.79(a)(3). The introductory text to section 52.79(a) states that a COL applicant must provide the following information in the FSAR, "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."[9] 10 C.F.R. § 52.79(a). Section 52.79(a)(3) states that an FSAR must include:

> 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). The dispute in this case revolves around the requirement that the FSAR discuss 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).

[9] In the Part 52 rulemaking in 2007, the Commission did not further discuss the meaning of the introductory text of this section; it stated that in revising section 52.79(a) the "NRC has attempted to capture all relevant requirements regarding contents of the FSAR for a combined license application." Final Rule, Licenses, Certifications, and Approvals for Nuclear Power Plants, 72 Fed. Reg. 49,352, 38,586 (Aug. 28, 2007).

In affirming the admissibility of the original contention 8, the Commission stated 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." *Levy County*, CLI-10-02, 71 NRC _ (slip op. at 24); *see also Southern Nuclear Operating Co*. (Vogtle Electric Generating Plant, Units 3 and 4), CLI-09-16, 70 NRC 33, 37 (2009) ("[T]he required information is tied to the COL applicant's particular plans for compliance through design, operational organization and procedures"). In LBP-10-20, the Board interpreted this statement to mean that a plan cannot consist merely of procedures or a promise to develop additional onsite storage. *Levy County*, LBP-10-20, 72 NRC _ (slip op. at 34-35). Instead, the Board stated that "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." *Id*. at 34 (emphasis omitted).

In its interpretation of the same Commission language, the Board in the *Vogtle* COL proceeding found that "the Commission seems merely to have been stating that the information required under section 52.79(a)(3) is tied to the applicant's 'particular plans for compliance through,' but not necessarily the details of, 'design, operational organization, and procedures' associated with any contingent long-term LLRW facility." *Southern Nuclear Operating Co*. (Vogtle Electric Generating Plant, Units 3 and 4), LBP-10-08, 71 NRC __ (May 19, 2010) (slip op. at 13-14). As discussed below, the *Vogtle* Board correctly interpreted section 52.79(a).

2. The Board in LBP-10-20 Erroneously Segmented the Applicant's Plan for Storing LLRW into an "Initial Plan" and an "Extended Plan"

In analyzing whether there is a material factual dispute in this case, the Board erred by separately analyzing the Applicant's "Initial LLRW Plan" and its "Extended LLRW Plan." *Levy County*, LBP-10-20, 72 NRC _ (slip op. at 16-17). This error affected many of the findings made later in LBP-10-20. The Board stated that "first and foremost, there is no dispute as to what

constitutes PEF's plan for managing LLRW. For purposes of summary disposition, PEF's LLRW plan can be divided into two parts – the initial LLRW Plan and the Extended LLRW Plan." *Id*. at 16. The Board found that the "Initial LLRW Plan" is section 11.4 of Revision 17 to the Design Control Document (DCD) for the AP1000 whereas the "Extended LLRW Plan" is PEF's RAI Responses. *Id*. at 16-17. The Board used this breakdown to analyze whether the "Extended LLRW Plan" meets the requirements in section 52.79(a). *Id*. at 20-40. After analyzing each statement made in the "Extended LLRW Plan" the Board found that it contained neither the quantity nor quality of information in the "Initial LLRW Plan" and did not meet section 52.79(a). *Id*. at 20-28, 31.

The Board is correct that the RAI Responses provide information that was not present in the Applicant's first FSAR regarding storage of LLRW beyond the time period set forth in the DCD. The flaw in the Board's reasoning is in reading the RAI Responses in isolation. The RAI Responses are not a standalone "Extended LLRW Plan" but are additions to the FSAR. The complete LLRW plan is comprised of the information incorporated by reference from the DCD, the information originally provided in Section 11.4 of the FSAR, and the FSAR additions in the RAI Responses.[10] In the FSAR there is no distinction between the "initial plan" and the "extended plan"; there is one plan. The portions of the plan that the Board classifies as the "Initial LLRW Plan" will function throughout the life of the plant; the RAI Responses are additions to the FSAR, not a new section or plan.[11] As the Board Dissent states, "the majority's analysis artificially divides PEF's LLRW management plan into two parts: an "initial" and an "extended" LLRW Plan. PEF's current LLRW plan is instead a revision of its initial plan that incorporates all

---

[10] In Attachment A of its Motion for Reconsideration, the Applicant provided a copy of what the FSAR will look like once all of these portions are combined into one document.

[11]The text of the RAI revisions states the "The following change will be made to the LNP FSAR in a future revision: COLA Part 2, FSAR Chapter 11, Subsection 11.4.6 will be revised to *add two new paragraphs at the end of STD COL 11.4-1*." Page 3 of 5 of RAI response (emphasis added).

processing and storage requirements from the original plan and extends them to cover the time period after the initial two to three years." *Id.,* Dissent at 5, n. 10.

The Board's analysis is flawed when it states: "For purposes of summary disposition, PEF's LLRW plan can be divided into two parts – the initial LLRW Plan and the Extended LLRW Plan." *Id*. at 16. Certainly, the Applicant's Motion for Summary Disposition focused on the RAI Responses, and states that "Progress's RAI Responses describe Progress's 'plans' or 'means' for addressing LLRW storage at a sufficient level of detail to satisfy 10 C.F.R. § 52.79(a)(3)." Applicant's Motion for Summary Disposition at 8. However, the Applicant never stated that the RAI Responses are the entire plan; in fact, in several portions of its Motion for Summary Disposition the Applicant points to areas where other parts of its LLRW plan provide information sought by the Joint Intervenors in Contention 8A. *See* Applicant's Motion for Summary Disposition at 5-6 (Stating how the DCD provides the "kinds and quantities of waste"), 11 (Describing that if section 52.79(a)(4) applies, the design of the facilities is provided in the DCD). The Staff agrees that the primary focus of this dispute is the RAI Responses; however, looking at them in isolation, as opposed to an addition to the existing plan, leads the Board to make inaccurate comparisons. For example, the Board compares the length and quality of information in the RAI Responses to that in the DCD concluding that "the difference is stark" and finds the information in the "Extended LLRW Plan" insufficient. *Levy County*, LBP-10-20, 72 NRC _ (slip op. at 31). But because the RAI Responses are additions to the details already provided in the DCD it is unsurprising that they are not as long or detailed. As shown in more detail below, the Board's artificial distinction between an "Initial LLRW Plan" and an "Extended LLRW Plan" creates several errors that support Commission review.

3. The Board's Erroneous Distinction Between an Initial and Extended LLRW Plan Resulted in its Erroneous Conclusion that the Applicant's FSAR Did Not Meet Section 52.79(a)

The Board made a legal error in finding that the Applicant's FSAR provided insufficient information to meet section 52.79(a). After splitting the Applicant's LLRW plan into the "Initial

LLRW Plan" and the "Extended LLRW Plan," the Board analyzed the Applicant's "Extended LLRW Plan" to determine if the FSAR commitments in it meet section 52.79(a). *Id*. at 20-28. After analyzing each FSAR commitment in the "Extended LLRW Plan," the Board found that "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." *Id*. at 30 (emphasis omitted). The Board found that the "Extended LLRW Plan" merely committed to a process or method and stated that "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." *Id*. at 34 (emphasis omitted). The Board further stated that "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." *Id*. (emphasis omitted).

In his dissenting analysis, Judge Baratta focused on the word "means" in section 52.79(a)(3), compared and contrasted section 52.79(a)(3) to section 52.79(a)(4), and looked at the findings that must be made in 10 C.F.R. § 20.1101. *Id*., Dissent at 3-5. After analyzing the Applicant's commitments, the Dissent states that "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). *Id*., Dissent at 7.

The Board majority committed a legal error when it determined that the Applicant's plan was insufficient to meet section 52.79(a). The operative phrase in this regulation is whether the plan contains 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). As the Dissent states, "dictionary definitions of the term 'means' state that a 'means' either consists of or includes a 'method' or 'strategy' for achieving an end." *Levy County*, LBP-10-20, 72 NRC _

(slip op. at Dissent at 3) (Citing several dictionary definitions of the word "means."). The Commission stated 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." *Levy County*, CLI-10-02, 71 NRC _ (slip op. at 24); *see also Vogtle,* CLI-09-16, 70 NRC 33, 37 (2009).

Using these standards, the Dissent was correct that the Applicant's plan meets section 52.79(a)(3). The Board states that the plan's flaws are its "utter lack of content" and its reliance on only procedural steps when procedures and methods by which compliance can be achieved are not enough by themselves to satisfy section 52.59(a). *Levy County*, LBP-10-20, 72 NRC _ (slip op. at 34, 39). However, as noted above, the *entire* LLRW plan contains more than just procedures. By artificially separating the plan into two parts, then by making each individual part meet all of the applicable requirements in section 52.79(a), the Board is creating a new requirement; no longer must the FSAR as a whole meet the requirements in section 52.79(a), but under the Board's analysis the RAI Responses must independently meet that requirement. That standard is too stringent, because the RAI Responses are additions to the FSAR, not a stand-alone FSAR section.

As a whole, the Applicant's LLRW plan meets section 52.79(a)(3) because it provides the means to comply with Part 20. The plan as a whole includes specific commitments regarding the kinds and quantities of waste (DCD Ch.11 § 11.4.2.1 at 11.4-3 to 11.4-6), the design of the storage containers (DCD § 11.4.2.1.3 at 11.4-3) and how the waste will be processed and packed (DCD §11.4.2.3.3 at 11.-10 to 11.4-11). The Applicant must follow these DCD commitments throughout the life of the plant. The only part of the plan that relies on procedures is the Applicant's plan to construct additional storage if necessary. The Applicant commits to send the waste offsite if possible prior to taking the step of constructing such additional storage. *Levy County*, LBP-10-20, 72 NRC _ (slip op. at 23-24). Furthermore, if the waste cannot be sent offsite, the Applicant will institute waste minimization strategies. *Id*. at 24.

If this remains insufficient the Applicant commits to construct additional storage capacity utilizing the guidance in NUREG-0800, Appendix 11.4-A.[12] *Id*. NUREG-0800, Appendix 11.4-A provides guidance on how to design temporary storage facilities for many different types of LLRW. If the Applicant must build extra capacity it will follow the requirements in 10 C.F.R. § 50.59 and, if necessary, 10 C.F.R. § 50.90. These commitments outline an appropriate regulatory approach to add storage if needed.[13]

Taken together, the Applicant's commitments are sufficient to provide the "means" for satisfying Part 20. As the Dissent states, "dictionary definitions of the term 'means' state that a 'means' either consists of or includes a 'method' or 'strategy' for achieving an end." *Levy County*, LBP-10-20, 72 NRC _ (slip op. at Dissent at 3). The Applicant has provided its method or strategy here by committing to a series of steps it will take should extra storage become necessary. If necessary, the Applicant will build more storage following the Staff's guidance in NUREG-0800, Appendix 11.4-A. The commitment to follow this guidance, as a part of the overall plan for managing LLRW, provides the Staff with enough information to conclude that the Applicant has provided its means to control LLRW within the limits of Part 20.

As another basis for its decision, the Board finds that the Applicant is misreading Commission precedent and is turning the word "and" in the Commission's decisions regarding LLRW into an "or" by stating that a plan that only includes "procedures" is sufficient to meet section 52.79(a). *See Id.* at 34-35 (citing *Levy County*, CLI-10-02, 71 NRC __ (slip op. at 24) ("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

[12] NUREG-0800, Appendix 11.4-A Design Guidance for Temporary Storage of Low Level Radioactive Waste, Revision 3 (March, 2007)

[13] The process of using NUREG-0800, Appendix 11.4-A, and the existing regulatory process has been used successfully at operating plants. *See* NRC Regulatory Issue Summary 2008-32 Interim Storage of Low Level Radioactive Waste Storage at Reactor Sites (December 30, 2008), included as Attachment F to the Applicant's Motion for Summary Disposition. Also available at ADAMS accession number ML082190768.

organization, and procedures.'")) (emphasis in original). The Board, however, is reading the Commission's language too strictly. The Commission's statement begins by stating that applicants must provide their "particular plans for compliance." *Levy County*, CLI-10-02, 71 NRC __ (slip op. at 24). As described above, the Applicant provided its particular plans for compliance with Part 20. The Commission then provided examples of what types of information can make up these plans. *Id*. As the Board in the *Vogtle* COL proceeding stated, "the Commission seems merely to have been stating that the information required under section 52.79(a)(3) is tied to the applicant's 'particular plans for compliance through,' but not necessarily the details of, 'design, operational organization, and procedures' associated with any contingent long-term LLRW facility." *Vogtle*, CLI-09-16, 70 NRC at 36-37. The Staff believes the *Vogtle* Board is correct. The Applicant provided its particular plans for compliance by providing a series of steps that it will take to ensure compliance with Part 20. There is no requirement to describe these steps in more detail. Instead, the Applicant committed to a known regulatory process, only the last step of which includes building additional storage by a method that has been successfully used at operating plants. This is all that is required for reviewing a COLA.

Even if the Board is correct and the Commission's holding states that procedures, by themselves, are not enough, the Applicant's plan meets this requirement because the Commission did not state that only the "Extended LLRW Plan" had to include details of "design, operational organization and procedures." Instead, the Commission is referring to the entire LLRW plan, because it is the FSAR as a whole that must meet Part 20. Read as a whole, the Applicant's LLRW plan includes many commitments that can be classified as "design, operational organization, and procedures." The LLRW plan, which includes the DCD, the original FSAR section, and the RAI Response FSAR additions, provides 15 pages of specific commitments. See Applicant's Motion for Reconsideration at Attachment A. Thus, even if procedures alone are insufficient to meet section 52.79(a)(3), the Applicant's LLRW plan as a whole provides sufficient information for the Staff to find that the Applicant has described 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).

4. The Board Decision in the *Vogtle* COL Proceeding Is Both Correct and Inconsistent with LBP-10-20, Supporting Commission Review

The Commission should also take review of LBP-10-20 because the differences in the decision in this case and in the *Vogtle* COL proceeding raise important questions of law and policy. 10 C.F.R. § 2.341(b)(6). The Board distinguishes its decision in LBP-10-20 from a similar decision in the *Vogtle* COL proceeding because of the differences between the contentions in the two cases. *Levy County*, LBP-10-20, 72 NRC _ (slip op. at 37-38). The Board states that the contention in *Vogtle* focused on the distinction between 52.79(a)(3) and 52.79(a)(4) whereas the contention in this case focuses on section 52.79(a)(3) and the introductory text of section 52.79(a). *Id*. However, once the *Vogtle* Board determined that section 52.79(a)(3) was the correct regulation, it found that the detailed design information sought by the Intervenors in that case was not required to meet section 52.79(a)(3). *Vogtle*, LBP-10-08, 71 NRC _ (slip op. at 13-14).

The *Vogtle* Board found that the Commission did not intend the word "means" in section 52.79(a)(3) to require "actual design, location, or health impacts information." *Id*. at 13. Instead, "the Commission seems merely to have been stating that the information required under section 52.79(a)(3) is tied to the applicant's 'particular plans for compliance through,' but not necessarily the details of, 'design, operational organization, and procedures' associated with any contingent long-term LLRW facility." *Id*. at 13-14 (citing *Vogtle*, CLI-09-16, 70 NRC at 36-37). In remarking on the contingent nature of the *Vogtle* plan, the *Vogtle* Board found that its interpretation that design level information is unnecessary "is consistent with the longstanding agency recognition of the availability of the mechanisms under 10 C.F.R. §§ 50.59 or 50.90 for obtaining authorization to construct additional onsite LLRW storage facilities." *Id.* at 13.

Even though the contentions in *Vogtle* and *Levy* are not identical, the holding in *Vogtle* contradicts the holding in LBP-10-20. For example, the *Vogtle* Board held that the details of a contingent LLRW facility are not necessary. *Id*. at 13-14. But the Board here seeks more details. The Applicant in its Summary Disposition Motion made an argument similar to the holding in *Vogtle* that the Commission's ruling only required the Applicant's "plans" for addressing additional storage of LLRW. Applicant's Motion for Summary Disposition at 8. The Board rejected this argument in holding that the Applicant's commitments are insufficient to meet section 52.79(a)(3), and that the Applicant's reading of the Commission's statement "substitutes the word 'or' for the term 'and' in the Commission's rulings." *Levy County*, LBP-10-20, 72 NRC _ (slip op. at 34) (Referencing the Commission's statement that "the required information is tied to the COL applicant's particular plans for compliance through design, operational organization *and* procedures.") (emphasis added) (Citing *Levy County*, CLI-10-02, 71 NRC _ (slip op. at 24). Further, while the Board highlighted differences in the text of the two contentions, contentions are also informed by their bases. Here, the Joint Intervenors sought many of the same details sought by the Intervenors in the *Vogtle* proceeding, yet the Board decision there was different from and inconsistent with the Board's decision here. *See* Declaration of Diane D'Arrigo in Support of Interveners' Amended Contention 8 on So-Called "Low-Level" Radioactive Waste Safety Issues (May 14, 2010) (D' Arrigo Declaration).[14]

Given that these two Board decisions establish different standards for what is required to meet section 52.79(a)(3), the Commission should take review of this issue under 10 C.F.R. § 2.341(b)(4)(iii). Section 2.341(b)(iii) states that the Commission may take review when a "substantial and important question of law, policy, or discretion has been raised." The

[14] Specifically, Ms. D' Arrigo states that the Applicant must specify for how long storage would be needed and which storage and minimization options would be pursued, asks whether storage will be in buildings, where the buildings will be located, whether they will be within the protected area; and asks what treatment options will be carried out onsite and where. D'Arrigo Declaration at ¶ 19-20.

Commission has stated that "review is particularly appropriate where the Board's ruling may have made a clear error as to a material fact, where the ruling turns on a legal conclusion that is without precedent or *conflicts with existing precedent*, or where the ruling raises an important policy issue that the Commission itself should consider." *Private Fuel Storage*, CLI-06-10, 61 NRC at 132 (internal citations omitted) (emphasis added). The question of what is necessary to meet section 52.79(a)(3) is an important policy and legal question. To ensure consistency among reviews, it is important to understand whether the Commission agrees with the interpretation of section 52.79(a)(3) by the *Vogtle* Board or with the interpretation by the *Levy* Board.[15]

B. The Board's Application of 10 C.F.R. § 50.59 is Erroneous

As support for its conclusions, the Board argues that "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." *Levy County*, LBP-10-20, 72 NRC _ (slip op. at 35) (emphasis omitted). The Board reasons that 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. *Id*. at 36 (emphasis omitted). This analysis is incorrect because the Applicant's LLRW plan does not "rely" on section 50.59 for its showing that the COLA meets all applicable requirements now. And the fact that an applicant may perform a 50.59 analysis in the future does not mean that the COLA is deficient.

Section 50.59 states that a COL licensee can make changes to the facility as described in the FSAR, without a license amendment, only if a change to the technical specifications is not

[15] The issue of what standard applies in reviewing LLRW plans is important to the Staff because the staff is finalizing several reviews of LLRW plans. The Vogtle and Summer COL Advanced Safety Evaluation Reports (AFSER) for Chapter 11 have already been issued and Chapter 11 of the Vogtle COL AFSER has been presented to the appropriate subcommittee of the Advisory Committee on Reactor Safeguards.

required and only if the change does not meet any of the criteria in section 50.59(c)(2). 10 C.F.R. § 50.59. If a change requires a change to the technical specifications or does not meet the criteria in section 50.59(c)(2), a licensee must apply for a license amendment pursuant to section 50.90. If a license amendment is requested under section 50.90, there is an opportunity for hearing. 10 C.F.R. § 50.91. If the licensee determines that an amendment is not necessary, it must maintain a record of the change it made to the facility, including "a written evaluation which provides the bases for the determination that the change, test or experiment does not require a license amendment." 10 C.F.R. § 50.59(d)(1). Every 24 months, licensees must submit to the NRC a "report containing a brief description of any changes, tests, and experiments, including a summary of the evaluation of each." 10 C.F.R. § 50.59(d)(2). For COL applicants, this report must be provided every six months during the period from the date of the COLA until the Commission makes its findings under section 52.103(g). 10 C.F.R. § 50.59(d)(2).

The Board incorrectly states that the Applicant "relies" on section 50.59. *Levy County*, LBP-10-20, 72 NRC _ (slip op. at 35). The Applicant is not relying on section 50.59, nor is the Staff relying on it to make its safety findings. The Applicant's plan meets section 52.79(a) now because of the information included in the DCD, the commitment to attempt to ship waste offsite should extended storage become necessary, the commitment to use waste minimization techniques, and finally, if more storage is necessary, the commitment to follow the guidance in NUREG-0800, Appendix 11.4-A to construct more storage. By referencing sections 50.59 and 50.90 the Applicant is stating that this is an accepted regulatory approach to implementing the guidance in NUREG-0800, Appendix 11.4-A. As stated in RIS-2008-32, the regulatory processes in section 50.59 and 50.90 have been successfully used at operating plants. Thus, the Staff is confident that the Applicant's plan with respect to building more storage capacity, if needed, can be successfully implemented.

Additionally, the fact that a safety analysis is required for future FSAR changes does not mean that the FSAR is currently insufficient. Licensees commonly make changes to their FSARs, and licensees analyze those changes under sections 50.59 and 50.90. This should be no different for COL holders. Just because the Applicant must perform a future 50.59 analysis if extra storage capacity for LLRW becomes necessary does not mean that its FSAR does not meet the requirements now. Currently, the FSAR states that the Applicant's preference is to ship the LLRW to an offsite disposal facility; if that is not possible, it will utilize waste minimization techniques; then, if needed, it will construct additional capacity in accordance with NUREG-0800, Appendix 11.4-A. Under the current FSAR, extra construction is the third choice, and it may not occur. As already discussed above, it is unnecessary for the Applicant to amend its FSAR now with a new safety analysis where an established regulatory process is set forth to provide for additional storage capacity if it were to become necessary. Nothing further is necessary in order for the Staff to make its safety finding now. For these reasons, the Board's holding that "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" is erroneous. *Levy County*, LBP-10-20, 72 NRC _ (slip op. at 35) (emphasis omitted)

CONCLUSION

Because the decision in LBP-10-20 makes a necessary legal conclusion that is contrary to established law, and because it raises an important question of law and policy, the Commission should take review of and reverse LBP-10-20.

Respectfully submitted,

/Signed (electronically) by/
Jody C. Martin
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
(301) 415-1569
Jody.Martin@nrc.gov

Dated at Rockville, Maryland
This 10th day of December, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC Staff Petition for Review of LBP-10-20" have been served on the following persons by Electronic Information Exchange on this 10th day of December, 2010:

Administrative Judge
Alex S. Karlin, Chair
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Alex.Karlin@nrc.gov

Administrative Judge
Anthony J. Baratta
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Anthony.Baratta@nrc.gov

Administrative Judge
William M. Murphy
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: William.Murphy@nrc.gov

Office of Commission Appellate Adjudication
Mail Stop O-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail:OCAAmail@nrc.gov

Office of the Secretary
ATTN: Docketing and Service
Mail Stop: O-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: HEARINGDOCKET@nrc.gov

Ann Hove
Joshua Kirstein
Law Clerks
Atomic Safety and Licensing Board
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Ann.Hove@nrc.gov
josh.kirstein@nrc.gov

Cara Campbell
The Ecology Party of Florida
641 SW 6th Ave
Ft. Lauderdale, FL 33315
E-Mail: levynuke@ecologyparty.org

Michael Canney
The Green Party of Florida
Alachua County Office
PO Box 12416
Gainesville, FL 32604
E-mail: alachuagreen@windstream.net

Michael Mariotte
Executive Director
Nuclear Information & Resource Service
6930 Carroll Ave. Suite 340
Takoma Park, MD 20912
Email: nirsnet@nirs.org

Mary Olson
NIRS Southeast
PO Box 7586
Asheville, NC 28802
E-mail: maryo@nirs.org

John H. O'Neill, Esq.
Michael G. Lepre, Esq.
Robert B. Haemer, Esq.
Jason P. Parker, Esq.
Stefanie N. George, Esq.
Counsel for Progress Energy Florida, Inc.
Pillsbury, Winthrop, Shaw, Pittman, LLP
2300 N. Street, NW
Washington, DC 20037-1122
E-mail: john.O'Neill@pillsburylaw.com
michael.lepre@pillsburylaw.com
robert.haemer@pillsburylaw.com
jason.parker@pillsburylaw.com
stefanie.george@pillsburylaw.com

/Signed (electronically) by/
Jody C. Martin
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
(301) 415-1569
Jody.Martin@nrc.gov