December 10, 2010

UNITED STATED OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)		
	)	Docket Nos.	52-029-COL
Progress Energy Florida, Inc.	)		52-030-COL
	)		
(Combined License Application for	)		
Levy County Nuclear Plant, Units 1 and 2)	)	ASLBP No.	09-879-04-COL

PROGRESS ANSWER OPPOSING JOINT INTERVENORS' AMENDED CONTENTION 4

I. Introduction

Progress Energy Florida, Inc. ("Progress") hereby opposes "An Amended Contention 4," submitted by Nuclear Information and Resource Service, the Ecology Party of Florida, and the Green Party of Florida (collectively, "Joint Intervenors"), in part, on November 15, 2010.[1] Rather than amending Contention 4 to challenge any new data or conclusions in the Draft Environmental Impact Statement, NUREG-1941 ("DEIS"), Joint Intervenors' Amended Contention 4 simply reiterates their challenges to Progress's Environmental Report ("ER"), by substituting "DEIS" for "ER" in the text of the original Contention 4 as admitted by the Board.[2] Amended Contention 4 is not admissible, *inter alia*, because the Nuclear Regulatory Commission ("NRC") Staff has thoroughly disclosed the environmental impacts of the Levy County Nuclear Power Plant Units 1 and 2 ("Levy") in the DEIS, and the environmental impacts the Joint Intervenors allege are either missing or not adequately addressed in the DEIS are not reasonably foreseeable.

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[1] Progress is treating this pleading as a motion by Joint Intervenors to amend Contention 4 ("JI Motion to Amend C4"). While the pleading itself was filed on November 15, 2010, most of the attachments to Dr. Bacchus's affidavit (Attachment 2 to the JI Motion to Amend C4) were not served until November 19, 2010, and Attachment 13 to the JI Motion to Amend C4 has never been served.

[2] See JI Motion to Amend C4 at 1-2 and Attachment A hereto, which is a red-lined version of Contention 4 showing the changes and tracking the similarities between Contention 4 as admitted by the Board and Amended Contention 4.

Joint Intervenors allege, without any support, that the NRC's independent review of a recent, relevant State of Florida siting certification, and in particular the Florida Department of Environmental Protection's Conditions of Certification ("COC"), must be disregarded. This essential challenge by the Joint Intervenors is contrary to the Commission on Environmental Quality ("CEQ") regulations implemented by the NRC to avoid duplication between Federal and local environmental reviews. In fact, compliance with 10 C.F.R. Part 51 and the CEQ regulations implementing the National Environmental Policy Act ("NEPA") encourage the NRC Staff to rely on existing environmental assessments taken by competent and responsible State authority in order to avoid the wasteful duplication of effort and expense.[3] This policy would seem to apply *a fortiori* when both the Federal and State agencies are reviewing the same ER.

Amended Contention 4, which alleges that the DEIS fails to adequately address and inappropriately characterizes as SMALL, certain direct, indirect, and cumulative impacts on the hydroecology, onsite and offsite, of constructing and operating the proposed LNP facility, is principally supported by legal conclusions masquerading as expert opinion and legal conclusions couched as alleged facts. After discounting the alleged facts or expert opinions that (1) this Board has already ruled implausible, (2) are legal conclusions not entitled to be assumed true, or (3) impermissibly assume that Progress will violate its permits or license, the meager remains of JI Motion to Amend C4 fail to support a genuine dispute on a material issue of law or fact. Alternatively, even if assumed true, Joint Intervenors' "alleged facts" and "expert opinions" do not plead a plausible claim that the NRC's independent review of the COC has overlooked any reasonably foreseeable LARGE environmental impacts arising from the proposed Federal action. The NRC can reasonably conclude that compliance

[3] See Philadelphia Electric Co., (Limerick Generating Station, Units 1 and 2), DD-84-13, 19 NRC 1137, 1147-48 (1984); Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-80-2, 11 NRC 44, 70 (1980); Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), LBP-78-28, 8 NRC 281, 282 (1978); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 527 (1977); 40 C.F.R. § 1506.2(b) and (c).

with the COC will preclude any foreseeable noticeable impact on any aspect of an environmental resource significant enough to destabilize that resource.

II. Background

This proceeding involves the Levy Combined Construction Permit and Operating License Application ("COLA"), submitted by Progress on July 28, 2008. Joint Intervenors filed their Petition to Intervene and Request for Hearing ("Petition") on February 6, 2009, alleging several contentions. The Atomic Safety and Licensing Board ("Board") held oral argument in this proceeding on April 20 and 21, 2009 and, on July 8, 2009, the Board found portions and subparts of three contentions to be admissible, including Contention 4. Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2) LBP-09-10, 70 NRC 51 (2009) ("LBP-09-10").

On July 20, 2009, Progress appealed LBP-09-10. With regard to Contention 4, the Commission stated that, as clarified by the Board, Contention 4 warranted further proceedings only to the extent the NRC relies on the analysis in the ER. The Commission stated:

> The Board's observations concerning Part 51 are correct, and clarify the basis that was presented by Petitioners. 10 C.F.R. Part 51 implements NEPA Section 102(2), consistent with NRC's domestic licensing and related regulatory authority. The agency may comply with NEPA without requiring that the applicant submit an environmental report, but NEPA and Council on Environmental Quality (CEQ) regulations permit agencies to request information from an applicant for a license or permit that will require a NEPA analysis. In order to facilitate our compliance with NEPA, we require a combined license applicant to submit a complete environmental report with its application, which is essentially the applicant's proposal for the draft environmental impact statement. … [W]e do not find that the Board erred as a matter of law by citing 10 C.F.R. Part 51 as a basis for Contention 4. Our rules require that, to the extent an environmental issue is raised in the applicant's ER, a petitioner must file contentions on that document. Although the ultimate burden with respect to NEPA lies with the NRC Staff, our policy with respect to the identification of issues for hearing has long been that such issues must be raised as early as possible.

Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-02, 72 NRC __ (slip op. at 8-9) (Jan. 7, 2010) ("CLI-10-02") (footnotes omitted).

On August 14, 2009, the NRC Staff filed a Joint Motion describing the agreement of the Parties on several scheduling issues, including agreement that contentions based on new information in the DEIS would be deemed timely if filed within sixty days of when the information first becomes available. Joint

Motion Regarding Enumerated Matters in Initial Scheduling Conference Order (Aug. 14, 2009) at 2. After the Board held a scheduling conference in this proceeding on August 18, 2009, the Board issued its Initial Scheduling Order.[4] The ISO states that a "motion and proposed new contention. . . shall be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if it is filed within thirty (30) days of the date when the new and material information on which it is based first becomes available." ISO at 647. At the request of the Joint Intervenors and NRC Staff, and without objection from Progress, the Board clarified that for new information in the DEIS, the filing deadline was sixty (not thirty) days. Licensing Board Order (Granting Motion for Clarification) (Sept. 3, 2009) (unpublished).

As part of the Site Certification Application ("SCA") pursuant to the Florida Power Plant Siting Act,[5] Progress submitted the ER to the State of Florida on June 2, 2008. After extensive public hearings involving 22 parties and one intervenor (Southern Alliance for Clean Energy) held between February 23 and March 12, 2009, the hearing officer issued his initial Recommended Order on Certification ("RO") on May 15, 2009. On August 26, 2009, the Governor and Cabinet of the State of Florida, sitting as a siting board, issued the Final Order on Site Certification ("Florida Final SC Order") for Levy. The Florida Final SC Order approved and enclosed the RO and associated COC. The Florida Department of Environmental Protection ("FDEP") issued final orders modifying the COC on January 12, 2010 and February 23, 2010.[6]

On August 5, 2010, the NRC Staff published the Levy DEIS, NUREG-1941 (Aug. 2010).

On September 27, 2010, Joint Intervenors filed a motion requesting an additional ninety days for the timely filing of new contentions on hydroecology. On September 29, 2010, the Board Order extended

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[4] Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-22, 70 NRC 640 (2009) ("ISO").

[5] FLA. STAT. §§ 403.501-403.518.

[6] The Florida Final SC Order was previously submitted to this Board as Attachment 4 to the Progress Motion to Compel (Nov. 30, 2009). The amended COC was submitted both as Attachment D to the Progress Motion for Summary Disposition of Contention 4 With Regard to Salt Drift and Passive Dewatering (Oct. 4, 2010) and as Attachment 3 to the JI Motion to Amend C4.

the October 4, 2010 deadline by forty days for "good cause shown." Licensing Board Order (Granting Motion for Extension of Time) (Sept. 29, 2010) (unpublished).[7]

On November 15, 2010, Joint Intervenors partially filed the JI Motion to Amend C4.

III. Standard For Contentions

A. Timeliness

Intervenors may file new or amended contentions with leave of the presiding officer. 10 C.F.R. § 2.309(f)(2). The Board granted Joint Intervenors leave to file new or amended contentions based on the DEIS until November 15, 2010. Licensing Board Order (Granting Motion for Extension of Time) (Sept. 29, 2010) (unpublished).[8]

B. Admissibility

A proposed contention must also satisfy, without exception, each of the admissibility criteria in 10 C.F.R. § 2.309(f)(1)(i)-(vii). Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 362-63 (1993). 10 C.F.R. § 2.309(f)(1) requires that a petition:

> (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
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> (ii) Provide a brief explanation of the basis for the contention;
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> (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
>
> (iv) Demonstrate that the issue raised in connection is material to the findings the NRC must make to support the action that is involved in the proceeding;
>
> (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and
>
> (vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety

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[7] The Order does not explicitly weigh whether an extension beyond the deadline for public comment on the DEIS can be granted solely for good cause if Joint Intervenors have not addressed the other timeliness factors required by 10 C.F.R. § 2.309(c)(2). See Progress Answer Opposing Extension of Time to File Amended or New Contentions on Hydroecology (Sept. 28, 2010) at 3.

[8] JI Motion to Amend C4 is non-timely without justification because it was not completely filed by the November 15, 2010 deadline for filing new or amended contentions based on the DEIS.

report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

10 C.F.R. § 2.309(f)(1)(i)-(vi).

Progress Energy's Answer Opposing Petition for Intervention and Request for Hearing by [Joint Intervenors] (Mar. 3, 2009) provides a fuller discussion of these standards. See Progress's Answer at 7-14. This pleading will focus on whether the Joint Intervenors' "alleged facts" or "expert opinion" support a genuine dispute on a material issue required by 10 C.F.R. § 2.309(f)(1)(iv)-(vi).

Under NRC regulations, a petitioner is obligated "to provide the [technical] analyses and expert opinion" or other information "showing why its bases support its contention." Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305, vacated in part and remanded on other grounds, CLI-95-10, 42 NRC 1, aff'd in part, CLI-95-12, 42 NRC 111 (1995). Where a petitioner has failed to do so, "the [Licensing] Board may not make factual inferences on [the] petitioner's behalf." Id., citing Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149 (1991).

Further, admissible contentions "must explain, with specificity, particular safety or legal reasons requiring rejection of the contested [application]." Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 359-60 (2001), reconsideration denied, CLI-02-1, 55 NRC 1 (2002). In particular, this explanation must demonstrate that the contention is "material" to the Commission findings and that a genuine dispute about a material issue of law or fact exists. 10 C.F.R. § 2.309(f)(1)(iv), (vi). The Commission has defined a "material" issue as one where "resolution of the dispute *would make a difference in the outcome* of the licensing proceeding." 54 Fed. Reg. 33,168, 33,172 (Aug. 11, 1989) (emphasis added).

The pleading standards governing the admissibility of contentions are the result of a 1989 amendment to 10 C.F.R. § 2.714, now § 2.309, which was intended "to raise the threshold for the admission of contentions." 54 Fed. Reg. 33,168; see also Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999); Palo Verde, CLI-91-12, 34 NRC at 155-56. The

Commission has stated that the "contention rule is strict by design," having been "toughened . . . in 1989 because in prior years 'licensing boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation.'" Millstone, CLI-01-24, 54 NRC at 358 (citation omitted).

The Commission has explained that this "strict contention rule" serves multiple purposes, which include putting other parties on notice of the specific grievances being raised and assuring that full adjudicatory hearings are triggered only by those able to proffer at least some minimal factual and legal foundation in support of their contentions. Oconee, CLI-99-11, 49 NRC at 334. By raising the threshold for admission of contentions, the NRC intended to "obviate serious hearing delays caused in the past by poorly defined or unsupported contentions." Id. The Commission reiterated its position by incorporating the heightened threshold standard into the new 10 C.F.R. Part 2 rules; "[t]he threshold standard is necessary to ensure that hearings cover only genuine and pertinent issues of concern and that issues are framed and supported concisely enough at the outset to ensure that the proceedings are effective and focused on real, concrete issues." 69 Fed. Reg. 2,182, 2,189-90 (Jan. 14, 2004). "Mere 'notice pleading' does not suffice." AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 (2006) (footnote omitted).

When interpreting the Part 2 rules of practice, Boards typically look to the courts' interpretations of the Federal Rules of Civil Procedure for guidance. See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 756 n.48 (1977); Duke Energy Corp., (Catawba Nuclear Station, Units 1 and 2), LBP-05-10, 61 NRC 241, 251 (2005); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-17, 39 NRC 359, 365 (1994). Federal Rule 8 serves the same purpose as the pleading standards of Part 2. Rule 8 ensures the non-moving party is placed on notice of the issues in dispute and ensures that the costs of further proceedings are only invoked where there is an adequate foundation. See Ashcroft v. Iqbal, 129 S.Ct. 1937, 1940 (2009). While the Federal Rules allow "notice pleading," a lower threshold than the

NRC rules of practice,[9] the court decisions provide a framework that can be looked to for guidance when interpreting whether alleged facts in a pleading are sufficient to make the asserted claim plausible.

Recent Supreme Court case law dictates that alleged facts cannot be solely legal conclusions couched as alleged facts. Iqbal, 129 S.Ct. at 1949 (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2006)). In evaluating whether sufficient facts have been pled, the courts rely on their experience. Iqbal, 129 S.Ct. at 1950. Consequently, alleged facts that are ambiguous and are more likely explained by benign inferences are not given favorable inferences. Twombly, 55 U.S. at 586 ("the plaintiff 'must show that the inference…is reasonable in light of the competing inferences"). The alleged facts must be factual and not conclusory. DM Research, Inc. v. Coll. of Am. Pathologists, 170 F.3d 53, 55 (1999) ("Conclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition.") To nudge a claim across the line from conceivable to plausible, the facts alleged must cross the lines from conclusory to factual and from factually neutral to factually suggestive. Twombly, 550 U.S. at 557 n.5.

Legal conclusions couched as alleged facts do not supplant the need for alleged facts to raise a plausible claim. Analogously, expert opinion does not supplant the Board's role to make legal conclusions. Where purported expert opinion asserts legal conclusions or opinions that go to the ultimate legal question, the Board does not rely on such conclusory opinions, even from a purported expert, masquerading as alleged facts. Licensing Board Memorandum and Order (Ruling on Joint Intervenors Motion to File and Admit New Contention 8A) (Aug. 9, 2010) at 17 n.21 (unpublished).

As set forth below, the bases on which Joint Intervenors rely in Amended Contention 4 to challenge the adequacy of the disclosure of environmental impacts in the DEIS, do not support a genuine dispute on a material issue as required by 10 C.F.R. § 2.309(f)(1)(iv)-(vi).

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[9] An explanation of the difference lies, in part, in the additional procedural mechanisms provided in the Federal Rules that are not in the NRC Rules of Practice - such as motions for a more definite statement in Fed. R. Civ. P. 12(e). See generally, Twombly, 550 U.S. at 595 n.13 (Stevens, J., dissent).

IV. Amended Contention 4 Should Be Dismissed

A proper evaluation of a submitted contention focuses on what is stated in the pleading. While the contention is informed by its bases, attaching a purported expert opinion with multiple attachments cannot swallow or supplant the pleading itself. The scope of a contention is derived from the words of the contention itself. Licensing Board Memorandum and Order (Ruling on Joint Intervenors Motion to File and Admit New Contention 8A) (Aug. 9, 2010) at 17 n.21 (unpublished). That principle applies with even greater force where, as here, the JI Motion to Amend C4 cites the attached affidavit of Dr. Bacchus and her opinion for a limited challenge to the content of the COC and does not otherwise rely on Dr. Bacchus, except generally.[10]

A. The NRC Need Not Perform a Duplicate Environmental Review, But Rather May Independently Review The Impacts Expected From Compliance With The COC

Based on an unsupported and legally invalid assertion that the NRC must duplicate rather than independently review a State environmental analysis, Joint Intervenors simply dismiss the NRC analysis in the DEIS. The Joint Intervenors assert that the "NRC Staff sidesteps [its NEPA] obligations" by relying on the COC. JI Motion to Amend C4 at 3. In fact, the Joint Intervenors' own quotations from the

[10] Joint Intervenors rely on a November 15, 2010 affidavit of Dr. Sydney Bacchus, including numerous attachments and also refer to the February 6, 2009 Affidavit of Dr. Bacchus, which was filed in support of Contention 4. The November 15, 2010 Bacchus Affidavit was filed in support of four other pleadings as well as the JI Motion to Amend C4. See generally, Motion for Order Compelling Discovery of PEF Groundwater Model Digital Files (Sept. 27, 2010); Intervener's Motion for Leave to File a New Contention and Contention 12 (Nov. 15, 2010); Intervenors' Response to Progress Energy's Motion for Summary Disposition of Contention 4 (Environmental Impacts of Dewatering and Salt Drift) with Regard to Salt Drift and Passive Dewatering (Nov. 15, 2010); and Co-interveners' Answer to Progress Energy Florida Motion to Dismiss as Moot the Aspects of Contention 4 Related to Active Dewatering During Levy County Units 1 & 2 Nuclear Operations (Nov. 15, 2010). General citation to the November 15, 2010 Bacchus Affidavit and other attachments does not meet the requirement to provide support with specificity. Baltimore Gas and Electric Co., (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 348 (1998). Commission precedent is clear that Petitioners are required to identify the evidence on which they rely with specific references. Joint Intervenors have failed to do so, and neither Progress nor the Board is required to sift through extensive affidavits and referenced documents to search for a needle of support that may be in a haystack. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-03, 29 NRC at 234 (1989). This is even more true where the November 15, 2010 Bacchus Affidavit addresses various issues in four different pleadings and the February 9, 2009 Bacchus Affidavit does not address the DEIS at all. Thus, if the purported evidence is not specifically cited, neither the Applicant nor the Board need look any further.

DEIS identify the NRC's independent review of the conclusions of the COC.[11] While it is likely that Joint Intervenors do not recognize that the "review team" is the NRC Staff, its contractor staff, and cooperating agency staff (DEIS at iii), even if given the benefit of the doubt, the gravamen of the Joint Intervenors' challenge is that the NRC reviewed rather than independently duplicated the analysis performed by Florida described in the Florida Final SC Order. CEQ regulations, NRC regulations, and NRC case law expect that the NRC will rely on competent local agency reviews. 10 C.F.R. § 51.70(c); see also Black Fox Station, LBP-78-28, 8 NRC at 282 (1978); Seabrook, CLI-77-8, 5 NRC at 527 (1977); Limerick, DD-84-13, 19 NRC at 1147-48.

Amended Contention 4 is not materially different from Contention 4 as admitted. Joint Intervenors admit this by stating that "Contention-4 (C-4) remains much as it was published when admitted …on July 8, 2009." JI Motion to Amend C4 at 2. In fact, Joint Intervenors introduce no new or materially different information and implicitly assert there is no significant change from the evaluation in the ER to that in DEIS. Such an assertion ignores the independent review team's assessment of the COC. Joint Intervenors ignore, at their peril, their ironclad obligation to review the issued documents. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982), vacated in part on other grounds, CLI-83-19, 17 NRC 1041 (1983).

Joint Intervenors assert that NRC Staff reliance on the COC is improper, stating that the "NRC staff relies upon PEF compliance with the Conditions of Certification instead of making its own determination that the dewatering impacts of construction would be SMALL." In fact, the DEIS section quoted by Joint Intervenors describes the review team's independent assessment. JI Motion to Amend C4 at 3. Joint Intervenors assert that the DEIS is deficient; however, the DEIS must be reviewed not only for what Joint Intervenors assert but also for what the document can be interpreted to fairly state. See e.g. Yankee Atomic Electric Co. (Yankee Nuclear Power Station) LBP-96-02, 43 NRC 61, 90 & n.30 (1996).

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[11] "Based on the information provided by PEF and the *review team's independent evaluation*, the review team concludes that the water-use impacts of construction and preconstruction activities would be SMALL, and mitigation beyond the State of Florida's Conditions of Certification (FDEP 2010a) would not be warranted." DEIS at 4-24; Joint Motion to Amend C4 at 3 (emphasis added).

In context, the DEIS does not blindly adopt the COC as alleged by the Joint Intervenors. The example described by Joint Intervenors relating to groundwater modeling makes that very point. See JI Motion to Amend C4 at 4. The Joint Intervenors find the modeling evaluation "deeply perplexing", and state the modeling evaluation provides no basis for ensuring no adverse impacts on wetlands. JI Motion to Amend C4 at 4-5. In fact, the DEIS explains the critical review of COC by the review team and concludes from the limited recalibration of groundwater modeling that model results are not conclusive. DEIS at 2-28 to 2-29, 5-5, 5-23 to 5-24. In that context, the DEIS finds that evaluating the impacts of compliance with the requirements of the COC more compelling as the basis for disclosing the impacts on wetlands. DEIS at 5-26 to 5-27. In the JI Motion to Amend C4, Joint Intervenors concede that the modeling is inconclusive. JI Motion to Amend C4 at 11.

Joint Intervenors provide no support for asserting that the NRC failed to independently and critically review the COC. Joint Intervenors instead proffer their own critique of the COC. JI Motion to Amend C4 at 5. The COC and supporting analysis have been available since August 26, 2009. Florida Final SC Order. Joint Intervenors averred to the Board that they had no such analysis such as a critique of the COC. Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-30, 70 NRC ___ (slip op. at 5) (Dec. 29, 2009). Now, eleven months later, with no intervening disclosure, Joint Intervenors claim to rely on a critique by Dr. Bacchus of the COC. Such a critique should be given no weight. See 10 C.F.R. § 2.336(e)(1).[12] However, even if this critique by Dr. Bacchus were to be considered by the Board, it provides no support for the allegation that NRC Staff has sidestepped its obligation to faithfully determine and disclose the effects of Levy. For example, Joint Intervenors assert that the DEIS relies solely on an Environmental Monitoring Plan ("EMP"). JI Motion to Amend C4 at 6. In fact, the DEIS identifies numerous aspects of the COC that support the NRC's assessment, of which

[12] The lead intervenor, NIRS, is a long-time participant in NRC proceedings. Their failure to raise any concerns regarding the COC many months ago is inconsistent with the obligations owed the Board by a party. 10 C.F.R. § 2.314(a).

the EMP is but one aspect. DEIS at 5-27. When read in its entirety, the COC does not simply rely on the EMP. Other provisions in the COC include:

- Aquifer Testing and Groundwater Impact Analysis: Drawdown and constant-rate tests to be performed on the production wells; implementation of an aquifer performance test plan which must be submitted to the District at least 6 months prior to the start of construction of the first production well to support plant operations and completed at least 5 years prior to initial use of the first production wells in excess of 100,000 gallons per day for production purposes. See COC at 35.
- Water quality sampling. See COC at 39-42.
- Listed Species Conditions specifically surveying and permitting. COC at 45-50.

Even without the other provisions of the COC, Joint Intervenors' untimely critique offers no support for their allegation that the DEIS's reliance on the COCs is in any way deficient or contrary to 10 C.F.R. Part 51. Joint Intervenors allege that "[m]onitoring does not preclude disastrous effects, it might (because there is no EMP, so no way to know how it will be set up, administered, and for what effects it will monitor) simply identify the problems, or, depending on its requirements, it might not." JI Motion to Amend C4 at 7. In contrast, the DEIS identifies the criteria that will be included in the EMP. DEIS at 5-27. In order to accept the bald assertion that monitoring in accordance with the criteria described in the DEIS and required by the COC would not "preclude disastrous effects," that "alleged fact" would have to be at the end of a chain of assumptions that are not plausible, let alone reasonably foreseeable. Specifically:

- First, it must be assumed that COC requirements prior to operation, like aquifer testing when the wells are drilled, fail to predict adverse effects;
- Second, it must be assumed that these unpredicted adverse effects occur;
- Third, it must be assumed that the adverse effects occur too rapidly to be detected by monitoring; and
- Fourth, it must be assumed that these rapidly on-setting adverse effects cannot be reversed when they noticeably alter some aspect of an environmental resource.

Making this implausible chain of assumptions would require the Board to infer facts on behalf of the Joint Intervenors contrary to NRC precedent. See Arizona Public Service Co. (Palo Verde Nuclear Generating

Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991); Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001) ("A licensing board is not free to supply missing information or draw factual inferences on the petitioner's behalf."), citing Palo Verde, CLI-91-12, 34 NRC at 155-56; PPL Susquehanna LLC (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 23 (2007).

The NRC review of the COC and acceptance of its conclusions based on its critical evaluation is appropriate. Joint Intervenors untimely critique of the COC is wholly inappropriate and provides no support for a genuine dispute on a material issue.

B. Amended Contention 4 Does Not Support A Genuine Dispute On A Material Issue

As discussed above, the only new challenge found in Amended Contention 4 is based on an incorrect legal interpretation of the relevant NEPA regulations. The rest of Amended Contention 4, when shorn of the legal conclusions masquerading as expert opinion and legal conclusions couched as alleged facts, is inadmissible. Amended Contention 4 is inadmissible because it does not support a genuine dispute on a material issue of law or fact and should be dismissed. After discounting the alleged facts or expert opinion that (1) already have been ruled by this Board as not plausible, (2) are legal conclusions not entitled to be assumed true, or (3) impermissibly assume that Progress will violate its permits or license, what little remains in the JI Motion to Amend C4 fails to support a genuine dispute on a material issue.

Joint Intervenors state that "[t]he heart of Contention 4 is that damages from individual causes will be compounded because of the interaction of the myriad stresses building and running the Levy plant." JI Motion to Amend C4 at 19. The magnitude of Joint Intervenors' allegation is extreme and facially implausible; they allege that groundwater use at Levy, combined with stresses from salt drift, will cause the "ecosystem to collapse." JI Motion to Amend C4 at 9. Such a compounding is facially implausible. If compounding groundwater use and salt drift were to have LARGE impacts from construction and operation of Levy, these noticeable changes on an aspect of the environmental resource

would have already been detected from existing groundwater use and salt drift. The groundwater use projected for Levy is a small fraction of annual rainfall, is a small fraction increase over current regional uses, and a less than 50% increase in local area groundwater uses. See DEIS at 7-14 and Figure 5-2. Joint Intervenors allege that salt drift from Levy will be comparable to that from a hurricane or other natural phenomena. JI Motion to Amend C4 at 19 and Attachment 13 compare with Attachment B.[13] In fact, salt drift impacts are limited to the local area of the cooling towers; therefore, region-wide impacts are not foreseeable. DEIS at 7-23 to 7-24.

Even if the alleged devastation were not facially implausible, the few alleged facts and expert opinions that are factually suggestive of adverse impacts do not plead a plausible claim that the NRC's independent review of the COC has overlooked any reasonable foreseeable environmental devastation arising from the proposed Federal action. The NRC can reasonably conclude that compliance with the COC will preclude any foreseeable noticeable impact on any aspect of an environmental resource significant enough to destabilize that resource. Joint Intervenors' conclusory allegations are opinions on the ultimate legal issue and are not entitled to be assumed true in determining whether it is plausible the alleged environmental impacts are reasonably foreseeable.[14]

1. Alleged Facts Cannot Include Allegations Already Determined Not To Be Plausible By This Board

The Joint Intervenors bring allegations about matters that have already been resolved by this Board. These matters are by definition not material. Specifically, Joint Intervenors raise issues related to excavation of the nuclear island (JI Motion to Amend C4 at 15) and impacts from sourcing fill or aggregate from a separate project; a proposed Tarmac Mine (JI Motion to Amend C4 at 12). The Board concluded that alleged impacts from these matters are too speculative to be part of an admissible

[13] The FDEP letter provided in Attachment B was included in Progress's initial disclosure in this proceeding. The reports cited in Attachment B, and (presumably) the missing Attachment 13 to the JI Motion to Amend C4, can be found at ADAMS Accession No. ML092470545.

[14] Of course, the asserted devastation flies in the face of decades of experience at nuclear plants and other large electric generating plants, including Progress Energy's Crystal River Plant, as described in Progress Motion for Summary Disposition of Aspects of Contention 4 – Salt Drift and Passive Dewatering, dated September 30, 2010.

contention. See LBP-09-10 at 49. Nothing in the DEIS has changed - nor is any such change cited by Joint Intervenors - to warrant reconsidering the Board's decision.

2. Alleged Facts Cannot Include Conclusory Opinions On the Ultimate Legal Issue

The Joint Intervenors make legal conclusions couched as alleged facts that are not entitled to be assumed true. Because the Board should not infer facts on behalf of the Joint Intervenors when determining the adequacy of the pleading, it is inappropriate to assume as true those alleged facts that are conclusory or factually neutral.

a. Joint Intervenors Make Numerous Legal Conclusions Couched As Alleged Fact

Joint Intervenors, and their expert Dr. Bacchus, attempt to couch the following legal conclusions as alleged facts:

(1) Decreased water levels in a water-dependent ecosystem are not a SMALL impact. JI Motion to Amend C4 at 6. This statement is a legal conclusion that some aspect of the environmental resource will be noticeably altered couched as an alleged fact.

(2) Lateral saltwater intrusion into the aquifer is not a SMALL impact. JI Motion to Amend C4 at 6. This statement is a legal conclusion that some aspect of the environmental resource will be noticeably altered couched as an alleged fact.

(3) The direct, indirect, and cumulative impacts of all aspects of dewatering and deposition of salt will be LARGE. JI Motion to Amend C4 at 9. This statement is a legal conclusion that some aspect of the environmental resource will be noticeably altered couched as an alleged fact.

(4) Overall environmental impacts, including those that are irreversible and irretrievable, will be LARGE. JI Motion to Amend C4 at 9. This statement is a legal conclusion that some aspect of the environmental resource will be noticeably altered couched as an alleged fact.

(5) There will be evaporative dewatering during drought periods that will cause LARGE impacts to surrounding wetlands. JI Motion to Amend C4 at 16. This statement is a legal conclusion that some aspect of the environmental resource will be noticeably altered couched as an alleged fact.

(6) It would be a LARGE impact to the ecosystem at Levy if the vegetative communities and the species they support were to change in response to salt drift and other stressors. JI Motion to Amend C4 at 18. This statement is a legal conclusion that some aspect of the environmental resource will be noticeably altered couched as an alleged fact.

(7) The hazards of construction and operation of the proposed reactors to the hydro-ecology of Levy and Citrus County area is not SMALL. JI Motion to Amend C4 at 20. This statement is a legal conclusion that some aspect of the environmental resource will be noticeably altered couched as an alleged fact.

(8) The direct, indirect and cumulative impact to the hydroecology of the area from dewatering, salt drift and changes in nutrient concentrations resulting directly and indirectly from these factors would be LARGE. JI Motion to Amend C4 at 21. This statement is a legal conclusion that some aspect of the environmental resource will be noticeably altered couched as an alleged fact.

b. Alleged Facts That Are Factually Neutral Cannot Be Considered

(1) Joint Intervenors' demand for certainty in environmental analysis does not raise a material dispute. For example:

- There has been no determination of what the minimum recharge rate is or where maximum aquifer recharge areas occur. JI Motion to Amend C4 at 10.

- The potential that freshwater input into the Withlacoochee Bay exists and will be reduced has not been assessed. JI Motion to Amend C4 at 14.

- Dr. Bacchus asserts that the constituents of salt drift include not only salt, but also unknown constituents that may be inert or more hazardous than salt. Bacchus Aff. at 16, ¶¶ 5-7.

All of these examples are factually neutral because the unknowns or uncertainties may be benign or harmful. Without inferring facts not alleged, harm cannot be presumed. In contrast, the DEIS provides reasonable bounding assumptions in order to make environmental analyses. Alleged facts claiming uncertainty, even if assumed to be true, do not render the DEIS suspect, absent an allegation that the unknown information is adverse and large enough in magnitude to provide the needed support for a genuine dispute on a material issue. Allegations of uncertainty are factually neutral. Furthermore, given the conservatism evident throughout the DEIS analysis, it is more likely that the proper inference is that additional review would show that the effect is more likely benign. Because the Joint Intervenors' assertions of uncertainty are factually neutral, they are not entitled to be presumed true. Consequently, none of the Joint Intervenors' assertions support a plausible claim that the DEIS is inadequate.

(2) Dr. Bacchus alleges that attempts by Federal, state, and private control-burn wildfire experts have been unable to reduce fuel loads in upland and wetland areas on and around the LNP site due to hydroperiod alterations. Bacchus Aff. at 14, ¶ 16b. If the alleged fact is assumed to be true, it does not support any increase in wildfires (just no reduction in fuel load). Without assuming more facts, the relationship between hydroperiod change, fuel load, and wild fire frequency must be inferred.

(3) Dr. Bacchus alleges that periodic occurrences of high rainfall would flush accumulated salt and other airborne contaminants from the proposed cooling towers into the soil and shallow aquifer system. Bacchus Aff. at 23, ¶ 25. This alleged fact is factually neutral because the possibility that "flushing" results is reasonably assumed to be benign. The DEIS analysis states that an almost forty-fold increase in concentration is needed before soil salinity is materially impacted (DEIS at 5-22 to 5-23);

therefore, flushing with higher rainfall than the DEIS assumes is more likely to reduce soil salinity than support a genuine dispute on a material issue.

3. Alleged Facts Cannot Include Assumptions That Progress Will Violate Its License or Permits

Joint Intervenors impermissibly assume that Progress will violate its permits or license. Absent a specific basis, it is not reasonable to presume that the COLA Applicant will not comply with its license or permits.

a. JI Motion to Amend C4 alleges that a drawdown of two feet which is not fluctuating due to natural variation in water flows is sufficient to stop spring flow. JI Motion to Amend C4 at 4. The alleged fact is factually neutral unless a further unstated alleged fact is inferred that assumes that the average decrease is not fluctuating. A drawdown as postulated in the alleged fact would be inconsistent with the COC. COC at 44-45. Without a more specific allegation, assuming that Progress will not comply with its permit is impermissible.

b. JI Motion to Amend C4 alleges that there will be no plan for an alternative water supply when needed. JI Motion to Amend C4 at 7. The COC requires that alternate water supply planning be initiated five years before operations start and only be deferred if adverse impacts are neither predicted nor detected. COC at 34-35. Therefore, this alleged fact assumes that Progress will not comply with its permit.

c. JI Motion to Amend C4 alleges that drawdown of up to 5.8 mgd will severely deplete the surficial aquifer and the underlying Floridan aquifer. JI Motion to Amend C4 at 9. The COC limits the average annual well use to well below this level. COC at 36, 44-45. Therefore, this alleged fact assumes that Progress will not comply with its permit.

4. The Remaining Alleged Facts, Even If Assumed To Be True, Are Not Material

What few alleged facts that remain in the JI Motion to Amend C4 fail to support a genuine dispute on a material issue of law or fact.

a. JI Motion to Amend C4 alleges the DEIS fails to accurately estimate the effects of dewatering on surficial waters. JI Motion to Amend C4 at 12-13. In fact, the DEIS identifies the fact that surface waters from Levy drain to the Gulf. DEIS, Figure 2-8. Therefore, even if it is assumed true that the estimate is inaccurate, it is not material. Estimated groundwater use is too small compared to flow in surface water for it to be plausible that there is a reasonably foreseeable impact. DEIS at 7-13 to 7-15.

b. Dr. Bacchus alleges that the Southwest Florida Water Management District ("SWFWMD") has failed to establish legally required minimum flows and levels for Levy County in the vicinity of the proposed Levy. Bacchus Aff. at 5, ¶1. Dr. Bacchus attempts to use this statement to allege that there is no scientific basis for claims by Progress and the NRC Staff in the DEIS that alterations to flows and levels of surface and ground waters that would result from the proposed LNP would be SMALL. There is no plausible connection. SWFWMD's failure to establish minimum flows and levels does not invalidate the evaluations made by Progress and the DEIS regarding alterations to flows and levels of surface and ground waters that would result from operation of Levy. If the levels are established then the standard conditions of the COC require that the levels be met. COC at 44-45. These levels are not referenced in or material to any of specific conditions in the COC.

c. Dr. Bacchus alleges that, during periods without rain, there will be no "stormwater" for recharge and evaporative loss will dewater the aquifer system. Bacchus Aff. at 9, ¶ 7. It is not reasonably foreseeable that the water level in the stormwater ponds will drop to below the average groundwater level without the groundwater level also dropping.[15] Without alleging or inferring more facts, the possibility

[15] Similarly, a conclusory allegation by Dr. Bacchus that passive dewatering is inherent in the proposed Levy design (Bacchus Aff. at 5) is implausible.

that passive dewatering will take place in the stormwater ponds at the Levy site is too remote and speculative to be material.

d. With regard to the impacts of salt drift, Dr. Bacchus alleges that Levy freshwater wetland vegetation is more sensitive than corn. Bacchus Aff. at 19, ¶ 16. This alleged fact is taken out of context. The DEIS uses a suggested threshold of 10 kg/ha/mo for potential leaf damage. DEIS at 5-20. Without more information, this alleged fact is not material because the DEIS assesses the impacts of salt drift above the suggested threshold. DEIS at 5-21 to 5-23.

5. Contention 4 As Amended Is Inadmissible

Even if assumed true, Joint Intervenors' alleged facts and expert opinions do not plead a plausible claim that the NRC's independent review of the COC has overlooked any reasonably foreseeable environmental devastation arising from the proposed Federal action. The NRC can reasonably conclude that compliance with the COC will preclude any foreseeable noticeable impact on any aspect of an environmental resource significant enough to destabilize that resource. Even if the facts Joint Intervenors properly allege, i.e., those facts that warrant being assumed true, are assumed true, Joint Intervenors have not marshaled facts or expert opinion that support a contention that the DEIS fails to adequately address, and inappropriately characterizes as SMALL, certain direct, indirect, and cumulative impacts on the hydroecology, onsite and offsite, of constructing and operating the proposed Levy facility. As discussed above, the alleged facts are either not material, or conclusory or factually neutral, so that benign interpretations are appropriate. Such facts, even if assumed true, do not support a genuine dispute on a material issue.

V. Conclusion

For all of these reasons, Contention 4 as amended should be dismissed. In the alternative, because it is untimely, the JI Motion to Amend C4 should be dismissed with leave to re-file if there is a showing of compliance with 10 C.F.R. § 2.309(c)(2).

CERTIFICATION

I certify that I have made a sincere effort to make myself available to listen, and respond, to the moving party, and to resolve the factual and legal issues raised in the Motion, and that my efforts to resolve the issues have been unsuccessful.

Respectfully Submitted,

/Signed electronically by John H. O'Neill Jr./
John H. O'Neill. Jr.
Robert B. Haemer
Ambrea Watts
PILLSBURY WINTHROP SHAW PITTMAN LLP
2300 N Street, NW
Washington, DC 20037-1128
Tel. (202) 663-8148

Counsel for Progress Energy Florida, Inc.

Dated: December 10, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)		
	)	Docket Nos.	52-029-COL
Progress Energy Florida, Inc.	)		52-030-COL
	)		
(Combined License Application for	)		
Levy County Nuclear Plant, Units 1 and 2)	)	ASLBP No.	09-879-04-COL

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Progress Answer Opposing Joint Intervenors' Amended Contention 4, dated December 10, 2010, was provided to the Electronic Information Exchange for service to those individuals on the service list in this proceeding this 10th day of December 2010.

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

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

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

Nuclear Information & Resource Service
P.O. Box 7586
Asheville, NC 28802
Mary Olson,
NIRS Southeast Regional Coordinator
E-mail: nirs@main.nc.us

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

Ecology Party of Florida
641 SW 6th Avenue
Ft. Lauderdale, FL 33315
Cara Campbell, Chair
Gary Hecker
E-mail: levynuke@ecologyparty.org

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

Alex S. Karlin, Chair
Administrative Judge
E-mail: ask2@nrc.gov

Anthony J. Baratta
Administrative Judge
E-mail: ajb5@nrc.gov

William M. Murphy
Administrative Judge
E-mail: William.murphy@nrc.gov,
wmm1@nrc.gov

Ann Hove, Law Clerk
E-mail: ann.hove@nrc.gov

Joshua A. Kirstein, Law Clerk
josh.kirstein@nrc.gov

Eckert Seamans Cherin & Mellott, LLC
600 Grant Street, 44th Floor
Pittsburg, PA 15219
Counsel for Westinghouse Electric Co., LLC
Barton Z. Cowan, Esq.
E-mail: teribart61@aol.com

Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop O-15D21
Washington, DC 20555-0001
Marian Zobler, Esq.
Sara Kirkwood, Esq.
Jody Martin, Esq.
Michael Spencer, Esq.
Laura Goldin, Esq.
Joseph Gilman, Paralegal
E-mail:
mlz@nrc.gov
sara.kirkwood@nrc.gov
jcm5@nrc.gov
michael.spencer@nrc.gov
jsg1@nrc.gov
Kevin.Roach@nrc.gov
Laura.goldin@nrc.gov

OGC Mail Center : OGCMailCenter@nrc.gov

/Signed electronically by Robert B. Haemer/
Robert B. Haemer

Attachment A

Red-lined Version of Contention 4 Showing

Joint Intervenors' Changes In Amended Contention 4

~~ATTACHMENT A~~

AN AMENDED CONTENTION 4

I. AMENDED CONTENTION 4:

~~CONTENTION 4:~~ The Draft Environmental Impact Statement (DEIS) and its reliance upon State of Florida Department of Environmental Protection Conditions of Certification (COC, Conditions, also FDEP 2010) to inform the NRC licensing action for Progress Energy Florida's (PEF's) ~~Environmental Report~~proposed Levy County Units 1 and 2 fails to comply with 10 C.F.R. Part 51 and the National Environmental Policy Act because it fails to specifically and adequately address, and inappropriately characterizes as SMALL, certain direct, indirect, and cumulative impacts, onsite and offsite, of constructing and operating the proposed LNP facility:

=

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

1. Impacts resulting from active and passive dewatering;

2. Impacts resulting from the connection of the site to the underlying Floridan aquifer system;

3. Impacts on Outstanding Florida Waters such as the Withlacoochee and Waccasassa Rivers;

4. Impacts on water quality and the aquatic environment due to alterations and ~~increases~~increase in nutrient concentrations caused by the removal of water; and

5. Impacts on water quality and the aquatic environment due to increased nutrients resulting from destructive wildfires resulting from dewatering.

B. Impacts to wetlands, floodplains, special aquatic sites, and other waters, associated with salt drift and salt deposition resulting from cooling towers (that use salt water) being situated in an inland, freshwater wetland area of the LNP site.

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

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

Summary Report: Litera Change-Pro ML IC 6.5.0.298 Document Comparison done on 12/9/2010 11:40:46 AM	
Style Name: Default Style	
Original Filename:	
Original DMS:iw://DCGateway/US_SE/402531932/1	
Modified Filename:	
Modified DMS: iw://DCGateway/US_SE/402531915/1	
Changes:	
Add	20
~~Delete~~	6
~~Move From~~	0
Move To	0
Table Insert	0
~~Table Delete~~	0
Embedded Graphics (Visio, ChemDraw, Images etc.)	0
Embedded Excel	0
Total Changes:	26

Attachment B

Florida DEP Letter of March 25, 1996

(Document PROD000158 of the Progress Initial Disclosure)

Department of Environmental Protection

Lawton Chiles
Governor

Twin Towers Office Building
2600 Blair Stone Road
Tallahassee, Florida 32399-2400

Virginia B. Wetherell
Secretary

March 20, 1996

MAR 2 5 1996

Department

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. W. Jeffrey Pardue, Director
Environmental Services Department H2G
Florida Power Corporation
Post Office Box 14042
St. Petersburg, Florida 33733

Re: Crystal River Salt Drift Study
PA 77-09, PSD-FL-007

Dear Mr. Pardue:

The Department has reviewed the recent status reports and your requests to discontinue the salt drift impact study in the vicinity of the Florida Power Corporation (FPC) Crystal River Power Plant. Based on the information provided to the Department and the site visit conducted by department personnel on January 23, the Department has concluded that damage to nearby vegetation has occurred primarily due to natural phenomena rather than by salt drift from the plant.

The Department considers Specific Condition 5 (Ambient Monitoring) of the PSD permit modification dated November 30, 1988 to have been fulfilled. In accordance with Specific Condition 5.c., the Department approves the elimination of the monitoring program contingent on no objections in the next thirty days from EPA. Please note that the plant is still required to monitor particulate matter from the cooling towers.

We have supplied EPA with a copy of all the correspondence related to this intended action. Please note that the authority to eliminate the program applies only to the PSD permit and not to the Site Certification. The parties to the original certification were advised directly and through the notice published in the Florida Administrative Weekly of FPC's request.

If you have any questions regarding this matter, please call Mr. Cleve Holladay at (904)488-1344 or Trudie Bell at (904)921-9886.

Sincerely,

Howard L. Rhodes, Director
Division of Air Resources
Management

HLR/aal/l

cc: Winston Smith, EPA
John Bunyak, NPS
Hamilton Oven, DEP
Trudie Bell, DEP
Bill Thomas, SWD