LBP-10-23

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alex S. Karlin, Chairman
Dr. Anthony J. Baratta
Dr. William M. Murphy

In the Matter of	Docket No. 52-029-COL, 52-030-COL
PROGRESS ENERGY FLORIDA, INC.	ASLBP No. 09-879-04-COL-BD01
(Combined License Application for Levy County Nuclear Power Plant, Units 1 and 2)	December 22, 2010

MEMORANDUM AND ORDER
(Granting Motion to Compel Disclosure of Groundwater Modeling Information)

On September 27, 2010, the Nuclear Information and Resource Service, the Ecology Party of Florida, and the Green Party of Florida (collectively, Intervenors) moved to compel Progress Energy Florida, Inc. (PEF) to produce certain groundwater modeling information associated with PEF's application to construct and operate two nuclear power reactors in Levy County, Florida.[1] Intervenors assert that the groundwater modeling information is relevant to one of their admitted contentions and must be disclosed pursuant to 10 C.F.R. § 2.336(a)(2)(i). See Motion at 1, 4, 5. PEF has declined to provide the information and opposes the motion.[2] The NRC Staff takes no position on this matter.[3]

For the reasons set forth below, we grant the motion.

[1] Motion for Order Compelling Discovery of PEF Groundwater Model Digital Files (Sept. 27, 2010) (Motion).

[2] Progress Answer Opposing Joint Intervenors' Motion to Compel (Oct. 7, 2010) at 1 (PEF Answer).

[3] NRC Staff Answer to Joint Intervenors' Motion to Compel (Oct. 7, 2010) at 1 (Staff Answer).

I. BACKGROUND

On July 28, 2008, PEF submitted its combined license application (COLA), pursuant to 10 C.F.R. Part 52, to construct and operate the proposed Levy Nuclear Plant (LNP) Units 1 and 2 at a site in Levy County, Florida.[4] This Board was established on February 23, 2009. 74 Fed. Reg. 9113 (Mar. 2, 2009). On July 8, 2009, we granted the Intervenors' petition to intervene in this proceeding, finding that they had demonstrated standing and had proffered three admissible contentions. See LBP-09-10, 70 NRC 51, 147 (2009).

One of the contentions we admitted was Contention 4. Id. This contention alleged, inter alia, that the Environmental Report submitted by PEF in connection with its COLA failed to adequately address, and inappropriately characterized as "small," the environmental impacts of the construction and operation of the proposed LNP facilities resulting from (a) active and passive dewatering, (b) the connection of the site to the underlying Floridan aquifer system, and (c) the impacts on water quality and the aquatic environment due to alterations in nutrient concentrations caused by the removal of water. Id. at 149.

The NRC regulations mandate that, within 30 days of the admission of a contention, each party must disclose to the other parties "all documents and data compilations in the possession, custody, or control of the party that are relevant to the contentions." 10 C.F.R. § 2.336(a)(2)(i). Pursuant to that regulation, on September 1, 2009, all parties submitted their initial mandatory disclosures.[5] These mandatory disclosures are updated every month. ISO at II.A; see 10 C.F.R. § 2.336(d).

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[4] [PEF]; Application for the Levy County Nuclear Power Plant Units 1 and 2; Notice of Order, Hearing, and Opportunity to Petition for Leave to Intervene, 73 Fed. Reg. 74,532, 74,532 (Dec. 8, 2008).

[5] On August 27, 2009, the Board issued an Initial Scheduling Order, specifying that initial mandatory disclosures were due on September 1, 2009. See Initial Scheduling Order § II.A, LBP-09-22, 70 NRC 640, 642 (2009) (ISO).

In its initial mandatory disclosures on September 1, 2009, PEF submitted a groundwater report relevant to Contention 4 entitled "Revised Conceptual Wellfield Layout and Evaluation of Simulated Drawdown Impacts for Levy Nuclear Plant Technical Memorandum No. 338884-TMEM-074 (Nov. 14, 2008) (Report 74)." PEF Answer at 2 n.2.[6] Report 74 was issued by CH2M Hill, an expert consulting firm hired by PEF. Tr. at 519. Report 74 describes itself as follows:

> This technical memorandum (TM) documents the simulated hydrologic impacts associated with the proposed normal daily withdrawal of 1.58 million gallons per day (mgd) of groundwater from the upper Floridan acquifer (UFA) to provide fresh water for [PEF's] proposed Levy Nuclear Plant (LNP). The impacts were evaluated using a MODFLOW (Harbaugh, Banta, Hill, and McDonald, 2000) groundwater flow model developed by CH2M Hill. A new model was prepared by CH2M Hill in response to questions raised by the Southwest Florida Water Management District (SWFWMD) staff in their review of the SCA Volume 5, Section D 10.09, Water Use Permit, Attachment B, Groundwater Modeling (Progress Energy, 2008).
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> The revised groundwater model was exported from the SWFWMD's District-Wide Regulation Model, Version 2 (DWRM2) (Environmental Simulations, Inc. 2004) using the telescopic mesh refinement (TMR) process, which creates a site-specific model from the regional DWRM model.

Report 74 at 2.

Subsequently, in its fifth supplement to its mandatory disclosures, PEF submitted a revised groundwater report issued by its consultant, CH2M Hill. See PEF Answer at 2 n.2.[7] This technical memorandum, referred to as Report 123, "documents an additional evaluation of the simulated hydrologic impacts associated with the proposed normal daily withdrawal of 1.58 million gallons per day (mgd) of groundwater from the Upper Floridan Aquifer." Report 123 at 2.

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[6] A copy of Report 74 was also provided as Attachment C to PEF's Motion to Dismiss as Moot the Aspects of Contention 4 Related to Active Dewatering During Levy Nuclear Plant Operations (Sept. 30, 2010).

[7] Revised Groundwater Model Evaluation of Simulated Drawdown Water Impacts, Levy Nuclear Plant, Technical Memorandum No. 338884-TMEME-123 (Dec. 7, 2009) (Report 123). A copy of Report 123 was provided as Attachment D to PEF's Motion to Dismiss as Moot the Aspects of Contention 4 Related to Active Dewatering During Levy Nuclear Plant Operations (Sept. 30, 2010).

Report 123 states that it was generated in response to an NRC request for additional information (RAI). "CH2M Hill completed a second evaluation by revising the model documented in [Report 74]. These revisions and associated simulation results are documented in [Report 123]." Id.

On August 5, 2010, the NRC Staff issued its draft environmental impact statement (DEIS) concerning PEF's COLA for LNP Units 1 and 2.[8] The DEIS discusses the LNP's expected impacts on water and groundwater and makes numerous references to the groundwater modeling work done by PEF and CH2M Hill.[9] The DEIS states that "PEF constructed a local-scale groundwater model as a requirement of the facility's Site Certification Application to the State of Florida. This model, which was a submodel of [SWFWMD's DWRM2] regional groundwater flow model, was used to simulate both LNP and cumulative groundwater-use impacts." DEIS at 2-25. The DEIS then explains that, because a "poor fit between simulated and observed heads in the vicinity of the LNP was obtained," the local scale model was "recalibrated by PEF using both site-specific and regional head data. A detailed description of this model and the recalibration process is provided by PEF (2009d)." DEIS at 2-28-29.

The CH2M Hill Report 74 is a technical memorandum that reports on the simulated environmental impacts predicted by what the DEIS refers to as the initial "local scale groundwater model" (hereinafter "Initial Local Scale GW Model"). Tr. at 518-20, 527. Meanwhile, Report 123 is a CH2M Hill technical memorandum that PEF/CH2M Hill generated after NRC requested that the Initial Local Scale GW Model be recalibrated. The DEIS refers to

[8] See Status Report (Aug. 5, 2010) at 2; Nuclear Regulatory Commission; Notice of Availability of the Draft Environmental Impact Statement for the Combined Licenses for Levy Nuclear Plant Units 1 and 2, 75 Fed. Reg. 49,539, 49,540 (Aug. 13, 2010).

[9] See Nuclear Regulatory Commission, Office of New Reactors, Draft Environmental Impact Statement for Combined Licenses (COLs) for Levy Nuclear Plant Units 1 and 2, Draft Report for Comment, NUREG-1941, at 2-24 to 2-29, 5-7 to 5-9 (Aug. 2010) (DEIS).

this as the recalibrated local scale groundwater model (hereinafter "Recalibrated Local Scale GW Model"). Id. at 519, 530-31.

On September 27, 2010, the Intervenors filed the instant motion. They request that we require PEF "to produce the revised groundwater model . . . and any other water-related models referred to in the DEIS and/or relied upon by the NRC in drawing their conclusions regarding groundwater use." Motion at 1. The Intervenors seek "all water-related computer models, input files and reports, parameters, input data, boundary conditions, assumptions, and all iterations and results, in a model-ready digital format." Id. The Intervenors assert that they wish to determine for themselves whether the Initial Local Scale GW Model and the Recalibrated Local Scale GW Model are appropriately calibrated and accurate. Id. at 5. They assert that "in no way is any result verifiable without access to the digital model files of the various iterations of model runs." Id. The Intervenors also explain, at some length, why the motion to compel was not filed earlier and outline what they describe as the "labyrinthine process [they] have navigated" to attempt to obtain the relevant information, either from PEF, the State of Florida, and/or the NRC Staff, all to no avail. Id. at 2-4 & Attachments 1-8. The Intervenors have retained two experts to assist them in evaluating the requested groundwater related information.[10]

On October 7, 2010, PEF filed its answer opposing the motion to compel, asserting that it is untimely. PEF argues that some of the requested information (e.g., the SWFWMD DWRM2 model) is publicly available. PEF Answer at 3. As to the Initial Local Scale GW Model and the Recalibrated Local Scale GW Model, PEF asserts that they are not in PEF's possession, custody, or control, but are instead in the hands of CH2M Hill. PEF Answer at 2; Tr. at 515,

[10] See Note from Cara Campbell to Mary Olsen, FWD: Info Asked for in Oral Arguments Scheduling Order (Nov. 9, 2010) (ADAMS Accession No. ML103130685) (Identifying Kevin Vought, Water Resources Engineer and Groundwater/Surface Water Model); Petition to Intervene and Request for Hearing by the Green Party of Florida, the Ecology Party of Florida and Nuclear Information and Resource Service (Feb. 6, 2009), Exh. K, Expert Declaration by Dr. Sydney T. Bacchus in Support of Petitioners' Standing to Intervene in this Proceeding (Feb. 6, 2009).

518-20. PEF asserts that it would be unduly burdensome and costly for PEF to obtain these models from CH2M Hill and thus that PEF is not obliged to produce the requested information. See PEF Answer at 3; Tr. at 523-25.

On November 17, 2010, the Board heard oral argument on the motion. Tr. at 497-627.

II. ANALYSIS AND RULING

Our analysis begins with the words of the regulation. The mandatory disclosure regulation is entitled "General discovery" and specifies, in pertinent part, that "all parties . . . shall . . . disclose and provide . . . all documents and data compilations in the possession, custody, or control of the party that are relevant to the contentions." 10 C.F.R. § 2.336(a)(2)(i). The disclosing party can either provide the other parties with an actual copy of the document or data compilation, or can simply describe it and provide it if the other party requests it. Id. If the document or data compilation is "publicly available," then a citation to the document and a description of where it may be publicly obtained is sufficient. 10 C.F.R. § 2.336(a)(2)(iii). The regulation makes clear that each party must make the mandatory disclosures automatically without the need for a party to file a discovery request. As to the scope of this obligation, the Commission has recently affirmed that "mandatory disclosures . . . which apply to Subpart L proceedings, are wide-reaching." Crow Butte Resources, Inc. (North Trend Expansion Project) CLI-09-12, 69 NRC 535, 572 (2009).

Based on the regulations and the pleadings herein, our analysis focuses on the following issues:

1. Are the models and associated modeling information, which are the subject of the motion to compel, "documents" or "data compilations" within the meaning of 10 C.F.R. § 2.336(a)(2)(i)?
2. Are they "relevant" to Contention 4?
3. Are they in the "possession, custody, or control" of PEF?
4. Are they "publicly available" such that no further mandatory disclosure is needed?

5. If 10 C.F.R. § 2.336(a)(2)(i) mandates the disclosure of these groundwater models and associated information, would the production of this material be "unduly burdensome and costly," and, if so, should PEF be excused from the duty to produce them?

6. Should the motion to compel be denied as untimely?

Our analysis and interpretation of the mandatory disclosure regulation (10 C.F.R. § 2.336) are aided by the regulation's origins and context. The regulation was promulgated in 2004 as part of the Commission's new "informal" form of adjudicatory proceedings to be conducted pursuant to 10 C.F.R. Part 2 Subpart L.[11] In a Subpart L proceeding, mandatory disclosure pursuant to 10 C.F.R. § 2.336 is the only form of discovery allowed, and all other forms are expressly prohibited. See 10 C.F.R. §§ 2.336(g), 2.1203(d).[12]

NRC based the new mandatory disclosure regulation on the parallel requirements in the Federal Rules of Civil Procedure (FRCP).

> The Commission believes that the tiered approach to discovery set forth in the proposed rule represents a significant enhancement to the Commission's existing adjudicatory procedures, and has the potential to significantly reduce the delays and resources expended by all parties in discovery. At the foundation of the Commission's approach are the provisions in Subparts C and G which provide for mandatory disclosure of a wide range of information, documents, and tangible things relevant to the contested matter in the proceeding, and the NRC's provisions for broad public access to documents in § 2.390. The mandatory disclosure provisions, which were generally modeled on Rule 26 of the Federal Rules of Civil Procedure, have been tailored to reflect the nature and requirements of NRC proceedings. Mandatory disclosure of information relevant to the contested matter (together with the hearing file and/or electronic docket, discussed later) should reduce or avoid the need to draft often complex discovery requests such as interrogatories, prepare for time-consuming and costly depositions, and engage in extended litigation of the responsiveness of a party to a discovery request. Reducing the burden of discovery may enhance the participation of ordinary citizens in the discovery process, since they often do not have the resources to engage in protracted litigation over discovery.

69 Fed. Reg. at 2194 (emphasis added).

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[11] Nuclear Regulatory Commission; Changes to Adjudicatory Process; Final Rule, 69 Fed. Reg. 2182, 2247 (Jan 14, 2004).

[12] See also Citizens Awareness Network, Inc. v. NRC, 391 F.3d 338, 344-45, 350 (1st Cir. 2004).

A. Document

As a threshold matter, the Board finds that the term "document," as used in 10 C.F.R. § 2.336, is not limited to paper documents. Nothing in the plain language of the regulation restricts the term "document" to hard-copy documents. Meanwhile, a variety of indicators point to the conclusion that the term "document," as used in the regulation, refers to information stored on any medium, including electronically stored information (ESI). First, this conclusion is consistent with the similar provisions of the FRCP.[13] In addition, it is consistent with the Commission's statement that the mandatory disclosure provision covers a "wide range of information." 69 Fed. Reg. at 2194. Furthermore, our initial scheduling order herein confirms and mandates that ESI is covered by 10 C.F.R. § 2.336. ISO at II.A.4.

Next, the Board holds that the term "document," as used in 10 C.F.R. § 2.336 includes computer models. Computer modeling is used extensively in the nuclear industry by applicants, both for safety analyses under the Atomic Energy Act and environmental analyses under the National Environmental Policy Act. The NRC itself relies heavily on computer modeling. There is no doubt that computer models and associated documentation are within the scope of discovery under NRC's regulations. For example, in Illinois Power Co. (Clinton Power Station, Unit Nos. 1 and 2), ALAB-340, 4 NRC 27, 33-34 (1976), the Appeal Board (and underlying Licensing Board) dealt with a request by an intervenor that the applicant bring to the evidentiary hearing the "underlying data on computer models" which the applicant's expert had used in forecasting lifetime fuel cycle costs for the Clinton station. Id. at 31. The Appeal Board noted that the request covered the "source decks, data decks, computer programs and documentation upon which the models . . . were based." Id. at 34. While the request for the computer model

[13] The FRCP were amended in 2006 to expressly include ESI. See Federal Rules Decisions; Administrative Office of the U.S. Courts; Federal Rules of Civil Procedure; Adoption and Amendments to Civil Rules, 234 FRD 219 (Apr. 12, 2006). However, even before this amendment, the FRCP case law had established that ESI was included within the scope of discovery and mandatory disclosures. See infra notes 15, 16.

was denied for other reasons (because it had been made on the very eve of the evidentiary hearing), no one suggested that computer models are not subject to discovery in NRC proceedings.[14]

The case law under the parallel provisions of the FRCP clearly establishes that computer modeling, and all of the inputs, outputs, and software associated with it, are within the scope of discovery.[15]

Given the NRC's heavy reliance on computer modeling, it is essential that litigants be able to access, evaluate, and challenge the computer modeling work that serves as the basis for a party's position and/or the grant or denial of a license. Such information will often be essential to the fair adjudication of admitted contentions, and to sound decision-making by the boards.[16] Accordingly, we hold that the scope of mandatory disclosure under 10 C.F.R.

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[14] See also Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-05-29, 62 NRC 635, n.62 (Feb. 24 [as redacted Oct. 28], 2005) (Where applicant and Staff used computer models to analyze potential consequences due to aircraft impact on an independent spent fuel storage installation facility); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-4, 59 NRC 31, 46 (2004) (Addressing dismissal for late filing of a contention challenging the use of a computer model used to analyze transportation impacts).

[15] See Bartley v. Isuzu Motors, Ltd., 151 FRD 659, 660-61 (D. Colo. 1993) ("When one party seeks to present a computer study, in order to defend against the conclusions that are said to flow from those efforts, the discovering party not only must be given access to the data that represents the computer's work product, but also must see the data put into the computer, the programs used to manipulate the data and produce the conclusions, and the theory or logic employed by those who planned and executed the experiment."); City of Cleveland v. Cleveland Elec. Illuminating Co., 538 F. Supp. 1257, 1267 (N.D. Ohio 1980) (Where "expert reports are predicated upon complex data, calculations and computer simulations which are neither discernable nor deducible from the written reports themselves, disclosure thereof is essential to the effective and efficient examination of the experts at trial.").

[16] See Novartis Corp. v. Ben Venue Laboratories, Inc., 271 F.3d 1043, 1054 (Fed. Cir. 2001) (Explaining, with regard to "computer model" evidence, that while "there is nothing inherently unreliable or suspect about computer simulations as evidence . . . every simulation of a physical process embodies at least some simplifying assumptions, and requires both a solid theoretical foundation and realistic input parameters to yield meaningful results. Without knowing these foundations, a court cannot evaluate whether the simulation is probative, and it would be unfair to render an expert's opinion immune to challenge because its methodology is hidden in an uncommented computer model."); Perma Research & Dev. Co. v. Singer Co., 542 F.2d 111, 125 (2d Cir. 1976) (Van Graafeiland, J., dissenting) (Stating that a "computer model is valid only insofar as it enables us to make valid inferences about the real-world system being simulated,"

§ 2.336(a)(2)(i) includes computer models (whether they be ESI or not), including the underlying data used in a computer analysis or simulation, the programs and programming methods, the software that embodies the computer program, and the inputs and outputs that comprise the model.

B. Relevant

10 C.F.R. § 2.336(a)(2)(i) mandates the disclosure of documents that are relevant to the admitted contentions. Despite PEF's assertion to the contrary, Tr. at 545-47, it is clear that the computer modeling information specified in the motion to compel is relevant to Contention 4. The contention asserts, inter alia, that PEF's ER failed to adequately address and analyze the environmental impacts that the proposed LNP project will have on the water and groundwater in the vicinity of the site. See LBP-09-10, 70 NRC at 149. The adequacy of the modeling that PEF and its expert, CH2M Hill, performed to analyze and estimate the environmental impacts that the LNP project will have on the water and groundwater in the vicinity of the proposed site is of central relevance to Contention 4. For example, the Intervenors wish to determine for themselves whether the Initial Local Scale GW Model and the Recalibrated Local Scale GW Model are appropriately calibrated and whether they provide a fair and accurate simulation and/or prediction regarding dewatering and its impacts on the water and groundwater. Motion at 1, 5, 6. The DEIS discusses these local scale models extensively, and the NRC Staff agrees that it is, in part, relying on these models for its conclusions. See DEIS at 2-25, 2-28 to 2-29, 5-7; Tr. 581-82.

The Federal Rules of Evidence (FRE) provide some useful guidance. The FRE state that "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable

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and that "although the computer has tremendous potential for improving our system of justice by generating more meaningful evidence . . . it presents a real danger of being the vehicle of introducing erroneous, misleading, or unreliable evidence.").

than it would be without the evidence." Fed. R. Evid. 401. Clearly, the groundwater modeling information that is the subject of the instant motion to compel would be relevant under FRE Rule 401. For example, the inputs, logic, and software programs that PEF/CH2M Hill used to develop the Initial Local Scale GW Model and Recalibrated Local Scale GW Model are documents that will have a tendency to make the adequacy of the ER's environmental assessment of the LNP projects (i.e., the issue that is in dispute in this portion of Contention 4) "more probable or less probable." The groundwater modeling information therefore has probative value for the resolution of Contention 4 and is relevant.

Our conclusion in this regard is fortified by the fact that the relevance standard of 10 C.F.R. § 2.336 is even more flexible than the relevance standard of FRE Rule 401. First, although the FRE are not mandated for NRC adjudicatory proceedings, the Commission has endorsed the use of the FRE as guidance for the Boards,[17] with the express proviso that Boards must apply the Part 2 rules with greater flexibility than the FRE. See 69 Fed. Reg. at 2187; 10 C.F.R. § 2.319(d). Second, 10 C.F.R. § 2.336 is a discovery regulation, and the rules are clear that the scope of discovery is broader than the scope of admissible evidence. See 10 C.F.R. § 2.705(b)(1) ("It is not a ground for objection [to discovery] that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."). See also Fed. R. Civ. P. 26(b)(1). Third, the Commission has stated that the mandatory disclosures in Subpart L proceedings encompass a "wide range of information." 69 Fed. Reg. at 2194.

The Board concludes that the documents that are the subject of the Intervenors' motion to compel are relevant to the resolution of Contention 4.

[17] See Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), CLI-04-21, 60 NRC 21, 27 (2004); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-01-9, 53 NRC 239, 250 (2001); Consolidated Edison Co. of New York (Indian Point, Unit No. 2), CLI-85-6, 21 NRC 1043, 1084 (1985); Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 475 (1982).

C. Possession, Custody, or Control

The third test of the NRC mandatory disclosure regulation is that the document must be in the party's "possession, custody, or control." 10 C.F.R. § 2.336(a)(2)(i). PEF asserts that the computer models and associated information covered in the instant motion to compel are not in its possession, custody, or control, and therefore, it is not obliged to produce them. PEF Answer at 2.

At the outset, we note that NRC case law has never construed the phrase "possession, custody, or control" in the context of 10 C.F.R. § 2.336. Nor has it done so for the two other NRC regulations in which the phrase appears. First, there is a parallel provision governing formal adjudications under 10 C.F.R. Part 2, Subpart G proceedings that requires parties to disclose all relevant documents in their "possession, custody, or control." 10 C.F.R. § 2.704(a)(2). Second, the Subpart G rules allow a party to file a "request for production of documents," and the regulation states that a party receiving such a request must produce any relevant document in its "possession, custody, or control." 10 C.F.R. § 2.707(a)(1). However, as far as we are aware, no NRC decision has ever construed the meaning of the phrase "possession, custody, or control" under any of the Part 2 regulations.[18]

In this context, we turn to the FRCP for guidance. As previously noted, NRC's mandatory disclosure regulations are based on FRCP 26. See 69 Fed. Reg. at 2194. FRCP 26 is, in pertinent part, essentially identical to the relevant provisions of 10 C.F.R. § 2.336(a)(2)(i) and 10 C.F.R. § 2.704(a)(2). FRCP 26(a)(1)(A)(ii) requires parties to make an "initial disclosure" including "a copy--or a description by category and location--of all documents, electronically

[18] While some NRC cases use or cite the phrase "possession, custody, or control," none of them provide relevant interpretation or construction of the phrase, or of the term "control." See Louisiana Energy Services., L.P. (National Enrichment Facility), LBP-04-14, 60 NRC 40, 72 & n.18 (2004); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 244 (1998); Illinois Power Co. (Clinton Power Station, Unit 1), LBP-81-61, 14 NRC 1735, 1738 (1981); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-72-29, 5 AEC 142, 143 (1972).

stored information, and tangible things that the disclosing party has in its possession, custody, or control." Likewise, FRCP 34(a)(1), is essentially the same as NRC's "production of documents" regulation, 10 C.F.R. § 2.707(a)(1). The federal rule specifies that a party can request and obtain a copy of any document "in the possession, custody, or control" of the party upon whom the request is served. Fed. R. Civ. P. 34(a)(1).

The case law and commentary on these provisions of the FRCP, including the phrase "possession, custody, or control," serve as a valuable and practical guide for our interpretation of this phrase here. While we do not attempt to summarize all of the law interpreting the FRCP, we believe that the following principles apply here.

First, we note, as the FRCP cases do, that "[t]he phrase 'possession, custody, or control' is in the disjunctive, and only one of the enumerated requirements need be met."[19] Legal ownership of the documents is not required, nor is actual possession necessary if the party has control.[20]

In the instant case, PEF states that it does not have actual possession or custody of the relevant computer models and modeling information (e.g., the Initial Local Scale GW Model, the Recalibrated Local Scale GW Model, and the associated interim documents), because they are in the hands of PEF's contractor. The question becomes - are these documents nonetheless within PEF's "control"?

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[19] Cumis Ins. Society, Inc. v. South-Coast Bank, 610 F. Supp. 193, 196 (N. D. Ind. 1985); see also James Wm. Moore et al., Moore's Federal Practice ¶ 34.12[2][a] (3d ed. 2010) at 34-71 (Moore's Federal Practice).

[20] Moore's Federal Practice at 37-73 (citing Green v. Fulton, 157 FRD 136, 142 (D. Me. 1994) (When party has "right, authority, or ability to obtain those documents on demand," they will be deemed to be under party's control.); Prokosch v. Catalina Lighting, Inc., 193 FRD 633, 636 (D. Minn. 2000) ("'[C]ontrol' does not require that the party have legal ownership or actual physical possession of the documents at issue; rather, documents are considered to be under a party's control when that party has the right, authority, or practical ability to obtain the documents from a non-party to the action.") (citation omitted)).

In the context of the FRCP, the term "control" is broadly construed.[21] Documents are deemed to be within the control of a party if the party has the right to obtain the documents on demand.[22] In addition, the cases affirm that a document is deemed to be within a party's control if it is held by the party's attorney, expert, insurance company, accountant, or agent. Moore's Federal Practice at 37-74.

The concept of control extends to situations in which the party has the practical ability to obtain materials in the possession of another, even if the party does not have the legal right to compel the other person or entity to produce the requested materials.[23] Practical control by a party over the person in possession of the document is deemed sufficient to require that the party produce the document.[24]

The foregoing principles provide a sound basis for determining whether a document must be disclosed pursuant to 10 C.F.R. § 2.336(a)(2)(i).

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[21] Id. at 34-75 (citing Scott v. Arex, Inc., 124 FRD 39, 41 (D. Conn. 1989) (Party controls document if it has right, authority, or ability to obtain document on demand); Japan Halon Co. v. Great Lakes Chem. Corp., 155 FRD 626, 627 (N. D. Ind. 1993) (In context of analyzing "control" issue, court stated that Fed. R. Civ. P. 34 is to be liberally construed)).

[22] Id. (citing In re Bankers Trust Co., 61 F.3d 465, 469 (6th Cir. 1995) ("In practice, the courts have sometimes interpreted Rule 34 to require production if the party has practical ability to obtain the documents from another, irrespective of his legal entitlement to the documents."); c.f. United States v. Skeddle, 176 FRD 258, 261 (N.D. Ohio 1997).

[23] Id. at 34-79 ("[T]he better view is that the concept of control extends to situations in which the party has the practical ability to obtain materials in the possession of another, even if the party cannot compel the other person or entity to produce the requested materials.') (citing Addamax Corp. v. Open Software Found., Inc., 148 FRD 462, 467-68 (D. Mass. 1993) (Some cases have expanded definition of control); Comeau v. Rupp, 810 F. Supp. 1127, 1166 (D. Kan. 1992) (Control "comprehends . . . the right, authority, or ability to obtain the documents"); In re Domestic Air Transp. Antitrust Litig., 142 FRD 354, 356-57 (D. Ga. 1992) (Defendants required to request that their employees order copy of transcripts of their deposition testimony given to government agency)).

[24] Id. at 34-80 (citing Gray v. Faulkner, 148 FRD 220, 223 (N. D. Ind.1992) (Party must seek information reasonably available from employees, agents, or others subject to party's control)).

In determining the question of "control," e.g., whether a party has the practical ability to obtain a document that is in the possession of another, we look to the pleadings and representations of counsel at the oral argument.

We focus particularly on whether the Initial Local Scale GW Model and the Recalibrated Local Scale GW Model are within PEF's control. First, we note that the DEIS states that these models were "prepared by PEF."[25] PEF stated, however, that these models were actually prepared by CH2M Hill, the expert environmental consulting firm hired by PEF. Tr. at 524-525. PEF stated that CH2M Hill performed the Initial Local Scale GW Model work in conjunction with PEF's site certification application (SCA) to the State of Florida for the LNP project. Id. at 527. In its initial mandatory disclosure, PEF produced Report 74, which is CH2M Hill's report documenting the results of CH2M Hill's modeling work. Id. The Environmental Report that PEF submitted to NRC as part of its COLA is the same as the ER that it submitted to Florida for the SCA. Id. at 528. As to the Recalibrated Local Scale GW Model, this was prepared and developed by CH2M Hill, at PEF's request (in response to NRC's RAI). Id. at 530. Report 123 is the CH2M Hill report documenting the results of CH2M Hill's work. Id.

PEF emphasizes that, under its contract with CH2M Hill, the Initial Local Scale GW Model and the Recalibrated Local Scale GW Model (and the interim documents related to these models) were not contract deliverables. PEF states that it hired CH2M Hill to produce and deliver the final reports (e.g., Report 74 or 123), but the contract did not require CH2M Hill to provide PEF with a copy of the computer modeling work that underlay Reports 74 and 123 and that CH2M Hill performed, as a necessary step in generating them. "To go back and get [the models] would be a change to the contract and would require additional money. . . . We're not saying [the models are] not available. . . . It's [just] not under Progress's control." Id. at 534-35. "CH2M Hill in achieving Progress' objectives, developed intellectual property that has value.

[25] DEIS at 2-25 ("PEF constructed a local-scale groundwater model"), 2-29 ("PEF's model recalibration effort resulted in significant improvements in the model fit.").

Under the terms of the contract, CH2M Hill retained that property and retains the ability to sell it for its own purposes. It is not a product that is supplied to Progress." Id. at 535-36.

PEF readily acknowledges that it could obtain the models from CH2M Hill if it chose to do so. Id. at 542. For example, PEF could readily obtain the models, if NRC asked for them. Id. This makes sense, given the fact the documents are in CH2M Hill's possession and CH2M Hill is (and presumably wishes to continue to be) PEF's environmental consultant on the LNP application. PEF's practical access to these documents is especially apparent here, because CH2M Hill generated the local scale models as a part of its work for PEF. Of course, PEF would discuss the matter with CH2M Hill and may need to compensate CH2M Hill for the cost and value of delivering the models. PEF says that this could cost it "in excess of $30,000." Id. at 543. "This is the cost for CH2M Hill to go through, pick out the correct computer file, put them together in an integrated package so that they run together and provide them on essentially a DVD." Id.

The issue of "control" is illuminated by the fact that the groundwater modeling work done by CH2M Hill (PEF's contractor) was performed under quality control measures, id. at 557, and that PEF has the contractual right to audit and review this information. Id. at 559.

> You're asking, Your Honor, whether or not Progress can see these files in the hands of CH2M Hill without – and the answer is yes. If Progress wanted to see the files, Progress could see the files. That's different from being able to walk away with a DVD of the file. That would require a contract mod.

Id. at 567. Likewise, PEF acknowledged that it has the ability to negotiate with CH2M Hill so that CH2M Hill would allow the Intervenors' expert to access the computer models and underlying work. Id. at 568-69.

Given the foregoing circumstances, the Board concludes that (a) PEF has the practical ability to obtain the groundwater models and supporting modeling information generated by PEF's contractor, CH2M Hill, during CH2M Hill's performance of work in support of PEF's COLA (and related State environmental permit) for the LNP project, and therefore that (b) these

documents are within PEF's "control" for purposes of 10 C.F.R. § 2.336(a)(2)(i). As a practical matter, PEF can readily obtain such information from its expert consultant – CH2M Hill. Thus, we conclude that PEF has control of (i.e., the practical ability to obtain) these particular documents now possessed by its expert consultant, CH2M Hill.

PEF's "practical ability to obtain" such documents is further demonstrated by the fact that, as a quality assurance measure, it retains the right to access the documentation and work done by its contractor, even if it is not a contract deliverable.[26]

Even though the computer models and associated information were not contract deliverables under the original contract between PEF and its expert consulting firm, and even though some cost may be involved, it is clear that, as a practical matter, PEF can readily obtain and produce the referenced computer models and supporting documentation and that PEF has "control" of the referenced computer models and information.[27]

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[26] The NRC's standard review plan for environmental reviews for Nuclear Power Plants states:

> In evaluating the applicant's environmental information, reviewers should identify and evaluate the quality assurance measures taken by the applicant in collecting and analyzing data. Quality assurance measures, including verification and validation, are also evaluated where computer models have been used to predict environmental consequences of the proposed actions.

Office of Nuclear Reactor Regulation, Standard Review Plans for Environmental Reviews for Nuclear Power Plants, NUREG-1555, at 13 (Initial ESRP Oct. 1999) (emphasis added) available at http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1555/sr1555.pdf.

[27] In an analogous situation, we note that when the U.S. Department of Energy (DOE) was required, under 10 C.F.R. § 2.1003(a), to make an initial mandatory disclosure of documentary material relevant to its application for a geologic repository for the disposal of high level radioactive wastes, DOE contacted its consultants and contractors working on the application and required them to submit to all of the relevant documentary material in their possession. See U.S. Dep't of Energy (High-Level Waste Repository), LBP-04-20, 60 NRC 300, 337 (2004). Likewise, when the State of Nevada was required to produce its documentary material, it gathered such information from all of its consultants and contractors. See U.S. Dep't of Energy (High-Level Waste Repository), LBP-08-5, 67 NRC 205, 212 n.32, 221 (2008) (Karlin, J., dissenting). No one suggested that such documents were exempt from disclosure because they were not formal contract deliverables.

To rule otherwise, i.e., that disclosure under 10 C.F.R. § 2.336(a)(2)(i) is limited to formal contractual deliverables, would ignore practical reality. Such a reading of 10 C.F.R. § 2.336(a)(2)(i) would encourage applicants to draft consulting contracts to "insulate" themselves, see Tr. at 595, from the obligation to disclose critical computer modeling information. This is information that applicants routinely provide to the NRC Staff, if requested, during the application process.[28] Rather than focusing on the contractual formalities, we adopt the FRCP approach and focus on the practical realities. We rule that an applicant has "control" of a document under 10 C.F.R. § 2.336 if the applicant has the practical ability to obtain it, albeit for a cost or fee, from the expert consulting firm that generated the document while performing work for the applicant.

Having concluded that the computer models and modeling information, including the Initial Local Scale GW Model and the Recalibrated Local Scale GW Model, are relevant documents that are within PEF's possession, custody, or control, we turn to PEF's arguments that it is relieved from the mandatory disclosure duty of 10 C.F.R. § 2.336(a)(2)(i) because either (a) the documents are publicly available, or (b) it would be unduly burdensome and costly for PEF to produce them.

D. Public Availability

The mandatory disclosure regulation excuses a party from producing a document if it is publicly available and if the party specifies where the document may be found. 10 C.F.R. § 2.336(a)(2)(iii).

The pleadings in this case reflect the confusion between the Intervenors and PEF as to which computer models and modeling information are being sought, and whether such

[28] PEF seeks support from this Board's prior ruling, denying PEF's motion to compel. PEF states "[a]s this Board has previously held, a party is not obligated to disclose that which it does not have." PEF Answer at 2 (citing LBP-09-30, 70 NRC __, __ (slip op. at 9) (Dec. 29, 2009)). PEF misses the mark entirely. PEF's earlier motion to compel was denied because the document in question did not exist, not because the Intervenors did not have possession, custody, or control of it. Id.

documents are publicly available. The motion to compel provides a "lengthy narration" with numerous attached e-mails, attempting to explain that, when PEF claimed that the relevant computer models and information were publicly available, the Intervenors diligently pursued such documents, to no avail. Motion at 2-4. Specifically, the Intervenors state that when PEF represented that the models were publicly available from the SWFWMD, the Intervenors diligently contacted SWFWMD, NRC personnel, and others in an attempt to obtain this information. Id. The Intervenors apparently pursued several blind alleys involving SWFWMD's DWRM2 model before realizing that this was not what they were seeking (i.e., not the local scale groundwater submodels that PEF/CH2M Hill had generated and which were referred to in the DEIS). Id. Meanwhile PEF, apparently also focusing on the DWRM2, stated:

> the computer model at issue here was developed by agencies of the State of Florida, not Progress. Analysis was performed by Progress's contractor on an extracted section of that computer model. In the spirit of cooperation, counsel for Progress advised Joint Intervenors that the computer model can be obtained from public sources.

PEF Answer at 3.

During the oral argument, it became clear that the Intervenors were not seeking the DWRM2 model developed by the SWFWMD. Tr. at 598. Apparently the DWRM2 is indeed publicly available in some form. Id. Instead, the Intervenors stated that they are seeking the Initial Local Scale GW Model and the Recalibrated Local Scale GW Model. Id. at 597. In addition, the Intervenors stated that they are interested in the "Multi-Layer Unsteady state (MLU) model of transient well flow in layered aquifer systems," referred to in the DEIS. DEIS at 2-26; Id. at 603. Counsel for PEF indicated that CH2M Hill worked with the MLU model as part of its work scope for PEF, tr. at 606, but was unsure whether the MLU model was still available from CH2M Hill. Id. at 608.

The Board concludes that, with regard to the Initial Local Scale GW Model, the Recalibrated Local Scale GW Model, and the MLU model, PEF has not shown that they are publicly available. Therefore, PEF has not shown that it should be excused, under 10 C.F.R.

§ 2.336(a)(2)(iii), from being required to produce these documents pursuant to 10 C.F.R. § 2.336(a)(2)(i).

E. Undue Burden and Cost

PEF argues that it should be excused from the mandatory disclosure requirement of 10 C.F.R. § 2.336(a)(2)(i) because it would be "both burdensome and costly." PEF Answer at 3. We disagree.

PEF first cites to our ISO for the proposition that a party need not disclose "information that is not reasonably accessible because of undue burden or cost." PEF Answer at 3 (citing ISO at II.A.4.(i)). But, the ISO provision in question is entitled "Electronically Stored Information – Reasonable Search." That provision focuses on the burden of searching for ESI (a potentially enormous task when dealing with ESI), not the cost of producing it. In contrast, in the instant situation the search costs are virtually nil, because PEF knows where the requested information is located (i.e., with CH2M Hill). The ISO does not support PEF's position.

Second, PEF says that obtaining the computer model would be burdensome and costly "because the input files are in a format that can only be used in conjunction with a proprietary computer program maintained by a contractor to the State of Florida." PEF Answer at 3. In fact, however, the Intervenors are not seeking a computer model or program from the State of Florida (e.g., the DWRM2 model from the SWFWMD). Rather, they are seeking a computer model and program held by PEF and/or its environmental consultant, e.g., the local scale models constructed and developed by CH2M Hill.

Third, on a related point, we reject PEF's suggestion that they cannot produce the requested information because it is "proprietary," either to PEF, CH2M Hill, or to the company that provides software to CH2M Hill. See PEF Answer at 3; Tr. at 516, 535-36, 584, 592, 602. There is, however, no risk that any such proprietary information (e.g., trade secrets or confidential commercial or financial information) will be released into commerce and thus inflict commercial harm or damage. This is because any such proprietary information will be

protected under the terms of the protective order (and non-disclosure agreement) that we have already issued in this case.[29] Under the protective order, the use of any proprietary information that is produced under 10 C.F.R. § 2.336 is strictly limited to this proceeding, and such information must be promptly returned at the close of this proceeding. See id.

Fourth, PEF says that the cases cited by the Intervenors regarding the production of computer inputs and models "are not on point because they pertain to discovery in Federal Court, not disclosure in NRC proceedings" and because they "relate to the admissibility of evidence." PEF Answer at 3. As discussed above, we find the cases interpreting provisions of the FRCP that are virtually identical to the NRC regulations, including the mandatory disclosure regulations, to be useful guidance for our analysis of the language of 10 C.F.R. § 2.336.

At bottom, PEF's "undue burden and cost" argument seems to be that PEF might need to pay CH2M Hill "in excess of $30,000," which PEF says "is the cost for CH2M Hill to go through, pick out the correct computer file, put them together in an integrated package so that they run together and provide them on essentially a DVD." Tr. at 543. In the context of PEF's COLA and Contention 4, however, $30,000 does not represent an "undue burden or cost" that should relieve PEF from the duty to make the mandatory disclosures otherwise required by 10 C.F.R. § 2.336. PEF's application concerns the construction of two large nuclear reactors, at a total cost in excess of $14 billion.[30] The COLA application and the NRC application process itself (disregarding any adjudicatory costs) is a multi-million dollar effort by PEF. Turning to the adjudication itself, $30,000 is likely to pale in comparison to PEF's cost of bringing its environmental experts (including CH2M Hill experts) to the evidentiary hearing on Contention 4

[29] Licensing Board Order (Protective Order Governing Non-Disclosure of Certain Documents Claimed to be Proprietary) (Oct. 14, 2009) at 3 (unpublished).

[30] See News Release, Progress Energy gets approval to take next step to secure Florida's energy future (July 15, 2008), http://www.progress-energy.com/aboutus/news/article.asp?id=19062 ("The company estimates the total cost of the project to be approximately $14 billion for the two units and an additional $3 billion for the necessary transmission equipment.").

and preparing them for that hearing.[31] In the context of this case, the ability of the Intervenors (and this Board) to test the validity of the local scale groundwater models that PEF is using to support its environmental conclusions appear to be essential to the resolution of Contention 4.[32]

Lastly, we note that these models are maintained under a quality assurance program and hence should be relatively available for inspection and review by the NRC Staff, a fact repeatedly acknowledged by PEF at the oral argument. Tr. at 538-41, 544-45; see also id. at 587-91. In these circumstances, we reject the proposition that it would be unduly burdensome or costly to require PEF to comply with this aspect of its mandatory disclosure duties under 10 C.F.R. § 2.336(a)(2)(i).[33]

F. Timeliness

PEF asserts that the Intervenors' motion to compel is untimely. PEF Answer at 4. PEF points out that it disclosed the existence of Report 74 in its initial disclosures on September 1, 2009, and that challenges to the adequacy of the initial disclosure were due on November 30,

[31] The fact that a document, such as computer modeling information, is within the scope of the mandatory disclosure requirements of 10 C.F.R. § 2.336(a)(2)(i) does not mean that the party must automatically go to the cost and expense of gathering and producing it (e.g., pay its subcontractor $30,000). To the contrary, the regulation allows a party to comply by merely providing a "description by category and location" of all documents subject to mandatory disclosure. Id. Once such descriptions are provided, a party need not provide an actual copy of the document unless and until the other party requests it.

[32] Under a proper quality assurance program (e.g., complying with safety requirements in 10 C.F.R. Part 50 app. B), information relating to the development and use of a recalibrated site model in the preparation of a COLA would be readily available as part of a configuration management program. We therefore question why producing this information is as burdensome as PEF claims.

[33] We also note that while there is an "undue burden or cost" exclusion to discovery under Subpart G, see 10 C.F.R. § 2.705(b)(2)(iii) (disclosure not required if "the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the proceeding, the parties resources, the importance of the issue in the proceeding and the importance of the proposed discovery in resolving the issues"), there is no such "undue burden or cost" exclusion to the mandatory disclosures under 10 C.F.R. § 2.336.

2009.[34] Id. Likewise, PEF disclosed the existence of Report 123 in an updated disclosure on March 18, 2010, and therefore maintains that a challenge to that disclosure would have been due on March 29, 2010. Id. PEF notes that the Intervenors did not ask for these models until July 8, 2010, "more than three months after the second deadline." Id. The motion to compel was not filed until September 27, 2010.

We agree with PEF that the timeliness of the Intervenors' request is problematic. Under NRC regulations, motions are to be filed within ten days of the event or circumstance from which they arise. 10 C.F.R. § 2.323(a). Likewise, we have set deadlines for the filing of various motions both in the ISO and elsewhere. This Board is committed to active and efficient case management of this proceeding, so that matters are raised (and resolved) as promptly as possible. It does appear that the Intervenors could have challenged the completeness of PEF's mandatory disclosures and sought the models underlying Report 74 and Report 123 at an earlier time.

On the other hand, there are circumstances that counsel that the instant motion to compel should not be rejected on timeliness grounds. First, it is still quite early in this proceeding. The NRC Staff does not expect to issue the Final Environmental Impact Statement (FEIS) and the Final Safety Evaluation Report (FSER) for at least a year. See Status Report (Dec. 2, 2010) at 1-2. Indeed, the FSER was recently delayed by more than six months. Id. Meanwhile, the evidentiary hearing is at least eighteen months away. ISO at II.J.6. Second, there is no suggestion that the timing of this motion causes prejudice or harm to any party. Requiring PEF to produce the requested information now will not disrupt its preparation for the evidentiary hearing. Third, the requested local scale groundwater models and associated information were relied upon, and discussed extensively by the NRC Staff in its August 5, 2010

[34] Normally, motions to compel must be filed within 10 days of the event or circumstance from which they arises. 10 C.F.R. § 2.323(a). The Board extended this deadline for initial mandatory disclosures and extended the deadline for challenges thereto. See ISO at 4 and 7; Order (Granting Motion for Extension of Time) Oct. 27, 2009 (unpublished).

DEIS. This served to remind the parties and the Board of the importance of these models to the issues raised in Contention 4. Indeed, if and when the NRC Staff relies on a document, then the NRC Staff itself is also obliged to disclose the document, to the extent it is available.[35] See 10 C.F.R. § 2.336(b)(3). The Intevernors asked for these models on July 8, 2010, even before the DEIS was issued. As a fourth matter, we agree that, once the Intervenors contacted PEF about these models, the Intervenors diligently pursued the modeling information, ultimately reaching an impasse with PEF and finding that the relevant models were not publicly available.

It is the Board's assessment that the groundwater issues are of central importance to the dewatering, groundwater, and other water-related allegations of Contention 4, and that mandatory disclosure of the models requested here will be very important in resolving the merits of Contention 4.[36] Given the importance of this information, the lack of prejudice to PEF or to the efficiency of this proceeding, and the fact that it in no way affects the critical-path of this licensing process or evidentiary hearing, we decline to reject this motion to compel on the grounds of untimeliness.

III. CONCLUSION AND ORDER

For the foregoing reasons, the motion to compel Progress Energy Florida, Inc. to comply with the mandatory disclosure requirements of 10 C.F.R. § 2.336(a)(2)(i) is granted. We rule

[35] "Availability" not "possession, custody, or control" is the criterion for the NRC Staff's mandatory disclosure responsibilities. Compare 10 C.F.R. § 2.336(b) with 10 C.F.R. § 2.336(a)(2)(i).

[36] PEF has filed two motions for the dismissal or disposition of certain parts of Contention 4. Motion to Dismiss as Moot the Aspects of Contention 4 Related to Active Dewatering During Levy Nuclear Plant Operations (Sept. 30, 2010); Progress Energy's Motion for Summary Disposition of Contention 4 (Environmental Impacts of Dewatering and Salt Drift) with Regard to Salt Drift and Passive Dewatering (Oct. 4, 2010). Meanwhile, the Intervenors have filed a motion for leave to file an amended Contention 4A. Ecology Party of Florida, Green Party of Florida, Nuclear Information and Resource Service Motion for Leave to Amend Contention 4 (Nov. 15, 2010); An Amended Contention 4 (Nov. 15, 2010). Although the Board has yet to issue its rulings on those motions, we affirm that Contention 4 remains a viable contention.

that Progress Energy Florida, Inc. must provide to the Intervenors the documents specified on Attachment A.

Within twenty (20) days of this Memorandum and Order, the Intervenors (including their experts) shall make a good faith effort to confer with Progress Energy Florida, Inc. (and its experts from CH2M Hill) for the purpose of discussing and attempting to arrange for a full, adequate, and efficient disclosure of the documents specified in Attachment A. For example, the parties may agree that such disclosure can be best achieved by having the Intervenors' expert(s) visit the facilities of CH2M Hill and review and run the relevant models at that location. Within thirty (30) days of this Memorandum and Order, the Intervenors shall advise the Board, in writing, whether such an agreement has been reached. If no such agreement is reached, then on the fortieth (40) day after this Memorandum and Order, Progress Energy Florida, Inc. shall deliver to the Intervenors, in an electronic format readable and usable by the Intervenors, all documents specified in Attachment A. If any of these documents contain information that is claimed to be proprietary, then it shall be disclosed, but Progress Energy Florida, Inc. may designate and identify any such information as proprietary, and it will be protected by the protective order previously issued in this proceeding.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Anthony J. Baratta
ADMINISTRATIVE JUDGE

/RA/

Dr. William M. Murphy
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 22, 2010

ATTACHMENT A

DOCUMENTS CONTAINING GROUNDWATER MODELS OR MODELING INFORMATION TO BE PRODUCED PURSUANT TO 10 C.F.R. § 2.336

A. Scope of Mandatory Disclosure: Pursuant to 10 C.F.R. § 2.336(a)(2)(i), and the December 22, 2010 Memorandum and Order of the Atomic Safety and Licensing Board in the matter of Progress Energy Florida, Inc. (Combined License Application for Levy County Nuclear Power Plant, Units 1 and 2), LBP-10-23, 72 NRC __ (slip op.) (Dec. 22, 2010), Progress Energy Florida, Inc. (PEF) shall provide to the Intervenors, a copy of each document described below that is in the possession, custody, or control of PEF.

1. The Initial Local Scale Groundwater Model as that term is used in LBP-10-23.

2. The Recalibrated Local Scale Groundwater Model as that term is used in LBP-10-23.

3. The "Multi-Layer Unsteady state (MLU) model of transient well flow in layered aquifer systems" discussed, inter alia, in the DEIS at page 2-26.

4. Input data (in machine readable format) used to perform the analyses associated with the models listed in items 1-3 above.

5. Results (in machine readable format) produced from running the models listed in items 1-3 above.

6. Documents relating to, or providing results obtained from, the models listed in items 1-3 above, including documents discussing how the results produced from the modeling and calculations were interpreted and the basis for the interpretations.

7. Documents describing how the models listed in items 1-3 above were developed, including such information as the assumptions made and how the physical measurements of the site were used to create the model input and associated grid.

8. Documents describing the method used to recalibrate the model based on the measurements made.

B. Definitions and Conditions: For purposes of this Order:

1. The term "document" includes information of any kind, including, reports, analysis, raw data, algorithms, logic, graphics, inputs, output, and any computer analysis, simulation, software, program, model or submodel, that is contained, stored, or embodied in any form or medium, including paper, electronic, or otherwise.

2. As discussed in LBP-10-23, a document is within the PEF's "possession, custody, or control" if (a) PEF has actual possession or custody of the document, (b) PEF has legal title to the document or the legal right to access the document, or (c) the

document was developed or generated by PEF's environmental consulting firm, CH2M Hill, in the course of CH2M Hill's performance of work for PEF related to the proposed LNP project (regardless of whether the document was a contract deliverable under the contractual arrangement between PEF and CH2M Hill and even though CH2M Hill may charge PEF a cost or fee for producing the document).

3. PEF is not obliged to generate, or require CH2M Hill to generate, any entirely new information, but it is obliged to review its extant information and documents (e.g., computer files) and gather, copy, and/or download the relevant and responsive portions thereof into an "integrated package" or packages and to provide them pursuant to LBP-10-23. See Tr. at 543.

4. If PEF or CH2M Hill (or any of their vendors) claims that any document contains trade secrets or proprietary commercial or financial information, then such document shall be disclosed in accordance with the terms of the October 14, 2009, protective order and non-disclosure agreement issued herein. Only the Intervenors and their experts who have signed a non-disclosure agreement may access any such Proprietary Documents, and they shall use them only as necessary for the conduct of this proceeding.

5. Documents shall be disclosed in the same form (electronic or paper) as the original document in PEF's or CH2M Hill's possession. If it was ESI, then it shall be disclosed and produced in a searchable and readable electronic format accessible to the Intervenors.

6. The provisions of the August 27, 2009, initial scheduling order (ISO) herein (e.g., waiver of mandatory disclosures for documents claimed to be attorney work product, continuing duty to update disclosures) shall apply to the information covered by LBP-10-23. In case of conflict, the provisions of LBP-10-23 will control.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (GRANTING MOTION TO COMPEL DISCLOSURE OF GROUNDWATER MODELING INFORMATION) (LBP-10-23) have been served upon the following persons by Electronic Information Exchange.

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

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: Anthony.baratta@nrc.gov

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

Joshua A. Kirstein, Law Clerk
E-mail: josh.kirstein@nrc.gov

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

Pillsbury Winthrop Shaw Pittman, LLP
2300 N. Street, N.W.
Washington, DC 20037-1122
Counsel for Progress Energy Florida, Inc.
John H. O'Neill, Esq.
Robert B. Haemer, Esq.
Ambrea Watts, Esq.
Alison Crane, Esq.
Michael G. Lepre, Esq.
Jason P. Parker, Esq.
Stefanie Nelson George, Esq.
Stephen Markus
E-mail:
john.oneill@pillsburylaw.com
robert.haemer@pillsburylaw.com;
ambrea.watts@pillslburylaw.com
alison.crane@pillsburylaw.com
michael.lepre@pillsburylaw.com
jason.parker@pillsburylaw.com
stefanie.george@pillsburylaw.com
stephen.markus@pillsburylaw.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.
Kevin Roach, Esq.
Lauren Goldin, Esq.
Joseph Gilman, Paralegal
E-mail:
marian.zobler@nrc.gov
sara.kirkwood@nrc.gov
jody.martin@nrc.gov
michael.spencer@nrc.gov
kevin.roach@nrc.gov
laura.goldin@nrc.gov
jsg1@nrc.gov

OGC Mail Center : OGCMailCenter@nrc.gov

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

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

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

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

[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 22nd day of December 2010