

December 29, 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

PROGRESS ANSWER OPPOSING JOINT INTERVENORS' MOTION FOR CONTENTION 12

I. Introduction

Progress Energy Florida, Inc. ("Progress") hereby opposes the Motion for Leave to File a New Contention, and Contention 12 ("JI Motion") submitted by Nuclear Information and Resource Service, the Ecology Party of Florida, and the Green Party of Florida (collectively, "Joint Intervenors") dated November 15, 2010. Joint Intervenors request that the Atomic Safety and Licensing Board ("Board") admit as timely Contention 12, which challenges the sufficiency of the consideration in the Levy Draft Environmental Impact Statement ("DEIS") of alternatives to the proposal to build two Advanced Passive 1000 ("AP1000") nuclear power reactors on the Levy County site. See JI Motion at 2-3.

Joint Intervenors here recycle an objection to the siting of the proposed Levy Nuclear Plant ("Levy" or "LNP") raised in the 2009 Florida Site Certification proceeding by the Withlacoochee Area Residents, Inc. ("WAR"). There WAR objected to the proposed location of the LNP cooling water intake structure ("CWIS") in the Cross Florida Barge Canal ("CFBC") as preventing future reconnection of the Withlacoochee River. Joint Intervenors fail to bring to this Board's attention their collateral attempt to pursue WAR's objection, which was rejected by the Governor and Cabinet of the State of Florida, sitting as the Florida Siting Board. The Recommended Order on Certification of LNP adopted by the Florida

Siting Board noted that the Southwest Florida Water Management District “has evaluated restoration of the River to its original condition, but has not advocated reconnection.”¹

The underpinning of Joint Intervenors’ argument for timeliness is WAR’s July 14, 2010 proposal to create an impoundment of six miles of the CFBC submitted to the Withlacoochee Regional Water Supply Authority (“WRWSA”) and considered in a public meeting of the WRWSA on October 20, 2010. JI Motion, Attachment 12. The WRWSA Board agreed to “accept” WAR’s “interesting” proposal as a “potential alternative water supply (AWS) project for consideration as a long-term [20 to 25 years] water supply project.” JI Motion, Attachment 11 at 2-3. The WRWSA Board further agreed with the recommendation of its Executive Director that “further analysis of the project not take place until the time in which these long-term AWS projects are further analyzed for consideration and development in the future.” Id. at 3. WAR’s proposal is speculative, is not new,² and has not been adopted by any Florida state or local agency.

The JI Motion should be summarily denied because it is untimely and fails to meet the criteria for a properly filed non-timely contention. Alternatively, even if the JI Motion were considered timely, Contention 12 is still inadmissible because it fails to meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1). Specifically, Contention 12 fails: (1) to demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action involved in the proceeding; (2) to provide adequate support for the assertions made in the contention; and (3) to show that a genuine dispute exists on a material issue of law or fact. 10 C.F.R. § 2.309(f)(1)(iv)-(vi).

¹ Re Progress Energy Florida Levy Nuclear Projects Units 1 and 2, Recommended Order on Certification, State of Florida, Division of Administrative Hearings (Case No. 08-2727EPP) (May 15, 2009) at 33, 97 (“RO”); adopted by the State of Florida Siting Board, Final Order Approving Certification (Aug. 26, 2009) (“Final Order”).

² WAR’s July 14, 2010 proposal was in turn based on an evaluated option published in a 2004 URS Lower [Withlacoochee] River Restoration Alternatives Feasibility Study. See JI Motion Attachment 11, Figure 5.

At bottom, the Joint Intervenors seek to pursue the WAR proposals in this proceeding. Those proposals, however, seek not to move LNP to an alternative site, but rather to move the CWIS further westward down the CFBC. WAR essentially argues that later relocation of the CWIS in the CFBC would add objectionable costs to the local ratepayers. Thus, Joint Intervenors' concerns regarding the potential restoration of the hydraulic connection of the Withlacoochee River and creation of a freshwater impoundment on the CFBC boil down to a question of cost and, consequently, do not raise a cognizable genuine dispute on a material issue of law or fact with the DEIS consideration of alternatives.

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 on February 6, 2009, alleging several contentions. On July 8, 2009, the Board found portions and subparts of three contentions to be admissible.

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 60 days of when the information first becomes available. NRC Staff Motion (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 ("ISO").³ 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 filled 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 60 (not 30) days. Licensing Board Order (Granting Motion for Clarification) (Sept. 3, 2009) (unpublished).

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 90 days for the timely filing of new contentions on hydroecology. Over objections by Progress and the NRC Staff, on September 29, 2010 the Board granted Joint Intervenors' motion for extension of time to file a motion to admit amended or new contentions based on the DEIS. The Board's order extended the October 4, 2010 deadline by forty days. Licensing Board Order (Granting Motion for Extension of Time) (Sept. 29, 2010) (unpublished).

On November 15, 2010, Joint Intervenors partially filed Contention 12, challenging the sufficiency of the DEIS's consideration of alternatives to the proposal to build two AP1000 nuclear power reactors on the Levy County site. On December 2, 2010, the Parties filed a Joint Motion that agreed that answers to Contention 12 would be due by December 29, 2010, or twenty-five days after the final attachment to Contention 12 was served. That same day, the Board issued an Order granting the Joint Motion.

III. Standard for Contentions

A. Timeliness

Under the NRC Rules of Practice, contentions must be based on documents or other information available at the time the petition is filed, which occurs at the onset of a proceeding. 10 C.F.R. §§ 2.309(b), 2.309(f)(2). 10 C.F.R. § 2.309(f)(2) states that, "on issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report ["ER"]." The Commission has held that "contention pleading rule[s] require[] a petitioner to file [National Environmental Policy Act] NEPA contentions on the applicant's ER so that environmental issues are raised as soon as possible." Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC125, 130 (2004). Furthermore, the Commission has stated that it "is essential to efficient case management that intervenors file contentions on the basis of the applicant's environmental report and not delay their contentions until after the Staff issues its environmental

³ Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-22, 70 NRC 640 (2009) ("ISO").

analysis.” Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-4, 59 NRC 31, 45 (2004) (footnote omitted).

Reflecting that information contained in the DEIS or final environmental impact statement (“FEIS”) may differ significantly from information contained in the ER, 10 C.F.R. § 2.309(f)(2) authorizes the filing of new or amended contentions in light of new and material information in the DEIS or FEIS. “The petitioner may amend those contentions or file new contentions if there are data or conclusion in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant’s documents.” 10 C.F.R. § 2.309(f)(2). This Board has ordered that an amended or new environmental contention is “timely” if it is filed promptly after “the new and material information on which it is based first becomes available.” ISO at 647. Consequently, the ISO requires a two-step inquiry with respect to timeliness of contentions: (1) what is, and when was, the new and material information that is the basis of the new or amended contention (“trigger event”); and (2) how soon after that information became available was the contention filed? See also Southern Nuclear Operating Co. (Vogtle Electric Generating Plant), LBP-10-21, 72 NRC ___, slip op. at 23, 28, & n.17 (Nov. 30, 2010).

It is not sufficient that the information is in the DEIS because issuance of the DEIS itself does not occasion the raising of additional arguments that could have been raised previously. Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 385-86 & n.61 (2002) (citing Union of Concerned Scientists v. NRC, 920 F.2d 50, 55 (D.C. Cir. 1990) (“[W]e think it unreasonable to suggest that the NRC must disregard its procedural timetable every time a party realizes based on NRC environmental studies that maybe there was something after all to a challenge it either originally opted not to make or which simply did not occur to it at the outset.”)). The filing of new contentions is permitted when new and material information is obtained that was not available early enough to provide the basis for the timely filing of that contention. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045 (1983). “[T]he unavailability of these documents does not constitute a showing of good cause for admitting a late-filed contention

when the factual predicate for that contention is available from other sources in a timely manner.” Id. at 1043. Further, the requirement that there be data or conclusions that “differ significantly” from those in the ER is analogous to the requirement that the information be “materially different” from information previously available. Exelon Generation Co. (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134 (2005).

Non-timely filings will not be entertained absent a determination that the contention should be admitted based on a balancing of the following factors:

- (i) Good cause, if any, for the failure to file on time;
- (ii) The nature of the requestor’s/petitioner’s right under the Act to be made a party to the proceeding;
- (iii) The nature and extent of the requestor’s/petitioner’s property, financial or other interest in the proceeding;
- (iv) The possible effect of any order that may be entered in the proceeding on the requestor’s/petitioner’s interest;
- (v) The availability of other means whereby the requestor’s/petitioner’s interest will be protected;
- (vi) The extent to which the requestor’s/petitioner’s interest will be represented by existing parties;
- (vii) The extent to which the requestor’s/petitioner’s participation will broaden the issues or delay the proceeding; and
- (viii) The extent to which the requestor’s/petitioner’s participation may reasonably be expected to assist the developing a sound record.

10 C.F.R. § 2.309(c)(1). Where an intervenor has already been admitted as a party, factors (ii)-(iv) weigh in their favor. Vogtle, LBP-10-21, 72 NRC ___, slip op. at 27.

In weighing these factors, whether good cause exists for failure to file on time is given the most weight. State of New Jersey (Department of Law and Public Safety’s Requests Dated October 8, 1993), CLI-93-25, 38 NRC 289, 296 (1993). If the petitioner cannot demonstrate good cause for lateness, petitioner’s demonstration on the other factors must be particularly strong in order to justify admission of the contention. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-

92-12, 36 NRC 62, 73 (1992); Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 565 (“If a petitioner cannot show good cause, then its demonstration on the other factors must be ‘compelling’.”) (footnote omitted).

B. Admissibility

Even if a proponent of a new contention satisfies the requirements of 10 C.F.R. § 2.309(f)(2) and 10 C.F.R. § 2.309(c), the proponent must also demonstrate that the new contention satisfies the standard for admissibility in 10 C.F.R. § 2.309(f)(1)(i)-(vi). 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;
- (ii) Provide a brief explanation of the basis for the contention;
- (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 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’ Answer Opposing Petition for Intervention and Request for Hearing by [Joint Intervenors] (Mar. 3, 2009) provides a fuller discussion of these standards, which will not be repeated here.

IV. Joint Intervenors Contention 12 Is Untimely And Should Be Summarily Dismissed

Contention 12 should be summarily dismissed because it is untimely, the Joint Intervenors fail to demonstrate good cause for their failure to file on time, and Joint Intervenors showing on the remaining 10 C.F.R. § 2.309(c)(1) factors is not compelling.

A. Contention 12 Is Untimely Because It Is Based On Previously Available Information

Commission regulations permit new environmental contentions based on the DEIS only if there are data and conclusions in the DEIS that differ significantly from the data and conclusions in the applicant's documents. 10 C.F.R. § 2.309(f)(2). Joint Intervenors' Contention 12 challenges the sufficiency of the DEIS's consideration of alternatives to the proposal to build two nuclear power reactors on the Levy County site. See JI Motion at 2-3. Contrary to the requirements of Section 2.309(f)(2), Joint Intervenors do not challenge any new information or analysis in the DEIS, but instead question the sufficiency of information and conclusions initially provided in Progress's ER, which essentially comport with those in the DEIS.⁴

Contention 12 concerns two alleged key impacts resulting from the location of the CWIS in the CFBC, and the purported failure of the DEIS's consideration of alternative sites for the proposed Levy Nuclear Plant ("LNP") to consider such impacts. JI Motion at 2. However, the proposed location of the CWIS in the CFBC, the alternatives analysis' consideration of cumulative aquatic impacts for the Levy County site and the alternative sites, and the ultimate conclusion that no alternative site is "environmentally preferable" to the Levy County site are not new to the DEIS.

⁴ Joint Intervenors requested an extension to file contentions based on the DEIS related to hydroecology in order to accommodate medical conditions of Dr. Bacchus. The Board found good cause for a 40-day extension. Board Memorandum and Order (Granting Motion for Extension of Time) at 1 (Sept. 29, 2010) (unpublished). However, the proposed contention challenges the DEIS alternatives analysis and does not rely on hydroecology analysis by Dr. Bacchus (as discussed infra, the opinion of Dr. Bacchus apparently contradicts Contention 12). Accordingly, even assuming Contention 12 was based on the DEIS, which it is not, pursuant to the Joint Motion on Scheduling and the Board's clarification of the ISO, Contention 12 should have been filed by October 4, 2010.

The LNP ER⁵ thoroughly describes the location of the CWIS in the CFBC, and the expected environmental impacts from that cooling water intake system for the proposed LNP. For example, ER Section 2.3.1.3, Cross Florida Barge Canal, describes the history of the CFBC, the fact that the CFBC bisects the Withlacoochee River, severing the hydraulic connection between Inglis Dam and the downstream portion of the river, and the proposal to locate the CWIS in the CFBC. ER Sections 5.2.1.4, Cross Florida Barge Canal, and 5.3.1, Intake System, describe the location of the CWIS and the expected impacts from operation of the CWIS on the CFBC. Among other impacts, the ER notes that operation of the CWIS in the CFBC will result in higher-salinity water moving up the canal (eastward) towards the CWIS, but that “[t]he more constant range of higher salinity waters during LNP full pumping conditions is anticipated to improve water quality conditions for many aquatic organisms and result in an improved biota in the upper CFBC.” ER § 5.2.1.4 at 5-14. In addition, ER Section 5.11 describes the process used to consider present and future federal, nonfederal, and private actions identified in local land use plans that could have meaningful cumulative impacts with the Levy project. ER Section 5.11 in turn refers to the discussion of land use plans in ER Chapter 4. ER Section 4.1.1.1.2.3, Land Use Plans, “summarizes the federal, state, or regional land use plans relevant to the [Levy] site and vicinity.”

The ER alternatives analysis thoroughly describes the consideration of expected water impacts at the alternative sites considered. See ER § 9.3, Site Selection Process. Some relevant considerations identified in this discussion include that: (1) for the Crystal River site, its location near the Gulf of Mexico provides it with adequate cooling water and a reservoir would not be needed, ER § 9.3.3.1.3; (2) for the Dixie site, adequate cooling water was likely available from the Suwannee River, but the site would likely require construction of a reservoir, ER § 9.3.3.2.3; (3) for the Highlands site, the primary source of water would be the Kissimmee River, but water availability is uncertain at this time, and the site would likely require the construction of a reservoir, ER § 9.3.3.3.3; and (4) for the Putnam site, the

⁵ Unless otherwise noted, references to the ER are to Rev. 0 of the LNP ER.

primary water supply would be the St. Johns River, but the site would require construction of a reservoir, which would likely interfere with future restoration plans for the river, ER § 9.3.3.4.3.

The ER ultimately concluded that none of the alternative sites were environmentally preferable to the Levy County site. ER at § 9.3.4 and Table 9.3-19.

The expected aquatic impacts resulting from operation of two reactors at the proposed Levy County site and the alternative sites was also the subject of multiple requests for additional information (“RAI”) from the NRC to Progress. By letter dated February 24, 2009, the NRC Staff submitted a number of RAI’s to Progress. See ADAMS Accession Nos. ML090360596 (transmittal letter) and ML090500793 (Enclosure 1). RAI No. 4.7-1 (Aquatic Ecology) requested that Progress “[p]rovide information on cumulative impacts to aquatic resources for proposed activities that may impact waters of the CFBC, such as Inglis Hydropower project, elimination of the Inglis Lock, US19 bridge expansion, Tarmack quarry, and plans for additional quarries or mines.” Feb. 24, 2009 RAI Enclosure 1 at 11. Progress responded to RAI No. 4.7-1 by letter dated March 27, 2009 (see ADAMS Accession No. 091320073, Enclosure 1 at 64-68), which was provided to Joint Intervenors in the initial document disclosure. Progress analyzed the identified proposed activities and projected that the activities would result in no cumulative impacts, small cumulative impacts, or would otherwise be mitigated by Florida Department of Environmental Protection (“FDEP”) and U.S. Army Corps of Engineers (“USACE”) permit requirements. Id.

In addition, on March 13, 2009, the NRC, on behalf of the USACE, submitted to Progress an “Addendum to [RAI] Regarding the Environmental Review of the Combined License Application for the Levy Nuclear Power Plant, Units 1 and 2, (“RAI USACE-11”) (ADAMS Accession Nos. ML090610165 and ML090610172), which requested (among other things) “sufficient information for the alternatives analysis” so that the USACE could “reasonably evaluate, differentiate and compare the relative impacts of each practicable alternative on the overall environment, and on the aquatic environment in particular”

and the “outcome of the alternatives analysis under 40 C.F.R. 230.10 – Determination of the Least Environmentally Damaging Practicable Alternative (LEDPA).” RAI USACE-11, Addendum to Enclosure 2 at 1. Progress responded to RAI USACE-11 by letter dated June 26, 2009, with the “Levy Nuclear Units 1 and 2 (LNP) Section 404(b)(1) Alternatives Analysis” (“LEDPA Analysis”) attached to the letter (ADAMS Accession Nos. ML091830341 and ML091830342, respectively). The June 26, 2009 letter and the LEDPA Analysis were included in the September 1, 2009 initial document disclosures to Joint Intervenors.⁶

The NRC Staff, its contractors’ staff, and the USACE staff (collectively, “review team”), independently evaluated information contained in the ER and supplemental documents and Progress’s responses to RAIs, as well as the Progress Site Certification Application submitted to the FDEP, the FDEP review of the proposed project, USACE permitting documentation, and other governmental and independent sources. DEIS § 5.0. DEIS Section 5.2.3.1, Surface Water, describes the expected impacts resulting from the LNP CWIS on the CFBC, the Old Withlacoochee River (“OWR”), and the lower Withlacoochee River. The review team concluded that the impact of operating LNP on surface water quality of the CFBC, OWR, the lower Withlacoochee River, and other nearby streams would be small and mitigation beyond the FDEP Conditions of Certification would not be warranted. DEIS § 5.2.3.1 at 5-16. DEIS Section 5.12 and Table 5-22 identify the other “Measures and Controls to Limit Adverse Impacts During Operation,” including compliance with the FDEP Conditions of Certification. For Water Use Impacts, the review team found that “[n]o mitigation would be required for pumping water from the Gulf of Mexico via the CFBC,” and for Water Quality Impacts, the review team found that “[n]o mitigation would be required for changes in water movement and temperature changes associated with the operation of the LNP intake.” DEIS Table 5-22 at 5-123.

⁶ The USACE review of the LEDPA Analysis is on-going and the USACE has submitted additional comments to Progress. Later revisions of the LEDPA Analysis continue to be submitted to the USACE to resolve these comments.

The review team also evaluated cumulative impacts from operation of LNP. “Cumulative impacts may result when the environmental effects associated with the proposed action are compounded with the environmental effects associated with the proposed action with temporary or permanent effects associated with past, present, and reasonably foreseeable future projects.” DEIS § 7.0 at 7-1. For surface water use impacts, the cumulative analysis considers other past, present, and reasonably foreseeable future actions that could affect surface-water use. Id. at 7-10. The review team determined that the consumptive use of water from operation of LNP and all other existing or future uses would not alter the volume of water in the Gulf of Mexico and would not noticeably alter the surface water resource within 20 miles of the Levy site. DEIS § 7.2.1.1 at 7-13. The review team concluded that the cumulative impacts on surface water from construction, preconstruction, and operations of two nuclear units and other past, present, and reasonably foreseeable future activities would be SMALL and no mitigation warranted. Id.

The DEIS alternatives analysis summarizes the review team’s characterization of the cumulative impacts related to locating a two-unit nuclear power facility at the proposed Levy site and at each alternative site. DEIS § 9.3.6 at 9-239. The NRC criteria used in assessing whether a proposed site is to be rejected in favor of an alternative site is based on whether the alternative site is environmentally preferable, and if so, whether it is obviously superior to the site proposed by Progress. Id. Although the review team determined that “there are differences and distinctions between the cumulative environmental impacts of building and operating two new nuclear generating units at the proposed [Levy County] site and the alternative sites,” it “concludes that none of these differences is sufficient to determine that any of the alternative sites would be environmentally preferable to the proposed site for building of two nuclear generating units.” DEIS § 9.3.6.2 at 9-245. Accordingly, the NRC Staff concluded that none of the alternative sites would be “obviously superior” to the Levy site. DEIS § 9.3.6.3 at 9-245.

In sum, none of the information, data, and conclusions on aquatic impacts and alternative sites provided in the DEIS materially differs from the information, data, and conclusions on aquatic impacts and alternative sites provided in the ER or any of the supplemental documents prepared by Progress, such as the LEDPA Analysis..

Thus, in order for Contention 12 to be timely, Joint Intervenors must otherwise demonstrate that the information on which the proposed contention is based was not previously available, is materially different than information previously available, and that the information has been submitted in a timely fashion based on the availability of the subsequent information. 10 C.F.R. § 2.309(f)(2). This Joint Intervenors have failed to do.

First, Joint Intervenors complain that the ER's discussion of alternatives "is only about 40 pages" compared to the DEIS, which "devotes more than 200 pages to this exercise." JI Motion at 9. Aside from the fact that Joint Intervenors overlook the hundreds of pages of Progress's responses to the NRC Staff's RAIs (only two of which are discussed here), the distinction in page-length between the ER's and DEIS' discussions of alternatives is not relevant for Section 2.309(f)(2) purposes where the information, data, and ultimate conclusions in the ER and the DEIS are materially the same.

Nor is the information on which Contention 12 is based new. Indeed, Joint Intervenors concede that "something as basic as the location of the proposal is not 'new' information." JI Motion at 10.

Joint Intervenors rely on the purported actions of the Withlacoochee River Basin Board concerning the Withlacoochee River in support of their contention. JI Motion at 9. Joint Intervenors claim that the Withlacoochee River Basin Board intends to "restor[e] the hydraulic connection between the upper and lower river segments." JI Motion at 3. But, as discussed in Section V of this Answer, infra, Joint Intervenors nowhere provide any support for their claim that the Withlacoochee River Basin Board or any federal, state, or local agency ever intends to restore the hydraulic connection between the

bisected Withlacoochee River segments. Joint Intervenors cannot invent a new and material issue for section 2.309(f)(2) purposes out of whole cloth.

In any event, Joint Intervenors admit that they were not aware of the Withlacoochee River Basin Board's (purported) river restoration plans until publication of the DEIS and concede that their lack of awareness "does not cure the timeliness factor." JI Motion at 9. Consequently, this information is not a new and material issue under Section 2.309(f)(2).

Joint Intervenors also contend that the "action of the [] Withlacoochee Regional Water Supply Authority on October 20, 2010 with respect to the impoundment of freshwater in the CFBC brought these issues into focus." JI Motion at 9. Bringing issues into focus, however, does not demonstrate that the issues are new or material under 10 C.F.R. § 2.309(f)(2). Moreover, the information on which Joint Intervenors rely shows that this issue is neither new nor material. The WAR proposal itself states that it is "similar to the one evaluated in Option 2 in the 2004 URS Lower River Restoration Alternatives Feasibility Study." JI Motion Attachment 12 at 1. Thus, this is not a new proposal. The October 20, 2010 "action" by the Withlacoochee Regional Water Supply Authority – merely "accepting" the WAR brief written proposal for further consideration along with other proposals sometime in the future - is not material to anything. JI Motion Attachment 11 at 3.

Accordingly, Joint Intervenors' Contention 12 presents no new, material information and is therefore untimely under 10 C.F.R. § 2.309(f)(2).

B. Contention 12 Fails To Meet The Criteria For Properly Filed Non-Timely Contentions

Because Contention 12 is untimely under 10 C.F.R. § 2.309(f)(2), it must meet the non-timely contention criteria contained in Section 2.309(c)(1) before being considered for admission. However, Contention 12 fails to meet those criteria and therefore should be rejected.

First, Joint Intervenors have failed to demonstrate good cause for failing to file Contention 12 on time for many of the same reasons why the contention is untimely under section 2.309(f)(2). Joint Intervenors have failed to identify any new information, analysis, or conclusions in the DEIS that differs from the ER or supplementary documents from Progress. Thus, Petitioners cannot contend that publication of the DEIS provides the requisite good cause for filing Contention 12 now. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-27, 52 NRC 216, 223 (2000) (late contention denied where there was no showing of “new or different data or conclusions” in the DEIS); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-79, 16 NRC 1116, 1118 (1982) (no good cause for late filing where draft environmental impact statement contained no new information relevant to the contention). Indeed, Joint Intervenors admittedly “understand that something as basic as the location of the proposal is not ‘new’ information.” JI Motion at 10.

Joint Intervenors contend, however, that “action within the local community in the area of the proposed Levy site that is incompatible with the proposed project” provides sufficient good cause for the failure to raise Contention 12 previously (JI Motion at 10), apparently referring to actions purportedly being taken by the Withlacoochee River Basin Board and the WRWSA. See JI Motion at 9. These arguments are without merit.

First, Joint Intervenors concede that they are inexcusably late with respect raising those portions of Contention 12 stemming from the purported actions of the Withlacoochee River Basin Board because they were unaware of its purported plans concerning the Withlacoochee River prior to publication of the DEIS. JI Motion at 9. Information is not new, and therefore cannot provide good cause for an untimely filing, simply because a party was not aware of the information earlier. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 126 (2009).

In any event, as discussed in Section V of this Answer, infra, Joint Intervenors point to no information to support their assertions. No information is provided supporting the claim that the

Withlacoochee River Basin Board (or anyone else for that matter) is contemplating restoring the hydraulic connection between the now severed segments of the Withlacoochee River. Information that does not exist certainly cannot provide the requisite good cause for failing to timely file Contention 12. Accordingly, Joint Intervenors have failed to demonstrate good cause for failing to raise those portions of Contention 12 concerning the purported plan of the Withlacoochee River Basin Board.

The October 20, 2010 action by the WRWSA, which allegedly “brought these issues into focus” (JI Motion at 9) for Joint Intervenors, also fails to provide the requisite good cause for untimely filing those portions of Contention 12 related to that action. To demonstrate good cause, Joint Intervenors must establish that (1) the information is new information not already in the public domain and could not have been presented earlier, and (2) Joint Intervenors acted promptly after learning of the new information. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 69-73 (1992). Here, the ER was abundantly clear that the CFBC receives freshwater contributions from springs discharging into the CFBC and from periodic releases from Inglis Lock and the Lake Rousseau Dam. ER §§ 5.2.2.2 at 5-20, 5.3.1.2.1 at 5-31. Further, these freshwater contributions were the subject of the NRC Staff’s February 24, 2009 RAI No. 5.2.2-1. See ADAMS Accession Nos. ML090360596 (transmittal letter) and ML090500793 (Enclosure 1 at 7). Progress responded to RAI No. 5.2.2-1 by letter dated March 27, 2009 (see ADAMS Accession No. ML091320073, Enclosure 1 at 48), which was provided to Joint Intervenors in the initial document disclosure. Any concerns that Joint Intervenors had with regard to potential freshwater and operation of LNP should have been raised long ago based on these Progress documents.

Furthermore, the WAR proposal on which Joint Intervenors rely for support (JI Motion Attachment 12) belies Joint Intervenors good cause arguments. For one, that proposal is dated July 14, 2010, and Joint Intervenors have failed to explain why they waited until November 15, 2010 to submit a contention based on its contents. Moreover, the WAR proposal states that it “propose[s] capturing freshwater inflows to the [upper segment of the Withlacoochee River] and the [CFBC] that would

otherwise be wasted by installing a saltwater barrier in the canal similar to the one evaluated in Option 2 in the 2004 URS Lower River Restoration Alternatives Feasibility Study.” JI Motion Attachment 12 at 1. Thus, a proposal of the sort that Joint Intervenors contend is “incompatible with the proposed project” (JI Motion at 10) has been available in the public domain for years. The fact that Joint Intervenors failed to focus on these issues before October 20, 2010 does not demonstrate good cause. Millstone, CLI-09-5, 69 NRC at 126.

Nor is it sufficient to claim that WRWSA’s October 20, 2010 “action” sufficiently changed the nature of the WAR proposal to justify good cause for waiting until now to file the contention. Contrary to the assertions of Joint Intervenors, nothing suggests that the WRWSA “supports” or otherwise endorsed the WAR proposal. JI Motion at 7. Rather, it is clear from JI Motion Attachment 11 that the WRWSA’s Consulting Engineer expressed concerns about the viability of the project, that Mr. Hilliard agreed with that assessment, that a member of WRWSA’s Board of Directors “agreed there were various issues with the project,” and that the WRWSA Executive Director recommended that “an in-depth analysis to determine [its] viability was required.” JI Motion Attachment 11 at 2. WRWSA “accepted” the WAR proposal as a “potential alternative water supply (AWS) project for consideration as a long-term water supply project along with other AWS projects” but that “further analysis of the project [would] not take place until the time in which these long-term AWS projects are further analyzed for consideration and development in the future.” Id. at 3 (emphasis added). In other words, the WRWSA review evaluated only the potential viability as a water supply project and did not consider any environmental factors. The proposal is nothing more than a suggested course of action submitted by a member of the public to a local government association planning body (that has neither the expertise to evaluate environmental impacts nor the authority to authorize construction of a project to impound waters on the CFBC) and that will not be further considered until some unknown time in the future, may never be adopted by the local

government association planning body,⁷ and may never be implemented by the State.⁸ The October 20, 2010 “action” is hardly sufficient justification to prompt Joint Intervenors to raise the issue now, particularly when similar proposals have been in the public domain for years.

Accordingly, Joint Intervenors have failed to demonstrate good cause for failing to file Contention 12 until now.

Having failed to demonstrate good cause, Joint Intervenors’ demonstration on the other factors must be particularly strong in order to justify admission of the contention. Comanche Peak, CLI-92-12, 36 NRC at 73; Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 565 (“If a petitioner cannot show good cause, then its demonstration on the other factors must be ‘compelling’”) (footnote omitted).

Having already been admitted as a party, factors (ii)-(iv) weigh in Joint Intervenors’ favor. Vogtle, 72 NRC ___, LBP-10-21, slip op. at 27. With respect to the remaining factors, factor (v), the availability of other means whereby Joint Intervenors’ interest will be protected; factor (vii), the extent to which the Joint Intervenors’ participation will broaden the issues or delay the proceeding; and factor (viii), the extent to which Joint Intervenors’ participation may reasonably be expected to assist the developing a sound record, weigh against admitting the contention. Factor (vi) likely weighs in favor of Joint Intervenors.

⁷ WRWSA is a municipal association of Citrus, Hernando, Marion and Sumter Counties, plus the city of Ocala. Its purpose is to “evaluate the potable water needs of the Withlacoochee Region, prepare plans that would provide for those needs and help the local governments in the region provide for future water supply through regional cooperation.” See http://wrwsa.org/About_Us.htm (last visited Dec. 27, 2010); JI Motion, Attachment 2.

⁸ The Project involves raising the level by two feet in the six miles of the Barge Canal downstream of Inglis Lock while providing a connection to the Withlacoochee River. JI Motion, Attachment 12 and Fig. 4 and 5. Implementation by the State is not reasonably foreseeable because the project in essence is diverting flow from the Lower Withlacoochee River, an Outstanding Florida Water, indirectly to the aquifer with an uncertain hope to increase the amount of freshwater in the aquifer. Evaluating the viability of the plan includes considering how long, if ever, it would take for the currently brackish CFBC and OWR to be “flushed” to freshwater quality.

Factor (v) weighs against admitting the contention because there are other means to protect Joint Intervenors' interests. The FDEP Conditions of Certification provide that

In the event that any state or federally funded projects required for the maintenance or enhancement of surface waters of the State require modifications to the [CFBC], the Department may choose to seek to modify this certification after notice and opportunity for hearing.

FDEP Levy Plan Conditions of Certification at 30. Joint Intervenors are aware of this Condition of Certification and cite to it in their Motion. JI Motion at 6. Thus, if the WAR proposal advanced here by Joint Intervenors is further developed, Joint Intervenors would have the opportunity to advance its interests in the State proceedings. Furthermore, especially with regard to the adequacy of the LEDPA Analysis, the USACE conducted one public hearing, in which the Joint Intervenors (and WAR) participated, and likely will conduct one or more additional hearing(s) as part of its process for acting on the CWA 404 permit application for Levy. See, e.g., 75 Fed. Reg. 49,540 (August 13, 2010); Levy DEIS Public Meeting Transcript at 10-11 (September 23, 2010).

For factor (vii), the extent to which the contention will broaden the issues or delay the proceeding, Joint Intervenors claim that there has been no irretrievable investment in the Levy County site to date and therefore there will be no "toxic or deadly delay." JI Motion at 12. Even if this were true, Joint Intervenors elsewhere admit that "[a] reconsideration of the alternate sites, which is not impossible, could cure this matter." JI Motion at 11. Even if not impossible, a reconsideration of the alternatives analysis after the NRC Staff has already issued the DEIS would undoubtedly delay the proceeding. In addition, admission of Contention 12 would undoubtedly broaden the issues under consideration here. Thus, this factor weighs against admission.

For factor (viii), Joint Intervenors are required to demonstrate that they have special expertise on the subjects they wish to raise by setting forth the precise issues they intend to cover, identifying their prospective witnesses, and summarizing the witnesses' proposed testimony. Commonwealth Edison Co.

(Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 246 (1986). This Joint Intervenor has failed to do, thus this factor weighs against admitting the contention.⁹

Factors (v) and (vi) are accorded less weight than factors (vii) and (viii). Braidwood, CLI-86-8, 23 NRC at 245-46. Of these four factors, the two that carry the most weight and one of the less weighty factors weigh against admitting Contention 12. Joint Intervenor has therefore failed to overcome their failure to demonstrate good cause with a compelling showing on the remaining factors. Hence, Contention 12 should not be considered for admission.

V. Contention 12 Is Not An Admissible Contention

Even assuming the Board were to find Contention 12 to be timely (which it is not), or met the late-filed criteria (which it does not), the Board should still reject Contention 12 because it fails the contention admissibility criteria set forth in 10 C.F.R. § 2.309(f)(1)(iv)-(vi).

Contention 12 states:

Levy County site is not “obviously superior” to alternatives and two key impacts have not been considered in the choice of site.

JI Motion at 2. For the contention’s basis, Joint Intervenor asserts that the DEIS’s

consideration of alternatives to the proposal . . . fails to factor two key issues that are associated with the Levy site only, not the four alternate sites. The Levy site would necessitate construction of a Cooling Water Intake Structure (CWIS) in the Cross Florida Barge Canal [“CFBC”] which is incompatible with 1) the restoration of the severed upper and lower Withlacoochee River and also with 2) the option of creating an impoundment in the [CFBC] for freshwater to augment and support municipal water supply.

⁹ Joint Intervenor’s consultant, Dr. Sydney Bacchus, is not relied on to support Contention 12 apparently. See JI Motion at 2 (list of attachments in support). Rather than supporting Contention 12, Dr. Bacchus’s affidavit of November 12, 2010 (Bacchus Aff.) apparently contradicts Contention 12. See generally, Bacchus Aff. at ¶D.1 (objecting to alteration of flows in surface waters), ¶D.4 (altering CFBC would adversely impact manatees), ¶D.9 (objecting to diverting flow in the OWR away from the Gulf of Mexico and associated estuarine ecosystems), ¶F.3 (reliance by manatees for access to springs feeding the CFBC), and Section G (discussing alternate energy sources, not alternate sites).

Id. The contention asserts that the first key impact makes the Levy site not the least environmentally damaging practicable alternative (“LEDPA”) because the construction of the CWIS would delay restoration of the hydraulic flow between the upper and lower Withlacoochee River segments until after Levy is decommissioned, which could alter the outcome of the alternative site analysis. JI Motion at 3. The contention asserts that the second key impact arises from a beneficial resource that could be created by impounding freshwater in the CFBC. This proposal before the WRWSA is a benefit not considered or factored into the relative merits of the alternative sites. Id. at 3. Joint Intervenors assert that, when either or both of these two key impacts are considered, the Levy site is “obviously inferior” compared to the other site options or the no-action alternative. Id.

Contention 12 is inadmissible for multiple reasons, including that Contention 12: (a) is not material to the findings the NRC must make to support issuance of the Levy combined license; (b) is not adequately supported; and (c) fails to raise a genuine dispute on a material issue of law or fact. 10 C.F.R. § 2.309(f)(1)(iv)-(vi).

A. Contention 12 is inadequately supported

Joint Intervenors have failed to provide support for Contention 12 pursuant to 10 C.F.R. § 2.309(f)(1)(v). To litigate a NEPA claim, Joint Intervenors must allege with adequate support that the NRC Staff has failed to take a “hard look” at significant environmental questions – that the NRC Staff has unduly ignored or minimized pertinent environmental effects. Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 431 (2003) (affirming Licensing Board’s rejection of intervenor’s contention). Section 2.309(f)(1)(v) has been “interpreted to require a petitioner to ‘present the factual information and expert opinions necessary to support its contention adequately.’” Calvert Cliffs 3 Nuclear Project, LLC and UniStar Nuclear Operating Services, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-4, 69 NRC 170, 216 (2009), quoting Louisiana Energy Services, L.P. (National Enrichment Facility), LBP-04-14, 60 NRC 40, 55 (2004). See also Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim

Nuclear Power Station), LBP-06-23, 64 NRC 257, 355 (2006). A contention is inadmissible if “the petitioner ‘has offered no tangible information, no experts, no substantive affidavits,’ but instead only ‘bare assertions and speculation.’” Calvert Cliffs, LBP-09-4, 69 N.R.C. 170, 216, quoting Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-04-28, 60 NRC 548, 555 (2004), quoting Fansteel Inc. (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003).

Contrary to this well-established precedent, Joint Intervenors have offered no alleged facts or expert opinion in support of a genuine dispute on a material issue, but instead only offer bare assertions and speculation. Consequently, Contention 12 is inadmissible.

1. Restoring the hydraulic connection of the Withlacoochee River

Joint Intervenors assert that Levy’s use of the CFBC “as a conduit for cooling water . . . would prevent implementation of the Withlacoochee Basin Board’s mandate (from the Florida State Legislature) to restore a protected, Outstanding Florida water, the Withlacoochee River,” claiming that “[r]estoration plans of the Board include restoring the hydraulic connection” of the river’s segments. JI Motion at 3. In support of this assertion, Joint Intervenors cite to Attachment 2, which is a three-page printout of a webpage describing the SWFWMD seven basin boards. Among other things, Attachment 2 provides that the Basin Boards “identify key issues and establish priorities in their Basins in four areas of responsibility” including water supply and water quality. JI Motion Attachment 2 at 2. But Attachment 2 says nothing about any State Legislature mandate “to restore protected Outstanding Florida water, the Withlacoochee River,” or to restore the hydraulic connection of the now-bisected Withlacoochee River. Attachment 2 does not support the contention. In contrast, the allegation is not plausible because the Board focuses on water resource management, not environmental protection.¹⁰ Id.

¹⁰ As discussed infra, the Florida Department of Environmental Protection, the agency with the mandate in question, issued a permit for the specific location of the CWIS described in the DEIS.

Similarly, Joint Intervenors point to a statement in DEIS § 9.4.2.4 that “the Withlacoochee River Basin Board has made the restoration of Lake Rousseau and the Lower Withlacoochee River a priority in the its Fiscal Year 2006 Basin Priorities Statement,” and claim that there is “no reference to the NRC staff considering the implications of this priority of the Board when considering the impact of the Levy site decision.” JI Motion at 5. As discussed above, Joint Intervenors nowhere justify their belief that the Board has this priority. Even if assumed true, Joint Intervenors have not provided any support for their assertion that the NRC should consider whether construction of the CWIS in the CFBC will prevent restoration of the hydraulic connection between the Lower Withlacoochee River and the Old Withlacoochee River segments. Indeed, the quoted statement discusses the Lower Withlacoochee River but says nothing of the Old Withlacoochee River or of any effort to reconnect the bisected segments. In fact, elsewhere in the DEIS, the NRC Staff recognized that the Withlacoochee River is bisected by the CFBC, leaving the Old Withlacoochee River portion of the river to run into the CFBC; whereas the Lower Withlacoochee River is not connected to the CFBC and empties into the Gulf of Mexico. See DEIS § 5.2.3.1, at Figure 5-3 at 5-10, Appendix F § 7.0 at F-47. Furthermore, the NRC Staff did consider impacts to the Lower Withlacoochee River in its analyses. See, e.g., DEIS §§ 2.3 at 2-14 (considering that the local surface water features, including the Lower Withlacoochee River and the CFBC, may receive storm water runoff); 5.3.2.1 at 5-54 (discussing potential reduction of groundwater discharge to the Lower Withlacoochee River), and 7.3.2 at 7-30 (discussing potential impacts to the Lower Withlacoochee River from the proposed Tarmac King Road Limestone mine). Joint Intervenors’ circular reasoning about the need to consider an unapproved project in the DEIS offers no support for Contention 12.

Joint Intervenors again contend that “location of the Applicant’s CWIS at the proposed site will prevent” “restoring the hydraulic connection between the severed segments of the Withlacoochee river,” pointing to Attachment 6 as support. JI Motion at 6. Attachment 6 is a 107 page December 31, 2003 study entitled West Terminus-Cross Florida Greenway Assessment, Work Order 1 Final Report. Its

stated purpose is to evaluate a number of alternatives which are intended to mitigate some of the environmental impacts created by the construction of the CFBC. Attachment 6 at 2. According to Joint Intervenors, three restoration alternatives examined in the report involved restoring the hydraulic connection between the severed segments of the river resulting from CFBC construction. JI Motion at 6. But, nowhere does the attached report discuss, explain, or provide any other support for Joint Intervenors' assertion that location of the CWIS in the CFBC would prevent restoring the hydraulic connection. In fact, Joint Intervenors admit that if the State were to approve this highly speculative project, the State retained authority to relocate the CWIS. JI Motion at 6. All Joint Intervenors offer are bare assertions and mere speculation, which are insufficient to admit the contention. Fansteel Inc., CLI-03-13, 58 NRC at 203.

Although Joint Intervenors assert that “[r]iver restoration has been a priority of a number of bodies, including the Southwest Florida Water Management District,” and cite to Attachment 3 at 24-26 (JI Motion at 4), the cited pages in the Attachment nowhere provide any factual basis, expert opinion, affidavit or any other support for the contention. Attachment 3 is a 58 page document dated September 15, 2009 from the State of Florida Department of Community Affairs to Citrus County concerning objections, recommendations, and comments on proposed amendments to the county’s comprehensive plan. JI Motion Attachment 3 at 1. Pages 25-29 of Attachment 3 are an August 14, 2009 letter from Douglas K. Sanders, Staff Planner for the Southwest Florida Water Management District (“SWFWMD”) to Mr. D. Ray Eubanks, of the Bureau of Local Planning, concerning “Citrus County DCA #09-02 Hollinswood Harbor (Port District). The letter provides comments on the proposed Hollinswood Harbor project as they relate to issues of concern to the SWFWMD. JI Motion Attachment 3 at 25. All the letter says regarding the CFBC is that the SWFWMD is conducting “a multi-year project to evaluate restoration alternatives to mitigate some of the environmental impacts created by the [CFBC’s] construction” and as-of-yet unrealized plans to adopt, in 2011, “Minimum Flows and Levels” for this section of the river. Id., Attachment 3 at 26. With respect to the proposed LNP, all the letter states is that interagency

coordination is needed among multiple local, state, and federal agencies because “[t]he cooling purposes for the plant would be met by withdrawing 130 mgd of saltwater from the [CFBC].” *Id.* at 27. The cited pages of Attachment 3 say nothing of any plans to restore the hydraulic connection of the Withlacoochee River and therefore fail to support Contention 12.¹¹

Joint Intervenors also assert that the DEIS fails to consider the impacts resulting from the indefinite postponement of the restoration of the Withlacoochee River, including “[p]rogressive degradation of the Lower Withlacoochee River due to reduced system flows” and inshore movement of current isohaline gradients in the Withlacoochee River which will result from diversion of freshwater supplies to coastal waters and attendant increases of salinity and sulfate concentrations. JI Motion at 4. Joint Intervenors provide no explanation, let alone any factual or expert support, for these bare assertions. In fact, Joint Intervenors admit that the “Rock Dam” hydraulically isolates the CFBC and the Lower Withlacoochee River. JI Motion at 3. Consequently, withdrawals at the proposed CWIS impact only the CFBC and potentially the OWR, but not the Lower Withlacoochee River that is fed by the Inglis Bypass Spillway. JI Motion, Attachment 10 at 10. Contention 12 offers no plausible support for any degradation of, or changes in the isohaline gradients in, the lower Withlacoochee River arising from the CWIS. 10 C.F.R. § 2.309(f)(1)(v).

Joint Intervenors claim that the “importance of the Withlacoochee River to the biodiversity and ecological integrity of the biome of the Levy County area cannot be overstated” (JI Motion at 5), but nowhere provide any explanation as to how this claim relates to the contention. Specifically, Joint Intervenors filings up to this point have emphasized the importance of preserving the Lower Withlacoochee River not changing the status of the Old Withlacoochee River. Further, Joint Intervenors’

¹¹ Joint Intervenors cite to only three pages of Attachment 3. Commission precedent requires that Joint Intervenors identify the information on which they rely with specificity. Thus, if the alleged facts are not on the cited pages, neither the Applicant nor the Commission need look any further because they are not required to sift through voluminous attachments to search for a needle that may be in a haystack. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-03, 29 NRC 234, 241 (1989).

reference to page 14 of Attachment 4 fails to support the claim. Attachment 4 is a 107 page, August 25, 2010 draft report prepared by the FDEP on “Site-Specific Information in Support of Establishing Numeric Nutrient Criteria in Suwannee Estuary/Suwannee Sound/Cedar Keys, Waccasassa Bay, and Withlacoochee Bay.” According to the report’s executive summary, the report was prepared “to support development of numeric nutrient criteria for the Suwannee, Waccasassa, and Withlacoochee Estuaries.” JI Motion Attachment 4 at 1. The “primary purpose of the proposed numeric criteria is to protect healthy, well-balanced natural populations of flora and fauna from the effects of excess nutrient enrichment.” JI Motion Attachment 4 at 1. The page referenced by Joint Intervenors (page 14) merely provides a description of the Withlacoochee watershed, including its affected area, natural ecosystem communities, public land ownership in the watershed, and land use within the watershed. JI Motion Attachment 4 at 14. Neither the report nor the referenced page says anything of the proposed LNP, any potential impact from the proposed LNP, or the analysis contained in the DEIS. In fact, most of the cited page discusses the Withlacoochee River upstream of Lake Rousseau and discusses the environmental importance of the Lower Withlacoochee River only with regard to its impact on the Withlacoochee Bay estuary. JI Motion Attachment 4 at 14-15. Joint Intervenors have failed to make any relation whatsoever between the contents of Attachment 4 and Contention 12. Thus, Attachment 4 does not support admission of the contention. 10 C.F.R. § 2.309(f)(1)(v).

Joint Intervenors also refer to “Bacchus” in support of this same claim, but provide no document or page reference. This lame attempt to provide support for a contention falls far short of the Commission’s expectations. Even if we are to assume that Joint Intervenors intended to refer to the hodgepodge of materials from Dr. Sydney Bacchus submitted in support of their Contention 4 to also support Contention 12, a bare reference such as that provided here is not even remotely sufficient. The affidavits of Dr. Bacchus submitted in this proceeding refer only to the protection of the portion of the

Lower Withlacoochee River that is an Outstanding Florida Water.¹² Joint Intervenors are required to provide specific references to their support, and neither the Commission nor Progress are required to sift through voluminous documents to find a needle that is unlikely ever to be found in the haystack of purported support offered for the contention. Seabrook, CLI-89-03, 29 NRC at 241.

For this same reason, Joint Intervenors bare reference to the discussion in “Attachment 5 Janicki” is inadequate support for the contention. Attachment 5 is a 186 page, March 28, 2008 report prepared by Janicki Environmental, Inc., entitled Cross Florida Greenway: Watershed Evaluation, Evaluation of Alternative Flow Scenarios Using Hydrodynamic Models. Joint Intervenors make no specific reference to any portion of the document as NRC regulations and Commission precedent require. 10 C.F.R. § 2.309(f)(1)(v); Seabrook, CLI-89-03, 29 NRC at 241. Moreover, the report appears to discuss the impact of elevated salinity levels in the Lower Withlacoochee River and the correlation of those higher levels to the deaths of 8-10 cypress trees along the river. JI Motion Attachment 5 at 1. Nowhere does the report appear to relate any of its purported findings to the construction of the CWIS in the CFBC, nor do Joint Intervenors make any such relation. In fact, the report concludes that changing the flow regime would have no beneficial environmental impact. JI Motion, Attachment 5 at 48-49. Accordingly, Attachment 5 does not support admission of Contention 12, and, in fact, contradicts it.

For additional support, Joint Intervenors rely on: (1) a statement in the DEIS regarding the potential availability of an additional 93 million gallons per day of surface water supply; (2) a non-specific reference to Attachment 7, which is a 141 page Regional Water Supply Plan, Northern Planning Region, prepared by the SWFWMD¹³; (3) Attachment 8, which is an area map of the Withlacoochee

¹² The filing from Dr. Bacchus on November 15, 2010 references the OWR in only one place and that apparently contradicts Contention 12 because she is discussing an implausible potential for impact on the Gulf of Mexico and associated estuarine ecosystems from diverting flow in the OWR that otherwise would go through the CFBC to the Gulf of Mexico. Bacchus Aff. at 10.

¹³ Though not referenced by Joint Intervenors, page 51 of Attachment 7 states that “an additional 93 mgd of water supply is potentially available from the Withlacoochee River” and goes on to explain that the “estimated additional surface water that could potentially be obtained from the Withlacoochee River in

River that identifies, among other things, Lake Rousseau, the Inglis By-pass spillway, and the Inglis main dam; and (4) Attachment 9, which is a printout of the Florida State Parks webpage on Rainbow Springs State Park that states, among other things, that the Rainbow River is popular for swimming, snorkeling, canoeing, and kayaking. JI Motion at 6-7. Based on this assortment of unrelated and unprobative information, Joint Intervenors make various unsupported and unexplained assertions concerning consumptive water use, reduction of flows to the Lower Withlacoochee River, the Applicant's consumption of fresh water from the CFBC,¹⁴ potential lack of compliance with the Clean Water Act, and potential impacts to Rainbow Springs and Silver Springs. JI Motion at 6-7. But Joint Intervenors make no effort to explain how this information relates to the DEIS, or how the DEIS is inadequate for failing to consider impacts that might result if the CWIS were prevented from being constructed in the CFBC, and how those impacts may or may not alter the alternatives analysis.

Next, Joint Intervenors state that “[m]uch of the foregoing reflects comments made by Dan Hilliard to the [NRC] on [the DEIS],” which are provided in full in Attachment 10. JI Motion at 7. Joint Intervenors appear to be correct that much of what appears in Contention 12 was cut-and-pasted from Attachment 10. However, those portions of Attachment 10 copied into Contention 12 fail to provide adequate support for the contention for the same reasons explained herein, supra. Moreover, other

the Planning Region ranges from approximately 0.49 mgd to 93.7 mgd. The lower end of the range is the amount of surface water that has been permitted but is currently unused and the upper end includes permitted but unused quantities plus the estimated remaining available surface water (93.2). Additional factors that could affect the quantities of water that are ultimately developed for water supply include the future establishment of minimum flows, variation in discharges to the river from outside sources, and the ability to develop sufficient storage capacity.” Joint Intervenors nowhere make any effort to relate this information to the DEIS or the (unsupported) claims they make in Contention 12. The cited reports discuss water supply availability upstream of Lake Rousseau and imply that water diversion from the Lower Withlacoochee River for water supply purposes is not viable.

¹⁴ Although DEIS notes that freshwater enters the CFBC from groundwater springs and from overflow contributions from Lake Rousseau via the Inglis Dam and Inglis Lock channel bypass and spillway (see, e.g., DEIS §§ 2.4.2.1 at 2-89; 5.2.3.1 at 5-9, & Figs. 5-3 & 5-4 at 5-10 – 5-11), the DEIS is abundantly clear that the salt water of the Gulf of Mexico is the (essentially unlimited) source of makeup water for normal plant operations. DEIS §§ 2.3, 5.2.2.1. Joint Petitioners' mischaracterization of the DEIS does not raise a material dispute. 10 C.F.R. § 2.309(f)(1)(vi); Crow Butte Resources, Inc. (License Renewal for In Situ Leach Facility, Crawford, Nebraska), CLI-09-09, 69 NRC 331, 363

statements in Attachment 10 belie the assertions made in Contention 12 concerning the location of the CWIS in the CFBC. Whereas Contention 12 complains that construction of the CWIS in the CFBC is simply incompatible with restoration of the severed upper and lower Withlacoochee River; therefore, the alternatives analysis is flawed, Attachment 10 instead concludes with two recommendations. (1) If necessary to capture freshwater resources and restore river systems, “[r]elocating the CWIS westward in the CFBC.” JI Motion Attachment 10 at 14. As Joint Intervenors admit, this recommendation engenders no genuine dispute because the State approval for the location of the CWIS allows for relocation if necessary. JI Motion at 2 and Attachment 10 at 12. (2) Relocate the proposed site to the Crystal River Energy Complex (“CREC”). JI Motion Attachment 10 at 13-14. While WAR asserts Levy and CREC have “parity” and CREC may be WAR’s preference,¹⁵ Joint Intervenors are disingenuous in asserting the NRC licensing process is only a “rubber stamp” unless it is restructured to allow ordering an application be filed for another site. JI Motion at 12. As long-time participants in NRC proceedings, Joint Intervenors should be aware that the NRC licensing process is structured to either approve or disapprove of the proposed site. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 529 (1977). Because Attachment 10 concludes that CREC and Levy have “parity,” it does not support a genuine dispute with the DEIS alternative analysis. Any supporting material provided by a petitioner, including portions of the material that are not relied upon, is subject to Board scrutiny. Pilgrim, LBP-06-23, 64 NRC at 355-56, citing Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90 (1996), rev’d in part on other grounds, CLI-96-7, 43 NRC 235 (1996). Accordingly, Attachment 10 does not support the claims made by Joint Intervenors in Contention 12.

(2009).

¹⁵ Public preference is not a substitute for environment preference. However, compared to the limited dissent expressed by WAR, the selection of the Levy site considered extensive public outreach. Final Order at 5-8.

Finally, Joint Intervenors fail to address the August 26, 2009 Final Order issued by the State of Florida Siting Board – composed of the Governor and Cabinet of the State of Florida – which explicitly contradicts Joint Intervenors’ assertions. The Final Order approved Progress’ application to build, operate, and maintain the Levy nuclear units, including the CWIS located in the CFBC. The Final Order adopted the May 15, 2009 RO issued by the reviewing Administrative Law Judge. Among other things, the RO found that the

[Southwest Florida Water Management District (“SWFWMD”)] has evaluated restoration of the [Withlacoochee] River to its original condition, but has not advocated reconnection. Reconnection of the Withlacoochee River or downstream impoundment of the CFBC probably would not prevent the impacts of increased salinity in the Lower Withlacoochee River during periods of low freshwater flow. Although no agency is currently pursuing a project of this type, [FDEP] has proposed a condition of certification to address further public projects for the maintenance, preservation, or enhancement of surface waters requiring modifications to the CFBC.

RO at 33-34. Thus, there are no reasonably foreseeable proposals (and Joint Intervenors have pointed to no such proposals) to reconnect the river.

In sum, the claims made by Joint Intervenors regarding location of the CWIS in the CFBC lack adequate support, and therefore these claims are inadmissible.

2. Creating a freshwater impoundment in the CFBC

Similarly unsupported are Joint Intervenors’ claims with regard to the creation of a freshwater impoundment in the CFBC, and the alleged failure of the DEIS to consider the (potential) beneficial resource when analyzing alternative sites. JI Motion at 3. For support, Joint Intervenors rely on Attachment 11, which are the meeting minutes from the October 20, 2010 board of directors meeting for the WRWSA. JI Motion Attachment 11. During the meeting, the WRWSA’s board members heard a “report on use of CFBC as a water supply,” namely a proposal by Mr. Dan Hilliard of WAR to use the CFBC as an alternative water supply. Id., Attachment 11 at 2. Among other things, the proposal called for “the installation of a structure to help prevent saltwater intrusion and create a freshwater reservoir downstream of the Inglis Lock.” Id. One of the WRWSA’s board members said it was “an interesting

proposal,” but “would require an in-depth level of analysis to determine the viability of the project.” Id. Another Board member “agreed there were various issues with the project.” Id. The WRWSA’s Executive Director recommended, and the Board unanimously approved the recommendation, to “accept [WAR’s] proposal as an alternative water supply (AWS) project for consideration as a long-term water supply project along with the other AWS projects” but that “further analysis of the project [would] not take place until the time in which these long-term projects are further analyzed for consideration and development in the future.” Id., Attachment 11 at 3.

Thus, as a result of the WRWSA’s October 20, 2010 action, the freshwater impoundment proposal is nothing more than a suggested course of action submitted by a member of the public to a local planning body that has no authority to permit construction of a project to impound waters on the CFBC, and that will not be further considered until some unknown time in the future, may never be adopted by the local planning body, and may never be implemented by the State of Florida. Nowhere do Joint Intervenors explain how the October 20, 2010 WRWSA action will result in the creation of a freshwater impoundment on the CFBC. Furthermore, Joint Intervenors do not identify that such an impoundment would be environmentally beneficial.¹⁶

Furthermore, even assuming for the sake of argument that Joint Intervenors’ assertions concerning the amount of freshwater that could be impounded in the CFBC are true, Joint Intervenors have nowhere explained, or provided any expert support describing, how the location of the CWIS in the CFBC is “completely incompatible” with construction of the CWIS. Joint Intervenors’ bare assertions are mere speculation without adequate support and insufficient to admit a contention.

¹⁶ If successful, the impoundment would maintain sufficient head to divert enough freshwater flow to maintain the impoundment free of saltwater intrusion and flush saline from the aquifer. JI Motion, Attachment 12. In contrast, in Contention 4, Joint Intervenors allege that any diversion of flows from the Lower Withlacoochee River is a LARGE impact. Levy, LBP-09-10, 70 NRC, 51, 90-91 (2009).

In sum, Joint Intervenors' claims regarding a freshwater impoundment lack adequate support and are therefore inadmissible.¹⁷

B. Contention 12 raises immaterial issues

Contention 12 is inadmissible under Section 2.309(f)(1)(iv) for many of the same reasons that it is inadmissible under Section 2.309(f)(1)(v). Because Joint Intervenors have provided no support for their claims that restoration of the hydraulic connection of the Withlacoochee River or the construction of a freshwater impoundment in the CFBC will occur and result in (presumably beneficial) impacts that must be considered in the NRC Staff's NEPA analysis, nothing in the contention or in the various attachments supporting Contention 12 indicate that either action is likely to occur.

Hence, Joint Intervenors' arguments are immaterial to the finding that the NRC must make in this proceeding because they demand that the NRC consider environmental impacts resulting from speculative future actions that are not reasonably foreseeable. NEPA only mandates that the NRC consider actions that are reasonably foreseeable. In addition, Joint Intervenors fail to make any showing that the alternatives analysis would be different when considering the impacts allegedly overlooked. 10 C.F.R. § 2.309(f)(1)(iv).

1. NEPA does not require consideration of speculative actions

NEPA does not require an evaluation of environmental impacts that are only remote and speculative possibilities. Metropolitan Edison Co., et al. (Three Mile Island Nuclear Station, Unit No.1), ALAB-705, 16 NRC 1733, 1744 (1982), citing Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 551 (1978) (affirming licensing board's rejection of a contention). Further, "there is no need to

¹⁷ Progress notes an ironic inconsistency in Joint Intervenors' advocacy in having raised concerns regarding alleged dewatering and salt drift from the operation of LNP on Outstanding Florida Waters, including prominently the Withlacoochee River, in Contention 4. There is no discussion of the potential impacts to the Outstanding Florida Waters and wetlands of a proposed impoundment of 1.5 billion gallons of fresh water in a six-mile segment of the CFBC with a two foot head maintained above the current average water level and then using this freshwater, either directly or indirectly through the aquifer, for human consumption. See JI Motion Attachment 12.

consider alternatives of speculative feasibility or alternatives which could only be implemented after significant changes in environmental policy or legislation or which require similar alternations of existing restrictions” Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 145 (1993) (rejecting an environmental contention), quoting NRDC v. Callaway, 524 F.2d 79, 93 (2d 1975).

Consistent with this precedent, DEIS Chapter 7 considers “potential cumulative impacts on resources that could be affected by the combination of construction, preconstruction, and operation of two Westinghouse Electric Company LCC AP1000 pressurized water reactors at the LNP site, and other past, present and reasonably foreseeable future actions.” DEIS at 7-1. The DEIS provides that “[f]uture actions are those that are reasonably foreseeable through the building and operation of proposed LNP Units 1 and 2, including decommissioning.” Id. Accordingly, the DEIS provided a “cumulative impact assessment for each resource area,” including the impacts from “reasonably foreseeable future Federal, non-Federal, and private actions that could affect the same resources as the proposed action.” Id. at 7-2.

For cumulative surface water impacts, referring to DEIS Table 7-1, the DEIS identified past, present, and reasonably foreseeable future actions that contribute to cumulative impacts, including the CREC, a planned uprate of CREC Unit 3, potential decommissioning of CREC Units 1 and 2, existing and proposed mines, and transportation projects. Id. at 7-3; see also Table 7-1. Another proposed project in the area considered is the Inglis Lock bypass channel spillway hydropower project. Id. at 7-4. Table 7-1 indicates that, for each of the reasonably foreseeable future projects specifically identified and considered by the DEIS, the project’s status is “proposed,” i.e., at least an application for the project has been submitted to one or more approving authorities, or was expected to be submitted. As examples: an application has been submitted to the USACE for the Tarmac King Road Limestone Mine; an application has been submitted to the Federal Energy Regulatory Commission for the Inglis Lock bypass channel spillway hydropower project; and, for the CREC Unit 3 uprate, the State of Florida had approved the

application, USACE had issued a public notice, and a federal application was expected to be submitted to the NRC in 2010. DEIS Table 7-1.

The NRC Staff's cumulative impacts analysis for the proposed site is then factored into its alternatives analysis. See DEIS § 9.3.6, (summarizing the review team's characterization of the cumulative impacts related to locating a two-unit AP1000 nuclear power facility at the proposed LNP site and at each alternative site). In other words, the cumulative analysis, which considers past, present, and reasonably foreseeable future actions and their impacts, is used to determine whether any of the alternatives sites considered is environmentally preferable to the proposed site. DEIS at 9-239.

Contrary to controlling NEPA precedent, Contention 12 argues that the DEIS failed to consider the cumulative impacts of two actions that are unreasonably speculative – the restoration of the hydraulic connection in the Withlacoochee River and the potential impoundment of freshwater in the CFBC for municipal use. The contention essentially argues that construction of the CWIS in the CFBC would prevent both speculative actions, and that the purported beneficial impacts that might result from these two speculative actions ought to be factored into the cumulative impact analysis and thus the alternative site analysis. See, e.g., JI Motion at 3.¹⁸ However, as discussed in the previous section, nothing in Contention 12 even remotely suggests that any State or local government body possessing the requisite authority to permit and implement the restoration of the hydraulic connection of the Withlacoochee River, or to build a freshwater impoundment in the CFBC, is contemplating either action. “[A]n EIS need not delve into the possible effects of a hypothetical project, but need only focus on the impact of the particular proposal at issue and other pending or recently approved proposals that might be connected to or act cumulatively with the proposal at issue.” Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2), Catawba Nuclear Station, Units 1 and 2), LBP-02-4, 55 NRC 49, 92 (2002) (citing Nat'l Wildlife Fed'n v. FERC, 912 F.2d 1471, 1478 (D.C. Cir. 1990)). Thus, neither action (nor their purported

beneficial impacts) is “reasonably foreseeable” for NEPA purposes. Accordingly, the DEIS is not required to consider these actions or their impacts.

Furthermore, if and when a proposal does advance to restore the hydraulic connection of the Withlacoochee River, or to create a freshwater impoundment on the CFBC, such proposal would have to follow the process set forth in the Conditions of Certification regarding “further public projects for the maintenance, preservation, or enhancement of surface waters requiring modifications to the CFBC” referenced in the RO and adopted by the Final Order signed by the Governor. The relevant Condition of Certification provides:

In the event that any state or federally funded projects required for the maintenance, preservation, or enhancement of surface waters of the State require modifications to the [CFBC], the [FDEP] may choose to seek to modify this certification after notice and opportunity for hearing.

FDEP Levy Plan Conditions of Certification (Modified Feb. 23, 2010) at 30. Thus, any proposal to reconnect the Withlacoochee River or to create a freshwater impoundment (and, potentially to relocate the CWIS) would be subject to the FDEP proceeding to modify the Conditions of Certification. Consequently, the hydraulic reconnection or the freshwater impoundment actions, and any requirement to relocate the CWIS, would require “significant changes in environmental policy or legislation or which require similar alterations of existing restrictions” and are therefore not reasonably foreseeable under NEPA. Rancho Seco, CLI-93-3, 37 NRC 135.

2. Joint Intervenors fail to make any showing that the alternatives analysis would be any different

The gravamen of Contention 12 is that the DEIS fails to consider purportedly beneficial impacts that would result were the CWIS not located in the CFBC, and that such beneficial impacts were overlooked by the NRC Staff when comparing the Levy Site to the alternative sites. See, e.g., JI Motion

¹⁸ As discussed above, Joint Intervenors only allege that the benefits of the impoundment arise from increasing the availability of freshwater for human consumption and do not even allege facts that the benefits also extend to other aspects of the environment.

at 2-3. However, nowhere do Joint Intervenors attempt to quantify the supposedly “LARGE” adverse impacts that would result if the CWIS is constructed in the CFBC (or, conversely, the supposedly “LARGE” beneficial impacts to the environment would result if such construction is avoided in favor of a freshwater impoundment), or to show that consideration of such impacts would alter the alternatives analysis. Joint Intervenors merely make conclusory assertions that consideration of the impacts raised in the contention “could impact the outcome of the alternate site analysis.” JI Motion at 3 (emphasis added). However, Joint Intervenors fail to make any showing of how this supposed inadequacy has any practical impact on the DEIS analysis. Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 273-74 (2007) (ruling a contention inadmissible for failing to show how including allegedly omitted information “would result in material changes to the ER’s analysis” or “change the conclusions reached in the ER” and thus be material to the decision before the Board). Thus, the contention fails to raise any material issue. 10 C.F.R. § 2.309(f)(1)(iv).

C. Contention 12 fails to raise a genuine dispute on a material issue of law or fact

As an initial matter, for all the claims Joint Intervenors make in Contention 12, nowhere do they dispute the DEIS findings concerning the alternative sites. DEIS Section 9.3.6.2, Environmentally Preferable Sites, summarizes the NRC Staff’s findings and identifies where the Levy site compared favorably or unfavorably to the alternative sites considered. Nowhere do Joint Intervenors attempt to justify how their claims, even if assumed correct, would negate the DEIS’s findings that none of the alternative sites is environmentally preferable. Joint Intervenors have failed to challenge this information therefore fail to meet their ironclad obligation to review the public documents and to materially dispute the DEIS with specificity. 10 C.F.R. §§ 2.309(f)(1)(vi).

Furthermore, Joint Intervenors contend that the Levy site is “obviously inferior” compared to the other alternative sites considered once the impacts resulting from restoring the hydraulic connection of the Withlacoochee River or creating a freshwater impoundment are factored into the analysis. JI Motion at 3. This conclusory statement is only a legal conclusion couched as an alleged fact and not sufficiently

factual to warrant a presumption of truth. Furthermore, the statements are facially implausible. (1) It is not plausible that not connecting a river that has not been connected for decades can noticeably destabilize an undefined aspect of any environmental resource. (2) It is not plausible that creating a freshwater impoundment to increase recharge to the aquifer at the expense of surface water flows can be environmentally beneficial. But, even if these statements were plausible, they do not raise a material dispute with the appropriate standard by which to judge the DEIS alternatives analysis. The Joint Intervenors admit, as discussed above, that the CWIS can be relocated for a cost. While cost and other socioeconomic factors are considered in an obviously superior evaluation, they are only considered after a threshold finding that another site is environmentally preferable. Joint Intervenors have not demonstrated any site is environmental preferable; as discussed above, taking the JI Motion most favorably, it only alleges that CREC and Levy have “parity.” Therefore, Contention 12 does not raise a genuine dispute on a material issue.

Longstanding Commission precedent holds that a licensing board should not reject a proposed site unless an alternate site is “obviously superior” to the proposed site. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 526 (1977) (emphasis added). The NRC Staff must first determine whether any environmentally preferable alternatives exist. If so, then, and only then, will the NRC Staff undertake a cost-benefit balancing to determine whether such alternatives are obviously superior and therefore should be implemented. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Unit Nos. 3 and 4), ALAB-660, 14 NRC 987, 1004 (1981). As the NRC Staff explained in DEIS Section 9.3.6, the “obviously superior” test is appropriate because key factors considered in the alternative site analysis are difficult to quantify, and the proposed site has been examined in greater detail than the alternative sites. Rochester Gas & Electric Corp. (Sterling Power Project Nuclear Unit No. 1), ALAB-502, 8 NRC 383, 397 (1978), affirmed, CLI-80-23, 11 NRC 731 (1980). The “obviously superior” standard means that an alternative site must be deemed “clearly and substantially” superior to the proposed site. Id. Thus, NEPA does not require that a nuclear plant be

constructed on the best site, but only that the effects of building the plant on alternative sites be carefully considered and factored into the ultimate decision. Id. at 394 (citing New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87 (1st Cir. 1978)). A claim that Levy County site is “obviously inferior” to all of the alternative sites does not materially dispute whether any one particular alternative site is obviously superior – clearly and substantially superior – to the Levy County site absent a threshold showing that the alternate site is environmentally preferable.

Moreover, Joint Intervenors also fail to materially dispute the DEIS because, at bottom, they are really raising cost issues that have no place in the environmental analysis absent a determination that an alternative site is environmentally preferable. The DEIS found that “the impact of operating LNP Units 1 and 2 on surface water quality of the CFBC, [OWR], [Lower Withlacoochee River], and other nearby streams would be SMALL and mitigation beyond the FDEP Conditions of Certification would not be warranted.” DEIS § 5.2.3.1 at 5-16 (emphasis added). As discussed elsewhere in this Response, the FDEP Conditions of Certification provide (among other things) that

[i]n the event that any state or federally funded projects required for the maintenance or enhancement of surface waters of the State require modifications to the [CFBC], the Department may choose to seek to modify this certification after notice and opportunity for hearing.

FDEP Levy Plan Conditions of Certification at 30. This Condition of Certification – which the NRC Staff has considered in its environmental analysis – means that the State may pursue future modifications to the CFBC (perhaps along the lines suggested by Joint Intervenors) and modify the certification after notice and opportunity for hearing. Joint Intervenors acknowledge this Condition of Certification. JI Motion at 6.

However, Joint Intervenors complain that, “[s]hould the State [modify the Levy certification] for purposes of restoration or impoundment of fresh water resources for public beneficial use, rate payers will fund both initial and subsequent construction costs of the CWIS if relocation is required.” Id. (emphasis added). See also JI Motion Attachment 12 (WAR Comments to NRC) at 12 (stating that WAR “would

prefer to [pay for construction of the CWIS] only once.”) Thus, at bottom, Joint Intervenors are raising cost issues related to the location (and potential relocation) of the CWIS, should the process set forth in the identified Condition of Certification be triggered, and a modification of the certification be enacted, requiring relocation of the CWIS to elsewhere on the CFBC. But, these cost issues are not relevant to the alternative site analysis in the DEIS. If no environmentally preferable alternative is identified, cost-benefit balancing does not take place to determine whether any obviously superior site exists. Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant, Units 2 and 3), LBP-08-21, 68 NRC 554, 576 (2008) (quoting Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-458, 7 NRC 155, 162 (1978)).

In short, all of Joint Intervenors’ concerns regarding the potential restoration of the hydraulic connection of the Withlacoochee River and creation of a freshwater impoundment on the CFBC boil down to a question of cost and, consequently, do not raise a genuine dispute on a material issue of law or fact with the DEIS consideration of alternatives. 10 C.F.R. § 2.309(f)(2)(vi).

VI. Conclusion

For all of these reasons, Contention 12 should not be admitted.

CERTIFICATION

I certify that I am not aware of any effort by Joint Intervenors to contact Progress or make any effort to resolve the factual and legal issues raised in the JI Motion.

Respectfully Submitted,

/Signed electronically by John H. O’Neill Jr./

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Dated: December 29, 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' Motion for Contention 12, dated December 29, 2010, was provided to the Electronic Information Exchange for service to those individuals on the service list in this proceeding this 29th day of December 2010.

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