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 Nos. 52-029-COL, 52-030-COL
PROGRESS ENERGY FLORIDA, INC.	ASLBP No. 09-879-04-COL-BD01
(Levy County Nuclear Power Plant, Units 1 and 2)	March 16, 2011

MEMORANDUM AND ORDER
(Denying Contention 7A)

This proceeding concerns the application of Progress Energy Florida, Inc. (PEF)[1] for a combined license (COL) to construct and operate two AP1000[2] nuclear power reactors at its Levy Nuclear Plant (LNP) site in Levy County, Florida. On October 4, 2010, the Nuclear Information and Resource Service, Green Party of Florida and the Ecology Party of Florida (collectively, Intervenors) moved for the admission of a new contention, hereinafter referred to as Contention 7A or C-7A.[3] For the reasons set forth below, we do not admit C-7A.

[1] [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 (Dec. 8, 2008).

[2] See Design Certification Rule [DCD] for the AP1000 Design, 10 C.F.R. Part 52 app. D.

[3] Motion for Leave to File a New, Timely Contention and Contention 7A: Inadequacy of the Levy DEIS with Respect to the Environmental Impacts of Low-Leve [sic] Radioactive Waste (Oct. 4, 2010) at 1 (Motion); see also Progress Answer Opposing Contention 7A (Oct. 29, 2010) at 1 (PEF Answer); NRC Staff Answer to Intervenors' New Contention 7A (Oct. 28, 2010) at 1 (Staff Answer); Interveners [sic] Reply Brief to Answer from NRC Staff to Proposed New Contention 7A (Nov. 4, 2010); Interveners [sic] Reply Brief to Answers [sic] from Progress Energy Florida to Proposed New Contention 7A (Nov. 5, 2010).

I. CONTENTION 7A

Proposed Contention 7A asserts that the draft environmental impact statement (DEIS), issued by the NRC Staff on August 4, 2010,[4] is deficient because it allegedly fails to adequately discuss various environmental impacts associated with the management and storage of low level radioactive waste (LLRW) that would be generated by the two nuclear reactors. Contention C-7A, is as follows:

> The US Nuclear Regulatory Commission's (NRC's) Draft Environmental Impact Statement (DEIS) prepared as an initial report to support a Commission ruling on a proposed COL at Progress Energy Florida's (PEF's) Levy County Florida nuclear power reactor site fails to comply with 10 C.F.R. Part 51 and the National Environmental Policy Act because it fails to adequately address, and inappropriately characterizes as SMALL, direct, indirect, and cumulative impacts, onsite and offsite, of generating and managing so-called Low-Level Radioactive Waste (so-called LLRW) from operating the proposed two AP1000 reactors:
>
> A. Radiological impacts to workers (occupational dose) specifically:
> 1. Impacts resulting from storage of so-called LLRW under the DCD
> 2. Impacts resulting [sic] extended storage of so-called LLRW not covered by the DCD but likely do [sic] to the lack of an off-site location for permanent disposition of Levy County so-called LLRW
>
> B. Soil and ground water contamination that is possible from "normal storage" of LLRW:
> 1. Impacts resulting from storage of so-called LLRW under the DCD
> 2. Impacts resulting [sic] extended storage of so-called LLRW not covered by the DCD
>
> C. Impacts, including (but not limited to) soil and groundwater contamination resulting from practices intended to minimize storage of Class B and Class C so-called LLRW are not analyzed in the DEIS but should be part of any DEIS or Final EIS on the proposed reactors:
> 1. The applicant has invoked, but not described "waste minimization" actions
> 2. NRC Staff have not demanded disclosure or specific plans associated with "minimizing" class B and C waste
> 3. The DEIS is deficient because it does not address environmental impact that may result from waste minimization activities that will

[4] 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); 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 (Aug. 2010) (DEIS).

be the direct result of so-called LLRW generation in Levy County FL.

D. Environmental impacts such as those arising from the contamination of ground water and soil or other possible impacts that would become clear if there were an explicit plan for waste management may result in significant impact of the proposed project, such as the possibility that all contaminated soil would be required to be exhumed during clean up or decommissioning in the event of a leak.

E. The lack of a detailed plan from the applicant about storage, management and possible treatment of so-called LLRW beyond the 1 – 2 year storage capacity described in the DCD for the AP1000 has resulted in omissions and inadequacies described above. Therefore the DEIS also failed to adequately identify, and inappropriately characterizes as SMALL:

1. Environmental impacts,
2. Impacts on workers
3. Appropriate mitigation measures

Motion at 3-4.

Contention 7A, which is an "environmental" or "NEPA" contention, can fairly be paired with another contention in this proceeding, Contention 8A, which is a "safety" or "AEA" contention. Contention 8A, which this Board admitted on August 9, 2010, alleges that the LLRW management plan contained in PEF's COLA fails to provide sufficient information to satisfy 10 C.F.R. § 52.79, NRC's relevant Atomic Energy Act (AEA) regulation.[5] Meanwhile, proposed Contention 7A alleges that the LLRW analysis contained in the DEIS issued by NRC fails to comply with NRC's responsibilities under the National Environmental Policy Act (NEPA) and 10 C.F.R. Part 51. Motion at 3. Although both contentions deal with LLRW, the legal requirements of 10 C.F.R. § 52.79 and NEPA are different, and the fact that C-8A met the admissibility criteria of 10 C.F.R. § 2.309 does not mean that C-7A meets those criteria as well.

[5] Memorandum and Order (Ruling on Joint Intervenors' Motion to File and Admit New Contention 8A) (Aug. 9, 2010) at 12-19 (unpublished) (Baratta J. Dissenting). The subsequent history of Contention 8A is found in LBP-10-20, 72 NRC __ (slip op.) (Nov. 18, 2010).

II. ANALYSIS AND RULING[6]

After studying all of the pleadings on this matter, the Board concludes that, although proposed Contention 7A was timely filed, it is not admissible, because the Intervenors have not shown that it meets the admissibility criteria of 10 C.F.R. § 2.309(f)(1)(i)-(vi).

A. Timeliness of New Contention

It is our determination that, as required by 10 C.F.R. § 2.309(f)(2), Intervenors' claims in C-7A are grounded in "information or conclusions" in the DEIS that "differ significantly" from PEF's Environmental Report (ER). Namely, unlike the ER, the DEIS discusses the environmental impacts that could result from storage and management of LLRW onsite at the LNP for an extended time period beyond that anticipated in the COLA. In addition, the Intervenors submitted C-7A within sixty days of the availability of the DEIS and thus complied with the applicable promptness deadline.[7]

We reject the proposition that C-7A should have been filed promptly after December 2009, when NRC issued a request for additional information (RAI) concerning PEF's plans for managing LLRW, or promptly after March 2010, when PEF responded to the RAI. See PEF Answer at 8, 9-10. These documents focus on safety requirements (i.e., 10 C.F.R. § 52.79), whereas the challenges in C-7A relate to the NRC's environmental regulations and NEPA. Contention 7A relates to the adequacy of the DEIS, and thus, necessarily, it could not have been filed until after the DEIS was issued.

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[6] We discussed the legal standards for admission of new contentions in several earlier decisions in this proceeding. See Memorandum and Order (Admitting Contention 4A) (Feb. 2, 2011) at 3-5 (unpublished); Memorandum and Order (Ruling on Joint Intervenors' Motion to File and Admit New Contention 8A) (Aug. 9, 2010) at 3-5 (unpublished); see also LBP-09-10, 70 NRC at 71-73.

[7] See Memorandum and Order (Granting Motion for Clarification) (Sept. 3, 2009) at 1 (unpublished).

B. Contention Admissibility Under 10 C.F.R. § 2.309(f)(1)(i)-(vi)

Intervenors failed to provide the Board or the parties with any discussion as to how or why proposed Contention 7A satisfies the six admissibility criteria specified in 10 C.F.R. § 2.309(f)(1)(i)-(vi). Inasmuch as the Intervenors are proceeding pro se, however, the Board has nevertheless examined their pleadings to determine if the regulatory standards have been met. As explained below, we conclude that they have not. Intervenors' allegations in C-7A are either outside the scope of this proceeding or fail to show a genuine dispute over a material issue of fact or law. Therefore, C-7A is inadmissible for failing to meet the standards of 10 C.F.R. § 2.309(f)(1)(iii) and (vi).

1. Scope

Several significant aspects of Contention 7A are inadmissible because they are outside of the scope of this COLA proceeding, in derogation of 10 C.F.R. § 2.309(f)(1)(iii). First, to the extent Intervenors challenge the DEIS discussion of environmental impacts relating to the initial two-year period of onsite LLRW management, it is outside the scope. For example C-7A(A)(1) relates to radiological impacts to workers resulting from storage of LLRW "under the DCD," and C-7A(B)(1) relates to contamination resulting from storage of LLRW "under the DCD."[8] The DCD is the product of rulemaking procedure, and as such, it is not subject to challenge before the Board. 10 C.F.R. § 2.335. Second, Intervenors' claims that the environmental impacts addressed in Table S-3 of 10 C.F.R. § 51.51 are inadequate are likewise outside the scope of this proceeding, as Table S-3 is a promulgated rule. 10 C.F.R. § 51.51 Table S-3, see also LBP-09-10, 70 NRC at 115. Third, although Intervenors spend a significant amount of time in this motion arguing that PEF's LLRW plan fails to satisfy 10 C.F.R. § 52.79, such allegations relate to safety requirements, which are both outside of the scope of, and not material to, whether or not the DEIS satisfies NEPA or NRC's NEPA regulations at 10 C.F.R. Part 51. We admitted C-

[8] See 10 C.F.R. § 52.63(a); Design Certification Rule for the AP1000 Design, 10 C.F.R. Part 52 app. D.

8A and have ruled on it. But the safety requirements of 10 C.F.R. § 52.79 do not apply to the DEIS.

2. Sufficient Information to Show a Genuine Dispute under 10 C.F.R. § 2.309(f)(1)(vi)

The remaining aspects of C-7A fail to show a genuine dispute over a material issue of fact or law, and fail to refer to any specific portion of the DEIS or to state the reasons why those sections are inadequate or defective. Intervenors make broad allegations with very little support. The dearth of support they provide fails to indicate what, or why, significant environmental impacts relating to onsite management of LLRW should have been, but were not, addressed in the DEIS.

The fact that PEF's COLA does not satisfy 10 C.F.R. § 52.79 does not itself establish an inadequacy in the DEIS with regard to NEPA requirements. Intervenors must do more than merely allege such an inadequacy – they must indicate what specific part of the DEIS discussion on environmental impacts related to LLRW storage is inadequate, and show how and why this part of the DEIS is inadequate under NEPA.

Our analysis of whether Intervenors have made this showing is a contention admissibility determination under 10 C.F.R. § 2.309(f)(1), not a merits determination. Therefore, we decline to analyze whether the DEIS in fact comports with the NEPA – namely, whether the NRC Staff has considered in its DEIS all reasonable environmental impacts resulting from extended storage and management of LLRW onsite at the LNP. Instead, we only address whether Intervenors in C-7A satisfy the pleading requirements of 10 C.F.R. § 2.309(f)(1).

We note immediately that the DEIS does, in fact, discuss the environmental impacts of PEF's onsite storage and management of LLRW, but that the Intervenors do not address this DEIS discussion, or otherwise explain or allege what is wrong with that DEIS discussion. Intervenors merely state, without elaboration, that lacking a more detailed LLRW management plan, the DEIS cannot adequately discuss the environmental impacts of LLRW management at the LNP.

Although we have held that PEF's extended LLRW plan is too vague to satisfy the safety requirements of 10 C.F.R. § 52.79, LBP-10-20, 72 NRC at __ (slip op. at 41), this does not mean, per se, that the DEIS must also be inadequate. The DEIS has a different goal and is subject to separate regulatory requirements. Upon reviewing the DEIS, we find that it indeed discusses the environmental impacts of PEF's LLRW plan, and discusses the potential impacts associated with three alternative courses of action that PEF might take if it becomes necessary for PEF to store or manage LLRW for an extended period of time (i.e., for longer than the 2 years covered by the DCD). See DEIS at 6-13. The Intervenors provide no support for their assertions that this discussion in the DEIS is inadequate, or that the environmental impacts of extended onsite storage and management of LLRW onsite at the LNP would be significant, or anything other than "small." Having no support or explanation for why specific sections of the DEIS are inadequate, we must deny C-7A for failure to meet the standards for admissible contentions in 10 C.F.R. § (iii) and (vi).

III. CONCLUSION

For the reasons set forth above, we conclude that some of the allegations in Contention 7A are outside the scope of this proceeding, and, more generally, that the Intervenors have

failed to provide sufficient support to show what aspects of the DEIS, if any, fail to meet the requirements of 10 C.F.R. Part 51 or NEPA. Contention 7A fails to satisfy 10 C.F.R. § 2.309(iii) and (vi) and is therefore not admitted.

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
March 16, 2011

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NUCLEAR REGULATORY COMMISSION

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	)	and 52-030-COL
(Levy County Nuclear Power Plant Units 1 and 2)	)	
	)	
(Combined License)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (DENYING CONTENTION 7A) have been served upon the following persons by Electronic Information Exchange.

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Office of the Secretary of the Commission

Dated at Rockville, Maryland
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