March 9, 2012

UNITED STATED OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

PROGRESS ENERGY'S ANSWER OPPOSING JOINT INTERVENORS' MOTION TO ADMIT PROPOSED CONTENTIONS 14 AND 14A

I. INTRODUCTION

Progress Energy Florida, Inc. ("Progress") hereby submits this Answer opposing the Motion for Leave to File Contention 14: Proposed Levy County Site for Two AP1000 Reactors Does Not Comply with Existing State and Federal Law (Feb. 13, 2012) ("Motion"), and the accompanying Contention 14 and Contention 14A (Feb. 13, 2012) ("Contention Statement") submitted by the Green Party of Florida, the Ecology Party of Florida, and Nuclear Information and Resource Service (collectively, "Joint Intervenors") on February 13, 2012. Joint Intervenors request that the Atomic Safety and Licensing Board ("Board") admit as timely Contention 14, or in the alternative admit and hold in abeyance Contention 14A (collectively, the "Contentions").

Contentions 14 and 14A claim that Progress's proposal to build two Advanced Passive 1000 ("AP1000") nuclear power reactors on the Levy County site ("Levy") would be inconsistent with a Federal law, a State law, and a resolution signed by the Governor of Florida (collectively the "CFBC Statutes"), all of which date from the early 1990s and are identified in the Contentions. See Motion at 1-2. The CFBC Statutes concern the de-authorization of the Cross Florida Barge Canal ("CFBC") and the transfer of the CFBC and some surrounding lands to the State of Florida under specified conditions. The CFBC Statutes also include a requirement that the State create and manage a "greenway corridor" over a specified portion of the lands. See 16 U.S.C. § 460tt (b)(2). Joint Intervenors claim that the CFBC

Statutes call into question whether Levy complies "with existing legally enforceable restrictions on the use of the [CFBC] and its associated lands and water resources." Motion at 5. Joint Intervenors request that the Board exercise "summary judgment" and "require [Progress] to conform to relevant laws which apply to this application and any restrictions therein." Id. As explained below, the Contentions should not be admitted for multiple reasons.

As a threshold matter, the Contentions should be rejected out of hand because Joint Intervenors have failed to comply with the consultation requirement set forth in 10 C.F.R. § 2.323(b).

Further, the Contentions should not be admitted because they are untimely under 10 C.F.R. § 2.309(f)(2). As Joint Intervenors concede (Motion at 3), the Contentions are premised on the CFBC Statutes, which were enacted more than two decades ago. Accordingly, allegations that Levy is not consistent with the requirements of the CFBC Statutes could have, and should have, been raised at the outset of this proceeding.

Joint Intervenors also have failed to demonstrate good cause for their untimely filing, which is required to satisfy the first, and most important, factor to be weighed when considering admitting untimely contentions under 10 C.F.R. § 2.309(c). In addition, Joint Intervenors have failed to even address, much less make a compelling showing, that the remaining Section 2.309(c) factors overcome the absence of good cause.

Even if the Joint Intervenors' Contentions were timely, or if the 10 C.F.R. § 2.309(c) factors weighed in favor of admission, the Contentions are nevertheless inadmissible because they fail to meet the substantive requirements for admissibility set forth in 10 C.F.R. § 2.309(f)(1). The Contentions seek enforcement of Federal and State legal authorities that are not within the NRC's jurisdiction. Therefore, the Contentions raise allegations that are beyond the scope of this proceeding. 10 C.F.R. § 2.309(f)(1)(iii). Indeed, the Federal statute at issue explicitly prescribes that, should the United States seek to enforce the Federal statute, the United States district courts – not the NRC or any other Federal agency – have original and exclusive jurisdiction over such enforcement. 16 U.S.C. § 460tt(c)(1). For the same reasons, the Contentions raise issues that are not material to any finding that the NRC must

make in this proceeding. 10 C.F.R. § 2.309(f)(1)(iv). Finally, the Contentions fail to raise a genuine dispute with the Levy Combined Construction Permit and Operating License Application ("COLA") on a material issue. 10 C.F.R. § 2.309(f)(1)(vi).

For all of these reasons, Contentions 14 and 14A are inadmissible.

II. BACKGROUND

This proceeding involves the Levy 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.[1]

After the Board held a scheduling conference in this proceeding on August 18, 2009, the Board issued its Initial Scheduling Order ("ISO").[2] The ISO provides that a party seeking to file a new contention shall file (1) a motion for leave to file a timely new contention under 10 C.F.R. § 2.309(f)(2); or (2) a motion for leave to file an untimely new contention under 10 C.F.R. § 2.309(c); or (3) both.[3] The ISO adds that a "motion and proposed new contention . . . shall be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if it is filed within thirty (30) days of the date when the new and material information on which it is based first becomes available."[4] At the request of the Joint Intervenors and the NRC Staff, and without objection from Progress, on September 3, 2009, the Board clarified that, for Contentions based on new information in the DEIS, the filing deadline would be 60 (not 30) days.[5]

On February 13, 2012, Joint Intervenors filed the Motion and Contention Statement. Contention 14 seeks a "summary judgment" ruling from the Board that the proposed Levy reactors do not comply with the CFBC Statutes. Motion at 5. In the alternative, if the Board "choose[s] not to give summary

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[1] Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51 (2009)

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

[3] Id. at 647.

[4] Id.

[5] Licensing Board Order (Granting Motion for Clarification) (Sept. 3, 2009) (unpublished).

disposition," Joint Intervenors request that Contention 14A be admitted and held in abeyance "until the issuance of the Record of Decision (ROD) on the Final Environmental Impact Statement [("FEIS")] on Levy [Units] 1 and 2." Motion at 5-6.

III. LEGAL STANDARDS REGARDING ADMISSION OF CONTENTIONS

A. Timeliness

The NRC does not look with favor on amended or new contentions submitted after the initial filing.[6] As the Commission has found,

> [o]ur contention admissibility and timeliness rules require a high level of discipline and preparation by petitioners, "who must examine the publicly available material and set forth their claims and the support for their claims at the outset." There simply would be "no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements" and add new contentions at their convenience during the course of a proceeding based on information that could have formed the basis for a timely contention at the outset of the proceeding. Our expanding adjudicatory docket makes it critically important that parties comply with our pleading requirements and that the Board enforce those requirements.[7]

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). New or amended contentions may be deemed timely filed only upon a showing that

> (i) The information upon which the amended or new contention is based was not previously available;
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> (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
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> (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

10 C.F.R. § 2.309(f)(2)(i)-(iii). Accordingly, 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

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[6] Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 636 (2004).

[7] AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 271-72 (2009) (citations omitted).

filing of that contention.[8] And, according to the ISO, such a contention must be filed within 30 days of the date on which the new information first becomes available.[9]

If the proposed contention is based on information that is not new or not materially different than that previously available, or is filed after that thirty day period, the contention shall be deemed untimely, and must satisfy 10 C.F.R. § 2.309(c) for admission. ISO, LBP-09-22, 70 NRC at 647. Admitting a contention under 10 C.F.R. § 2.309(c) requires a balancing of the following eight factors:

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

10 C.F.R. § 2.309(c)(1). These factors are "stringent."[10] "Late petitioners properly have a substantial burden in justifying their tardiness."[11] The Commission's rules explicitly provide that the "requester/petitioner shall address" the Section 2.309(c) factors in its nontimely filing. 10 C.F.R. §

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[8] Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045 (1983).

[9] ISO, LBP-09-22, 70 NRC at 647.

[10] Oyster Creek, CLI-09-7, 69 NRC at 260, citing Florida Power & Light Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2, et al.), CLI-06-21, 64 NRC 30, 33 (2006).

[11] Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975).

2.309(c)(2) (emphasis added). A petitioner's failure to even address these factors is a sufficient basis on which to reject an untimely contention.[12]

The Commission has held that the most important of the eight Section 2.309(c) factors is the first: whether the petitioner has demonstrated sufficient good cause for the untimely filing.[13] Indeed, failure to demonstrate good cause requires the petitioner to make a "compelling" showing with respect to the other factors.[14] In other words,

> A petitioner's showing must be highly persuasive; it would be a rare case where [the Commission] would excuse a non-timely petition absent good cause.[15]

In balancing the remaining factors, the Commission grants considerable weight to factors seven and eight:

> We regard as highly important the intervenor's ability to contribute to the development of a sound record on a particular contention. We also are giving significant weight to the potential delay, if any, which might ensue from admitting a particular contention.[16]

As discussed later in this Answer, Contentions 14 and 14A are untimely under Section 2.309(f)(2), and the balance of the Section 2.309(c) factors weighs heavily against admitting them.

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[12] See Boston Edison Company (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 466 (1985) ("It is equally clear that the burden of persuasion on the lateness factors is on the tardy petitioner and that, in order to discharge that burden, the petitioner must come to grips with those factors in the petition itself") (footnote omitted).

[13] Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 2), CLI-10-12, 71 NRC 319, 323 (2010) ("CLI-10-12"); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation) ("PFS"), CLI-00-02, 51 NRC 77, 79 (2000); Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 125 (2009); State of New Jersey (Department of Law and Public Safety's Requests Dated October 8, 1993), CLI-93-25, 38 NRC 289, 296 (1993).

[14] Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 565 (2005) ("If a petitioner cannot show good cause, then its demonstration on the other factors must be 'compelling'") (footnote omitted); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-04, 37 NRC 156, 165 (1993).

[15] Watts Bar, CLI-10-12, 71 NRC at 323 (footnote omitted).

[16] Consumers Power Co. (Midland Plant, Units 1 and 2) LBP-82-63, 16 NRC 571, 577 (1982) (citations omitted), citing South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-

B. Admissibility

As the ISO points out, even if a proponent of a new contention satisfies the requirements of 10 C.F.R. § 2.309(f)(2) or 10 C.F.R.§ 2.309(c), the proponent must also demonstrate that the new contention satisfies the substantive standard for admissibility in 10 C.F.R. § 2.309(f)(1)(i)-(vi).[17] Progress's Answer Opposing Petition for Intervention and Request for Hearing by [Joint Intervenors], filed on March 3, 2009 in this proceeding, provides a complete discussion of these standards, which will not be repeated here. As set forth below, Contentions 14 and 14A are inadmissible under 10 C.F.R. § 2.309(f)(1) because they (1) raise issues that are outside the scope of this proceeding; (2) raise issues that are immaterial to the findings that the NRC must make regarding the Levy COLA; and (3) fail to raise a genuine dispute on a material issue.

IV. JOINT INTERVENORS DID NOT COMPLY WITH THE SECTION 2.323 CONSULTATION REQUIREMENT

Contentions 14 and 14A should be rejected out of hand because Joint Intervenors failed to comply with the consultation requirement set forth in 10 C.F.R. § 2.323(b). That provision makes explicit that "a motion must be rejected" if it fails to contain the required certification. 10 C.F.R. § 2.323(b) (emphasis added). The Board reiterated this requirement in its ISO: "a motion will be rejected if it does not include the following certification . . ."[18] The Motion does not contain the requisite certification (nor does the Contention Statement). Joint Intervenors did not consult with Progress prior to filing the Motion. Consequently, the Board should reject the Motion and therefore find the Contentions inadmissible.[19]

642, 13 NRC 881, 895 (1981). See also Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 246-47 (1986).

[17] Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 362-63 (1993); ISO, LBP-09-22, 70 NRC at 647.

[18] ISO, LBP-09-22, 70 NRC at 649.

[19] Pursuant to the "Answer Certification" requirement set forth in the ISO (LBP-09-22, 70 NRC at 649-50), undersigned counsel hereby certifies that he is unaware of any attempt by the moving party to

V. CONTENTION 14 AND CONTENTION 14A ARE UNTIMELY, AND THE LATE-FILED FACTORS WEIGH HEAVILY AGAINST THEIR ADMISSION

The Board also should not admit Contention 14 and Contention 14A because (1) they are untimely under Section 2.309(f)(2); (2) the Joint Intervenors fail to demonstrate good cause for their failure to file on time as required by the first factor in 10 C.F.R. § 2.309(c)(1); and (3) the remaining 10 C.F.R.§ 2.309(c)(1) factors weigh heavily against admitting the Contentions. Indeed, this Board's analysis in its Order denying Intervenors' proposed Contention 12A[20] is precisely on point here.

A. Contention 14 and Contention 14A Are Untimely Because They Are Based On Information That Has Been Available For More Than Twenty Years

In order for proposed Contentions 14 and 14A to be timely, Joint Intervenors must demonstrate that (1) the information on which the proposed Contentions are based was not previously available; (2) the information on which the proposed Contentions are based is materially different than information previously available; and (3) the Contentions have been submitted in a timely fashion based on the availability of the subsequent information. 10 C.F.R. § 2.309(f)(2)(i)-(iii).[21] As explained below, the Contentions fail all three criteria.

The proposed Contentions allege that Levy is inconsistent with:

> 1. A Federal statute signed into law on November 28, 1990 (codified at 16 C.F.R. § 460tt) de-authorizing the construction of the CFBC and transferring the CFBC to

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contact him or other of Progress's counsel of record regarding the Motion, or to make any other effort to resolve the issues raised therein.

[20] Licensing Board Memorandum and Order (Denying Contention 12A) (Mar. 29, 2011) (unpublished) ("Contention 12A Order").

[21] None of the allegations in proposed Contention 14 claim that information in the Levy DEIS materially differs from the information, data, and conclusions provided in Levy's ER, or any of the supplemental documents prepared by Progress. Nor does proposed Contention 14A claim that the FEIS will materially differ from the information, data, and conclusions provided in Levy's ER or any of the supplements thereto. Neither proposed Contention makes any reference to any information, data, and conclusions in the ER. Accordingly, neither proposed Contention is timely based on the Section 2.309(f)(2) proviso that deems proposed contentions timely if they are based on "data or conclusions in the NRC draft or final environmental impact statement . . . that differ significantly from the data or conclusions in the applicant's documents."

> the State of Florida subject to the State agreeing to the terms and conditions specified in the statute;
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> 2. A resolution signed by the Governor of the State of Florida on January 22, 1991 agreeing to the terms and conditions specified in the Federal statute; and
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> 3. A State of Florida statute (codified at F.S.A. § 253.781) that took effect on January 22, 1991 with the de-authorization of the CFBC and, among other things, created the Cross Florida Greenways State Recreation and Conservation Area.

Motion at 1, 2, 3.

Obviously, these decades-old statutes and resolution are not new information under 10 C.F.R. § 2.309(f)(2)(i). Joint Intervenors concede the point, stating that "the existence of these laws cannot meet the standard in 10 CFR Part 2 for 'new' information since the statutes have been 'on the books' for twenty years." Motion at 4. Because proposed Contentions 14 and 14A fail to meet the first criteria of Section 2.309(f)(2), they are not timely. Nonetheless, the Joint Intervenors request that the Board overlook this failure to meet the Commission's regulations by suggesting that the Contentions meet the remaining criteria in Section 2.309(f)(2). Motion at 4. They do not.

First, Joint Intervenors assert that the Contentions meet the requirements of Section 2.309(f)(2)(ii) because "the statutes in question provide materially different information than that presented in the" Levy COLA. Motion at 4. Joint Intervenors, however, misunderstand the applicable requirement. Section 2.309(f)(2)(ii) requires that the "information upon which the amended or new contention is based is materially different than information previously available." 10 C.F.R. § 2.309(f)(2)(ii)(emphasis added). Claiming that information in the contention is different from information in the COLA is not sufficient to meet the criterion. Here, the pertinent inquiry is whether the CFBC Statutes (and the purported legal consequences that flow from the Statutes) are materially different than the laws which existed at the time contentions were initially to be filed. They are not. Just as the Board ruled that Contention 12A was untimely because it sought to litigate issues that "ha[d] been bandied about by various Florida agencies and stakeholders for at least several years," see Contention 12A Order at 9-10, so too should the Board rule Contentions 14 and 14A untimely because the CFBC Statutes predate the Levy COLA by nearly two

decades. The Contentions, therefore, do not rely on information that is "materially different than information previously available" at the outset of this proceeding, or at any time since then.

Second, Joint Intervenors claim that, "[i]n deference to NRC regulations," they submitted their contention within "30 days of the Limited Appearance session held in Crystal River on January 12, 2012 when [they] became aware of" the Federal and State legal authorities that form the basis of Contentions 14 and 14A. Motion at 4. This does not meet the requirements of Section 2.309(f)(2)(iii). The pertinent question is whether the Contentions were "submitted in a timely fashion based on the availability of the subsequent information," 10 C.F.R. § 2.309(f)(2)(iii) (emphasis added), not based on when Joint Intervenors became aware of the information. As the Board succinctly stated when ruling Contention 12A untimely, "[p]utting an old idea in front of yet another governmental entity . . . does not make it a new idea." Contention 12A Order at 10 (footnote omitted). Thus, while Joint Intervenors may believe that the Limited Appearance session "collect[ed], summarize[d], and place[d] into context the facts supporting" proposed Contentions 14 and 14A, the fact that a third party presented in a public forum pre-existing information of which the Joint Intervenors happened to be unaware does not excuse Joint Intervenors from failing to submit the contentions in a timely manner.[22] "To conclude otherwise would turn on its head the regulatory requirement that new contentions be based on 'information . . . not previously available.'"[23]

Accordingly, Joint Intervenors' Contentions 14 and 14A present information that is neither new nor materially different from that previously available. The Contentions, therefore, are untimely under 10 C.F.R. § 2.309(f)(2).

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[22] Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC __ (slip op. at 17) (Sept. 30, 2010).

[23] Id. at 17-18 (emphasis in original) (footnote omitted).

B. Joint Intervenors Neither Address Nor Meet The Criteria For Properly Filed Non-Timely Contentions

As the ISO indicates, contentions that are untimely under 10 C.F.R. § 2.309(f)(2) may nevertheless be eligible for admission if the factors contained in 10 C.F.R. § 2.309(c)(1) weigh in favor of considering the Contentions. However, Joint Intervenors have failed to address (let alone meet) those criteria.

A petitioner's failure to address the late-filed factors is sufficient reason alone to reject an untimely contention.[24] This is the case because "a licensing board hardly could determine" whether there was justification for the untimely filing, or the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record, "without knowing . . . information particularly within the possession of the petitioner" and "without having before it the petitioner's reasons for believing that [a] factor weighs in his or her favor."[25] Joint Intervenors' failure to address the late-filed factors is particularly glaring in light of their concession that the Contentions are late because the statutes on which they are based are more than twenty years old. Motion at 4.[26]

Even if the Board were to evaluate the Contentions against the Section 2.309(c)(1) factors, those factors weigh heavily against admission. Joint Intervenors have failed to demonstrate good cause for failing to file the Contentions on time under Section 2.309(c)(1) for the same reasons that the Contentions are untimely under Section 2.309(f)(2). There is no disputing that the CFBC Statutes forming the basis of the Contentions are more than 20 years old. Consequently, the Contentions could have been proffered at the outset of this proceeding.

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[24] See Pilgrim, ALAB-816, 22 NRC at 466; 10 C.F.R. § 2.309(c)(2) ("The requestor/petitioner shall address the [nontimely] factors . . . in its nontimely filing").

[25] Pilgrim, ALAB-816, 22 NRC at 466

[26] Joint Intervenors cannot credibly claim to be unaware of the need to address the late-filed criteria, given that the Board in this proceeding previously has applied Section 2.309(c)(1) to evaluate other of the Joint Intervenors' untimely contentions. See e.g., Contention 12A Order at 10-11. See also id. at 11 n.18 (admonishing intervenors for failing to address the Section 2.309(f)(2) contention admissibility

Although they do not directly address the good cause factor, Joint Intervenors claim that they "did not understand the implications" of the CFBC Statutes until the January 12, 2012 Limited Appearance session. Motion at 3-4. And, recognizing that they cannot legitimately claim that they timely raised their Contentions, Joint Intervenors assert that the "force" of the CFBC Statutes at issue here "exists continuously" and thus "any issue of 'timeliness' of this contention is irrelevant." Motion at 4-5. This rationale fails to demonstrate good cause for filing the Contentions late. To demonstrate good cause, Joint Intervenors must establish that the information is new information not already in the public domain that could not have been presented earlier.[27] Joint Intervenors' failure to understand the implications of the CFBC Statutes before the Limited Appearance session, and the claimed "continuous existence" of the statutes' legal effects, do not absolve Joint Intervenors' failure to present this information earlier. Accordingly, Joint Intervenors have failed to demonstrate good cause for failing to timely file proposed Contentions 14 and 14A.

Having failed to show good cause, Joint Intervenors' demonstration regarding the other factors must be particularly strong in order to justify admitting the Contentions.[28] Joint Intervenors nowhere address these factors. But, even if they had, Joint Intervenors could not make a compelling showing in favor of admitting the Contention because three of the remaining factors – including the two accorded the most weight after good cause – weigh against admission.

Factor (v), the availability of other means whereby Joint Intervenors' interest will be protected, weighs against admitting the Contentions. Joint Intervenors recognize that there are other means available to protect their interests. When discussing the easement Progress obtained from the State of Florida to use the affected land parcels, Joint Intervenors acknowledged that this COLA proceeding

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criteria even though the Board had "discussed the applicability of this regulation with respect to every prior contention").

[27] Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 69-73 (1992); Millstone, CLI-09-5, 69 NRC at 126.

[28] Comanche Peak, CLI-92-12, 36 NRC at 73; Millstone, CLI-05-24, 62 NRC at 565.

cannot focus on alleged "un-founded action taken by the state, but others may do so." Contention Statement at 6. In addition, Joint Intervenors state that they "will forward [their] filing to the US Army Corps of Engineers," indicating their intent to pursue remedies in at least one other venue. Contention Statement at 9. Thus, factor (v) weighs against admitting the contention for the same reason the Board ruled that this factor weighed against admitting proposed Contention 12A: "it appears that [Joint] Intervenors have significant 'other means whereby [their] interests will be protected.'" Contention 12A Order at 11.[29]

Factor (vii), the extent to which the Joint Intervenors' participation will broaden the issues or delay the proceeding, weighs against admitting the Contentions. None of the other admitted contentions raise the same legal concerns that are alleged in Contentions 14 and 14A. Thus, admission of the Contentions would undoubtedly broaden the issues under consideration here. In addition, if Contention 14 were admitted now, or if Contention 14A were admitted after the NRC Staff issues the FEIS, the Board would likely "be forced to significantly delay the litigation and hearing on the admitted contentions, or would need to set a second, later schedule for the litigation of" the Contentions.[30]

Factor (viii), the extent to which Joint Intervenors' participation may reasonably be expected to assist in developing a sound record, also weighs against admitting the Contentions. To satisfy this factor, Joint Intervenors must demonstrate that they have special expertise on the subjects they wish to raise by

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[29] It appears that Joint Intervenors have, and have had, multiple State and Federal avenues available to them for pursuing the concerns raised in proposed Contentions 14 and 14A. State avenues include the State of Florida site certification hearing, proceedings to obtain any other required permits and approvals from the Florida Department of Environmental Protection, and State court review of any final state agency action. Federal avenues include (as Joint Intervenors note) the Army Corps of Engineers process for permitting the discharge of dredge or fill material into navigable waters, and any Federal judicial review thereof.

[30] Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 582, 585 (2006) (finding that Section 2.309(c)(1)(vii) weighed against admitting proposed contentions "just when the adjudicatory hearing documents needed to be filed"). Based on the NRC Staff's most recent status report (which indicates that the Staff expects to complete the FEIS in April 2012) and according to the schedule set forth in the ISO, initial statements of position and related filings in the contested hearing will be due in mid-June 2012.

setting forth the precise issues they intend to cover, identifying their prospective witnesses, and summarizing the witnesses' proposed testimony.[31] Joint Intervenors have failed to meet this requirement. As Joint Intervenors do not appear to have the services of legal counsel, and have made no indication of any intent to retain such services, there is no evidence that they could contribute to developing the record on a purely legal argument. Accordingly, this factor weighs against the Contentions.

After factor (i) (good cause), factors (vii) and (viii) are accorded the most weight. Braidwood, CLI-86-8, 23 NRC at 245-46. As discussed above, these two factors, and factor (v), weigh against admission. Even if Joint Intervenors had addressed these factors, they nonetheless would have failed to make a compelling showing in favor of the Contentions. For these reasons – and consistent with the Board's ruling rejecting proposed Contention 12A – proposed Contentions 14 and 14A fail to meet the criteria for admission as untimely contentions.

VI. CONTENTIONS 14 AND 14A ARE NOT ADMISSIBLE

Even assuming that the Board *arguendo* were to find Contentions 14 and 14A to be timely, or that they meet the late-filed criteria, the Board should still reject the Contentions because they fail the contention admissibility criteria set forth in 10 C.F.R. § 2.309(f)(1). Contention 14 states:

> The Applicant's Proposed Levy County Site for Two AP1000 Reactors Does Not Comply With Restrictions in USC Title 16, Chapter 1, Subchapter CV, Section 460 tt (b)(2)(3)(4) and (c)(1) "Cross Florida Barge Canal;" the January 22, 1991 Resolution of the Governor of Florida and Secretary of State; and the Implementing Statute [Florida] Title XVIII, Chapter 253, Section 781 [Attachments 2, 3 and 4]; Compliance With These Laws Would Make the Proposed Levy County Site Not Viable.

Contention Statement at 1. In the alternative, should the Board reject Contention 14, Joint Intervenors request that Contention 14A be admitted and held in abeyance until the Commission issues the "record of decision" on the Levy FEIS. Motion at 5-6. Contention 14A states:

[31] Braidwood, CLI-86-8, 23 NRC at 246.

> The Issuance of a Record of Decision on the Final Environmental Impact Statement for the Proposed Two AP 1000 Atomic Fission Reactors on A Site in Levy County Site Does Not Comply With Restrictions in USC Title 16, Chapter 1, Subchapter CV, Section 460 tt(b)(2)(3)(4) and (c)(1) "Cross Florida Barge Canal;" the January 22, 1991 Resolution of the Governor of Florida and Secretary of State; and the Implementing Statute [Florida] Title XVIII, Chapter 253, Section 781 [Attachments 1, 2 and 3]; Non-Compliance With These Laws Is Subject to Federal Enforcement.

Contention Statement at 13. Both versions of the Contention allege that Levy does not comply with Federal and State requirements.

Joint Intervenors allege that Levy, as currently planned, would not comply "with existing legally enforceable restrictions on the use of the Barge Canal and its associated land and water resources." Motion at 5. Specifically, Joint Intervenors assert that "the parcels of land that [Progress] would use for the [Cooling Water Intake Structure ("CWIS")] and the barge slip for the delivery of large reactor components are explicitly tracts of land transferred from the federal government to the State of Florida for greenway development." Contention Statement at 4. Thus, according to Joint Intervenors, "the proposed CWIS and the proposed barge slip are incompatible with . . . 'conservation and recreation' . . . and . . . protection of the [Floridan] aquifer." Id. Joint Intervenors argue that, if the purported restrictions on the CFBC/Greenway set forth in the CFBC Statutes are enforced, sufficient cooling water would not be available for Levy, thus rendering one of the acceptance criteria in the combined license unmet. Contention Statement at 10-11. At bottom, Joint Intervenors "request that this Board order NRC Staff to exercise its delegated authority . . . under the Atomic Energy Act to require the applicant to conform to relevant laws which apply to this application." Motion at 5.

Neither Contention 14 nor Contention 14A is admissible under Section 2.309(f)(1) for multiple reasons. As discussed in detail below, the Contentions raise issues that are not within the scope of this proceeding – and that are not material to any finding the NRC must make on the Levy COLA – because they ask the NRC to enforce alleged noncompliance with the CFBC Statutes, which are outside the NRC's jurisdiction. 10 C.F.R. § 2.309(f)(1)(iii)-(iv). In addition, the Contentions nowhere challenge any

of the information contained in the DEIS (or the ER) discussing expected environmental impacts on the CFBC from, *inter alia*, construction of the barge slip and CWIS. Thus, they fail to raise a genuine dispute regarding a material issue. 10 C.F.R. § 2.309(f)(1)(vi).

A. The Proposed Contentions Raise Issues Outside the Scope of, and Immaterial to, This Proceeding

The Contentions are outside the scope of this proceeding because they would require the Board to litigate issues that fall outside the NRC's jurisdiction. Controlling Commission precedent holds that compliance with statutes, regulations, and other requirements that are the primary responsibility of other agencies is not within the NRC's jurisdiction. Here, the NRC is not responsible for the enforcement of the CFBC Statutes. Indeed, the Federal statute explicitly prescribes that Federal enforcement of the statute is exclusively the province of the U.S. district courts. Thus, whether Levy complies with the CFBC Statutes is not a question within this Board's (or the Commission's) jurisdiction. In addition, the Board has asked Progress and the NRC Staff to address a representation made by the NRC before the D.C. Circuit concerning the scope of the NRC's jurisdiction.[32] That representation, and the case law on which it is based, is entirely consistent with Commission precedent holding that litigation of issues that are the primary responsibility of other agencies is within neither the Commission's nor this Board's jurisdiction.

1. The NRC Has No Jurisdiction to Evaluate Compliance with the CFBC Statutes

A petitioner must demonstrate that, among other things, the issues raised in a contention address matters within the scope of the proceeding and material to the findings the NRC must make. 10 C.F.R. §§ 2.309(f)(1)(iii) and (iv). It is well-established that a contention is not cognizable unless it is material to a

[32] Licensing Board Memorandum (Issue to Address Answers to Proposed Contention 14) at 1-2 (Feb. 15, 2012) (unpublished) ("February 15th Memorandum").

matter that falls within the scope of the proceeding for which the licensing board has been delegated jurisdiction as set forth in the Commission's Notice of Opportunity for Hearing.[33] In other words,

> Adjudicatory boards do not have plenary subject matter jurisdiction in Commission proceedings. Under the Atomic Energy Act, the Nuclear Regulatory Commission is empowered to administer the licensing provisions of the Act and use licensing boards "to conduct such hearings as the Commission may direct." The boards, therefore, are delegates of the Commission and, as such, they may exercise authority over only those matters that the Commission commits to them.[34]

Any proposed contention that falls outside the specified scope of the proceeding must be rejected.[35]

Commission precedent holds that the scope of a licensing proceeding does not include litigating issues that are the primary responsibility of other agencies. The Commission has made clear that licensing boards "should narrowly construe their scope to avoid where possible the litigation of issues that are the primary responsibility of other agencies and whose regulation is not necessary to meet [the

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[33] Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976); see also Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426-27 (1980); Commonwealth Edison Co. (Carroll County Site), ALAB-601, 12 NRC 18, 24 (1980).

[34] Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790 (1985) (footnote omitted). In addition, the Appeal Board explained that "the various hearing notices are the means by which the Commission identifies the subject matters of the hearings and delegates to the boards the authority to conduct proceedings." Id. (footnote omitted). Here, the notice of opportunity to petition to intervene specified that the scope of this proceeding was limited to

> the Atomic Energy Act of 1954, as amended, and the regulations in Title 10 of the *Code of Federal Regulations* (10 CFR) Part 2, "Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders," 10 CFR part 50, "Domestic Licensing of Production and Utilization Facilities," and 10 CFR part 52, "Licenses, Certifications, and Approvals for Nuclear Power Plants."

73 Fed. Reg. 74,532, 74,532 (Dec. 8, 2008). More specifically, the intervention notice states that the NRC "will consider" the combined license and supplemental information submitted by Progress for Levy Units 1 and 2 under Subpart C of 10 C.F.R. Part 52 for a combined license, and under 10 C.F.R. 50.10 for a limited work authorization. Id.

[35] Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), LBP-04-15, 60 NRC 81, 90 (2004), citing Portland General Electric Co. (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 & n.6 (1979) ("the intervenors proceeded in the wrong forum to the extent that they sought below to press claims unrelated to the issues which had been specified for hearing").

Commission's] statutory responsibilities."[36] In accordance with this precedent, the Commission has ruled inadmissible contentions that sought to adjudicate the question of whether compliance with regulations administered by non-NRC agencies was required to obtain an NRC license. In Hydro Resources, the Commission ruled that "[w]hether non-NRC permits are required is the responsibility of bodies that issue such permits, such as the Federal Environmental Protection Agency, the Navajo nation, or state and local authorities" because "[t]o find otherwise would result in duplicate regulation."[37] The Commission explained that, "[s]uch a regulatory scheme runs the risk of Commission interference or oversight in areas outside its domain," and "[n]othing in [the Commission's] statute or rules contemplates such a role for the Commission."[38]

In short, Congress gave the Commission "no roving mandate to determine other agencies' permit authority."[39] While the Commission's "regulation[s] and [its] license condition[s] show due respect to [its] sister agencies' responsibilities," they "do not add to [its] own regulatory jurisdiction."[40] Accordingly, the Commission directed the Presiding Officer in Hydro Resources "not to adjudicate questions of Navajo, EPA, or state and local regulatory jurisdiction."[41]

Relying on Hydro Resources, the licensing board in the North Anna Unit 3 combined license proceeding rejected a contention as outside the NRC's jurisdiction where the contention requested that the board "evaluate whether Unit 3 will comply with [the Clean Water Act ("CWA")] or state or local permitting requirements."[42] The licensing board held that, if the petitioner "is concerned that Dominion

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[36] Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-16, 48 NRC 119, 121-22 (1998) (footnote omitted).

[37] Id. at 120.

[38] Id.

[39] Id. at 121.

[40] Id.

[41] Id.

[42] Virginia Electric & Power Co. (North Anna Power Station, Unit 3), LBP-08-15, 68 NRC 294, 329 (2008) ("In Hydro Resources the Commission made clear that licensing boards should not admit contentions alleging that the applicant must obtain permits from other agencies").

might not comply with the CWA or state or local requirements, it may communicate such concerns to the agencies that enforce those requirements"; any other approach would result in "duplicate regulation and interference or oversight in areas outside the NRC's domain that the Commission warned against in Hydro Resources."[43]

Consistent with the Commission's decision in Hydro Resources and the licensing board's decision in North Anna Unit 3, earlier in this proceeding, the Board rejected Joint Intervenors' Contention 4, Subpart P, which alleged that Levy would be inconsistent with the regulation governing disposal of dredge or fill material into wetlands (40 C.F.R. Part 230).[44] The Board ruled that,

> [w]hile Part 51 requires that the ER consider all significant environmental impacts, it does not authorize the NRC to regulate, or even to enforce, compliance with all other environmental laws and regulations. It assumes that, in due course, the applicant will obtain any such required permits and comply with otherwise applicable laws and regulations (environmental or otherwise).[45]

Although the Contention 4, Subpart P, inadmissibility was not on appeal before the Commission, the Commission spoke favorably of the Board's ruling that the contention impermissibly sought to litigate regulations administered by another agency.[46]

The Federal statute cited in the Contentions makes clear that enforcement of any legal obligations flowing from that statute is not within the NRC's jurisdiction. The statute explicitly prescribes that "the United States is directed to vigorously enforce the agreement . . . in the courts of the United States," and "[t]he United States district courts shall have original and exclusive jurisdiction of any action under this

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[43] Id.

[44] Levy, LBP-09-10, 70 NRC at 105-06.

[45] Id. (footnote omitted).

[46] Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-2, 71 NRC 27, 35 n.39 (2010) ("Subpart 4P claimed that the proposed project would violate federal regulations governing the issuance of a permit for disposal of dredged or fill material – regulations administered by the Army Corps of Engineers, not the NRC. The Board determined that, while the ER must address environmental effects of the proposed project – including effects outside this agency's jurisdiction to regulate – a contention whether the project will meet another agency's regulations is not admissible in our licensing proceedings"), citing Levy, LBP-09-10, 70 NRC at 105.

subsection." 16 U.S.C. § 460tt(c)(1).[47] The Contentions' claim that the NRC should enforce the requirements of the Federal statute in Levy's licensing proceeding simply cannot be reconciled with the express terms of the statute, which require Federal enforcement in the U.S. district courts.

Further, had Congress intended that the NRC – or any other Federal agency – enforce the terms of the statute on behalf of the United States, "Congress knows how to draft legislation that clearly states its intent"[48] to provide such jurisdiction. Congress did not do so here. Nothing in the text of the CFBC Statutes suggests that the NRC has jurisdiction to determine whether Levy or any other project is inconsistent with the Statutes. Nor is there anything to suggest that the NRC has the jurisdiction to determine, inter alia, whether the easement that Progress obtained from the State of Florida (see Contention Statement at 9 & Attachment 10) to site certain structures on or near the CFBC is inconsistent with the requirements of the Statutes. Joint Intervenors have identified no authority providing the Board with jurisdiction to adjudicate these questions.

In accordance with Commission precedent, the Board's ruling earlier in this proceeding rejecting Contention 4, Subpart P, and the CFBC Statutes' explicit prescription that jurisdiction for Federal enforcement of the CFBC Statutes exclusively resides in the U.S. district courts, the Board should find that Contentions 14 and 14A are inadmissible because they seek to litigate compliance with legal obligations that are not within the NRC's jurisdiction. The Contentions, therefore, do not raise issues that are material to or within the scope of this proceeding. 10 C.F.R. § 2.309(f)(1)(iii), (iv).

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[47] The Federal statute also provides a means by which the State of Florida can enforce the statute's requirements. The statute allows the State of Florida to enforce the requirements of the statute "in the courts of the State or of the United States." 16 U.S.C. § 460tt(c)(2).

[48] PFS, CLI-02-29, 56 NRC 390, 397 (2002). See also Calvert Cliffs 3 Nuclear Project (Calvert Cliffs Nuclear Power Plant Unit 3), LBP-09-15, 70 NRC 198, 218 & n.61 (2009), citing City of Chicago v. Envtl. Def. Fund, 511 U.S. 328, 337 (1994).

2. The NRC's Representation to the D.C. Circuit Is Consistent With the Commission's Hydro Resources Precedent

The Board has requested that Progress and the NRC Staff provide their views concerning a representation made by the NRC before the U.S. Court of Appeals for the District of Columbia Circuit regarding the scope and jurisdiction of Atomic Safety and Licensing Boards in the NRC adjudicatory process.[49] In short, the NRC's representation and the cases relied on by the NRC for that representation are consistent with the Commission precedent summarized above – i.e., the Commission's jurisdiction does not encompass alleged noncompliance with statutes and regulations administered by other Federal agencies.

In its D.C. Circuit brief, the NRC explained that petitioners had failed to exhaust their administrative remedies with respect to their allegation that the NRC inappropriately approved the Vermont Yankee license renewal without requiring Vermont Yankee to obtain a new Section 401 Clean Water Act ("CWA") permit. NRC Brief at 6, 25-29. As explained in the NRC Brief and made clear in NRC regulations, the environmental report for a reactor license renewal application is required to demonstrate "[s]tatus of compliance" by "list[ing] all Federal permits, licenses, approvals and other entitlements which must be obtained in connection with the proposed action and shall describe the status of compliance with these requirements." 10 C.F.R. § 51.45(d); NRC Brief at 12. Entergy's license renewal application for Vermont Yankee relied on the CWA Section 401 certification issued in 1970. NRC Brief at 14. Before the D.C. Circuit, petitioners alleged that a new CWA Section 401 certification was required to support Vermont Yankee's license renewal. NRC Brief at 6. The NRC moved to dismiss the petition on the ground that petitioners failed to sufficiently raise this argument below. NRC Brief at 17-18.

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[49] February 15th Memorandum at 1-2, quoting Initial Brief for Respondents [NRC] at 29, Vermont Dep't of Pub. Serv. & New England Coal. v. NRC, Nos. 11-1168 and 11-1177 (D.C. Cir. Jan. 20, 2012) ("NRC Brief").

According to the NRC, one argument raised by petitioners in opposing the NRC's motion to dismiss was that "adjudication of CWA claims must take place outside NRC's hearing process," and that the "'NRC has determined that the issue of compliance with the requirements of Section 401 is not an issue that is to be resolved in a license renewal hearing.'" NRC Brief at 28 (quoting Petitioners' Brief). The NRC responded that "[t]here is no reason to believe that CWA issues cannot be addressed in NRC license renewal hearings, or that CWA issues are somehow immune from ordinary exhaustion-of-remedies principles." NRC Brief at 28-29. The NRC Staff then made the following representation, on which the Board has requested briefing:

> NRC's hearing process is not limited to claims under the Atomic Energy Act, as petitioners' brief implies, but encompasses any claim of unlawfulness that would defeat issuing a license, including (for example) claims under the National Environmental Policy Act, the National Historic Preservation Act, and the CWA itself.

NRC Brief at 29 (emphasis in original) (footnote omitted).

That representation is entirely consistent with the Hydro Resources holding that a contention alleging non-compliance with statutes or regulations administered by other Federal agencies is inadmissible. In short, whether an applicant has complied with issues that are the primary responsibility of other agencies falls outside the NRC's jurisdiction; in specified cases, the NRC does have jurisdiction to review the status of such compliance.

The Commission's Hydro Resources (CLI-98-16) decision discussed above is one such case where the status of compliance with other agencies' permits was at issue. In Hydro Resources, when ruling that the "litigation of issues that are the primary responsibility of other agencies and whose resolution is not necessary to meet our statutory responsibilities" is not within the NRC's jurisdiction, the Commission explained that its ruling "ought not to be understood to mean that environmental or other permits issued by other regulatory bodies have no bearing on NRC licensing decisions."[50] The

[50] Hydro Resources, CLI-98-16, 48 NRC at 122 & n.3.

Commission cited 10 C.F.R. § 51.45(d) – the same provision discussed in the NRC Brief before the D.C. Circuit – as an example, which provides that the "licensee environmental report [is] required to list other required approvals and status of compliance."[51] While holding that demonstrating the "status of compliance" with such approvals is required under the NRC rules for license renewal, the Commission immediately reiterated that its "adjudicatory tribunal is not the proper forum for litigation and resolution of controversies about other agencies' permitting authority."[52] In other words – and as succinctly stated by this Board earlier in this proceeding – the NRC's regulations "assume[] that . . . the applicant will obtain any such required permits and comply with otherwise applicable laws and regulations" but "do[] not authorize the NRC to regulate, or even to enforce, compliance with all other environmental laws and regulations."[53]

The status of compliance with other agencies' permits was also at issue in Vermont Yankee,[54] one of the cases cited by the NRC to support its representation in its Brief. See NRC Brief at 29 & n.7. In Vermont Yankee, the Commission evaluated whether the applicant satisfied the requirements of 10 C.F.R. § 51.53(c)(3)(ii)(B), which provides that an applicant's environmental report may either (1) evaluate the aquatic impacts resulting from entrainment, impingement, or heat shock, or (2) provide a copy of the current Clean Water Act ("CWA") Section 316(a) permit issued by either EPA or the state where the plant is located.[55] In finding that the applicant had satisfied the applicable requirements by providing the permit, the Commission ruled that all it may do under the CWA "is examine whether the

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[51] Id. at 122 n.3.

[52] Id. The Commission cited to the decades-old Appeal Board decision in Yellow Creek: "This Commission may not incorporate in licenses to build nuclear power plants conditions which, in actuality, call for a 'review' of the adequacy of water quality requirements previously established by EPA." Tennessee Valley Authority (Yellow Creek Nuclear Plant, Units 1 and 2), ALAB-515, 8 NRC 702, 713 (1978). Thus, while NRC's regulations do not permit the NRC to review EPA's analysis of water impacts, NRC's regulations do require a license applicant to demonstrate the status of compliance with EPA's (and other permitting agencies') requirements.

[53] Levy, LBP-09-10, 70 NRC at 105-06.

[54] Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), CLI-07-16, 65 NRC 371 (2007),

[55] Id. at 384-85.

EPA or the state agency considered its permit to be a section 316(a) determination" and, "[i]f the answer is 'yes,' [the Commission's] inquiry ends."[56] The Commission found that it has no jurisdiction to determine whether the Section 316(a) approval properly issued because the CWA "does not give [the Commission] the option of looking behind the agency's permit to make an independent determination as to whether it qualifies as a bona fide section 316(a) determination."[57]

Similarly, the status of compliance with other agencies' permits was also at issue in PFS,[58] another case relied on in the NRC Brief. There, the licensing board admitted a contention challenging the applicant's compliance with 10 C.F.R. § 51.45(d).[59] As previously discussed, that provision requires an applicant's environmental report to list "all Federal permits, licenses, approvals and other entitlements which must be obtained in connection with the proposed action." 10 C.F.R. § 51.45(d). The provision does not provide the NRC jurisdiction to determine whether the applicant has complied with those permits. And nothing in the CFBC Statutes suggests that the NRC should "look behind" a determination by another authority – such as the State of Florida's grant of an easement for Levy – to evaluate the validity of that determination.

In addition to the "status of compliance" cases, the NRC Brief cited to cases in which the NRC had specific obligations under statutes other than the Atomic Energy Act. See NRC Brief at 29 n.7. These cases do not support admitting Contentions 14 and 14A because the CFBC Statutes impose no such obligations.

The NRC relied on Diablo Canyon,[60] which concerned resolution of a NEPA contention alleging that the NRC Staff environmental assessment failed to consider certain impacts.[61] There is no question

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[56] Id. at 386.
[57] Id. at 387.
[58] PFS, LBP-98-7, 47 NRC 142 (1998).
[59] Id. at 197-98.
[60] Pacific Gas & Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-26, 68 NRC 509 (2008).

that the NRC has specific obligations under NEPA. Nor is there any question that the NRC's regulations contemplate contentions alleging non-compliance with NEPA. See, e.g., 10 C.F.R. § 2.309(f)(2) (new or amended contentions may be proffered where the data or conclusions in the NRC Staff's environmental documents differ from those in the applicant's documents). Unlike NEPA, the CFBC Statutes impose no obligations on the NRC. Likewise, nothing in the NRC regulations suggest that non-compliance with the CFBC Statutes would present grounds for an admissible contention.

Similarly, the NRC's reliance on USEC[62] in its D.C. Circuit Brief does not support a claim that the NRC has jurisdiction to adjudicate whether Levy complies with the CFBC Statutes. USEC addressed (among other things) contentions alleging non-compliance with the National Historic Preservation Act ("NHPA").[63] There was no question that "[c]ompliance with the [NHPA was] also at issue in [the] proceeding" because "[s]ection 106 of the NHPA requires licensing agencies like the NRC to 'take into account the effect' of the licensed undertaking on historic properties."[64] As the Commission explained, the NRC uses its NEPA process to comply with the NHPA Section 106 requirements by "identify[ing], analyz[ing], and document[ing] any cultural impacts of a project as part of its environmental review."[65] "The NRC Staff's environmental impact statement typically contains the Staff's documentation of its identification and analysis of cultural impacts."[66] The contentions in USEC differ from Contentions 14 and 14A because nothing in the CFBC Statutes even remotely suggests that the NRC is required to take into account any effect from licensed undertakings on or near the CFBC, or to otherwise enforce the CFBC Statutes. Indeed, as previously explained, jurisdiction for any enforcement action by the Federal government rests in the U.S. district courts.

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[61] Id. at 514-15.
[62] USEC, Inc. (American Centrifuge Plant), CLI-06-9, 63 NRC 433 (2006).
[63] Id. at 437.
[64] Id.
[65] Id. at 438.
[66] Id.

The NRC Brief also cited to another Hydro Resources decision[67] which addressed, among other issues, the question of whether the NRC had complied with the Native American Graves Protection and Repatriation Act ("NAGPRA").[68] That statute proscribed "the intentional removal from or excavation of Native American cultural items from Federal or tribal lands" unless certain requirements are met, including that such items be excavated or removed only after consultation with or consent of the appropriate tribal authority. 25 U.S.C. § 3002(c)(2). The board in that proceeding issued a license authorizing activity on land covered by the NAGPRA without the Staff having sought concurrence from the appropriate Native American Tribes because the Staff found that the NAGPRA would not be violated. The Commission affirmed the board's decision.[69] That case contrasts with the allegations in Contentions 14 and 14A because, unlike the NAGPRA, the CFBC Statutes do not impose a requirement that the NRC consult with and receive concurrence from any other entity.

In summary, whether Levy complies with the CFBC Statutes is a question outside the scope of NRC jurisdiction. Joint Intervenors point to no law, NRC rule, or other authority that would provide NRC jurisdiction to evaluate Levy's compliance with those Statutes. Moreover, Federal enforcement of the CFBC Statutes is exclusively the province of the U.S. district courts. Thus, the Contentions fall outside the scope of this proceeding and do not raise issues that are material to the findings that the NRC must make in order to support issuance of the Levy COLA. 10 C.F.R. § 2.309(f)(1)(iii)-(iv).

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[67] Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-22, 50 NRC 3 (1999).

[68] Id. at 12-15.

[69] Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-99-9, 49 NRC 136, 137 (1999), aff'd, CLI-99-22, 50 NRC at 14. See also Crow Butte Resources, Inc. (License Renewal for In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 338 & nn.29, 30 (2009) (affirming a licensing board's determination that a Tribe had standing to intervene in the proceeding based in part on the fact that "several federal statutes recognize that Indian Tribes have an interest in artifacts related to their heritage," including the NAGPRA, and that under the NHPA, "a federal agency must consult with a Tribe concerning a federal action that might affect sites of cultural interest to the Tribe").

B. Contentions 14 and 14A fail to raise a genuine dispute on a material issue of law or fact

Contentions 14 and 14A are also inadmissible because they are not supported by sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact, as required by 10 C.F.R. § 2.309(f)(1)(vi). Section 2.309(f)(1)(vi) requires that information supporting the dispute either include references to specific portions of the application or identify where the application fails to contain information on a relevant matter. Under the NRC's Rules of Practice, "a protestant does not become entitled to an evidentiary hearing merely on request, or on a bald or conclusory allegation that such a dispute exists. The protestant must make a minimal showing that material facts are in dispute, thereby demonstrating that an 'inquiry in depth' is appropriate."[70]

As a threshold matter, despite all of their claims that construction and operation of Levy would be inconsistent with the intent of the CFBC Statutes, see, e.g., Contention Statement at 8, Joint Intervenors nowhere dispute any of the information in the ER (or the DEIS) concerning expected environmental impacts from Levy on the CFBC, nor claim that such an analysis is missing. They merely claim that constructing and operating Levy would violate the CFBC Statutes.

The Levy ER thoroughly describes the location of the CWIS in the CFBC, and the expected environmental impacts from the CWIS. For example, ER Section 2.3.1.3, Cross Florida Barge Canal, describes the history of the CFBC, 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.[71] And, the DEIS describes the expected

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[70] 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989) (quoting Conn. Bankers Ass'n v. Bd. of Governors, 627 F.2d 245, 251 (D.C. Cir. 1980)).

[71] In addition to the analysis in the DEIS, the expected aquatic impacts resulting from operation of two reactors at the Levy site were also the subject of multiple requests for additional information ("RAI") from 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."

impacts resulting from locating the CWIS on the CFBC. DEIS Section 5.2.3.1, Surface Water. The DEIS concludes that the impact of operating the Levy reactors on surface water quality of the CFBC and surrounding surface waters would be small and mitigation beyond those measures imposed by the State of Florida would not be warranted. DEIS § 5.2.3.1 at 5-16. Joint Intervenors have not challenged this or any other information in the ER or the DEIS, and, therefore, have failed to raise a material dispute. 10 C.F.R. § 2.309(f)(1)(vi). Consequently, Contentions 14 and 14A are inadmissible.

VII. CONCLUSION

For the reasons set forth above, the Board should not admit Contentions 14 and 14A.

Respectfully Submitted,

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Dated: March 9, 2012

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. ML091320073, 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.

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 Energy's Answer Opposing Joint Intervenors' Motion to Admit Proposed Contentions 14 and 14A, dated March 9, 2012, was provided to the Electronic Information Exchange for service to those individuals on the service list in this proceeding this 9th day of March 2012.

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