UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
Progress Energy Florida, Inc.	)	Docket Nos. 52-029-COL
(Levy County Nuclear Power Plant,	)	and 52-030-COL
Units 1 and 2)	)	August 22, 2012

INTERVENORS' OPPOSITION TO MOTIONS TO STRIKE TESTIMONY AND ARGUMENTS REGARDING CONTENTION 4

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.323 and the Atomic Safety and Licensing Board's ("ASLB's") August 9, 2012 Order (Granting Motion for Extension of Time), the Ecology Party of Florida and Nuclear Information and Resource Service ("Intervenors") hereby respond to motions by Progress Energy Florida ("PEF") and the Staff of the U.S. Nuclear Regulatory Commission ("NRC") to strike portions of Intervenors' testimony and legal arguments regarding Contention 4. Progress Energy Florida Inc.'s Motion to Strike Intervenors' Arguments and Testimony That Are Outside the Scope of the Contested Hearing and that Raise a New, Untimely Contention (Aug. 10, 2012) ("PEF Motion"); NRC Staff Motion *In Limine* to Exclude Portions of the Parties' Testimony and Statements of Position (Aug. 10, 2012) ("Staff Motion"). As discussed below, PEF's and the Staff's arguments are without merit and therefore the motions should be denied.

II. DISCUSSION

A. Intervenors' Arguments and Testimony Regarding Alternative Water Supply Are Within the Scope of Contention 4.

Both PEF and the NRC Staff argue that Intervenors' testimony and legal arguments should be stricken to the extent that they criticize the failure by the Final Environmental Impact Statement for Levy Units 1 and 2 ("FEIS") to adequately analyze alternatives to groundwater

withdrawal. PEF Motion at 4-6, Staff Motion at 3-8. They maintain that Contention 4 (also designated "Contention 4A) as amended by the Intervenors and admitted by the Atomic Safety and Licensing Board ("ASLB") in an unpublished Order dated February 2, 2011 ("2/2/11 Order"), is restricted to the question of whether the FEIS has adequately discussed and appropriately characterized the direct, indirect, and cumulative environmental impacts of groundwater pumping (i.e., active dewatering) and passive dewatering at the LNP as well as the environmental impacts of salt drift. PEF Motion at 4, Staff Motion at 3. According to PEF, "[c]hallenging the FEIS' evaluation of potential alternatives to groundwater pumping is a separate, distinct, and new issue." *Id.* *See also* Staff Motion at 3 ("Contention 4A does not mention alternatives.") Therefore they ask the ASLB to strike portions of the following documents: the Initial Pre-Filed Direct Testimony of David Still (Exhibit INT201), the Initial Pre-Filed Direct Testimony of Dr. Sydney Bacchus (Exhibit INT301), the Pre-filed Rebuttal Testimony of David Still (INT701), the Pre-filed Rebuttal Testimony of Dr. Sydney Bacchus (Exhibit INT801), the Pre-filed Rebuttal Testimony of Gareth Davies (Exhibit INT501), and portions of Intervenors' Initial and Rebuttal Statements of Position. Staff Motion at 4-8. *See also* PEF Motion at 6 n.12.

PEF and the Staff misperceive Contention 4, the ASLB's order admitting amended Contention 4, and the requirements of the National Environmental Policy Act ("NEPA"). Amended Contention 4, by its own terms, is not strictly limited to the question of whether the Draft EIS, by itself, adequately evaluated the environmental impacts of groundwater pumping, passive dewatering, and salt drift. In addition, the contention criticizes the Draft EIS for relying on statements by PEF that unknown mitigation measures to be proposed in an as-yet-nonexistent Environmental Monitoring Plan ("EMP") would reduce the environmental impacts of Levy Units

2 and 3 ("LNP") to an insignificant level. As stated in the amended contention:

> The Environmental Monitoring Plan (EMP) does not yet exist and so it is improper for the DEIS to rely on it when there can be no informed analysis to determine whether the plan is sufficient. It is impossible for the public to comment on a fictional EMP. It is impossible for Staff to take "a hard look at the EMP. Also, since minimum aquifer levels for the Levy County have not been established, there can be no way to ascertain whether or not the wells are impacting the wetlands. It is not appropriate that Staff rely on another agency's hypothetical plans when the DEIS is tasked to take a "hard look" at the environmental impacts. One cannot take a "hard look" at something that does not exist! Another example:
>
> > Listed species that use wetland habitats on the LNP site could be affected by hydrological impacts on wetlands caused by groundwater withdrawal. Although the extent of potential impacts is uncertain, monitoring to identify adverse environmental impacts caused by groundwater withdrawal is stipulated under the State-imposed conditions of certification (FDEP 2010). PEF would be required to mitigate the adverse impacts or implement an approved alternative water-supply project that would not impact wetlands (FDEP 2010). (DEIS p.5-37)
>
> The DEIS admits the consequences of groundwater withdrawal on animals, including endangered species, are unknown and claim that a non-existent EMP will identify any problems. Monitoring does not preclude disastrous effects, it might (because there is no EMP, so no way to know how it will be set up, administered, and for what effects it will monitor) simply identify the problems, or, depending on its requirements, it might not. Mitigation is a poor choice and will not help those creatures who are killed by the adverse hydrological impacts. And again, since no plan for the alternate water supply exists, Interveners cannot be sure *that* plan would not *also* have adverse environmental impacts, for after all, there is only a finite water supply and the water at Levy is all interconnected.

Amended Contention 4 at 6-7 (Nov. 15, 2010). In short, the Intervenors contended that the NRC staff relied on the predicted effectiveness of the mitigation measures in the EMP as a substitute for a rigorous analysis of the environmental impacts of the LNP. Quoting language from *Calvert Cliffs' Coord. Comm. v. AEC* regarding the rigorous procedural requirements of NEPA, the Intervenors also criticized the lack of procedural compliance with NEPA where the NRC Staff was relying for its impacts analysis on a document (the EMP) that "does not yet exist":

> Certification by another agency that its own environmental standards are satisfied involves an entirely different kind of judgment. Such agencies, without overall responsibility for the particular federal action in question, attend only to one aspect of the problem: the magnitude of certain environmental costs. They simply determine whether

> those costs exceed an allowable amount. Their certification does not mean that they found no environmental damage whatever. *In fact, there may be significant environmental damage (e. g., water pollution), but not quite enough to violate applicable (e. g., water quality) standards. Certifying agencies do not attempt to weigh that damage against the opposing benefits. Thus the balancing analysis remains to be done.* It may be that the environmental costs, though passing prescribed standards, are nonetheless great enough to outweigh the particular economic and technical benefits involved in the planned action. The only agency in a position to make such a judgment is the agency with overall responsibility for the proposed federal action — the agency to which NEPA is specifically directed.

An Amended Contention 4 at 5-6 (quoting *Calvert Cliffs,* 449 F.2d 1109, 1123 (D.C. Cir. 1971) (emphasis added)).

In admitting amended Contention 4, the ASLB specifically recognized that the NRC Staff's "over-reliance on the COC [Certifications of Compliance]" (including the Environmental Monitoring Program) was a "supporting reason" for the Intervenors' claims about the inadequacy of the Draft EIS' analysis of the environmental impacts of LNP. 2/2/10 Order, slip op. at 18. As the ASLB stated: "[t]he issue, which appears to be fairly raised in C-4A is whether the NRC Staff relied too heavily on the COC (and the associated, yet to be developed, Environmental Monitoring Program) and/or failed to independently assess the environmental impacts of the LNP in its DEIS." *Id.* at 19 (emphasis in original).

Under NEPA, the question of whether the NRC Staff relied too heavily on the COC and the EMP has both substantive and procedural aspects. From a substantive perspective, the Intervenors' testimony and Statement of Position legitimately question whether the vague assertions of the EMP regarding the likely effectiveness of future mitigative measures -- that the Staff had not reviewed at the time it issued the Draft or Final EIS and which may yet change again -- contain sufficient information to support the Staff's optimism. PEF and the Staff do not appear to dispute this aspect of the Intervenors' evidentiary presentations.

As the ASLB recognized in its 2/2/10 Order, however, in addressing the question of

whether the Staff relied too heavily on the EMP for its assessment of environmental impacts, the independence of the NRC's assessment from a procedural standpoint is also an important consideration. *Id.,* slip op. at 18. As the Board observed, while NEPA and Part 51 do not require the NRC Staff to "duplicate a current and sound environmental analysis issued by an authorized governmental agency," the NRC "is nevertheless "required to make *its own independent assessment* of the environmental impacts of a proposed project." *Id.* (emphasis added). Thus, the Intervenors' position statements and testimony legitimately addressed the procedural steps that the NRC would need to take in order to ensure that it had made a sufficiently independent and rigorous analysis of the effectiveness of mitigation measures, including identification of a sufficient array of reasonably feasible alternative measures, comparison of their costs and benefits, and some analysis of their relative effectiveness. The Intervenors' testimony not only discussed the procedural steps that should be taken, but demonstrated that reasonable and feasible mitigation alternatives exist that should have been considered in the Draft EIS and that might have altered the outcome of the Final EIS. PEF and the Staff misconstrue the scope of the contention by asserting that statements regarding these issues must be stricken from Intervenors' testimony and position statements.

The NRC Staff's argument also misconstrues NEPA. Citing the Intervenors' "repetitive use of the term 'alternative,'" the NRC Staff contends that the Intervenors "are discussing alternatives and not just mitigation measures." Staff Motion at 4. But the NRC's regulation governing the contents of draft environmental impact statements specifically uses the term "alternatives available for reducing or avoiding adverse environmental effects" to refer to mitigation measures. 10 C.F.R. § 51.71(d). Thus, Intervenors' repeated use of the term "alternatives" to describe mitigation measures indicates nothing more than consistency with the

regulations.[1]

B. Even Assuming for Purposes of Argument that the Scope of Contention 4 Does not include Intervenors' Evidence and Arguments Regarding The Staff's Consideration of Mitigation Alternatives, PEF has Opened the Door to that Evidence and Those Arguments by Submitting the EMP and Defending its Adequacy under NEPA.

Whether or not the evidence and legal arguments that PEF and the Staff seek to strike constituted relevant information initially, they have been rendered relevant by PEF's submission of the EMP as an exhibit and its lengthy defense of the adequacy of the EMP to comply with NEPA. *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 94 (1977). As the Appeal Board held in that case, the scope of "[p]ermissible inquiry necessarily extend[s] to every matter within the reach of the testimony submitted by the applicants and accepted by the Board." Here, in its *initial* evidence and Statement of Position – not in response to any argument or evidence submitted by the Intervenors -- PEF submitted the EMP (Exhibit PEF305) for the first time in this proceeding. PEF also defended the substantive adequacy of the EMP and the procedural adequacy of the NRC Staff's reliance on it at length. PEF Initial Statement of Position at 30-37. For instance, PEF's Statement of Position quotes its expert, Dr. Dunn, with respect to the EMP and the alternative water supply plan ("AWS") as follows:

> I agree with the FEIS's assessment that the testing, monitoring, and mitigation requirements of the COC, specifically the APT Plan, the EMP, and the potential implementation of an AWS, ensure that active dewatering during operation of the LNP will not have greater than SMALL impacts on wetlands, or on aquatic ecosystems or their underlying aquifers, no matter what the groundwater modeling results

[1] The Staff correctly recognizes the distinction between mitigation alternatives and alternatives that would "avoid all adverse environmental impacts." Staff Motion at 4. While the ASLB refused to admit the portion of amended Contention 4 that sought consideration of alternatives that would avoid all adverse environmental impacts (2/2/11 Order at 17), it did not rule that consideration of mitigation alternatives is outside the scope of Contention 4. To the contrary, it explicitly recognized the relevance of mitigation.

> are. NRC001, Section 9.4.3., at p. 9-250. The NRC Staff concluded, and I concur, that additional mitigation measures beyond those in the COC are not warranted. NRC001, Section 5.3.1.6., at p. 5-47.

PEF Statement of Position at 34 (quoting Dunn Initial Testimony at 37-38). In addition, although the Staff does not claim to have reviewed the EMP, its Statement of Position and testimony refer to the EMP, which is no longer an abstraction but an actual piece of evidence in the case. It would be extraordinarily unfair if PEF and the Staff were permitted to discuss the procedural adequacy of the Staff's review of the EMP (including the review and development of an alternative water supply plan) while the Intervenors were precluded from addressing the very same issue.

C. Intervenors' Statement and Testimony Regarding the FEIS' Failure to Respond to Dr. Bacchus' Comments Are Within the Scope of Contention 4.

The NRC Staff also seeks to strike portions of Intervenors' position statement and Dr. Bacchus' testimony which criticize the FEIS for failing to gather new data or otherwise cure the deficiencies identified in her comments. Staff Motion at 9. According to the Staff, these assertions should be stricken because they are outside the scope of the contention. *Id.*

The ASLB should not strike the testimony or position statement. The primary purpose of the testimony and position statement is to provide support for Intervenors' general claim that the FEIS is deficient because it fails to address Intervenors' concerns and that the deficiencies exist in spite of Intervenors' timely efforts to inform the NRC of those concerns in the NEPA commenting process. Intervenors do not seek to make an independent claim that the FEIS must be remanded to respond more specifically to Dr. Bacchus' comments.

D. Intervenors' Statements and Testimony Regarding the Need to Circulate the EMP for Public Comment Are Within the Scope of Contention 4.

The Staff also asserts that the ASLB should strike Intervenors' statements and testimony

regarding the FEIS' inadequacy for failure to publish the EMP for comment at the time it circulated the Draft EIS, on the ground that the claim was not made in amended Contention 4. This is simply incorrect, as evidenced by the following statements in the contention:

> The primary problem in terms of satisfying Contention 4 is that the NRC Staff have not reviewed the environmental monitoring plan upon which so many of its determinations are based. This is because the environmental monitoring plan does not exist. Indeed, the State of Florida does not require the Plan to exist until three years prior to a well withdrawal rate averaging 100,000 gallons per day (See page 3 of 20 of Attachment 3). Further, the plan need not be implemented until one year before such water withdrawals (average) will be attained. *The construction impacts of this project could be committed prior to the development, much less the implementation of these plans. In the interim the public, the interveners, our members and our expert are unable to review plans which do not exist.*

Amended Contention 4 at 5 (emphasis added).

The contention also states:

> The Environmental Monitoring Plan (EMP) does not yet exist and so it is improper for the DEIS to rely on it when there can be no informed analysis to determine whether the plan is sufficient. *It is impossible for the public to comment on a fictional EMP.*

Amended Contention 4 at 6 (emphasis added). Accordingly, this aspect of the Staff's motion should be denied. In addition, as discussed above in Section A, PEF has put the procedural adequacy of the NRC's reliance on the EMP into play by introducing it as evidence and defending its procedural adequacy in its Statement of Position.

E. As a General Matter, the ASLB Should Weigh the Relevance of Testimony In the Hearing Rather Than in Preliminary Motions.

Finally, Intervenors respectfully submit that given the complexity and interdependence of the issues raised by Contention 4, given that the ASLB is fully able to evaluate the relevance of Intervenors' evidence in this case, and given that the ASLB has specifically discouraged motions to strike in this proceeding, the ASLB should not grant any aspect of these motions to strike until it has concluded the hearing on Contention 4, if at all. As the NRC Staff itself has noted in its

own procedural digest, a determination on materiality is not an ironclad requirement prior to admitting testimony and exhibits because there is no jury and the Board will not be confused or misled by immaterial evidence. NUREG-0386, NRC Staff Practice and Procedure Digest, H 81 (2005). Determinations of materiality may therefore be safely left to a later date without prejudicing the interests of any party. *Public Service Company of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-520, 9 NRC 48, 50 n.2 (1979). In order for expert testimony to be admissible, it need only (1) assist the trier of fact, and (2) be rendered by a properly qualified witness. *Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1091 (1983). *See also* Fed. R. Evid. 702; *Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 475 (1982); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-808, 21 NRC 1595, 1602 (1985). Therefore, Intervenors believe that any considerations regarding the relevance of their testimony should await the complete development of the record.

III. CONCLUSION

For the foregoing reasons, the ASLB should deny PEF's and the Staff's motions to strike portions of Intervenors' testimony and legal arguments.

Respectfully submitted,

(Electronically signed by)
Diane Curran
Harmon, Curran, Spielberg, & Eisenberg, L.L.P.
1726 M Street N.W., Suite 600
Washington, D.C. 20036
dcurran@harmoncurran.com
202-328-3500

August 22, 2012

Certificate of Service

I hereby certify that on August 22, 2012, I posted copies of Intervenors' Opposition to Motions to Strike Testimony and Arguments Regarding Contention 4 on the NRC's Electronic Information Exchange. It is my understanding that the following individuals or offices were served as a result:

Office of Commission Appellate Adjudication U.S. Nuclear Regulatory Commission Mail Stop: O-16C1 Washington, DC 20555-0001 E-mail: ocaamail@nrc.gov	Office of the Secretary of the Commission U.S. Nuclear Regulatory Commission Mail Stop O-16C1 Washington, DC 20555-0001 Hearing Docket E-mail: hearingdocket@nrc.gov
Sara Kirkwood, Esq. Jody Martin, Esq. Michael Spencer, Esq. Kevin Roach, Esq. Laura Goldin, Esq. Emily Monteith, Esq. Office of the General Counsel U.S. Nuclear Regulatory Commission Mail Stop O-15D21 Washington, DC 20555-0001 E-mail: sara.kirkwood@nrc.gov jody.martin@nrc.gov michael.spencer@nrc.gov kevin.roach@nrc.gov laura.goldin@nrc.gov emily.moneith@nrc.gov joseph.gilman@nrc.gov karin.francis@nrc.gov	Michael G. Lepre, Esq. John H. O'Neill, Esq. Ambrea Watts, Esq. Alison Crane, Esq. Jason P. Parker, Esq. Stefanie Nelson George, Esq. Kimberly Harshaw, Esq. Stephen Markus Pillsbury Winthrop Shaw Pittman, LLP 2300 N. Street, N.W. Washington, DC 20037-1122 Counsel for Progress Energy Florida, Inc. E-mail: john.oneill@pillsburylaw.com ambrea.watts@pillslburylaw.com alison.crane@pillsburylaw.com michael.lepre@pillsburylaw.com jason.parker@pillsburylaw.com stefanie.george@pillsburylaw.com kimberly.harshaw@pillsburylaw.com stephen.markus@pillsburylaw.com

	Alex S. Karlin, Chair Anthony J. Baratta Randall J. Charbeneau Atomic Safety and Licensing Board Panel U.S. Nuclear Regulatory Commission Mail Stop T-3F23 Washington, DC 20555-0001 E-mail: ask2@nrc.gov E-mail: Anthony.baratta@nrc.gov E-mail: Randall.Charbeneau@nrc
Barton Z. Cowan, Esq. Eckert, Seamans, Cherin & Mellott, LLC 600 Grant Street, 44th Floor Pittsburg, PA 15219 E-mail: teribart61@aol.com	Joshua A. Kirstein, Law Clerk Matthew Flyntz, Law Clerk Atomic Safety and Licensing Board Panel U.S. Nuclear Regulatory Commission Mail Stop T-3F23 Washington, DC 20555-0001 E-mail: josh.kirstein@nrc.gov matthew.flyntz@nrc.gov

Signed [Electronically] by
Diane Curran