

October 5, 2012

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF ANSWER TO ORDER  
REGARDING THE BRIEFING OF CERTAIN LEGAL ISSUES

Pursuant to the Atomic Safety and Licensing Board's ("Board") September 21, 2012 Order (Regarding the Briefing of Certain Legal Issues) ("Order"), the NRC staff ("Staff") hereby submits its legal brief, answering issues presented in the Board's questions 1, 2a-i, 3, 4, 5a&b, 6, 7, and 8.

BACKGROUND

As stated in more detail in the Staff's Initial Statement of Position, this case involves an application for a combined license ("COL") filed by Progress Energy Florida, Inc. ("Applicant" or "PEF"). This contested hearing concerns Contention 4A as admitted by the Board, with certain exceptions, on February 2, 2011. Licensing Board Memorandum and Order (Admitting Contention 4A) at 22 (Feb. 2, 2011) (unpublished). On June 26, 2012, in conformance with the Board's initial scheduling order, the Intervenor, Applicant, and Staff filed their pre-filed direct testimony and exhibits for Contention 4A. On July 6, 2012, the Intervenor filed errata to their direct testimony, statement of position and exhibits, and they filed a motion to admit six new exhibits. On July 9, 2012, the Intervenor filed redline versions of their statement of position and testimony, a second erratum to their testimony, and a motion to admit the new versions of

their direct testimony and exhibits. On July 18, 2012, the Board issued a Memorandum and Order admitting Intervenors' new exhibits, corrected exhibits and corrected testimony. Licensing Board Memorandum and Order (Ruling and Instructions Regarding Evidentiary Filings) at 3-5 (July 18, 2012) (unpublished). On July 31, 2012, the parties filed their pre-filed rebuttal testimony and exhibits for Contention 4A. On August 10, 2012, the Staff filed its motion *in limine* to exclude portions of the Intervenors' Direct Testimony, Rebuttal Testimony and Initial and Rebuttal Statements of Position concerning Contention 4A. On September 6, 2012, the Board granted in part and denied in part the Staff's motion *in limine*. Licensing Board Memorandum and Order (Granting in Part and Denying in Part Motion in Limine and Motion to Strike) (Sept. 6, 2012) (unpublished). On September 21, 2012, the Board issued this Order requesting that the parties submit initial and rebuttal briefs on certain legal issues relevant to the evidentiary hearing to be held on October 31, 2012 and November 1, 2012. Licensing Board Memorandum and Order (Regarding the Briefing of Certain Legal Issues) (Sept. 21, 2012) (unpublished). The Staff's legal brief on these issues is as follows.

## DISCUSSION

### A. Question 1

What does the foregoing statement mean? That unacceptable adverse impacts caused by groundwater withdrawal are legally prohibited? Impossible? Not reasonably foreseeable? Please explain.

The FEIS states that "in accordance with SWFWMD's review criteria, groundwater withdrawal cannot cause unacceptable adverse impacts on wetlands or other surface waters." NRC001A at 5-30. As described below, this means that legally binding Florida law and regulations and the Florida Department of Environmental Protection (FDEP) Conditions of Certification ("CoCs") prohibit PEF from causing these adverse impacts. Because of the State of Florida's legal prohibition, it is, therefore, not reasonably foreseeable that these unacceptable adverse impacts to wetlands and other surface waters will occur.

Florida's prohibition on these unacceptable adverse impacts stems from several legal

authorities, including Florida Statutes, the Florida Administrative Code (F.A.C.), permitting information manuals that are incorporated by reference in the F.A.C., and the CoCs. Section C.II of the CoCs, specifying SWFWMD conditions on the consumptive use of water, provides that “if Licensee fails to comply with all of the provisions of Chapter 373, F.S., Chapter 40D, or the conditions set forth herein, the District shall seek revocation of any conditions of certification.” PEF005 at 53. Chapter 40D-2 of the F.A.C. contains SWFWMD’s water use rules, which prohibit unacceptable adverse impacts to wetlands and other surface waters due to consumptive use by licensees. See PEF312. Rule 40D-2.091, F.A.C., incorporates by reference SWFWMD’s “Water Use Permit Information Manual Part B, Basis of Review for Water Use Permit Applications” (WUP Basis of Review). Id. Rule 40D-2.301(1), F.A.C., pertaining to SWFWMD’s conditions on the issuance of permits, provides that an applicant must, among other things, provide reasonable assurance that the water use “will comply with the provisions of 4.2 of the WUP Basis of Review . . . regarding adverse impacts to wetlands, lakes, streams, estuaries, fish and wildlife or other natural resources.” Id. Section 4.2 “Environmental Impacts” of the WUP Basis of Review provides that “[t]he withdrawal of water must not cause unacceptable adverse impacts to environmental features,” which include surface water bodies, wetland habitats, and habitat for threatened or endangered species. PEF313 at B4-1. The CoCs include similar language prohibiting unacceptable adverse impacts: “[w]etlands and other surface waters may not be adversely impacted as a result of the water use authorized by these conditions of certification. If unacceptable adverse impacts occur, the District will request that DEP modify the conditions of certification to curtail or abate the unacceptable adverse impacts, unless the impacts can be mitigated by Licensee.” PEF005 at 53. If mitigation cannot be achieved to the satisfaction of SWFWMD, the CoCs include a requirement for PEF to utilize an alternative water source. See PEF005 at 43-44.

These requirements remain in place, unless the CoCs provide a specific modification,<sup>1</sup> for the life of the permit: “[t]he District shall order the modification of any permit if it is shown that the use or disposition of water is detrimental to other water users or to the water resources or no longer meets the conditions for issuance identified in Rule 40D-2.301, F.A.C.” PEF312 at r. 40D-2.331 (Modification of Permits) (emphasis added); see also PEF005 at 13, 53. Because the conditions for issuing a water use permit include Section 4.2 “Conditions for Issuance - Technical Criteria” for environmental impacts in the WUP Basis of Review, which include the prohibition on unacceptable adverse impacts described above, PEF is legally prohibited from causing these impacts. See PEF313 at B4-1. In the Levy FEIS the Staff concluded that operational impacts to terrestrial resources, including wetlands, would likely be SMALL to MODERATE. NRC001A at 5-47. The MODERATE portion of the potential range of impacts reflects the Staff’s acknowledgement of uncertainty in the ability of PEF to detect or predict adverse effects on wetlands in time to take action to prevent temporary, noticeable adverse impacts. Staff Direct Testimony at A106. Compliance with the CoCs—and therefore applicable Florida laws and regulations—would prevent the occurrence of LARGE impacts, which, in the Staff’s judgment, would exceed the threshold of unacceptable adverse impacts based on the WUP Basis of Review performance standards and the examples of adverse impacts provided in the CoCs. See PEF313 at B4-1 – B4-2; PEF005 at 54-55. In sum, the binding conditions that would be applied to PEF by the State of Florida through the CoCs support the Staff’s impact analysis and conclusion in the FEIS because they confirm that it is not reasonably foreseeable that LARGE adverse impacts to wetlands and other surface waters will occur as a result of the

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<sup>1</sup> Item C in “Section A: General Conditions, Scope” of the Conditions of Certification provides: “These Conditions of Certification, unless specifically amended or modified, are binding upon Licensee and shall apply to the construction, operation and maintenance of the Certified Facility. If a conflict should occur between the design criteria of this Certified Facility and the Conditions of Certification, the Conditions shall prevail unless amended or modified. In any conflict between any of these Conditions of Certification, the more specific condition governs.” PEF005 at 2.

proposed action.

B. Question 2

SWFWMD Review Criteria

- 2a. What is the legal basis for the statement that the four bulleted prohibitions are “performance review standards . . . upon which potential impacts would be judged”? Please cite the law(s), regulation(s), or permit condition(s) that impose these standards on Progress Energy Florida, Inc. (PEF).

The legal basis for the FEIS statement that the four bulleted prohibitions are “performance review standards . . . upon which potential impacts would be judged” is, as described in the Staff’s Answer to Question 1, State of Florida rules applicable to SWFWMD—specifically, the legally binding WUP Basis of Review Section 4.2., which is incorporated by reference in Rule 40D-2.091, F.A.C. See PEF 313 at B4-2. SWFWMD’s regulations further specify that an applicant must, among other things, provide reasonable assurance that the water use “will comply with the provisions of 4.2 of the WUP Basis of Review . . . regarding adverse impacts to wetlands, lakes, streams, estuaries, fish and wildlife or other natural resources.” PEF 312 at Rule 40D-2.301(1). The four bulleted prohibitions are termed “performance standards” in Section 4.2(A)(4) of the WUP Basis of Review, which discusses methods for evaluating wetlands impacts.

The Board also requested, in footnote 4 of its Order, clarification from the Staff regarding an FEIS citation identified as PEF 2009g. The discussion of SWFWMD performance review standards in the middle part of page 5-30 in the FEIS (NRC001A) should have referenced PEF 2009h. PEF 2009h is an RAI response package with an accession number of ML092570297. Within that RAI response package, the specific letter and enclosure containing the referenced information is ML092570293. The Staff regrets this error.

- 2b. The four bulleted prohibitions at FEIS 5-30 appear to be conditions precedent that must be met before SWFWMD will issue a permit. Is this correct? Please provide legal citations.

The four bulleted prohibitions at FEIS 5-30 are ongoing conditions of PEF’s water use

permit, not just conditions precedent to its issuance.<sup>2</sup> As explained in Question 1 of the Staff's Answer, SWFWMD regulations (Chapter 40D-2 F.A.C.) and the FDEP Conditions of Certification (CoCs) applicable to the LNP site indicate these are continuing requirements: "[t]he District shall order the modification of any permit if it is shown that the use or disposition of water is detrimental to other water users or to the water resources or no longer meets the conditions for issuance identified in Rule 40D-2.301, F.A.C." PEF312 at r. 40D-2.331 (emphasis added). Rule 40D-2.301 provides that applicants must provide reasonable assurance of compliance with Section 4.2 of the WUP Basis of Review, which establishes the technical criteria for the conditions for issuance with respect to environmental impacts. Id. at r. 40D-2.301; PEF313 at B4-1 – B4-2. Thus, the four bulleted prohibitions in Section 4.2 of the WUP Basis of Review, as criteria of the conditions for issuance in Rule 40D-2.301, have ongoing applicability after issuance of a water use permit. Finally, the CoCs applicable to SWFWMD requirements provide that "if Licensee fails to comply with all of the provisions of Chapter 373, F.S., Chapter 40D, or the conditions set forth herein, the District shall seek revocation of any conditions of certification." PEF005 at 54.

2c. Once SWFWMD concludes that these four bulleted conditions are met and issues the requisite permit(s), will these four prohibitions be moot or are they legally enforceable conditions and requirements applicable to PEF for the 40-year duration of the Levy Nuclear Plant (LNP)? Please identify the law(s), regulation(s), or permit condition(s) that impose these as continuing standards on PEF.

Once SWFWMD concludes that the four bulleted prohibitions from Section 4.2 of the WUP Basis of Review have been met, they remain legally enforceable unless and until the FDEP CoCs are modified to excuse compliance with these requirements. As described in the Staff's Answer to Question 1, Florida law and regulations and the CoCs applicable to the LNP

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<sup>2</sup> The laws and regulations noted by the Board in footnote 6 of its Order—Fla. Stat. § 373.223 (2010) (Conditions for a permit) (Exhibit PEF311); Fla. Admin. Code Ann. r.40D-2.301 (2007) (Conditions for Issuance of Permits) (Exhibit PEF312); SWFWMD, Water Use Permit Information Manual para. 4.2.A.4, at B4-2 (2012) (Conditions for Issuance – Technical Criteria – Wetlands) (Exhibit PEF313)—form the legal basis for concluding that the four prohibitions in the WUP Basis of Review are binding on PEF.

facility indicate that the four prohibitions from Section 4.2 of the WUP Basis of Review have continuing legal effect: “[t]he District shall order the modification of any permit if it is shown that the use or disposition of water is detrimental to other water users or to the water resources or no longer meets the conditions for issuance identified in Rule 40D-2.301, F.A.C.” PEF312 at r. 40D-2.331 (Modification of Permits) (emphasis added); see also PEF005 at 13, 53. Similarly, a permit may be revoked or cancelled for causing “significant adverse impacts to the water resources, environmental systems, or existing legal users” or violating material conditions of a permit or any provision of Chapter 40D F.A.C., which includes the four bulleted prohibitions. PEF312 at r. 40D-2.341 (Revocation and Cancellation of Permits). The CoCs provide that “if Licensee fails to comply with all of the provisions of Chapter 373, F.S., Chapter 40D, or the conditions set forth herein, the District shall seek revocation of any conditions of certification.” PEF005 at 53.

Although the CoCs provide that PEF may petition for a permit modification to discontinue environmental monitoring five years after groundwater usage reaches an annual average withdrawal amount of 1.25 million gallons per day (mgd), this request would be subject to SWFWMD concurrence that “monitoring demonstrates that no adverse impacts of groundwater withdrawals are occurring or predicted.”<sup>3</sup> PEF004 (Recommended Order on Certification; Findings of Fact) at 37; PEF005 at 42. There are no provisions in the Chapter 40D-2 rules or the CoCs that limit the period of PEF’s required compliance with applicable law, regulations, or permit conditions.<sup>4</sup> But Rule 40D-2.041(1) (Permits Required) indicates that the LNP facility will require a water use permit so long as its withdrawal capacity is greater than or equal to 1 mgd

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<sup>3</sup> Even if the monitoring requirements under the Environmental Monitoring Plan are terminated after five years, the Conditions of Certification provide that PEF must continue to demonstrate compliance with “the substantive requirements set forth in Chapter 40D-2, F.A.C., and the [WUP Basis of Review]” by submitting detailed compliance reports every five years. See PEF005 at 46.

<sup>4</sup> Rule 40D-2.321 F.A.C. addresses the duration of types of permits that SWFWMD issues, but not whether certain regulatory requirements have a limited duration of effect.

or its annual average daily withdrawal is greater than or equal to 100,000 gallons per day.

PEF312.

- 2d. The above-quoted provision of the FEIS specifies that if “adverse environmental impacts on wetlands and surface waters” occur certain actions must be taken. FEIS at 5-30. Is the term “adverse environmental impacts” defined in law, regulation, or the State permit(s) applicable to the LNP? What is the threshold for “adverse environmental impacts”? Please explain and provide citations.

The FEIS specifies that the applicant must take corrective action if “adverse environmental impacts on wetlands and surface waters” occur. Although the term “adverse impacts” is not specifically defined in applicable Florida law or regulations, the Standard Permit Conditions provided in the WUP Basis of Review (standard condition 13), the FDEP CoCs (standard conditions 12), and Rule 40D-2.381(3)(m) provide examples of adverse impacts to environmental features that must be mitigated: “a) [s]ignificant reduction in levels or flows in water bodies such as lakes, impoundments, wetlands, springs, streams or other watercourses; b) [s]inkholes or subsidence caused by reduction in water levels; c) damage to crops and other vegetation causing financial harm to the owner; and d) [d]amage to the habitat of endangered or threatened species.” PEF005 at 54-55; PEF313 at B6-1. As described in Staff Answer 2b, the four performance standards (prohibitions) in Section 4.2 of the WUP Basis of Review have ongoing applicability after the issuance of a water use permit. See PEF312 at r. 40D-2.301. These performance standards may be relevant to the State’s determination of whether adverse impacts have occurred.<sup>5</sup> However, even without considering the performance standards, the above examples of legally prohibited adverse impacts are consistent with avoiding destabilizing, LARGE impacts and the Staff’s FEIS conclusion. See NRC001A at 5-47. Considering the plain language of the four performance standards as informed by the adverse impacts examples

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<sup>5</sup> As the Florida Second District Court of Appeal acknowledged, the determination of whether an unacceptable adverse impact has occurred necessarily depends on site-specific factors and professional scientific judgment, rather than a quantitatively prescriptive rule. SWFWMD v. Charlotte County, 774 So. 2d 903, 911 (Fla. Dist. Ct. App. 2d Dist. 2001) (holding that SWFWMD rules were not impermissibly vague).



defined by the CoCs and Rule 40D-2.381(3)(m), the Staff considered it reasonable to conclude that, while these measures would not preclude all potential impacts to wetlands and surface water, they would preclude impacts that would be considered destabilizing and LARGE under the impact level definitions used by the Staff in its EIS. PEF005 at 54-55 and Staff Rebuttal Testimony at A55.

2e. Please explain the legal process whereby a determination is made that “adverse environmental conditions” have occurred and that mitigation or remedial actions must be taken. At each step, who makes the relevant determination (the licensee or a government agency), and how it is made?

There are a number of provisions in Chapter 40D-2 of SWFWMD’s water use permitting regulations and in the FDEP CoCs that are applicable to how SWFWMD may determine that mitigation or other remedial action must be taken. In considering whether to rely on the CoCs to inform its NEPA analysis, the Staff determined that the structure and substance of the CoCs requirements supported the conclusion that reasonably foreseeable impacts to terrestrial resources and wetlands would be less than LARGE, and also that Florida law made the requirements legally binding on the applicant. Section XIII “Enforcement” explains, for instance, that “[a]ny noncompliance by the Licensee with a Condition of Certification constitutes a violation of Chapter 403, F.S., and is grounds for enforcement action, license termination, license revocation, or license revision.” PEF005 at 13. The conditions applicable to the LNP site also provide that “if unacceptable adverse impacts [to wetlands and other surface waters] occur, the District will request that DEP modify the conditions of certification to curtail or abate the unacceptable adverse impacts, unless the impacts can be mitigated by Licensee.” Id. at 53. As discussed in the Staff’s Answer to Question 2d, the CoCs and Rule 40D-2.381(3)(m) provide examples of prohibited impacts. PEF005 at 54-55.

The CoCs require PEF to collect data and submit reports to SWFWMD and FDEP based on specified timelines. See id. at 41. For example, PEF must also submit “a compliance report beginning the fifth year after groundwater use rising to at least 1.25 million gallons per day

(average annual daily withdrawal quantity)” that contains sufficient information to “demonstrate reasonable assurance that the withdrawals and use of water authorized by these conditions of certification continue to meet the substantive requirements set forth in Chapter 40D-2, F.A.C., and the District's Water Use Permit Information Manual Part B, Basis of Review.” Id. at 46.

Based on a review of this report, SWFWMD may request that FDEP modify the CoCs to ensure compliance with applicable requirements. Id. PEF must also submit monthly reports of groundwater withdrawal amounts, quarterly water quality analysis reports, and annual environmental monitoring reports containing all raw data collected under the approved environmental monitoring plan. Id. at 43, 47, and 49.

Considering these various reporting, compliance, and enforcement provisions, the Staff found it reasonable to expect that any occurrence of unacceptable adverse impacts would result in SWFWMD or FDEP taking actions within their authorities, as described above. In addition to receiving information from the applicant, SWFWMD may also inspect the facility and assess hydrologic and environmental conditions. Id. at 54. In summary, based on the plain language of the CoCs and other applicable legal requirements, the Staff understands that: 1) PEF must comply with the CoCs, including the requirement to avoid unacceptable adverse impacts, 2) SWFWMD or FDEP may periodically review compliance with the CoCs and take action in accordance with their determinations, 3) SWFWMD may gather information regarding compliance with requirements through inspection and take action in accordance with its findings, and 4) SWFWMD may consider whether information submitted by PEF indicates noncompliance with requirements and take or recommend action in accordance with its determination. See id. at 13, 46, 53, and 54.

2f. Are the four bulleted prohibitions legally enforceable by NRC? Is the Environmental Monitoring Plan legally enforceable by NRC? Please explain. If NRC issues a combined license to PEF, does NRC have any further interest, concern, or role in PEF's implementation of its environmental monitoring and environmental mitigation measures? Please explain the legal basis for NRC's role or non-role.

Neither the four bulleted prohibitions in Section 4.2 of the WUP Basis of Review nor the

Environmental Monitoring Plan are enforceable by the NRC. NRC's jurisdiction to attach and enforce license conditions is linked to statutes that provide substantive authority to the NRC with respect to their subject matter, such as the Atomic Energy Act and the Endangered Species Act. The National Environmental Policy Act (NEPA) is a procedural statute that provides the NRC with no additional substantive authority to condition a license. See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). For this reason, NEPA provides no legal means by which the NRC could condition a license to include environmental requirements of the State of Florida that are otherwise outside of NRC's statutory authority. The requirements that are mandated by the CoCs do not relate to any matters that are within NRC's substantive authority to regulate. This issue is discussed further below in the Staff's response to Question 5. With respect to the Staff's interest or concern in PEF's implementation of environmental monitoring or mitigation measures, the NRC may not regulate these absent a substantive statutory basis to do so. When conducting NEPA reviews of future license applications, however, the Staff may take account of the extent to which such mitigation measures have proven to be effective in practice. See 76 Fed. Reg. 3843, 3845 (Jan. 21, 2011).

2g. In their testimony, Mr. J. Peyton Doub and Ms. Lara Aston state that the "Staff's conclusions in Section 5.3.1 rely in part on the FDEP COCs imposed on the Applicant." They quote the four bulleted prohibitions specified above, and then state, "If any changes to wetland hydroperiod are noticed in the course of performing the required monitoring, PEF would be required to immediately take action to prevent further degradation, in time to prevent the impacts from becoming LARGE or irreversible." Staff Rebuttal Testimony at 47 (emphasis added). Is this legally accurate? Please explain, with citations, the basis for the quoted statement.

In their testimony Mr. J. Peyton Doub and Ms. Lara Aston describe their reliance on the CoCs and state "if any changes to wetland hydroperiod are noticed in the course of performing the required monitoring, PEF would be required to immediately take action to prevent further degradation in time to prevent impacts from becoming LARGE or irreversible." Staff Rebuttal Testimony at 47 (emphasis added). The Staff acknowledges that this portion of testimony would be clearer without the word "immediately"—the Staff intended this term to mean "upon

discovery of noncompliance.”<sup>6</sup> As described in Staff Answer 2b, the four performance standards in Section 4.2 of the WUP Basis of Review, which includes the criterion that “a) [w]et season water levels shall not deviate from their normal range” has ongoing legal applicability following the issuance of a water use permit.<sup>7</sup> The CoCs also provide that “if Licensee fails to comply with all of the provisions of Chapter 373, F.S., Chapter 40D, or the conditions set forth herein, the District shall seek revocation of any conditions of certification.” PEF005 at 53. Therefore, if PEF is unable to meet the WUP Basis of Review performance standards and is unable to implement mitigation that is acceptable to SWFWMD, it must implement an Alternative Water Supply project. See PEF005 at 43-44. In sum, even if the State of Florida’s preventive action in response to an applicant’s noncompliance with one of the CoCs will not necessarily occur “immediately,” the Staff views the emphasis in the State’s rules (i.e., that the District “shall order” the modification of a permit that no longer meets the Conditions of Certification and emphasize that a permit may be revoked or cancelled for causing significant adverse impacts to the resource) as persuasive support for the Staff’s conclusion that such impacts would not become LARGE. See PEF312 at r. Rule 40D-2.331 and PEF005 at 13.

2h. In their testimony, Mr. Doub and Ms. Aston state that PEF’s groundwater production “wells may continue to be operated only as long as specific performance standards continue to be met, including” the four bulleted prohibitions. Id. at 48 (emphasis added). Is this legally correct? Please explain, with citations, the basis for the quoted statement. For example, please identify the legal provision that requires that the wells be shutdown

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<sup>6</sup> In any event, the Staff did not presume that PEF would violate State of Florida laws, regulations, or other requirements. See U.S. Army Installation Command (Schofield Barracks, Oahu, Hawaii, and Pohakuloa Training Area, Island of Hawaii, Hawaii), CLI-10-20, 72 NRC 185, 194 (2010) citing Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), CLI-01-9, 53 NRC 232, 235 (2001) (“in the absence of evidence to the contrary, the NRC does not presume that a licensee will violate agency regulations wherever the opportunity arises”).

<sup>7</sup> SWFWMD Rule 40D-2.301 (Conditions for Issuance of Permits) incorporates Section 4.2 of the WUP Basis of Review into the conditions for issuance of a water use permit, and Rule 40D-2.331 (Modification of Permits) provides that “[t]he District shall order the modification of any permit if it is shown that the use or disposition of water is detrimental to other water users or to the water resources or no longer meets the conditions for issuance identified in Rule 40D-2.301, F.A.C.” PEF 312 (emphasis added).

if the first bullet (“[w]et season water levels shall not deviate from their normal range”) is not met.

Mr. J. Peyton Doub and Ms. Lara Aston state in their testimony that PEF’s groundwater production “wells may continue to operate only as long as specific performance standards continue to be met, including” the four bulleted prohibitions. Staff Rebuttal Testimony at A55. As described in Staff Answer 2b, this is legally correct because the four performance standards from the WUP Basis of Review—the “specific” standards that the Staff was referring to in A55 of its Rebuttal Testimony—have ongoing legal applicability. SWFWMD Rule 40D-2.301 (Conditions for Issuance of Permits) incorporates Section 4.2 of the WUP Basis of Review into the conditions for issuance of a water use permit, and Rule 40D-2.331 (Modification of Permits) provides that “[t]he District shall order the modification of any permit if it is shown that the use or disposition of water is detrimental to other water users or to the water resources or no longer meets the conditions for issuance identified in Rule 40D-2.301, F.A.C..” PEF312 (emphasis added). The CoCs likewise require that PEF must either acceptably mitigate adverse impacts or implement an AWS. PEF005 at 43-44 (emphasis added).

- 2i. In their testimony, Mr. Doub and Ms. Aston state:  
Although altering the hydroperiod of approximately 2093 ac[res] of wetlands might be regionally destabilizing and could warrant a LARGE conclusion, the Staff expects the requirements to meet the performance standards under the COC [referencing the four bulleted prohibitions] to prevent such an extent of impact from ever occurring. . . . This is why the FEIS concluded that the overall impacts from the LNP operation on terrestrial resources, including wetlands would be SMALL to MODERATE.

Id. at 49. Is it NRC’s position that it is not reasonably foreseeable that the environmental impacts may be LARGE? Please explain.

The Staff’s position regarding impacts to terrestrial resources, including wetlands, during operation of the LNP units is that it is not reasonably foreseeable that environmental impacts will be LARGE. The Staff concluded that impacts would be SMALL to MODERATE. NRC001A at 5-47. The range of impacts “reflects the Staff’s acknowledgement of uncertainty in the ability of the Applicant’s proposed monitoring efforts to detect or predict adverse wetland impacts in time

to switch to an alternate water source before noticeable effects ensue.” Staff Direct Testimony at A106. In other words, due to the potential for temporary noticeable impacts to manifest even after taking corrective action, the Staff concluded this range, including potential temporary MODERATE impacts, was appropriate. See id. But “because the Conditions of Certification call for corrective action as soon as adverse wetland impacts are noticed, the Staff did not find that a LARGE conclusion is warranted.” Id. Based on this, the Staff determined that destabilizing, LARGE impacts to terrestrial resources are not reasonably foreseeable. See NRC Staff Rebuttal Testimony at A55.

C. Question 3

Please discuss whether and how this holding [New York v. Nuclear Regulatory Commission] applies to this case. Are the FEIS conclusions based on the proposition that the SWFWMD is “on duty”? Please distinguish.

No, the D.C. Circuit’s decision in New York v. NRC<sup>8</sup> does not suggest any flaw in the Staff’s analysis in the Levy County FEIS, including its consideration of the SWFWMD’s Conditions of Certification (CoCs) in determining potential environmental impacts of the NRC granting a combined license. In New York v. NRC, the D.C. Circuit concluded that the NRC’s NEPA analysis of potential leaks from spent fuel pools was insufficient, in part because it found the NRC’s emphasis on “its monitoring and regulatory compliance program as a buffer against pool degradation” to be unpersuasive. As discussed further below, these concerns about the waste confidence rule are readily distinguishable from the Levy FEIS’s consideration of the CoCs.

First, it is worth noting that since the waste confidence rule involved a generic assessment of potential environmental impacts, the monitoring and compliance program criticized by the court concerned a broad invocation of the NRC regulatory framework. It was not examining the applicability of the program with respect to any particular facility nor any

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<sup>8</sup> New York v. Nuclear Regulatory Commission, 681 F.3d 471 (D.C. Cir. 2012).

additional plant-specific provisions that might bear on the potential environmental impacts. By contrast, the Levy FEIS's examination of the CoCs considers the site-specific implications of the CoCs, including the state-imposed conditions tailored to the Levy site and SWFWMD performance review standards applicable to the Applicant's Environmental Monitoring Plan:

- Wet season water levels shall not deviate from their normal range.
- Wetland hydroperiods shall not deviate from their normal range and duration to the extent that wetlands plant species composition and community zonation are adversely affected.
- Wetland habitat functions, such as providing cover, breeding, and feeding areas for obligate and facultative wetland animals, shall be temporally and spatially maintained and not adversely affected as a result of withdrawals.
- Habitat for threatened or endangered species shall not be altered to the extent that use by those species is impaired.

NRC001A at 5-30. Also, the Staff based its analysis on many facets of information particular to the Levy site. In Chapter 4 of the FEIS, the Staff stated that:

Based on the review team's independent evaluation of the LNP project, including the ER, the SCA, FDEP Conditions of Certification, PEF's responses to NRC's and USACE's Requests for Additional Information, the identified mitigation measures and BMPs, and consultation with other Federal and State regulatory agencies, the review team concludes that the impacts of construction and preconstruction activities to terrestrial ecological resources (including wetlands and threatened and endangered species) would be MODERATE."

NRC001A at 4-71. Similarly, the Staff stated in chapter 5 of the FEIS that:

Based on the review team's independent evaluation of the LNP project, including the ER, the Site Certification Application, PEF's responses to the review team's RAIs, interactions with State and Federal agencies, the public scoping process, and the identified mitigation measures and BMPs, the review team concludes that operational impacts on terrestrial ecological resources (including wetlands and listed species) would be SMALL to MODERATE.

NRC001A at 5-47. So in contrast to the generic assessment of environmental impacts in the waste confidence decision, the impact conclusions in the Levy FEIS are based on information unique to the LNP site.

Next, the D.C. Circuit's rejection of the NRC's reliance on its spent fuel pool monitoring and compliance program stemmed from a number of considerations specific to the context of the waste confidence decision. For example, the court pointed to the existence of past pool

leaks and the Commission's assertion that such leaks had not resulted in near-term health effects. New York, 681 F.3d at 481. In addition to finding that the waste confidence rule contained "no analysis" of whether these revealed a possibility for future (and more harmful) leaks, it noted that, especially because the Commission was actively in the process of evaluating "improvements to spent fuel pools," measures which the court emphasized were therefore "untested," the NRC's assurances did not adequately explore the potential for future leaks and their impacts. Id.

In contrast, in the Levy FEIS, the Staff independently considered a range of potential impacts from construction through the operating life of the facility as well as potential future impacts and mitigation measures. The Staff also considered site-specific information such as the Applicant's analyses, groundwater modeling, and the implications of the CoCs for preventing or mitigating adverse environmental impacts, all of which form the basis for the Staff's findings. The Staff studied years of scientific data in order to assess and realistically predict possible impacts to wetlands and other terrestrial habitats at and around the Levy site. From studying these sources and examining the proposed wetland mitigation plan, best management practices, and mitigation specified in the CoCs, the Staff concluded that environmental impacts of construction and preconstruction activities to terrestrial ecological resources at the Levy site would be MODERATE and that operational impacts on terrestrial ecological resources (including wetlands and listed species) would be SMALL to MODERATE. NRC001A at 4-71, 5-47. In particular, part of the Staff's site-specific analysis involved "an independent review of the FDEP Conditions of Certification and the Comprehensive Wetland Mitigation Plan." Staff Direct Testimony at A230. The FEIS also details the Staff's independent and thorough examination of the CoCs regarding mitigation of impacts to wetlands and surrounding habitats. For example, with respect to construction and preconstruction impacts the FEIS stated that "[e]ven with implementation of BMPs [best management practices], the proposed wetland mitigation plan, and other mitigation outlined in the Florida Conditions of Certification, the review team believes



that the impacts to wetland and upland terrestrial habitats and their associated wildlife would still be noticeable in the surrounding landscape, especially in the short term.” NRC001A at 4-71. In addition, with respect to operational impacts the Staff concluded that “any possible effects of groundwater withdrawals on wetlands would be temporary and localized as long as the FDEP and USACE conditions are met. Additional mitigation beyond that proposed by PEF is not warranted; however, as stated in the State of Florida Conditions of Certification (FDEP 2011a), PEF must monitor groundwater and, if adverse operational hydrological effects on wetlands are discovered, PEF must either mitigate the effects or use an alternative water source.” NRC001A at 5-47.

From these conclusions it is apparent that the Staff did not simply rely on the existence of the CoCs (or a generalized expectation of SWFWMD being “on duty”) for the FEIS findings. Rather, the Staff conducted a thorough analysis which employed data to determine past impacts and reasonably predict future environmental impacts at the Levy site.

Furthermore, in rejecting the waste confidence analysis, the D.C. Circuit in New York pointed out that the environmental impacts of spent fuel storage could potentially extend for a longer period of time and “merely pointing to the compliance program” was insufficient because the Commission’s impact predictions “may extend to nearly a century for some facilities.” New York, 681 F.3d at 481. The court apparently concluded that given the NRC’s experience with “several incidents of groundwater contamination originating from leaking reactor spent fuel pools and associated structures” (even with NRC’s present regulatory regime in place), the waste confidence rule had not clearly considered the possible impacts of such leaks in the future, let alone why the compliance program might preclude them. Id. However, in the case of Levy, the Staff’s review of environment impacts is focused on the period of the life of the plant with the possible addition of a license renewal. Considering this, the Staff independently evaluated reasonably foreseeable impacts from construction and operation of the plant. As discussed above, in order to conduct an independent and comprehensive evaluation, the Staff looked at

the CoCs, the Applicant's mitigation plan, the BMPs, and research from the USACE. NRC001A at 4-71 and 5-47.

Moreover, in contrast to the D.C. Circuit's finding that it was insufficient for the NRC to in effect assert that it would be "on duty" to monitor spent fuel storage leaks, the Staff in Levy did not simply assume that impacts would be mitigated or prevented simply by virtue of SWFWMD's generic regulatory authority (i.e., a bare claim that it would be "on duty" to monitor impacts). Nor did the Staff simply defer to input or assurances from SWFWMD to support its FEIS conclusions that environmental impacts from construction and operation of the Levy plant will be minimal. The Staff explains that its reliance on the CoCs stems from an independent consideration of the likely effectiveness of the CoCs in identifying and preventing impacts to wetlands:

The Staff concludes that the potential overall impacts on terrestrial ecological resources, including wetlands, from operation of the LNP would be SMALL to MODERATE. Id. at 5-47. The "to MODERATE" reflects the Staff's acknowledgement of uncertainty in the ability of the Applicant's proposed monitoring efforts to detect or predict adverse wetland impacts in time to switch to an alternate water source before noticeable effects ensue. Id. However, because the Conditions of Certification call for corrective action as soon as adverse wetland impacts are noticed, the Staff did not find that a LARGE conclusion is warranted.

Staff Direct Testimony at A106.

As such, for the reasons explained here, the Staff's reliance on the CoCs and the SWFWMD's performance standards is not based on a generic assurance of another agency being "on duty", but rather a reasoned explanation of how and why the CoCs will prevent or mitigate certain potential environmental impacts of the proposed action. Indeed, as is evident in the FEIS and Staff Testimony, the Staff conducted a detailed study into the CoCs and SWFWMD's standards to reach its site-specific conclusions regarding environmental impacts at Levy. Accordingly, New York v. NRC does not indicate any inadequacy in the Levy County FEIS.

D. Question 4

Recognizing that the CEQ Guidance is not binding on NRC, please discuss whether its guidance is relevant or applicable to the situation in this case. If so, please explain how the principles in the CEQ Guidance apply here and whether NRC has met them.

The principles in the CEQ Guidance are relevant in this case because in determining the impact conclusions in its FEIS, the Staff considered and relied on measures for mitigating potential adverse environmental impacts. The Staff's consideration of these measures in its FEIS analysis is consistent with the CEQ Guidance because it appropriately accounts for the limitations on NRC's own authority to impose such mitigation and reasonably considers measures that will be required by other regulatory agencies.

The CEQ Guidance is "designed to facilitate agency compliance with NEPA, by clarifying the commitments agency decisionmakers may decide to make when complying with NEPA, and ensuring that information about those commitments is accurate and made available to the public." See Council on Environmental Quality, Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact, 76 Fed. Reg. 3843, 3843 (Jan. 21, 2011). According to the CEQ Guidance, agencies should not rely on successful mitigation in developing an EIS "unless they have sufficient legal authorities and expect there will be necessary resources available to perform or ensure the performance of the mitigation." 76 Fed. Reg. at 3847. However, the Guidance makes clear that consideration of mitigation measures in reaching a NEPA conclusion need not depend on the agency performing the mitigation measures itself, or even on imposing the measures on an applicant/licensee pursuant to that agency's organic authority: "[t]he agency's own underlying authority may provide the basis for its commitment to implement and monitor the mitigation. Alternatively, the authority for the mitigation may derive from legal requirements that are enforced by other Federal, state or local government entities (e.g., air or water permits administered by local or state agencies)." Id.

To that end, the Guidance states that "[i]n the decision documents concluding their

environmental reviews, agencies should clearly identify any mitigation measures adopted as agency commitments or otherwise relied upon (to the extent consistent with agency authority or other legal authority), so as to ensure the integrity of the NEPA process and allow for greater transparency.” Id. at 3847 (emphasis added).<sup>9</sup> As discussed further below in response to the Board’s Question 5, NEPA, a procedural statute, does not give the NRC authority to impose mitigation measures that are not otherwise authorized by the Atomic Energy Act or by other substantive environmental statutes, such as the Endangered Species Act. See, e.g., Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 352–53 (1989). However, as contemplated by the CEQ Guidance, it is appropriate for a permitting agency’s NEPA analysis to account for mitigation or monitoring measures that will be required of the applicant by another regulatory authority.

The Levy FEIS conclusions at issue in Contention 4A are based in part on mitigation and monitoring of the potential dewatering impacts of the Applicant’s proposed activities during both building and operation phases. Staff Direct Testimony at A99, A106, & A110. The Staff concluded that the impacts from the Applicant’s proposed construction methods, operational water usage, and storm water controls would not be significant enough to warrant additional mitigation. See, e.g., NRC001A at 4-25, 5-8. Furthermore, while the Staff considered monitoring and mitigation measures in its analysis, the measures that the Staff cited in support of its conclusions will be required by the Florida CoCs. Staff Direct Testimony at A99, A106, & A110; NRC001A, at 4-31 to 4-35, 5-8; see also PEF005 at 25, 42-46 (requiring monitoring of

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<sup>9</sup> The Board’s question highlighted another statement from the CEQ Guidance in connection with the appropriateness of a permitting agency imposing conditions to ensure mitigation: “[w]hen an agency ... permits, or otherwise approves actions, it should also exercise its available authorities to ensure implementation of any mitigation measures by including appropriate conditions on the relevant grants, permits, or approvals.” 76 Fed. Reg. at 3849 (emphasis added). As with other references in the Guidance to when commitments are appropriate, the use of the term “available authorities” acknowledges that an agency’s ability to impose a particular mitigation measure necessarily remains subject to the extent of the agency’s regulatory authority.

groundwater, the Applicant's adoption of alternative water sources under some circumstances, and allowing the Applicant to propose mitigation for unavoidable adverse impacts to wetlands). As discussed in more detail above in response to Question 2, Florida's CoCs are binding on the Applicant and enforceable by the State of Florida. See PEF005 at 13 ("The terms, conditions, requirements, limitations and restrictions set forth in these Conditions of Certification are binding and enforceable .... Any noncompliance by the Licensee with a Condition of Certification ... is grounds for enforcement action, license termination, license revocation, or license revision."). The CEQ Guidance acknowledges that a permitting agency may rely on mitigation measures that are required by other governmental entities. 76 Fed. Reg. at 3847.

Thus, even recognizing that CEQ's Guidance is not binding on NRC, the Staff's consideration in the FEIS of monitoring and mitigation measures required by the State of Florida is fully consistent with the principles of that guidance.

E. Question 5a

Does NRC have the legal authority under NEPA to deny a proposed license if its adverse environmental impacts greatly exceed its benefits? Please provide legal support and citation. Does NRC have the authority under NEPA to "appropriately condition" a proposed combined license in order "to protect environmental values"? See 10 C.F.R. § 51.107(a)(3). For example, could NRC or the Board legally insert a condition into PEF's combined license to require that the groundwater monitoring (like that specified in the EMP) be continued for ten years, rather than the five years specified in the COC? Please explain the legal basis for your answer.

The National Environmental Policy Act ("NEPA") does not give NRC the authority to deny a proposed license because NEPA is a procedural statute which does not grant an agency substantive authority.

Section 102 of NEPA states:

"[A]ll agencies of the Federal Government shall:

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on:

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."

42 U.S.C. § 4332. The Supreme Court has established that, even though these provisions require an agency to take a "hard look" at environmental consequences, "NEPA itself does not mandate particular results, but simply prescribes the necessary process." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989). See also Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227-228 (1980) (per curiam); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978).

In Methow Valley, the Court examined whether NEPA requires the Forest Service to include a fully developed mitigation plan in an EIS accompanying a proposal to build a ski resort, and to implement that mitigation plan. The Court held that NEPA merely requires that a Federal Agency adequately identify and evaluate adverse environmental impacts. Methow Valley, 490 U.S. at 351. In addition, NEPA does not prohibit the agency from finding that "other values outweigh the environmental costs." Id. The Court further stated that "[o]ther statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed – rather than unwise – agency action." Id. As the authority to mandate certain action, or deny a license, is substantive, NEPA does not provide such authority.

While Methow Valley clarified that NEPA was a purely procedural statute, the Supreme Court in Department of Transportation v. Public Citizen, 541 U.S. 752 (2004) further clarified that NEPA authority cannot expand an agency's authorizing statute. Prior to Public Citizen, federal courts had recognized the NRC's authority to mitigate environmental impacts under NEPA in situations where the AEA granted NRC jurisdiction over the aspect of the plant that caused the environmental impact.<sup>10</sup> In Public Citizen, the Court overturned an Appeals Court

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<sup>10</sup> See Public Service Company of New Hampshire v. Nuclear Regulatory Commission, 582 F.2d 77, 79-80 (1st Cir. 1978) (holding that regulating power lines for the sole purpose of

decision upholding a challenge to the Federal Motor Carrier Safety Administration's ("FMCSA") environmental assessment for new regulations directing the issuance of applications for Mexican motor carriers carrying cargo across the border. Id. at 760-61. The Court of Appeals had concurred that the EA was defective for failing to evaluate the environmental impacts attributable to the increased number of Mexican carriers operating in the United States. Id. at 763.

On appeal, the Court noted that FMCSA is subject to 49 U.S.C.A. § 13902(a)(1) which states that FMCSA "shall register a person to provide transportation . . . as a motor carrier if [it] finds that the person is willing and able to comply with" the Department of Transportation's safety and fiscal responsibility regulations. Id. at 766. As a result, the Court found that FMCSA had no authority to deny Mexican carriers licenses provided the carriers met the safety and financial requirements to operate in the United States. Id. at 768. The Court concluded that the environmental impact of the cross-border operations could not affect FMCSA's decision making process because FMCSA could not act on such information in its application process. Id. While the FMCSA was still required to fulfill its procedural duty under NEPA, the Court saw no reason to require FMCSA to consider the cross-border traffic in its environmental review because it would not affect its licensing determination. Id. As a result, the Court clarified that NEPA cannot expand an agency's authority where the agency must make a non-discretionary finding under another statute.

The NRC is similarly situated to the FMCSA in that the Commission is required to issue

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minimizing plant's non-radiological impact was authorized because the Commission was under a dual obligation: to pursue the objectives of the Atomic Energy Act and those of the National Environmental Policy Act); Detroit Edison Power Co. v. U.S. Nuclear Regulatory Comm'n, 630 F.2d 450, 454 (6th Cir. 1980) (stating that there can be no objection to using the AEA to achieve environmental ends). See also Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission, 449 F.2d 1109, 1128 (D.C. Cir. 1971) ("[I]t is pointless to 'consider' environmental costs without also seriously considering action to avoid them."). These cases also predated the decision in Methow Valley.

a license if the applicant meets certain statutory and regulatory requirements. For combined licenses, section 185b. of the AEA states:

The Commission shall issue to the applicant a combined construction and operating license if the application contains sufficient information to support the issuance of a combined license and the Commission determines that there is a reasonable assurance that the facility will be constructed and will operate in conformity with the license, the provisions of this Act and the Commission's rules and regulations.

42 U.S.C.A. § 2235(b) (emphasis added). Moreover, section 103(b) of the AEA states that:

The Commission shall issue [commercial] licenses on a nonexclusive basis to persons applying therefor (1) whose proposed activities will serve a useful purpose proportionate to the quantities of special nuclear material or source material to be utilized; (2) who are equipped to observe and who agree to observe such safety standards to protect health and to minimize danger to life or property as the Commission may by rule establish; and (3) who agree to make available to the Commission such technical information and data concerning activities under such licenses as the Commission may determine necessary to promote the common defense and security and to protect the health and safety of the public.

42 U.S.C.A. § 2133 (emphasis added). This language states that the Commission is required to issue the license if the applicant meets the statutory and regulatory requirements. It is not a discretionary decision. Therefore, consistent with both Methow Valley and Public Citizen, while NRC is still required to perform its duties under NEPA, NEPA's requirements do not expand the NRC's AEA authority to take substantive actions.

The Commission's understanding of NEPA's procedural nature, and its implications for the scope of the agency's authority to regulate, was reiterated in the Statements of Consideration for the Limited Work Authorization (LWA) rule revising 10 C.F.R. § 50.10. 72 Fed. Reg. 57,427 (Oct. 9, 2007). The Statements of Consideration recognize that "while NEPA may require the NRC to consider the environmental effects caused by the exercise of its permitting/licensing authority, the statute cannot be the source of the expansion of the NRC's authority to require construction permits, combined licenses, or other forms of permission for activities that are not reasonably related to radiological health and safety or protection of the



common defense and security.”<sup>11</sup> The Commission thus acknowledged that NEPA, by itself, does not expand the agency’s authority to consider issues unrelated to the AEA in NRC licensing proceedings.

Based on the Methow Valley and Public Citizen line of cases, NEPA does not provide the NRC with a legal basis to expand its regulatory authority under the AEA (or under other statutes that may give the NRC substantive authority to act, such as the Endangered Species Act (ESA)). NEPA, therefore, does not provide NRC the authority to deny a proposed license if the environmental impacts greatly exceed its benefits.

For the same reasons, NEPA, by itself, does not provide authority for conditioning or denying a license in connection with the findings a presiding officer makes pursuant to 10 C.F.R. § 51.107(a)(3). Nor does it provide the authority to impose conditions under 10 C.F.R. § 50.36b, a regulation that similarly refers to conditions relating to the environment. 10 C.F.R. § 51.107 states:

[I]n a proceeding for the issuance of a combined license for a nuclear power reactor under Part 52 of this chapter, the presiding officer will:

...  
(3) Determine, after weighing the environmental, economic, technical, and other benefits against environmental and other costs, and considering reasonable alternatives, whether the combined license should be issued, denied, or appropriately conditioned to protect environmental values.

10 C.F.R. § 51.107(a)(3). 10 C.F.R. § 50.36b states:

(a) [E]ach combined license under part 52 of this chapter may include conditions to protect the environment during construction. . . .  
(b) Each license authorizing operation of a production or utilization facility, including a combined license under part 52 of this chapter, . . . may include conditions to protect the environment during operation and decommissioning.

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<sup>11</sup> Id. See also Licenses, Certifications, and Approvals for Materials Licensees, 76 Fed. Reg. 56958 (Sept. 15, 2011) (“the courts have consistently determined that NEPA is a procedural statute, and as such it cannot and does not expand the NRC’s jurisdiction beyond the scope of the AEA; i.e., to give the NRC authority to decide non-radiological public health and safety issues.”).

10 C.F.R. § 50.36b. Based on the Supreme Court precedent discussed above, NEPA cannot provide the authority for authorizing substantive agency actions – such as denying or conditioning a license. That does not mean, however, that these provisions are without legal effect; rather, the determination of whether a license may be denied or conditioned to protect “the environment” or “environmental values” acknowledges circumstances where the agency may invoke authority granted under other statutes. For example, the Supreme Court has recognized that, unlike NEPA, the ESA “imposes a substantive (and not just procedural) statutory requirement.” National Ass’n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 667 (2007).

In sum, while the agency’s NEPA inquiry necessarily informs the 10 C.F.R. § 51.107(a)(3) determination or the decision to impose a condition under 10 C.F.R. § 50.36b (by identifying, disclosing, and weighing the relevant benefits and costs and their environmental implications), the authority to impose a substantive act would need to originate in a substantive statute, like the ESA. To help inform that inquiry, the NRC often coordinates its NEPA review with the analysis or consultation required under other environmental statutes. For example, the Clean Water Act (CWA) includes some substantive requirements, including requiring the NRC to incorporate any conditions placed by a state into a CWA Section 401 certification into a COL. 33 U.S.C. § 1341. The NRC has provided for this compliance via 10 C.F.R. § 50.54(aa), which automatically deems any such condition to be incorporated into the COL. Therefore, while NEPA by itself does not provide the NRC with the authority to “appropriately condition” a license, 10 C.F.R. § 51.107 and 10 C.F.R. § 50.36b reflect that another statute may provide that authority, and the NEPA review can provide the agency’s examination of the environmental benefits and costs of doing so. Without such statutory authority, and unless it is necessary for the NRC to make a required finding, neither the Staff nor a Licensing Board may insert a condition into a license to impose solely environmental requirements.

## Question 5b

Are voluntary commitments by licensees legally enforceable by NRC? If not, why not? If voluntary commitments are not enforceable by NRC, then what measures can NRC and/or the Board take to make them legally enforceable by NRC?

Voluntary commitments made by a licensee are not legally enforceable because the licensee is not required to fulfill these requirements in order to obtain a license. As stated above, the Commission is required to issue a license if the applicant meets the statutory and regulatory requirements. These requirements are mandatory and required for a COL.

Voluntary commitments are different in that they are statements in a licensing document in which the applicant promises to take certain actions that are beyond what the regulations require. See GE Hitachi Global Laser Enrichment LLC (GLE Commercial Facility), LBP-12-21, 74 NRC \_\_, \_\_ (slip op. at 193) (Sept. 19, 2012). Such commitments are not legally enforceable, unless the commitment is “tied down,” such as through incorporation into the license as a condition.<sup>12</sup> Additionally, because under the AEA the Commission is required to issue a license if the applicant meets the statutory and regulatory requirements, an applicant could withdraw its voluntary commitments but still be entitled to receive a license by virtue of having met all the statutory and regulatory requirements.<sup>13</sup> These commitments are more analogous to a promise without consideration than a binding contract. Therefore, voluntary commitments are not legally binding.

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<sup>12</sup> Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 305 (1994) (“By virtue of their incorporation by reference into the license, the procedures and limitations on activities prescribed in the specified manuals and documents became binding license requirements which AMS was not free to ignore.”); Clifton Power Corp. v. FERC, 88 F.3d 1258, 1261 (D.C. Cir. 1996) (holding that although the petitioner’s license application contained specific terms agreed to by the Agency, the terms were not enforceable because they were not included in the actual license); GE Hitachi, 74 NRC at \_\_ (slip op. at 193) (stating that voluntary commitments are not enforceable unless they are “tied down”).

<sup>13</sup> In situations where the applicant wishes to withdraw a voluntary commitment, it must notify the Staff of that decision or run the risk of failing to provide complete and accurate information under 10 C.F.R. § 52.6.

In order for the Commission to impose and enforce these commitments, they must be tied to the license as a condition or incorporated into the regulations through the rulemaking process. For the reasons already discussed above in 5a, a voluntary commitment cannot be imposed on the license as an enforceable condition unless it is necessary for the NRC to make a required finding on the application.

It is also of note that in the case at hand, many of the voluntary commitments made by the applicant are requirements of other agencies (i.e. other federal, state or local regulatory bodies). The NRC lacks jurisdiction to act within the bounds of another regulatory body's purview.<sup>14</sup> In any event, the NRC presumes that the applicant will comply with NRC regulations and requirements of other regulatory bodies, making additional regulation in those areas unnecessary.<sup>15</sup>

F. Question 6

Assuming that, as a general rule, NEPA does not require that mitigation measures be implemented, is the legal situation different if the agency's characterization of the environmental impacts (e.g., SMALL to MODERATE) depends on the implementation of mitigation measures? Specifically, if an FEIS expressly relies on environmental monitoring and mitigation measures as a basis for concluding that the environmental impacts of a project will be SMALL to MODERATE, does NEPA require that the agency

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<sup>14</sup> See Tennessee Valley Authority (Yellow Creek Nuclear Plant, Units 1 & 2), ALAB-515, 8 NRC 702, 712-13 (1978) ("Section 511(c)(2) of the FWPCA does not change a licensing agency's obligation to weigh degradation of water quality in its NEPA cost-benefit balance, but the substantive regulation of water pollution is in EPA's hands."), See Hydro Resources, Inc. (292 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-16, 48 NRC 119, 120 (1998) ("Whether non-NRC permits are required is the responsibility of bodies that issue such permits, such as the Federal Environmental Protection Agency, . . . or state and local authorities. To find otherwise would result in duplicate regulation as both the NRC and the permitting authority would be resolving the same question, i.e., whether a permit is required. Such a regulatory scheme runs the risk of Commission interference or oversight in areas outside of its domain. Nothing in our statute or rules contemplates such a role for the Commission.").

<sup>15</sup> See U.S. Army Installation Command (Schofield Barracks, Oahu, Hawaii, and Pohakuloa Training Area, Island of Hawaii, Hawaii), CLI-10-20, 72 NRC 185, 194 & n.48 (2010) (refusing to assume the Army would act contrary to Department of Defense guidance, applicable law, "or the strictures of its license in the future."); cf. Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), CLI-01-9, 53 NRC 232, 235 (2001) ("in the absence of evidence to the contrary, the NRC does not presume that a licensee will violate agency regulations wherever the opportunity arises.").

independently (a) identify and understand what the monitoring and mitigation measures will be, (b) assess and confirm that the mitigations will actually be implemented, and/or (c) assess and confirm that they will be effective?

As indicated in the Board's question, NEPA does not require agencies to implement mitigation plans, but rather to identify mitigation measures and their relevance for the agency's impact conclusions "in sufficient detail to ensure that environmental consequences have been fairly evaluated." See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 352 (1989). Where an agency relies on mitigation measures to support a conclusion in its EIS, NEPA does require that the agency explain what mitigation measures it reasonably anticipates will be implemented. In addition, under NEPA an agency must provide a reasoned basis for asserting the expected effect of such mitigation measures in minimizing adverse impacts of the agency action. However, as discussed further below, to meet the NEPA standard of reasonableness it is not necessary for the agency to also guarantee that those mitigation measures will be implemented or be effective.

First, it is well established that under NEPA, agencies are not required to implement mitigation plans. Methow Valley, 490 U.S. at 350. As the Supreme Court has held, "[t]here is a fundamental distinction, however, between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other." Id. at 352. This is because "it would be inconsistent with NEPA's reliance on procedural mechanisms-as opposed to substantive, result-based standards-to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act. Cf. Baltimore Gas & Electric Co., [462 U.S. 87 100, (1983)] ('NEPA does not require agencies to adopt any particular internal decisionmaking structure')." Id. In addition, "both the CEQ regulations and NEPA itself compel only "a reasonably complete discussion of possible mitigation measures'....The EIS in this case may not be flawless, but it certainly is reasonably complete." Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 206 (D.C. Cir.

1991); see also Laguna Greenbelt, Inc., v. U.S. Dept. of Transportation, 43 F.3d 517, 528 (9th Cir. 1994) (an EIS is only required to discuss mitigation measures that are “reasonably complete” and “in sufficient detail to ensure that environmental consequences have been fully evaluated.”).

Consistent with this rationale, agencies are not required to account for environmental impacts that are not reasonably foreseeable. See Sierra Club v. Marsh, 976 F.2d 763, 767 (1st Cir. 1992). For NEPA purposes the appropriate inquiry for the agency is what impacts (including activities whose impacts may have a synergistic effect when combined with those of the proposed action) are reasonably foreseeable such that an agency should account for them in developing its EIS. The Commission itself has emphasized that NEPA “does not call for certainty or precision, but an *estimate* of anticipated (not unduly speculative) impacts.” Louisiana Energy Servs. (National Enrichment Facility), CLI-05-20, 62 NRC 523, 536 (2005). Also, NEPA does not require that agencies reach certain results, only that agencies will consider all available information regarding environmental impacts. Winter v. Nat’l Res. Def. Council, Inc., 555 U.S. 7, 23 (2008) (citing Methow Valley, 490 U.S. at 350).

Courts have consistently held that an agency’s consideration of mitigation measures is sufficient as long as it supports an informed agency decision. For example, in City of Carmel-by-the-Sea v. U.S. Dept. of Transportation, the agency’s FEIS for a proposed realignment of a California highway was determined to contain a sufficiently detailed wetlands mitigation plan that included both on-and-off-site mitigation proposals. 123 F.3d 1142, 1154 (9th Cir. 1997). The Ninth Circuit held the FEIS complied with NEPA because the mitigation plan was thorough and adequate even though it did not account for new wetlands that were created as a result of a recent earthquake. Id. at 1174. As this case further exemplifies, NEPA requires only “a ‘reasonably thorough’ discussion of the environmental consequences in question.” Id. at 1151.

In sum, to the extent an agency’s FEIS expressly relies on environmental monitoring and mitigation measures as a basis for concluding what the environmental impacts of a project will

be, NEPA does requires that the agency identify and explain what those anticipated monitoring and mitigation measures are. However, as long as the analysis provides a reasoned basis for the anticipated measures as well as sufficient detail to explain why their implementation would support the agency's conclusion about reasonably foreseeable impacts of the proposed action, the agency need not go further and assess and confirm that the mitigations will actually be implemented, or assess and confirm that they will be effective. To find that an agency's EIS must not only characterize the reasonably anticipated mitigation plans and their relevance for the agency conclusion but also ensure that they will occur and be effective would go far beyond the holdings in Methow Valley, Citizens United Against Burlington, Inc., and their progeny, which emphasize that NEPA demands only an informed decision, not a particular outcome.

G. Question 7

In Robertson, the Court recognized that some of the environmental effects discussed in the FEIS "cannot be mitigated unless nonfederal government agencies take appropriate action," but stated that "it would be incongruous to conclude that the [U.S] Forest Service has no power to act until the local agencies have reached a final conclusion on what mitigation measures they consider necessary." 490 U.S. at 352-53.

How does this decision and principle apply to this case?

The Supreme Court's holding in Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989), supports the Staff's approach in the Levy FEIS. In particular, the decision confirms that it is appropriate for the Staff to consider mitigation measures that would be implemented by nonfederal governmental authorities and that those measures need not be finalized or fully implemented for the EIS analysis to comply with NEPA.

The Methow Valley decision found that a Federal agency may discharge its duty under NEPA to provide a "hard look" at the environmental consequences of an action even if other agencies with authority over aspects of that action may not have reached a conclusion on mitigative measures within their jurisdiction. As the Board noted, the Methow Valley Court acknowledged that even though certain mitigation measures "cannot be mitigated unless nonfederal government agencies take appropriate action . . . it would be incongruous to

conclude that the [U.S.] Forest Service has no power to act until the local agencies have reached a final conclusion on what mitigation measures they consider necessary.” 490 U.S. at 352–53. In Methow Valley, the Forest Service was reviewing a permit application for a ski resort and had developed an EIS that identified mitigation actions that could be implemented by both the county government and the Forest Service; however, the Court of Appeals, in finding the EIS inadequate, had emphasized that the mitigation measures had not been fully developed, nor had the Forest Service assessed their effectiveness. 490 U.S. at 347. The Court reversed, holding that an agency may take the requisite “hard look” without the need to have in hand “a complete mitigation plan” that is “actually formulated and adopted.” 490 U.S. at 352. Consequently, the Methow Valley decision provided that the Forest Service did not need to wait until the other agencies arrived at specific mitigation measures prior to issuing its EIS and permit decision.

The Staff’s consideration of mitigation measures in the Levy FEIS is not only in accord with the principles set forth in Methow Valley, but indeed relies on mitigation measures that are both more fully developed and likely to be implemented than those found sufficient by the Court. In finding that a “complete mitigation plan” was not required for an agency to discharge its NEPA responsibilities, the Court recognized that mitigation is only required to be “discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated.” Id. at 352. The Court rejected the notion that an EIS must include “a detailed explanation of specific measures which will be employed to mitigation the adverse impacts of a proposed action.” (emphasis omitted). Id. at 353. The Court stated that “[b]ecause NEPA imposes no substantive requirement that mitigation measures actually be taken, it should not be read to require agencies to obtain an assurance that third parties will implement particular measures.” Id. at 353 n.16.

As discussed above in response to Questions 2 and 3, the Staff’s conclusions about potential impacts to terrestrial resources were supported by a number of factors, including



mitigation measures that would be implemented pursuant to the Florida Department of Environmental Protection's Conditions of Certification and are enforceable by state authorities. These include the measures described in detail in a 74-page Wetlands Mitigation Plan, which was submitted to the State of Florida Department of Environmental Protection as required by the Conditions of Certification. See NRC048 at i-ii and PEF005 at 31. Moreover, in contrast to the mitigation in Methow Valley whose details remained to be considered by third parties, the mitigation measures relied on by the Staff have already been defined and developed by the State of Florida, and assessed in the FEIS. See, e.g., NRC001A at 4-71 to 72, 5-47. While these mitigation measures are detailed and developed, they would be implemented and enforced under the authority of the State of Florida rather than by the NRC. This consideration of measures that are ultimately within the control of other agencies is thus analogous to the Methow Valley situation, where the Forest Service EIS acknowledged certain mitigation measures that would need to be developed by state or county authorities rather than by the Forest Service; in fact, the Staff's analysis in the Levy FEIS recognized that were the Levy applicant not to comply with the mitigation measures contained in the CoCs, it would violate state requirements.

In sum, the mitigation measures considered and relied on in the Levy FEIS, including those already defined and required by the State of Florida, are both more detailed and more likely to be implemented than those found sufficient in Methow Valley. Consequently, the decision supports the conclusion that the Staff's Levy analysis complies with NEPA.

#### H. Question 8

In New England Coalition on Nuclear Pollution v. U.S. Nuclear Regulatory Commission, the U.S. Court of Appeals for the First Circuit upheld NRC's issuance of a license and, citing 33 U.S.C. §1371(c)(2)(A), held that, under NEPA, "NRC may rely on EPA findings made in the course of determining whether to issue a [National Pollutant Discharge Elimination System] permit." 582 F.2d 87, 99 (1st Cir. 1978). Similarly, in Carolina Power & Light Company (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), the Appeal Board grappled with the differing need for-power projections proffered (respectively) by the NRC Staff, the Applicant, and the North Carolina Utilities Commission (NCUC). ALAB-490, 8 NRC 234, 239-40 (1978). The Appeal Board affirmed the Licensing

Board's ruling stating, "we think that the NCUC total demand forecast is entitled to be given great weight," and noting that the NCUC is the body "charged by [State] law with the responsibility of providing up-to-date analyses of . . . 'the probable future growth of the use of electricity.'" Id. at 240.

How do these decisions and principles apply to this case?

The two decisions referenced by the Board—New England Coalition on Nuclear

Pollution v. U.S. Nuclear Regulatory Commission and Carolina Power & Light

Company (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4)—address issues

analogous to, though not entirely on all fours with, the present case. Both, however, support the Staff's partial reliance on the FDEP Conditions of Certification (CoCs) to inform its analysis of reasonably foreseeable environmental impacts in the FEIS.

In New England Coalition the First Circuit, in ruling "that the NRC may rely on EPA findings made in the course of determining whether to issue a discharge permit," considered that the NRC adoption of EPA's findings concerned only one aspect of the overall environmental analysis and did not result in the NRC shirking its responsibility to consider all costs and benefits of the project. 582 F.2d 87, 98-99 (1st Cir. 1978). The Court also determined that its decision raised no fairness concerns because the intervenors had the opportunity to present their arguments to the EPA, but failed to do so. Id.

Because the Staff in the Levy FEIS conducted an independent analysis of environmental impacts and did not simply defer to the findings or analysis of another agency as the basis for its conclusions, several principles from New England Coalition demonstrate that the Staff's approach complies with NEPA in the present case. First, the Staff did not base any of its findings or conclusions solely on the CoCs in its consideration of impacts to terrestrial ecology and wetland resources in the manner of the agency adoption of EPA findings at issue in New England Coalition. Rather, the Staff determined based on its consideration several sources of information that certain provisions of the CoCs would be effective in ensuring that the proposed action would not result in LARGE impacts to terrestrial resources. See Staff Rebuttal Testimony at A55. For example, in arriving at this decision, the Staff also considered the results of its own

quantitative wetlands analysis. See Staff Direct Testimony at A100. Second, the Staff also evaluated the terms of the CoCs in detail before determining that it was reasonable to rely on them to bound reasonably foreseeable impacts. See id. at A105. Therefore, the Staff's partial reliance on the CoCs for informing its impact determinations demonstrated even more independent staff consideration than the adoption of EPA findings that the First Circuit found acceptable.

The Intervenor in this case, as in New England Coalition, also had an opportunity to participate in the site certification process conducted by the State of Florida, which included a determination that the CoCs would be acceptable. See PEF004 (Final Order Approving Site Certification) at 4-5, 11; 582 F.2d 87, 98-99 (1st Cir. 1978). While the Intervenor in this case did not participate in the site certification process, a number of individuals and public interest groups did do so. PEF004 at 4-5. Thus, as in New England Coalition, the NRC's consideration of the CoCs presents no fairness concerns, particularly because the Staff did not substitute reliance on the CoCs for its own independent review of reasonably foreseeable environmental impacts.

In Shearon Harris, the Appeal Board ruled that the NRC satisfied its NEPA responsibilities when it relied on the analysis of an expert body charged by law with analyzing its relevant subject area—the North Carolina Utilities Commission's (NCUC) demand forecast—because that analysis was not shown to be seriously flawed. See Shearon Harris, ALAB-490, 8 NRC 234, 240-41. SWFWMD and the FDEP are, similarly, expert bodies in the subject areas of water resources and “might be expected to possess considerable familiarity with the primary factors bearing upon” the resources that they regulate. Id. at 241.

The Staff's reliance on the CoCs is similar to the NRC's reliance on the NCUC demand forecast in Shearon Harris, although, as noted above, reliance on the CoCs comprises only a part of Staff's basis for the conclusions in the FEIS. See, e.g., NRC001A at 5-47. Before it determined that it was reasonable to rely on them, the Staff examined whether the structure and

substance of the CoCs were likely to prevent LARGE impacts to terrestrial resources and wetlands as well as whether they were legally enforceable by the State. As described in the Staff's Answer to questions 1, 2b and 2e, the Staff determined that the CoCs met both of these considerations. Among the reasons for this decision are that the CoCs require extensive testing and characterization to ensure that adverse impacts will not occur when PEF begins full scale groundwater pumping, and there is a continuing requirement that PEF not cause unacceptable adverse impacts to wetlands and other surface waters. See PEF005 at 42, 45, and 53; see also PEF313 at B4-1.

Although the CoCs provide that the applicant may request, subject to SWFWMD's concurrence, termination of environmental monitoring requirements under the Environmental Monitoring Plan after five years following groundwater use rising to more than 1.25 mgd, provisions would remain in place to ensure that PEF complies with the prohibition on causing unacceptable adverse impacts. See PEF005 at 42. In particular, PEF must submit a report beginning the fifth year after groundwater use rising to at least 1.25 million gallons per day, and at 5 year intervals thereafter, providing information sufficient "to demonstrate reasonable assurance that the withdrawals and use of water authorized by these conditions of certification continue to meet the substantive requirements set forth in Chapter 40D-2, F.A.C., and the [WUP Basis of Review]." PEF005 at 46.

Given the Staff's independent consideration of the CoCs as described above, it was reasonable to conclude that these requirements developed and administered by expert State agencies could inform the Staff's determination of reasonably foreseeable environmental impacts. See Shearon Harris, ALAB-490, 8 NRC 234, 240-41. For the reasons discussed above, both cases referenced by the Board support the Staff's actions with respect to its reliance on the CoCs.

CONCLUSION

For the Board's consideration, the Staff hereby submits its legal brief on certain legal issues in preparation for the evidentiary hearing in this proceeding.

Respectfully submitted,

**/Signed (electronically) by/**

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The 5<sup>TH</sup> Day of October 2012

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 and 52-030  
)  
)  
(Levy County Nuclear Site, Units 1 and 2) )

CERTIFICATE OF SERVICE

I hereby certify that the NRC Staff's Brief to Order Regarding the Briefing of Certain Legal Issues has been filed through the E-Filing system this 5th day of October 2012.

**/Signed (electronically) by/**  
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