

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))	October 12, 2012

**INTERVENORS' REPLY BRIEF IN RESPONSE TO
ASLB ORDER OF SEPTEMBER 21, 2012**

I. INTRODUCTION

As provided in the Atomic Safety and Licensing Board's ("ASLB's") September 21, 2012 Order (Regarding the Briefing of Certain Legal Issues), the Ecology Party of Florida and Nuclear Information and Resource Service ("Intervenors") hereby reply to Progress Energy Florida's ("PEF's") and the U.S. Nuclear Regulatory Commission ("NRC") Staff's responses to the ASLB's questions of September 21, 2012. Progress Energy Florida's Initial brief Regarding Legal Issues in the Contested Hearing for Contention 4A (Oct. 5, 2012) ("PEF Brief"); NRC Staff Answer to Order Regarding the Briefing of Certain Legal Issues (Oct. 5, 2012) ("Staff Brief").

Question 1

Intervenors' Reply: While this question was directed only at the NRC Staff, PEF also responded to the question with its own "insight" into the FEIS. PEF Brief at 2. Intervenors have their own view on this question, and therefore will comment on both the Staff's and PEF's responses.

In explaining the basis for its statement that "[i]n accordance with SWFWMD's review criteria, groundwater withdrawal *cannot* cause unacceptable adverse impacts on wetlands or other surface waters," the Staff correctly asserts that Florida regulations "prohibit" PEF from causing unacceptable adverse impacts to wetlands or other surface waters. Staff Brief at 2. But a prohibition in the law against significant adverse environmental impacts does not equate to a guarantee that such impacts will not

occur. Therefore, the Staff errs in relying on the State’s “legal prohibition” for the conclusion that “it is . . . not reasonably foreseeable that these unacceptable adverse impacts to wetlands and other surface waters will occur.” *Id.*

There are several reasons why the mere prohibition of adverse impacts does not ensure that they will not occur. First, as the Staff acknowledges, the SWFWMD issues a water use permit based on predictive “reasonable assurance” findings regarding the applicant’s prospective ability to prevent adverse impacts to wetlands and water resources. *Id.* at 3. Based on these predictive findings, the permit contains conditions intended to ensure that unacceptable adverse impacts will not occur. But predictions are educated guesses, not guarantees. If the predictions are in error, adverse impacts may occur – whether or not they have been prohibited, and despite the applicant’s intention not to cause the impacts.

The Staff acknowledges as much, by stating:

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 Brief at 4 (citing Staff Testimony at A106). Similarly, PEF asserts that the permitting requirements “ensure” that proposed water withdrawals “*are not expected to have ‘unacceptable impacts on wetlands or other surface waters.’*” PEF Brief at 2 (quoting Sept. 21 Order at 2) (emphasis added).¹ As both NRC Staff and PEF tacitly admit, the mere prohibition of significant impacts, by itself, cannot prevent them from occurring.

¹ PEF misleadingly states that under the Basis of Review, “the SWFWMD cannot authorize a withdrawal of water if it causes ‘unacceptable adverse impacts to environmental features’ such as ‘surface water bodies’ or ‘wetland habitats.’” PEF Brief at 3. PEF’s statement implies that the SWFWMD already knows, when it issues the permit, whether the activity “causes” adverse environmental impacts and therefore can prohibit them. At the time the SWFWMD issues a permit, however, no water withdrawals will have yet occurred, and therefore the SWFWMD must rely on a prediction that impacts will be insignificant. Once the permit has been issued, separate enforcement action must be taken to stop or modify adverse impacts.

Second, the Staff's prediction that adverse impacts will not be significant is based on the unsupportable assumption that impacts will be detected before they can become significant. As discussed in Dr. Bacchus' testimony, there is no evidence that adverse impacts to the pond-cypress wetlands on the proposed LNP site and surrounding vicinity or bald-cypress wetlands in the LNP vicinity can be reversed by the time those impacts are observed by monitoring proposed in PEF's Environmental Monitoring Plan ("EMP"). Bacchus Direct Testimony, A.28, A.52 (Exhibit INT301R); Bacchus Rebuttal Testimony, A.10 (Exhibit INT801). In fact, Dr. Bacchus has not observed a single case where those types of impacts have been reversed, despite numerous requirements and attempts by agencies and private companies. Bacchus Rebuttal Testimony, A.10. Mr. Still also cites "many examples of failed mitigation, especially with attempted wetlands creation," as well as two instances in which monitoring programs failed to detect adverse impacts before they became irreversible. Still Direct Testimony, A.15 (Exhibit INT201R). Third, as noted in Mr. Still's testimony, the CoC permit PEF to request the termination of its environmental monitoring program after five years, and that in "today's difficult economic times, even the most well-intentioned government agencies will be hard-pressed to require the continuation of the program." Still Direct Testimony, A.10. Therefore, Mr. Still believes there is a "strong possibility that the EMP could be terminated before the environmental damage is discovered." *Id.* His concern that impacts may take five to ten years to manifest themselves is confirmed by the testimony of both Dr. Bacchus and PEF's witness Dr. Dunn. Still Direct Testimony, A.10 (citing Bacchus Direct Testimony, A.9 (Exhibit INT301) and Dunn Direct Testimony at 21 (Exhibit PEF300)).

Finally, as testified by several of Intervenors' witnesses, due to PEF's inadequate groundwater modeling, the geographic scope of PEF's environmental monitoring program ("EMP") is not adequate to detect adverse impacts of LNP on wetlands in several practical respects, including its failure to ensure adequate collection of baseline data (Still Rebuttal Testimony, A.11; Bacchus Direct Testimony A.49,

A.50) and its failure to provide for off-site monitoring to detect far-afield and localized impacts (Still Direct Testimony, A.12 and A.13; Bacchus Direct Testimony, A.48).

Question 2a

Intervenors' Reply: Intervenors do not have any further comment on Question 2a.

Question 2b

Intervenors' Reply: The parties appear to agree that the four performance standards quoted in the FEIS are conditions precedent to issuance of a permit by SWFWMD. In addition, as stated by the NRC Staff, those performance criteria are enforceable throughout the term of the permit. NRC Staff Brief at 6.

Question 2c

Intervenors' Reply: In response to this question, both the Staff and PEF assert that the four performance criteria quoted in the FEIS will not become moot. Staff Brief at 7, PEF Brief at 7-10. As explained by PEF, the performance standards are incorporated into the EMP. PEF Brief at 7. However the Staff did not review the EMP and therefore cannot rely upon it to justify the findings in the FEIS. In addition, as explained above in response to Question 1, PEF may seek to discontinue the EMP after five years. Therefore, the Staff cannot rely upon the EMP to mitigate impacts throughout the licensed period of operation. Furthermore, while PEF asserts that the EMP requires it to report on wetlands impacts every five years, the Florida statute that formerly required 5-year reports has changed the reporting period to 10 years. *See Florida Statutes, Chapter 373, Section 236(4)*. In addition, it is possible that the reporting requirement will be discontinued after five years. In that event, PEF could operate another 35 years without reporting on its impacts to wetlands.

Question 2d

Intervenors' Reply: The NRC Staff and PEF concede that the meaning of “adverse

environmental impacts on wetlands and surface waters” is not defined in any law, regulation, or permits applicable to the LNP. NRC Brief at 8, PEF Brief at 10. They cite various documents as sources of examples of adverse environmental impacts, *i.e.*, the performance criteria in the Basis of Review and a list of examples of adverse impacts in the CoC. While the performance criteria are fairly specific, they exclude factors such as how much impact can/will occur before deemed unacceptable harm, or what is the area, extent, or length of drawdown (frequency and duration) before the applicant incurs harm. For instance, it fails to specify at what frequency, duration and depth the wetlands can be altered before harm occurs. And the CoC are both vague and circular: for instance, they require permittees to mitigate “significant reduction in levels or flows in water bodies,” without defining the meaning of “significant,” thus begging the question of what “significant” means. As Mr. Still points out, PEF itself has a muddled idea of how the SWFWMD evaluates the significance of adverse environmental impacts. Still Rebuttal Testimony, A.5 (Exhibit INT701).

Thus, it remains unclear exactly what impacts the State or SWFWMD will require PEF to mitigate. Under the circumstances, the Staff does not have an adequate basis to assert that adverse impacts will be mitigated to the point of insignificance or that it has taken a “hard look” at those mitigation measures. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 n. 16 (1989).

Question 2e

Intervenors’ Reply: Both the Staff and PEF lay out enforcement procedures that the State and SWFWMD can use to revoke or modify PEF’s permit. It is important to note that the decision regarding whether to take enforcement action is discretionary. *See* Intervenors’ Initial Brief, Response to Question 2d. PEF’s response to Question 2c states that PEF’s groundwater withdrawals will be reviewed at five-year intervals. PEF Brief at 9. As discussed above, however, this interval has been changed to ten years. Thus, although PEF is required to submit monitoring reports annually (*see* PEF Brief at 11), there may

be a long lag time between the reporting of adverse impacts and the SWFWMD review that leads to enforcement action. Unless adverse impacts are pointed out by PEF, they could go unabated for as long as a decade.

Question 2f

Intervenors' Reply: The parties agree that the NRC is not in a position to enforce the performance standards established by the State of Florida in the absence of a license condition. The Staff also argues that NRC may not impose license conditions related to the fulfillment of monitoring and mitigation measures because NRC's jurisdiction to attach and enforce license conditions is limited to matters governed by the Atomic Energy Act and the Endangered Species Act, because NEPA is purely procedural. NRC Brief at 11 (citing *Robertson*, 490 U.S. at 351 n. 16). PEF also asserts that the NRC should defer to the SWFWMD and the U.S. Army Corps of Engineers ("USACE") to ensure that mitigation measures are carried out. PEF Brief at 13 (citing *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 527 (1977)).

However, the Staff is ignoring the NRC's own regulations, which explicitly provide for environmental conditions to be incorporated into operating licenses. The regulations state that operating licenses, including combined licenses, "may include conditions to protect the environment during operation and decommissioning" other than conditions for mitigating environmental impacts in compliance with the Federal Water Pollution Control Act. 10 CFR 50.36b(b). *See also* 10 C.F.R. § 51.71(d) note 3. To facilitate such conditions, the applicant's own environmental report is required to identify potential environmental license conditions for the Staff's consideration. 10 C.F.R. § 51.50(c). At the ASLB level, litigants may not challenge the validity of the Commission's regulations. Therefore, the Board should regard these regulations as dispositive of this issue.

Moreover, even if the NRC had no power to place environmental conditions in the license, that would not excuse the NRC from independently evaluating the environmental impacts of the LNP on wetlands, including an independent evaluation of the effectiveness of mitigation measures. While the NRC may give “substantial weight” to the conclusions of other government agencies, *Public Service Co.*, 5 NRC at 527, it may not assume that they are correct and must consider the contrary evidence put before it, placing the burden of proof on the NRC Staff as the proponent of the EIS. *See* Intervenor’s Brief, Response to Question 8 (citing *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant Units 1, 2, and 3), ALAB-590, 8 NRC 234, 241 (1978)). *See also* 10 C.F.R. §2.325. Here, the record shows that it was highly unreasonable for the NRC Staff to rely on the promise of future monitoring and mitigation measures that had yet to be developed.

Question 2g

Intervenor’s Reply: The Staff has revised the statement in the FEIS that if any changes to wetland hydroperiods are noticed in the course of performing environmental monitoring, PEF would be required to “immediately take action to prevent further degradation.” Staff Brief at 11. The Staff now states that “it intended this term to mean discovery of noncompliance.” Given that the SWFWMD is scheduled to conduct a full compliance review only at five or ten-year intervals, however, discovery of noncompliance may not be timely enough to prevent degradation.

Question 2h

Intervenor’s Reply: The Staff asserts that PEF’s groundwater production wells may continue to operate only as long as specific performance standards are met. Staff Brief at 13. As discussed above, if PEF is allowed to drop its EMP after five years, as a practical matter the SWFWMD will not have an effective means of enforcing this requirement.

Question 2i

Intervenors' Reply: This question was directed to the NRC Staff. Intervenors have previously addressed the Staff's lack of a basis for concluding that significant or "LARGE" impacts are not foreseeable.

Question 3

Intervenors' Reply: The Staff makes a number of arguments regarding why, in its view, *State of New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012) is not applicable here. But none of these arguments gets around the fundamental inconsistency of the Levy FEIS with the Court's holding in *State of New York*: that while the Staff acknowledged "uncertainty regarding whether PEF's monitoring program under the FDEP Conditions of Certification can predict or detect the occurrence of wetlands impacts with sufficient margin to preclude noticeable impacts," it nevertheless concluded that the environmental impacts of LNP were not significant "because the FDEP Conditions of Certification require corrective action as soon as wetlands impacts are detected or predicted." Intervenors' Rebuttal Statement of Position at 23-27 (quoting NRC Staff SoP at 33). As the Court held in *State of New York*, "merely pointing to [a] compliance program" – *i.e.*, the Conditions of Certification -- is insufficient to support a conclusion regarding the environmental impacts of a proposed NRC action. In this case, significant portions of the "compliance program" did not exist at the time the NRC prepared the FEIS, and therefore the Staff could not have taken a "hard look" at them. Missing information includes the EMP, an aquifer performance testing plan, and an alternative water supply plan. Still Rebuttal Testimony, A.17 Bacchus Direct Testimony, A.39. Mr. Still is also concerned that a required Water Conservation Plan has not been prepared or analyzed. Still Direct Testimony, A.19. Other future plans that were not reviewed in the FEIS are an erosion and sedimentation control plan, a stormwater pollution prevention plan, and a dewatering plan Bacchus Direct Testimony A.50; Still Direct Testimony A.19. These plans will not be

approved by the Florida Department of Environmental Protection until after the issuance of a COL. In addition, an avian protection plan relied on in the FEIS does not exist, thus precluding an accurate assessment not only of impacts on endangered species but also of appropriate mitigation. Bacchus Direct Testimony, A.39.

Question 4

Intervenors' Reply: The CEQ guidance confirms that the degree to which an agency preparing an FEIS may rely on proposed future mitigation measures as a basis for concluding that environmental impacts are insignificant is limited:

When a Federal agency identifies a mitigation alternative in an EA or an EIS, it may commit to implement that mitigation to achieve an environmentally-preferable outcome. Agencies should not commit to mitigation measures considered and analyzed in an EIS or EA if there are insufficient legal authorities, or it is not reasonable to foresee the availability of sufficient resources, to perform or ensure the performance of the mitigation.

76 Fed. Reg. 3843, 3848 (Jan. 21, 2011). The NRC acknowledges that this guidance instructs agencies that they “should not rely on successful mitigation in developing an EIS unless the mitigation meets the criteria stated above. NRC Brief at 19. Here, the CEQ’s standard is not met, because the NRC has stated that in the absence of license conditions, it has no legal authority to impose conditions on LNP’s license related to wetlands impacts. Under the CEQ guidance, the NRC is not permitted to rely on proposed future mitigation measures, over which it has no authority or control, to declare that the environmental impacts of LNP on wetlands are insignificant. The obvious conclusion is that if the Staff wishes to rely on the mitigation programs it must first review them, then find them satisfactory, then condition the license upon compliance with the mitigation program.

Question 5a

Intervenors' Reply: Intervenors have considered the Staff’s argument regarding the Supreme

Court's holding in *Robertson*, and believe that the NRC has the authority to refuse to issue a license if it concludes that environmental impacts within the scope of its substantive authority outweigh the benefits of the project. As discussed above, NRC regulations actually require the licensing decision to state whether all practicable measures were taken to avoid environmental harm and, if not, why not. 10 C.F.R. § 51.103(a)(4). Therefore, if the Staff does not have a rational reason for failing to condition the license upon the successful implementation of an approved mitigation plan, the licensing decision would be arbitrary and capricious. In addition, NRC regulation 10 C.F.R. §§ 51.107(a)(2), (3), and (5) do require the presiding officer to take the following actions:

(2) Independently consider the final balance among conflicting factors contained in the record of the proceeding with a view to determining the appropriate action to be taken;

(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; [and]

(5) Determined, in a contested proceeding, whether in accordance with the regulations in this subpart, the combined license should be issued as proposed by the NRC's Director, Office of New Reactors or Director, Office of New Reactor Regulation, as appropriate.

In addition, before it may approve the issuance of a license, the ASLB must determine, pursuant to 10 C.F.R. § 51.107(a)(1) that the requirements of Sections 102(2)(A), (C), and (E) of NEPA have been met.

Question 5b

Intervenors' Reply: The Staff makes a distinction between voluntary commitments made by a licensee (not enforceable) and voluntary statements made by a license applicant in the context of a license application (enforceable). Intervenors agree with the Staff that the second form of voluntary commitments is enforceable.

Question 6

Intervenors' Reply: This question is addressed by the CEQ guidance discussed above in

response to Question 4. As discussed in Intervenor's Reply regarding that question, Under the CEQ guidance, as a matter of law the NRC is precluded from relying on proposed future mitigation measures, over which it has no authority or control, to declare that the environmental impacts of LNP on wetlands are insignificant. Therefore, under NEPA's rule of reason, to the extent that the NRC relies on the mitigation measures proposed by PEF to reduce adverse environmental impacts to an insignificant level, it must be able to evaluate the effectiveness of those mitigation measures and confirm that they will be implemented.

Question 7

Intervenor's Reply: As discussed in Intervenor's Brief in response to this question, the NRC must demonstrate that it has taken a "hard look" at mitigation measures that could reduce the environmental impacts of the LNP. *Robertson*, 490 U.S. at 340-41. In response to Question 7, the Staff claims to have satisfied that test here. NRC Brief at 32-33. According to the Staff, the mitigation measures it considered in this case are "more fully developed and likely to be implemented" than the mitigation measures approved by the Court in *Robertson*. But that attempted comparison does not hold up under scrutiny. As discussed above in response to Question 3, a number of important mitigation-related documents did not *exist* when the FEIS was written, including the EMP. That is very different from the situation in *Robertson*, where the question was which measures, among a range of concrete actions that had been analyzed by the agency and were described by the Court, would be implemented.

Question 8

Intervenor's Reply: Neither PEF nor the NRC Staff has made any arguments that would cause Intervenor to alter their previous response to Question 8. Intervenor notes that the Staff's attempts, in its response to Question 8, to recharacterize its unquestioning reliance on PEF's proposed mitigation measures as an "independent" review (Staff Brief at 34) are contradicted by the evidentiary record,

including the FEIS and Staff testimony. *See* Intervenors' Rebuttal Statement of Position at 23-27.

Respectfully submitted,

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October 12, 2012

Certificate of Service

I hereby certify that on October 12, 2012, I posted copies of Intervenors' Reply Brief in Response to ASLB Order of September 21, 2012 on the NRC's Electronic Information Exchange. It is my understanding that the following individuals or offices were served as a result:

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