UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

PROGRESS ENERGY FLORIDA, INC.'S REBUTTAL BRIEF REGARDING LEGAL ISSUES IN THE CONTESTED HEARING FOR CONTENTION 4A

I. INTRODUCTION

On September 21, 2012, the Atomic Safety and Licensing Board ("Board") issued an Order requesting that the parties to this proceeding submit initial and rebuttal briefs regarding eight legal issues, or "Questions," identified by the Board ("Sept. 21 Order"). On October 5, 2012, Progress Energy Florida, Inc. ("PEF"), the NRC Staff ("Staff"), and the Ecology Party of Florida and the Nuclear Information and Resource Service (collectively, the "Intervenors") filed their initial briefs. Pursuant to the Sept. 21 Order, PEF hereby submits this rebuttal brief ("Rebuttal Brief").

II. SUMMARY

PEF's initial brief ("PEF Initial Br.") addresses most of the issues raised by the Intervenors' initial brief ("Intervenors' Initial Br."). In addition, PEF generally concurs with the positions taken by the Staff in their initial brief ("Staff Initial Br."). Accordingly, this Rebuttal Brief addresses only selected issues raised by Intervenors, where PEF believes further clarification or additional legal argument is appropriate.

As set forth below, in some cases the Intervenors misinterpret the State of Florida's requirements for certifying the Levy County Nuclear Power Plant ("LNP") project and for ensuring the LNP's ongoing compliance with the State-imposed Conditions of Certification ("COC") (PEF005). The Intervenors also

fail to recognize that the National Environmental Policy Act ("NEPA"), as interpreted by the U.S. Supreme Court and other relevant precedent, does not require mitigation plans described in an environmental impact statement ("EIS") to be fully developed before an agency can act, nor does it impose a substantive requirement that mitigation measures actually be implemented. The Intervenors also are incorrect in their claims that the Final Environmental Impact Statement ("FEIS") prepared by the Staff in this proceeding failed to take the required "hard look" at the potential for environmental impacts at issue in Contention 4A. The FEIS satisfied that requirement by, among other things, examining and discussing the binding, ongoing conditions regarding environmental monitoring and mitigation imposed upon PEF by the State of Florida through the COC. Accordingly, there is no basis for the Board to find that the LNP FEIS is insufficient, or to recommend the imposition of a license condition related to environmental monitoring and mitigation.

III. DISCUSSION

A. QUESTION 2

1. QUESTION 2b

In their response to Question 2b, the Intervenors claim that the four performance standards cited by the Board at the beginning of Question 2 are not "conditions precedent" and instead "appear to be prospective" in application. Intervenors' Initial Br. at 3. They contend that the Southwest Florida Water Management District ("SWFWMD") has no "operational evidence" that PEF will comply with those standards and that the SWFWMD "must necessarily predict whether the criteria will be met." Id. In their view, the SWFWMD's agency rules and the Water Use Permit ("WUP") Basis of Review do not provide any "measurable criteria" to determine if reasonable assurance of compliance with those standards has been provided. Id. at 3.

The Intervenors' characterizations of Florida law are incorrect. As discussed in PEF's Initial Brief, the four performance standards are conditions precedent and conditions subsequent, as applied to the LNP. PEF Initial Br. at 6-7. The SWFWMD's regulations, including Rule 40D-2.301, Florida

Administrative Code (PEF312) and the WUP Basis of Review (PEF313), require the SWFWMD to consider those standards before recommending approval of a consumptive use of water, either in the form of a SWFWMD WUP or, in the case of the LNP, as part of a site certification issued under Florida's Electrical Power Plant Siting Act, Chapter 403, Part II, Florida Statutes ("PPSA"). As the WUP Basis of Review expressly states, "[t]he objective of this Manual is to identify the usual procedures and information used by [SWFWMD] staff in permit application review." PEF313 at B1-1 (emphasis added).

As Dr. Dunn's rebuttal testimony (quoted in relevant part in PEF Initial Br. at 6-7) notes, those four performance standards were considered as part of the SWFWMD's review of the proposed water withdrawals during the LNP site certification proceeding before the site certification was issued in 2009. Thus, contrary to the Intervenors' implication, the SWFWMD does not, and is not required to, wait for "operational evidence" before conducting a review of a permit application. Rather, the SWFWMD must make its determination that the performance standards can be met by a proposed water withdrawal during its review of the permit application. Other reliable evidence was considered by the SWFWMD and, ultimately, the Siting Board, in determining whether PEF provided reasonable assurance[1] of compliance with the criteria for certification under Section 403.509(3), Florida Statutes. Those certification criteria include "whether, and the extent to which" the project will comply with the applicable non-procedural agency requirements (including the four performance standards). Fla. Stat. § 403.509(3)(b). See also PEF004 at 13 ("Progress Energy provided reasonable assurance that its proposed use of groundwater from the Floridan Aquifer satisfied the substantive criteria of the SWFWMD set forth in Chapter 373, Florida

[1] In general, an applicant for certification must provide "reasonable assurance" that its project meets the statutory criteria for certification contained in Section 403.509(3), Florida Statutes. See, e.g., Metro. Dade Cnty. v. Coscan Fla., Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992); Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981). Because "reasonable assurance" has been interpreted to mean a "substantial likelihood," Coscan, 609 So. 2d at 648; Hamilton Cnty. Bd. of Cnty. Comm'rs v. Dep't of Envtl. Regulation, 587 So. 2d 1378, 1387 (Fla. 1st DCA 1991), it does not require an absolute guarantee that the applicable conditions for the issuance of the certification have been satisfied. See Manasota-88 Inc. v. Agrico Chem. Co. & Dep't of Envtl. Regulation, 12 F.A.L.R. 1319, 1325, 1988 WL 617583 (DER 1990).

Statutes, Rule Chapter 40D-2, Florida Administrative Code, and the SWFWMD's Basis of Review for water permit applications").

Additionally, contrary to the Intervenors' assertion, the four performance standards were used by the SWFWMD and, ultimately, the Siting Board to determine whether reasonable assurance of compliance with the SWFWMD's WUP requirements has been provided during the site certification process. As discussed in PEF's response to Question 2c in PEF's Initial Brief (at 7-10) and below, the performance standards also remain applicable to the LNP once it commences operation and begins withdrawing water.

2. QUESTION 2c

In their response to Question 2c, the Intervenors argue that, under the WUP Basis of Review, the SWFWMD has the ability to revoke or cancel a permit if "significant adverse impacts" occur from the water withdrawals. Intervenors' Initial Br. at 3-4. The Intervenors contend, however, that this standard is not "explicitly tied" to the four performance standards. Id. at 4. They go on to argue that the four performance standards are not included in the COC or in the Florida Siting Board's Final Order Approving Certification ("Final Order") (PEF004). Intervenors' Initial Br. at 4.

The Intervenors' position is incorrect. First, the four performance standards are addressed in the Final Order and remain applicable under the COC. As discussed by PEF, the Final Order recognizes that the LNP complies with Section 4.2 of the WUP Basis of Review, which includes the four performance standards. PEF Initial Br. at 6. Several of the COC conditions make the four performance standards applicable to the LNP over its operating life. Id. at 8-10. See also PEF005 at 46 (COC condition C.II.A.5), 53-55 (conditions C.II.B.1, 2 and 12). In addition, the Environmental Monitoring Plan ("EMP") required under the COC must be designed to address the considerations set forth in the four SWFWMD performance standards. PEF Initial Br. at 7-8. See also PEF005 at 42-43 (COC condition C.II.A.2).

3. QUESTION 2d

In their response to Question 2d, the Intervenors refer to WUP Basis of Review Section 1.13, and suggest that the phrase "significant adverse impacts" in that section has the same meaning as the phrase "adverse environmental impacts" used elsewhere in the WUP Basis of Review and referenced by the Board in Question 2d. They further suggest that use of the phrase "may revoke" in WUP Basis of Review Section 1.13 leaves the SWFWMD with the discretion to decide whether to take enforcement action. Intervenors' Initial Br. at 4.

Contrary to the Intervenors' claims, Section 1.13 of the WUP Basis of Review is not applicable to the LNP. Rather, enforcement of compliance with the COC and revocation of the site certification is pursuant to the PPSA. Fla. Stat. §§ 403.504(8), 403.512, 403.514. See also PEF005 at 13 (conditions A.XIII and A.XIV). Section 1.13 of the WUP Basis of Review provides the grounds for revocation and cancellation of a WUP issued by the SWFWMD, and only applies when a separate WUP is issued by the SWFWMD.[2] PEF Initial Br. at Attachment A; Fla. Stat. § 403.511(1).

Although Section 1.13 of the WUP Basis of Review is inapplicable here, COC condition C.II.B.2 makes clear that the SWFWMD must take action if adverse environmental impacts to wetlands and surface waters occur: "If during the term of this certification, it is determined by the [SWFWMD] that the use is not reasonable and beneficial, in the public interest, or does impact an existing legal use of water, the [SWFWMD] shall seek modification [sic] these conditions of certification or revocation of the certification authorized by DEP." PEF005 at 53 (emphasis added). Similarly, COC condition C.II.B.12 provides that "[w]hen adverse impacts occur or are imminent, [PEF] shall be required to mitigate the impacts. Id. at 54 (emphasis added).

In addition, as discussed in PEF's Initial Brief, the term "adverse environmental impacts on wetlands" (for which the Board in Question 2d sought a definition) is defined in Section 4.2 of the WUP

[2] Because LNP water use is authorized under the Final Order, PEF was not required to (and did not) obtain a separate WUP from the SWFWMD.

Basis of Review by reference to the four performance standards, and is further explained in the COC. PEF Initial Br. at 10. WUP Basis of Review Section 1.13's use of the phrase "significant adverse impacts", as cited by the Intervenors (Intervenors' Initial Br. at 4), is irrelevant to the Board's Question 2d because, as stated above, Section 1.13 is inapplicable to the LNP and, in any event, that is not the term for which the Board sought a definition.

4. QUESTION 2e

Question 2e asks the parties to explain the legal process by which the State makes a determination that adverse environmental conditions have occurred. Sept. 21 Order at 4. Intervenors responded by quoting Section 373.119, Florida Statutes (relating to SWFWMD enforcement actions) and two SWFWMD standard permit conditions found in WUP Basis of Review Section 6.1. Intervenors' Initial Br. at 4-5. They offer no analysis beyond those quotations.

Intervenors have failed to identify the applicable Florida law. Section 373.119, Florida Statutes applies where a separate WUP is obtained from the SWFWMD and therefore is inapplicable in the LNP's case. Fla. Stat. § 403.511(1). Enforcement of compliance with the conditions of certification is accomplished pursuant to the PPSA. Fla. Stat. §§ 403.504(8), 403.512, 403.514. PEF's initial response to Question 2e accurately describes the legal process whereby a determination is made that adverse environmental conditions have occurred due to operation of the LNP. PEF Initial Br. at 10-12.

5. QUESTION 2f

The Intervenors' response to Question 2f proffers no legal basis in statute, judicial case law, or NRC precedent establishing the NRC's obligation or authority to impose license conditions requiring implementation of the groundwater and wetlands monitoring and mitigation measures discussed in the FEIS.

The Intervenors' response reads the NRC's procedural obligations under NEPA to evaluate mitigation approaches or measures within an FEIS as evidence of legal obligation and authority for the

NRC to impose license conditions requiring mitigation. See Intervenors' Initial Br. at 6. However, the Intervenors identify no provision within NEPA or any other statute in support of their assertion.[3] Further, although the Intervenors claim (Intervenors' Initial Br. at 6) that the D.C. Circuit's decision in Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971), supports their understanding of the NRC's obligations and authority, the passages identified by the Intervenors are silent regarding the NRC's obligation or authority to impose license conditions; rather, those passages relate only to the NRC's procedural obligation under NEPA to discuss mitigation as part of a larger evaluation of the environmental impacts of a proposal. See id. at 1123.

As explained by PEF (PEF Initial Br. at 31-32) and the NRC Staff (Staff Initial Br. at 11), the Supreme Court in Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989), drew a sharp distinction between NEPA's purely procedural requirements[4] and an agency's substantive legal obligations and authority under other statutes to impose requirements for environmental protection. See id. at 350-53 & n.14 (distinguishing between NEPA and substantive environmental protection statutes such as the Endangered Species Act). See also DOT v. Public Citizen, 541 U.S. 752, 768 (2004) (holding that NEPA's procedural requirements do not expand an administrative agency's authority to take action to protect the environment under other substantive statutes). Consequently, NEPA does not provide or

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[3] Nor, moreover, do the Intervenors provide any legal basis for their assertion that the NRC can "impose the no-action alternative if environmental impacts would be unacceptable and mitigation would be ineffective." Intervenors' Initial Br. at 6. As explained by PEF (PEF Initial Br. at 22-24) and the Staff (Staff Initial Br. at 22), NEPA permits agencies to conclude that a proposal can proceed regardless of the environmental impacts or the efficacy of mitigation described in an EIS. Further, as explained by the Staff (Staff Initial Br. at 22-25), the NRC does not have unlimited discretion under the Atomic Energy Act to deny a license application on the basis of generic concerns regarding the environmental impacts from a facility.

[4] Although the Intervenors imply that NEPA imposes a substantive obligation for agencies to demonstrate that the environmental impacts of a proposal "will be insignificant" (Intervenors' Initial Br. at 7), NEPA imposes no such "burden" on administrative agencies. As explained by PEF (PEF Initial Br. at 23-24), NEPA is a procedural statute that does not require administrative agencies to make any particular showing regarding the magnitude of the environmental impacts from a proposal. See, e.g., Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-96-25, 44 NRC 331, 342 (1996).

imply a legal basis for the NRC to impose a license condition requiring the implementation of environmental monitoring and mitigation measures discussed in an FEIS.

Nor, moreover, has the NRC adopted a different interpretation of its legal obligation or authority to impose license conditions requiring the implementation of mitigation measures discussed in an FEIS. As explained by the Staff (Staff Initial Br. at 11, 24-25), the NRC's ability to impose license conditions derives from the Atomic Energy Act and other statutes assigning the NRC substantive legal obligations and authority to assure (inter alia) public health and safety, the common defense and security, and to protect specific environmental interests identified by substantive statutes. Id. at 24-25 (citing 72 Fed. Reg. 57,427 (Oct. 9, 2007)). Indeed, the licensing decisions cited by the Intervenors are consistent with this understanding, as they either involve the imposition of license conditions pursuant to the NRC's obligation under the National Historic Preservation Act to protect historic areas from noise pollution (see Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-11, 17 NRC 413, 434-35 (1983)), or its obligation to assure radiological safety under the Atomic Energy Act (see Hydro Resources, Inc. (P.O. Box 777, Crownpoint, NM 87313), LBP-06-1, 63 NRC 41, 60 (2006)).[5] Those cases nowhere assert a broad obligation or authority for the NRC to impose license conditions requiring mitigation measures to protect generic environmental interests, much less the specific environmental interests protected by the monitoring and mitigation of groundwater withdrawals that is described in the LNP FEIS.

Lastly, even if the NRC had the legal basis to impose a license condition requiring implementation of the wetlands and groundwater monitoring and mitigation discussed in the FEIS, no such license condition is warranted here. As explained by PEF (PEF Initial Br. at 13-14), PEF will be legally bound to implement a monitoring and mitigation strategy approved by State and Federal

[5] Although the Intervenors cite a third decision (Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-20, 56 NRC 147, 158 (2002)), this citation seems to be in error, as this decision involved the denial of an environmental justice contention, not the imposition of a license condition for the mitigation of adverse environmental justice impacts as suggested by the Intervenors. See id. at 160.

regulatory entities with more relevant expertise in groundwater and wetlands monitoring than the NRC.[6] An NRC license condition imposing monitoring and mitigation requirements similar to those required under the LNP's COC and those anticipated under the LNP's forthcoming Section 404 permit would offer no additional benefit for the environmental interests at stake and could interfere with those other regulatory entities' efforts to employ adaptive management principles to protect environmental interests. See PEF Initial Br. at 14.

6. QUESTION 2g

Intervenors contend that there are no provisions in Florida law or in the LNP's COC requiring "immediate" action if wetland impacts occur as result of water withdrawals. Intervenors' Initial Br. at 8.

PEF concurs with the Staff's clarification concerning their use of the term "immediately." Staff Initial Br. at 11-12. As discussed in PEF's initial response to Question 2g, it is clear under the COC that PEF will be required to take action, subject to oversight and direction by the SWFWMD and the Florida Department of Environmental Planning ("FDEP"), to mitigate or avoid wetland impacts that may unexpectedly occur from water withdrawals. PEF Initial Br. at 10-15. Such action by PEF will ensure that any potential wetland impacts do not become LARGE.

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[6] The Intervenors assert that the Staff "implicitly question[ed]" the State's finding of reasonable assurance in the Final Order, because the FEIS states that the LNP "could affect . . . wetlands within a localized area." Intervenors' Initial Br. at 7. However, as set forth in footnote 1 to this Rebuttal Brief, Florida law's "reasonable assurance" standard does not demand an absolute guarantee that a proposed water use will be without any adverse effect on wetlands; rather, it requires a finding of a "substantial likelihood" that a proposed withdrawal will not cause the "unacceptable adverse impacts to environmental features" with which the performance standards are concerned. PEF313 at B4-1 (emphasis added). Consequently, the Staff's determination, after conducting its own independent analysis, that the benefits of the LNP groundwater use "most likely" outweighed the potential SMALL to MODERATE adverse environmental impacts from LNP groundwater withdrawals (NRC001 at 10-17 to 10-30) is entirely consistent with the Final Order's finding that PEF provided reasonable assurance that its proposed use of groundwater satisfied the substantive criteria in the SWFWMD's WUP Basis of Review. Additionally, the Intervenors are incorrect when they assert that the Staff's approach in the FEIS is "inconsistent with Florida law, which requires that mitigation measures must be proposed at the time of permitting." Intervenors' Initial Br. at 7. Because the Siting Board concluded that PEF satisfied the permitting criteria, there was no requirement under Florida law that PEF propose mitigation measures prior to permitting.

7. QUESTION 2h

In their response to Question 2h, the Intervenors argue that there is no State provision allowing enforcement of the four performance standards. Intervenors' Initial Br. at 8-9. The Intervenors again incorrectly cite to WUP Basis of Review Section 1.13 to suggest that the standard for revocation of a SWFWMD-issued WUP is not tied to the four performance standards.

As discussed above with respect to Question 2d, WUP Basis of Review Section 1.13 is not applicable to the LNP. PEF has provided appropriate legal citations in its Initial Brief (at pages 15-16) to demonstrate that the groundwater wells may only continue to be operated if the four performance standards are met during the LNP's operation.

B. QUESTION 3

Intervenors' response to Question 3 ignores both the detailed environmental analyses disclosed in the LNP FEIS and the plain language of the D.C. Circuit's ruling in New York v. NRC, 681 F.3d 471 (D.C. Cir. 2012).

First, Intervenors assert that the LNP FEIS "presumed [the] effectiveness of future regulatory actions," instead of performing "an adequate evaluation of the risks of environmental harm." Intervenors' Initial Br. at 10. This assertion is belied by even a cursory review of the LNP FEIS. As explained by both PEF and the Staff, the FEIS analysis contains detailed, quantitative estimates of potential environmental impacts due to groundwater withdrawals and a discussion of uncertainties surrounding those estimates, all supporting the FEIS's overall conclusion that SMALL – and in one case SMALL to MODERATE – impacts may occur from the LNP groundwater withdrawals. PEF Initial Br. at 18-19; Staff Initial Br. at 16-17. Consequently, Intervenors' request that the Staff "evaluate technical evidence about the potential for environmental harm to occur" (Intervenors' Initial Br. at 10) is without merit.

Second, Intervenors incorrectly assert that, under New York, "as a matter of law the NRC may not rely on" the presumed effectiveness of state agency regulatory programs. Intervenors' Initial Br. at

10. That is not the holding of New York. As PEF explained (PEF Initial Br. at 20), the D.C. Circuit in New York stated only that reliance on such programs is not "sufficient" to support a scientific finding of no significant environmental impact. 681 F.3d at 481 (emphasis added). The court nowhere stated that such reliance is impermissible. Here, the LNP FEIS disclosed predicted environmental impacts from groundwater withdrawals and discusses the State-imposed COC. Thus, New York does not call into question any aspect of the LNP FEIS.

C. QUESTION 4

In their response to Question 4, the Intervenors argue that NEPA allows the NRC to "oversee the effectiveness of committed mitigation measures," and that the NRC failed to take proper action to evaluate the "effectiveness" of mitigation, groundwater monitoring, or the contents of an Alternative Water Supply ("AWS") plan. Intervenors claim NEPA would be "toothless" without such a requirement. Intervenors' Initial Br. at 11.

Nothing in NEPA, however, authorizes the NRC to oversee whether the monitoring of LNP groundwater withdrawals and the mitigation (if necessary) of environmental impacts due to such withdrawals will be effective. As PEF noted in its Initial Brief (PEF Initial Br. at 21 n.8), the U.S. Supreme Court in Robertson held that:

> Because 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.

490 U.S. at 353 n.16 (emphasis added). The U.S. Supreme Court reached that holding even where mitigation was critical to prevent the violation of air quality standards and adverse impacts to a deer herd. PEF Initial Br. at 27-30 & n.13. Robertson merely requires that an EIS discuss steps that can be taken to mitigate adverse environmental consequences. Robertson, 490 U.S. at 351-53. The FEIS satisfies that requirement, disclosing the potential environmental impacts at issue in Contention 4A and identifying the monitoring and mitigation measures to be implemented by PEF in accordance with the State of Florida's

requirements. NRC001 at 4-70 to 4-71, 5-26 to 5-31, 5-46 to 5-47. As set forth in Robertson, ensuring that those measures are implemented and effective is outside the scope of NEPA.[7]

D. QUESTION 5

1. QUESTION 5a

In response to Question 5a, the Intervenors repeat their unsupported assertions that the NRC has the authority to "choose among alternatives for mitigating or avoiding adverse environmental impacts," or to "impose [mitigation-related] license conditions." Intervenors' Initial Br. at 12.

As discussed by PEF (PEF Initial Br. at 22-24) and the Staff (Staff Initial Br. at 24-26), NEPA is a procedural statute that cannot authorize or obligate the NRC to deny or condition a license to protect generic environmental interests. Moreover, as discussed above with respect to Question 2f, the NRC does not have unlimited discretion to deny or condition licenses because the Atomic Energy Act in fact limits the NRC's discretion to deny a license application, as it demands issuance of a license whenever an applicant satisfies the NRC's statutory and regulatory requirements. Staff Initial Br. at 23-25. Further, the NRC's authority to impose environmental license conditions must be predicated on a statutory grant of substantive authority to protect a particular environmental interest. See supra at 6-9. See also Staff Initial Br. at 21-26. Here, the Intervenors have identified no statutory authority or regulatory requirement on which the NRC could predicate a denial of the LNP's license application or impose a license condition to require the monitoring and mitigation of groundwater withdrawals discussed in the FEIS.

Additionally, even if the NRC had the authority to deny or condition the LNP's license to protect the environmental interests addressed by the monitoring and mitigation discussed in the FEIS, it would

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[7] The Intervenors cite Morris v. NRC, 598 F.3d 677 (10th Cir. 2010), to support their argument. In the discussion cited by the Intervenors, the Morris court found that the FEIS in that case adequately considered the potential impacts on groundwater quality and discussed possible mitigation measures. Morris, 598 F.3d at 704-05. Similarly, the LNP FEIS adequately identifies potential adverse impacts from groundwater withdrawals, and discusses how such impacts will be monitored and mitigated (if necessary). The FEIS concludes that "if adverse environmental effects on wetlands and surface water are predicted or detected through wellfield [Aquifer Performance Testing], revised groundwater modeling, or environmental modeling of wetlands, PEF would be required either to mitigate the adverse impacts or implement an approved alterative water-supply project." NRC001 at 5-30.

have no reason to exercise such authority here. As explained by PEF (PEF Initial Br. at 24), denial of the license application would be inappropriate, as the Staff has determined that benefits of the LNP would "most likely" outweigh its adverse environmental impacts – notwithstanding the uncertainty that PEF's monitoring and mitigation efforts are intended to address. Further, PEF's monitoring and mitigation program will be subject to the oversight of State and Federal regulatory entities that have greater expertise in groundwater and wetlands monitoring than the NRC. PEF Initial Br. at 24.

2. QUESTION 5b

The Intervenors' response to Question 5b overstates the circumstances whereby the NRC has been willing to convert voluntary commitments of NRC licensees into binding obligations or license conditions.

The Intervenors' suggestion that all licensee commitments are legally binding and enforceable is inconsistent with NRC policy and unsupported by Commission precedent. As explained by PEF (PEF Initial Br. at 25-26) and the Staff (Staff Initial Br. at 27-28), NRC policy recognizes that licensee voluntary commitments are not per se legal obligations enforceable by the NRC, but can be converted into enforceable legal obligations by NRC action.

Indeed, the Commission decision cited by the Intervenors in support of their suggestion that all licensee commitments are legally binding (see Intervenors' Initial Br. at 12 (citing Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-09, 53 NRC 232 (2001)) is in fact consistent with this understanding of NRC policy. In Private Fuel Storage, the Commission nowhere states or implies that all licensee commitments are legally obligatory and enforceable; rather, the Commission identifies several means – specifically the imposition of a license condition or the imposition of a requirement in NRC regulations – mentioned in NRC policy as paths for the conversion of a voluntary commitment into a legal obligation. See id. at 234-35. Ultimately, the Commission determined that the particular commitment at issue in Private Fuel Storage was legally binding because it had been

made pursuant to a regulatory requirement for licensees to submit NRC-approved emergency plans. See id. at 235-36.

Similarly, Private Fuel Storage provides little support for the Intervenors' suggestion that NRC precedent establishes a presumption in favor of incorporating voluntary commitments within license conditions. In fact, the Commission declined to impose a license condition in the Private Fuel Storage decision. Id. at 236. Further, as PEF has explained (PEF Initial Br. at 14), the Commission has elsewhere expressed its reluctance to impose license conditions where the complexity of the issues involved placed a premium on regulatory flexibility. See, e.g., Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), CLI-12-02, 75 NRC ___ (slip op. at 83) (Feb. 9, 2012).

NRC policy echoes this approach, as it emphasizes the use of alternatives to license conditions to promote regulatory flexibility. See NRC Office of Nuclear Reactor Regulation ("NRR"), LIC-105 Rev. 3, "NRR Office Instruction: Managing Regulatory Commitments Made by Licensees to the NRC" at 5 (Mar. 19, 2009), available at MLS Accession No. ML090640415. Because the monitoring and mitigation discussed within the FEIS involves the use of adaptive management strategies by both State and Federal regulatory entities (PEF Initial Br. at 14), the emphasis on regulatory flexibility within NRC precedent and policy cautions against the imposition of a license condition here.[8]

E. QUESTION 6

In their response to Question 6, Intervenors acknowledge that, under Robertson, even where mitigation measures are appropriate to reduce environmental impacts, there is no requirement under NEPA that agencies ensure mitigation measures will be implemented. Intervenors' Initial Br. at 13. See also PEF Initial Br. at 29-30. Citing their answer to Question 2f, however, Intervenors also argue that the

[8] The Intervenors suggest that "practically" as well as "legally," the NRC should impose a license condition requiring greater specificity in PEF's monitoring and mitigation program to facilitate enforcement by these other regulatory entities. Intervenors' Initial Br. at 12. Given that these other State and Federal regulatory entities have both greater expertise than the NRC in environmental monitoring and mitigation of groundwater withdrawals, as well as approval authority over PEF's program, they are better positioned than the Board to identify for themselves the level of detail needed for their enforcement efforts. Further, as discussed infra and in the Initial Briefs of PEF (PEF Initial Br. at 31-34) and the Staff (Staff Initial Br. at 31-33), the monitoring and mitigation program reviewed in the FEIS has been described with sufficient specificity to satisfy NEPA's legal requirements.

NRC retains the discretion to require mitigation measures as license conditions. Intervenors' Initial Br. at 13. That argument is addressed in PEF's discussion of Questions 2f and 5a in this Rebuttal Brief.

Intervenors also claim that, "if the NRC would not find the project acceptable without the mitigation measures, it must ensure that the essential measures are carried out." Intervenors' Initial Br. at 13. Intervenors provide no citation or other legal authority for that principle. In addition, nothing in the Robertson decision implies that the U.S. Supreme Court would have required the Forest Service to ensure that mitigation measures were implemented if the Forest Service believed the project at issue would have been unacceptable without mitigation measures. Moreover, even if there were such a principle, there is no reason for the Board to find it applicable here, as there is no indication that the Staff would have found the LNP unacceptable without the obligatory monitoring and mitigation measures discussed in the FEIS.

Additionally, contrary to the Intervenors' claims (Intervenors' Initial Br. at 14), the Staff did take a "hard look" at monitoring and mitigation measures based on sufficient information. As both PEF and the Staff point out in their Initial Briefs, the FEIS relied (in part) on monitoring and mitigation measures that are more fully developed, and more likely to be implemented, than the "vague" mitigation measures which the Supreme Court found sufficient in Robertson. PEF Initial Br. at 32-33; Staff Initial Br. at 32-33. For example, the COC, which the Staff reviewed in preparing the FEIS, very specifically describe the mandated monitoring and mitigation plans. PEF005 at 42-46. Accordingly, there is no basis for the Board to find that the Staff lacked the information necessary to satisfy its obligations under NEPA.

F. QUESTION 7

The Intervenors' response to Question 7 ignores the Supreme Court's holding in Robertson, and, similar to the Intervenors' response to Question 6, fails to demonstrate that the NRC lacked adequate information regarding monitoring and mitigation measures to satisfy NEPA's "hard look" requirement.

The Intervenors' claim that NEPA requires, "as a practical matter" (Intervenors' Initial Br. at 14), evaluation of monitoring and mitigation measures that have been finalized by other regulatory entities,

has no basis in Robertson or NRC precedent. Indeed, as discussed by both PEF (PEF Initial Br. at 32) and the Staff (Staff Initial Br. at 32), the Court determined in Robertson that a "fair evaluation" of mitigation measures could involve the discussion of a conceptual outline of mitigation approaches, rather than a fully-articulated and adopted mitigation plan. See Robertson, 490 U.S. at 351-53. Nor, moreover, has NRC precedent established "as a practical matter" a more demanding standard in NRC licensing proceedings. The Commission has explicitly held that its evaluation of mitigation within an FEIS requires neither a "complete mitigation plan", nor a "detailed explanation of specific measures which will be employed". Hydro Resources, Inc. (P.O. Box 777, Crownpoint, NM 87313), CLI-06-29, 64 NRC 417, 426-27 (2006) (footnotes omitted).

Additionally, the Intervenors have failed to demonstrate why a more demanding standard was necessary as a practical matter for the "fair evaluation" of the particular monitoring and mitigation measures identified in the FEIS. As explained by PEF (PEF Initial Br. at 32-34) and the Staff (Staff Initial Br. at 32-33), the Staff had access to more specific and more concrete information regarding monitoring and mitigation than the Forest Service did in Robertson. Further, as discussed by PEF (PEF Initial Br. at 33-34), the information regarding PEF's monitoring and mitigation evaluated in the FEIS was the best information available at the time the FEIS was prepared, given that the final design and implementation of monitoring and mitigation measures cannot — as a practical matter — take place before the NRC licenses the LNP. For these reasons, there is no legal or practical reason why the FEIS's discussion of monitoring and mitigation needed to await final articulation of monitoring and mitigation measures, as the Intervenors claim in their response to Question 7.

G. QUESTION 8

In their response to Question 8, the Intervenors concede that the NRC may place "great weight" on the judgment of a State agency, where that judgment resulted from a "rigorous public hearing where testimony from all sides was taken." Intervenors' Initial Br. at 15. As PEF and the Staff have pointed out (PEF Initial Br. at 37; Staff Initial Br. at 35), such a rigorous public hearing did take place in this case.

The State of Florida site certification proceeding involved 28 State agencies, 8 days of public hearing, receipt of dozens of hours of public comment, and dozens of exhibits. PEF Initial Br. at 37. Thus, under the Intervenors' own argument, the Staff was entitled to attribute significant weight to the State of Florida's Final Order and the COC.

Respectfully Submitted,

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October 12, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Progress Energy Florida, Inc.'s Rebuttal Brief Regarding Legal Issues In The Contested Hearing For Contention 4A, dated October 12, 2012, was provided to the NRC's Electronic Information Exchange for service to those individuals on the service list in this proceeding as of this 12th day of October 2012.

/Signed electronically by Robert B. Ross/
Robert B. Ross