

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

Before Administrative Judges:

Alex S. Karlin, Chairman
Dr. Anthony J. Baratta
Dr. Randall J. Charbeneau

In the Matter of

PROGRESS ENERGY FLORIDA, INC.

(Levy County Nuclear Power Plant, Units 1 and 2)

Docket Nos. 52-029-COL, 52-030-COL

ASLBP No. 09-879-04-COL-BD01

September 21, 2012

ORDER

(Regarding the Briefing of Certain Legal Issues)

The evidentiary hearing in this proceeding is scheduled to commence on October 31, 2012, in Bronson, Florida. In preparation for that hearing, and in compliance with 10 C.F.R. § 2.1207 and our initial scheduling order (ISO), LBP-09-22, 70 NRC 640, the parties have submitted their respective initial and rebuttal statements of position, pre-filed written testimony, and exhibits. Our initial review of these submissions revealed several legal issues where briefing by counsel for the parties may materially assist the Board. Accordingly, we request that counsel for the parties (including the NRC Staff) submit initial and rebuttal legal briefs on the following issues.

1. Southwest Florida Water Management District (SWFWMD) Prohibition

The Final Environmental Impact Statement (FEIS) includes the following statement: "In accordance with SWFWMD's review criteria, groundwater withdrawal cannot cause

unacceptable adverse impacts on wetlands or other surface waters.”¹

Question 1 (NRC²): What does the foregoing statement mean? That unacceptable adverse impacts caused by groundwater withdrawal are legally prohibited? Impossible? Not reasonably foreseeable? Please explain.

2. SWFWMD Review Criteria

The FEIS includes the following statement:

The SWFWMD performance review standards applicable to the Environmental Monitoring Plan, upon which potential impacts on wetlands would be judged, include the following (as summarized from PEF 2009g):

- 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.

Considering the uncertainty associated with the existing groundwater modeling for the LNP site, operational impacts from groundwater withdrawal to wetlands on and around the LNP site could affect the hydrological and hence ecological properties of wetlands within a localized area (see Table 5-2 and Figure 5-5). However, if adverse environmental impacts on wetlands and surface waters are predicted or detected through wellfield APT, revised groundwater modeling, or environmental monitoring of wetlands, PEF would be required either to mitigate the adverse impacts or implement and approved alternative water-supply project (FDEP 2011a).

¹ Div. of New Reactor Licensing, Office of New Reactors, Nuclear Regulatory Commission, Environmental Impact Statement for Combined Licenses (COLs) for Levy Nuclear Plant Units 1 and 2, Final Report, NUREG-1941, at 5-30 (Apr. 2012) (FEIS) (emphasis added).

² This designates that the NRC should brief this question.

FEIS at 5-30.

Question 2a (NRC/All³): 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).⁴

Question 2b (All⁵): 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.⁶

Question 2c (All): 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

³ This designates that NRC should brief this issue and other parties may brief it.

⁴ The FEIS cites to a reference document identified as “PEF 2009g.” FEIS 5-30. The FEIS goes on to state that PEF2009g is a letter from Garry Miller to NRC, and is available in the NRC’s Agencywide Documents Access and Management System (ADAMS) at Accession No. ML092240661. See id. at 5-147. However, Accession No. ML092240661 leads to an electronic package of 25 distinct documents covering over 150 pages. The letter from Mr. Miller appears to be a part of this package, available at Accession No. ML092240658. However, this letter is a 30-page document that does not appear to support the statement made at FEIS 5-30. It is unclear to the Board whether the FEIS is citing to this letter, another document within the package, or to the contents of the package as a whole. In addition to the legal citations requested above, the NRC Staff should provide us with a more precise citation to PEF 2009g. See Nextera Energy Seabrook, LLC (Seabrook Station, Unit 1), CLI-12-05, 75 NRC __, __ (slip op. at 40) (Mar. 8, 2012) (explaining that, when a party cites to a lengthy document it should cite to a specific page or section because neither the Commission nor the Board “should be expected to sift through [the lengthy document] in search of asserted factual support that [the party] has not specified”).

⁵ This designates that all parties, including NRC, should brief this issue.

⁶ For example, are the following provisions the source of such conditions precedent: 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)?

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.

Question 2d (NRC/All): 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.

Question 2e (All): 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?

Question 2f (NRC/All): 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.

Question 2g (NRC/All): 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.”⁷ 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

⁷ Rebuttal Testimony of Ann L. Miracle, Michael T. Masnik, J. Peyton Doub, Lara M. Aston, Dan O. Barnhurst, Lance W. Vail, Rajiv Prasad, Vince R. Vermeul, Kevin R. Quinlan, Larry K. Berg, And Gerry L. Stirewalt Concerning Contention 4a, at 46 [hereinafter Staff Rebuttal Testimony].

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.

Question 2h (NRC/All): 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 if the first bullet (“[w]et season water levels shall not deviate from their normal range”) is not met.

Question 2i (NRC): 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.

3. New York v. Nuclear Regulatory Commission

In New York v. Nuclear Regulatory Commission, the U.S. Court of Appeals for the D.C. Circuit rejected NRC’s argument that its environmental assessment did not need to deal with the potential impacts of leaks from spent fuel pools because, NRC said, its monitoring and regulatory compliance program would prevent such leaks. 681 F.3d 471, 481 (D.C. Cir. 2012).

The court stated:

That argument . . . amounts to a conclusion that leaks will not occur because the NRC is “on duty.” With full credit to the Commission’s considerable enforcement and inspection efforts, merely pointing to the compliance program is in no way sufficient to support a scientific finding that spent-fuel pools will not cause a significant environmental impact during the extended storage period.

Id.

Question 3 (All): Please discuss whether and how this holding applies to this case. Are the FEIS conclusions based on the proposition that the SWFWMD is “on duty”? Please distinguish.

4. CEQ Guidance on Use of Mitigation

The U.S. Council on Environmental Quality (CEQ) has issued guidance on the appropriate use of mitigation and monitoring under NEPA. See 76 Fed. Reg. 3843 (Jan. 21, 2011). The CEQ Guidance acknowledges “that NEPA itself does not create a general substantive duty on Federal agencies to mitigate adverse environmental effects,” id. at 3846, but recommends that if an agency relies upon mitigation measures in its FEIS then it should take steps to ensure that mitigation commitments are implemented, monitor the effectiveness of such mitigation commitments, and be able to remedy failed mitigation. Id. at 3847. The CEQ Guidance states, “For agency decisions based on an EIS, the CEQ Regulations explicitly require that ‘a monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.’” Id. at 3849 (citing 40 C.F.R. § 1505.2(c) (2012)). The CEQ Guidance makes clear that this applies to permitting actions: “When an agency . . . permits, or otherwise approves actions, it should also exercise its available authorities to ensure implementation of any mitigation commitments by including appropriate conditions on the relevant grants, permits, or approvals.” Id.

Question 4 (All): 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.

5. NRC Legal Authority

Question 5a (All): 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.

Question 5b (All): 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?

6. Legal Status of Mitigation Plans

PEF cites Citizens Against Burlington, Inc. v. Busey, wherein the U.S. Court of Appeals for the D.C. Circuit stated, “NEPA not only does not require agencies to discuss any particular mitigation plans that they might put into place, it does not require agencies—or third parties—to effect any.”⁸ Meanwhile, the Supreme Court has stated that “[t]here is a fundamental distinction . . . 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.” Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 352 (1989). In this case, the FEIS conclusion (that the environmental impacts will be SMALL to MODERATE) appears to be

⁸ [PEF’s] Rebuttal Statement of Position in the Contested Hearing for Contention 4A (July 31, 2012) at 25 (citing 938 F.2d 190, 206 (D.C. Cir 1991)).

expressly based on the implementation and success of certain mitigation plans. For example, in its Summary of Impacts on Terrestrial Resources, the NRC concludes:

Based on the review team's independent evaluation of the LNP project, including . . . 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. . . . The review team believes 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

FEIS at 5-47 (emphasis added).

Question 6 (All): 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 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?

7. Reliance on Inchoate Mitigation Plans

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.

Question 7 (All): How does this decision and principle apply to this case?

8. Reliance on State and Local Permit Conditions or Requirements

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.

Question 8 (All): How do these decisions and principles apply to this case?

The Board recognizes that the legal analysis and response to some of these questions may overlap to some extent. A general discussion of related principles is permissible, provided that the briefs also provide, at a minimum, a separate and succinct answer, with citations, to each question. We also note that the foregoing questions raise issues that are primarily, if not purely, legal. Thus, additional evidentiary submissions (except for copies of cited laws or regulations) will not be entertained at this time.

Initial briefs/answers should be submitted within fourteen (14) days of this order.

Responsive briefs are due seven (7) days thereafter.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 21, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing ORDER (REGARDING THE BRIEFING OF CERTAIN LEGAL ISSUES) have been served upon the following persons by Electronic Information Exchange.

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ORDER (REGARDING THE BRIEFING OF CERTAIN LEGAL ISSUES)

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[Original signed by Nancy Greathead]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 21st day of September 2012