

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))	

**INTERVENORS' MOTION FOR LEAVE TO FILE A NEW CONTENTION
CONCERNING TEMPORARY STORAGE AND ULTIMATE DISPOSAL OF SPENT
REACTOR FUEL AT LEVY NUCLEAR POWER PLANT**

I. INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.309(f)(1) and 2.309(f)(2), Nuclear Information and Resource Service and the Ecology Party of Florida (“Intervenors” seek leave to file a new contention which challenges the failure of the U.S. Nuclear Regulatory Commission’s Environmental Impact Statement (“EIS”) for the proposed Levy nuclear power plant (“LNP”) to address the environmental impacts of spent fuel pool leakage and fires as well as the environmental impacts that may occur if a spent fuel repository does not become available. The contention is based on the United States Court of Appeals for the District of Columbia Circuit’s recent decision in *State of New York v. NRC*, No. 11-1045 (June 8, 2012), which invalidated the Nuclear Regulatory Commission’s (“NRC”) Waste Confidence Decision Update (75 Fed. Reg. 81,037 (Dec. 23, 2010)) (“WCD”) and the NRC’s final rule regarding Consideration of Environmental Impacts of Spent Fuel After Cessation of Reactor Operation (75 Fed. Reg. 81,032 (Dec. 23, 2010)) (“Temporary Storage Rule” or “TSR”). *State of New York* vacated the generic findings in 10 C.F.R. § 51.23(a) regarding the safety and environmental impacts of spent fuel storage. As a result, the NRC no longer has any legal basis for Section 51.23(b), which relies on those findings

to exempt both the agency staff and license applicants from addressing long-term spent fuel storage impacts in individual licensing proceedings.

Intervenors recognize that because the mandate has not yet issued in *State of New York*, this contention may be premature. Nevertheless, Intervenors are submitting the contention within 30 days of becoming aware of the court's ruling, in light of Commission precedents judging the timeliness of motions and contentions according to when petitioners became aware of a decision's potential effect on their interests. *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 386 (2002). If the Atomic Safety and Licensing Board or Commission determines that this contention is premature, Intervenors request that consideration of the contention be held in abeyance pending issuance of the mandate.

II. FACTUAL BACKGROUND

In 1984, the NRC issued its first WCD, making findings regarding the safety of spent fuel disposal and the safety and environmental impacts of spent fuel storage. Over the several decades that have passed since then, the NRC has updated the WCD. The latest update was issued in December 2010. On June 8, 2012, the U.S. Court of Appeals for the D.C. Circuit took review of the NRC's 2010 WCD Update and TSR and vacated those rules in their entirety. In the course of reviewing the WCD Update, the court found that the WCD is a "major federal action" under the National Environmental Policy Act ("NEPA"), therefore requiring either a finding of no significant impact ("FONSI") or an environmental impact statement ("EIS"). *Id.*, slip op. at 8. The court also found it was "eminently clear that the WCD will be used to enable licensing decisions based on its findings" because the WCD "renders uncontestable general conclusions about the environmental effect of plant licensure that will apply in every licensing

decision.” *Id.*, slip op. at 9 (citing 10 C.F.R. § 51.23(b)).

With respect to the WCD’s conclusions regarding spent fuel disposal, the court observed that the NRC has “no long-term plan other than hoping for a geologic repository” and that spent reactor fuel “will seemingly be stored on site at nuclear plants on a permanent basis” if the government “continues to fail in its quest” to site a permanent repository. *Id.*, slip op. at 13. Thus, the court concluded that the WCD “must be vacated” with respect to its conclusion in Finding 2 that a suitable spent fuel repository will be available “when necessary.” *Id.*, slip op. at 11. In order to comply with NEPA, the court found that the NRC must “examine the environmental effects of failing to establish a repository.” *Id.*, slip op. at 12.

With respect to the TSR’s conclusions regarding the environmental impacts of temporary storage of spent reactor fuel at reactor sites, the court concluded that the NRC’s environmental assessment (“EA”) and FONSI issued as part of the TSR “are not supported by substantial evidence on the record” in two respects. First, the NRC had reached a conclusion that the environmental impacts of spent fuel pool leaks will be insignificant, based on an evaluation of past leakage. The court concluded that the past incidence of leaks was not an adequate predictor of leakage thirty years hence, and therefore ordered the NRC to examine the risks of spent fuel pool leaks “in a forward-looking fashion.” *Id.*, slip op. at 14. In addition, the court found that the NRC’s analysis of the environmental impacts of pool fires was deficient because it examined only the probability of spent fuel pool fires and not their consequences. *Id.*, slip op. at 18-19. “Depending on the weighing of the probability and the consequences,” the court observed, “an EIS may or may not be required.” *Id.*, slip op. at 19.

In remanding the WCD Update and the TSR to the NRC, the court purposely did not express an opinion regarding whether an EIS would be required or an EA would be sufficient.

Instead, it left that determination up to the discretion of the NRC. *Id.*, slip op. at 12, 20.

III. CONTENTION

A. Statement of the Contention

The EIS for the proposed Levy nuclear power plant does not satisfy NEPA because it does not include a discussion of the environmental impacts of spent fuel storage after cessation of operation, including the impacts of spent fuel pool leakage, spent fuel pool fires, and failing to establish a spent fuel repository, as required by the U.S. Court of Appeals for the D.C. Circuit in *State of New York v. NRC*, No. 11-1045 (June 8, 2012). Therefore, unless and until the NRC conducts such an analysis, no COL may be issued.

B. The Contention Satisfies the NRC's Admissibility Requirements in 10 C.F.R. § 2.309(f)(1)

1. Brief Summary of the Basis for the Contention

The contention is based on the United States Court of Appeals for the District of Columbia Circuit's decision in *State of New York v. NRC*, which invalidated the NRC's generic findings in 10 C.F.R. § 51.23(a) regarding the safety and environmental impacts of spent fuel storage after cessation of reactor operation with respect to spent fuel pool leakage, pool fires, and the environmental impacts of failing to establish a repository. As a result, the NRC no longer has any legal basis for Section 51.23(b), which relies on those findings to exempt both the agency staff and license applicants from addressing spent fuel storage impacts in individual licensing proceedings. To the extent that the Levy EIS addresses spent fuel storage impacts, it does not address the concerns raised by the Court in *State of New York*. Therefore, before the NRC may issue a combined license ("COL") for Levy, those impacts must be addressed.

Intervenors do not currently take a position on the question of whether the environmental

impacts of post-operational spent fuel storage should be discussed in an individual EIS or environmental assessment for this facility or a generic EIS or environmental assessment. That question must be decided by the NRC in the first instance. *Baltimore Gas and Electric Co. v. NRDC*, 462 U.S. 87 (1983). Intervenors reserve the right to challenge the adequacy of any generic analysis the NRC may prepare in the future to address the site-specific environmental conditions at the Levy site. The current circumstances, however, are such that the NRC has no valid environmental analysis, either generic or site-specific, on which to base the issuance of a COL for this facility.

2. The Contention is Within the Scope of the Proceeding

The contention is within the scope of this licensing proceeding because it seeks to ensure that the NRC complies with the NEPA before issuing a COL for Levy. There is no doubt that the environmental impacts of spent fuel storage must be addressed in all NRC reactor licensing decisions. *State of New York*, slip op. at 8 (holding that the WCD is a “predicate” to every licensing decision); *Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979).

3. The Issues Raised Are Material to the Findings that the NRC Must Make to Support the Action that is Involved in this Proceeding

The issues raised in this contention are material to the findings the NRC must make to support the action that is involved in this proceeding, in that the NRC must render findings pursuant to NEPA covering all potentially significant environmental impacts. *See* discussion above in subsection (2). As such, in the absence of 10 C.F.R. § 51.23(a), it is clear that this contention addresses a material omission in the Staff’s environmental review pursuant to NEPA.

4. Concise Statement of Facts of Expert Opinion Support the Contention

This contention is based primarily on law rather than facts. Intervenors have adequately

supported the contention by citing *State of New York* and discussing its legal effect on this proceeding. Intervenor also rely on the undisputed fact that the NRC has taken no steps to cure the deficiencies in the basis for 10 C.F.R. § 51.23(a) that the Court identified in *State of New York*.

5. A Genuine Dispute Exists with the Applicant on a Material Issue of Law or Fact.

Intervenor has a genuine dispute with the applicant, Progress Energy Florida, Inc. (“PEF”) regarding the legal adequacy of the environmental analysis on which PEF relies in seeking a COL for Levy. Unless or until the NRC cures the deficiencies identified in *State of New York* or PEF withdraws its application, this dispute will remain alive.

IV. THE CONTENTION IS TIMELY PURSUANT TO 10 C.F.R. § 2.309(f)(2).

The contention meets the timeliness requirements of 10 C.F.R. § 2.309(f)(2), which call for a showing that:

- (i) The information upon which the amended or new contention is based was not previously available;
- (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
- (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

Id.

Intervenor satisfies all three prongs of this test. First, the information on which the contention is based -- *i.e.*, the invalidity of 10 C.F.R. § 51.23(b) and the findings on which it is based -- is new and materially different from previously available information. Prior to June 8, 2012, 10 C.F.R. § 51.23 was presumptively valid. Subsequent to the issuance of *State of New York* by the U.S. Court of Appeals, the NRC no longer has a lawful basis for relying on that

regulation to exempt itself or license applicants from considering the environmental impacts of post-operational spent fuel storage in the environmental analyses for individual reactor license applications. By the same token, the generic analyses in the WCD and the TSR, on which the NRC relied for all of its reactor licensing decisions, are no longer sufficient to support the issuance of a license. Therefore the NRC lacks an adequate legal or factual basis to issue a COL for the proposed Levy reactors.

Finally, the contention is timely because it has been submitted within 30 days of June 8, 2012, the date the U.S. Court of Appeals issued *State of New York*.

V. CONCLUSION

For the reasons stated, Intervenors respectfully request that the Atomic Safety and Licensing Board grant leave to file their contention.

Respectfully submitted,

Electronically signed by

Diane Curran

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July 9, 2012

**CERTIFICATION REGARDING
CONSULTATION PURSUANT TO 10 C.F.R. § 2.323**

I certify that on July 7, 2012, I contacted counsel for PEF and the NRC Staff to seek their consent to this motion. Counsel for PEF stated that PEF will oppose the motion. Counsel for the NRC Staff stated that the Staff does not oppose the filing of the motion, but that based on the representations in Intervenor's counsel's e-mail, the Staff does not have enough information to take a position on the admissibility of the contention. The Staff will respond to the contention when it is filed.

Electronically signed by

Diane Curran

Certificate of Service

I hereby certify that on July 9, 2012, I posted copies of the foregoing Intervenor's Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Spent Reactor Fuel at Watts Bar Unit 2. It is my understanding that the following persons and/or offices were served as a result:

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

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Signed [Electronically] by
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