

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	Docket Nos. 52-029-COL, 52-030-COL
PROGRESS ENERGY FLORIDA, INC.	ASLBP No. 09-879-04-COL-BD01
(Levy County Nuclear Power Plant, Units 1 and 2)	September 6, 2012

ORDER

(Granting in Part and Denying in Part Motion in Limine and Motion to Strike)

On August 10, 2012, pursuant to section II.J.3 of our Initial Scheduling Order (ISO), LBP-09-22, 70 NRC 640, 655 (2009), the NRC Staff and Progress Energy Florida, Inc. (PEF) filed motions to strike portions of the Intervenor's initial and rebuttal statements of position and pre-filed testimony.¹ Both the NRC Staff and PEF claim that Intervenor's arguments regarding alternative water supplies are outside the scope of Contention 4A, and should be stricken. NRC Motion at 3-8; PEF Motion at 4-6. The NRC Staff raises two additional arguments. First, the Staff seeks to strike the Intervenor's argument that the Final Environmental Impact Statement (FEIS) failed to adequately address certain comments on the Draft Environmental Impact Statement (DEIS). NRC Motion at 9. Second, the NRC Staff objects to the Intervenor's complaints about the lack of opportunity to file public comments on PEF's Environmental

¹ See NRC Staff Motion in Limine to Exclude Portions of the Parties' Testimony and Statements of Position (Aug. 10, 2012) [NRC Motion]; [PEF's] Motion to Strike Intervenor's Arguments and Testimony that Are Outside the Scope of the Contested Hearing and that Raise a New, Untimely Contention (Aug. 10, 2012) [PEF Motion].

Monitoring Plan. NRC Motion at 10. Intervenor filed an answer in opposition to these motions on August 22, 2012.²

For the reasons stated below, these motions are granted in part and denied in part.

I. APPLICABLE LEGAL STANDARD

NRC regulations provide that “[o]nly relevant, material, and reliable evidence which is not unduly repetitious will be admitted” in an evidentiary hearing. 10 C.F.R. § 2.337(a). A licensing board may “strike any portion of a written presentation . . . that is irrelevant, immaterial, unreliable, duplicative or cumulative.” 10 C.F.R. § 2.319(d). The Commission has also stated that “a licensing board normally has considerable discretion in making evidentiary rulings.”³

II. ANALYSIS AND RULING

A. Adequacy of NRC Response to Dr. Bacchus’s Comments on the DEIS

We turn first to the NRC Staff’s request that we strike the Intervenor’s argument that the FEIS failed to adequately address certain comments on the DEIS. This portion of the motion arises from the Intervenor’s Initial Statement of Position which notes that one of their witnesses, Dr. Sydney Bacchus, filed a number of comments on the DEIS and argues that the responses to these comments in the FEIS were “insufficient to comply with NEPA.”⁴ The Intervenor says the FEIS is inadequate because the NRC Staff “did not . . . undertake to gather any additional data or to cure the deficiencies” pointed out by Dr. Bacchus in her comments. Id. In conjunction with this argument, the Intervenor filed written testimony by Dr. Bacchus where she stated that “the

² See Intervenor’s Opposition to Motions to Strike Testimony and Arguments Regarding Contention 4 (Aug. 22, 2012) [Intervenor’s Answer].

³ Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), CLI-04-21, 60 NRC 21, 27 (2004).

⁴ Intervenor’s Initial Written Statement of Position Regarding Contention 4 (June 26, 2012) at 14 [Intervenor’s Initial Statement].

FEIS has not resolved the concerns raised in my affidavits and comments.”⁵ The NRC Staff moved to strike this portion of the Intervenor’s Initial Statement and the Bacchus testimony, arguing that “because the Intervenor’s never raised this assertion in their original contention or in Contention 4A, they are foreclosed from raising it now.” NRC Motion at 9.

We agree. Intervenor’s complaints about the adequacy of the FEIS’s responses to Dr. Bacchus’s comments on the DEIS are entirely new. Nothing in Contention C4A remotely suggests any such complaint. This is necessarily so, given that Contention 4A was admitted in 2011,⁶ long before the FEIS (and its allegedly inadequate responses to the comments on the DEIS) was issued.⁷ As we discussed in our pre-hearing conference on January 12, 2012, any claim that the FEIS contained a new defect needed to be asserted in a new contention. Tr. at 857-58. However, the Intervenor’s failed to file a new contention and instead attempted to stretch the old one to cover this new issue. This is not acceptable.

Accordingly, the NRC Staff’s motion is granted with regard to the Intervenor’s arguments on Dr. Bacchus’s DEIS comments. The portions of the Intervenor’s Initial Statement relating to this topic, and any Rebuttal Statements responding thereto, will be disregarded. Meanwhile, the portions of Dr. Bacchus’s prefiled written testimony relating to this topic, listed in Appendix A to this ruling, are stricken.

⁵ Initial Pre-Filed Testimony of Dr. Sydney Bacchus in Support of Contention C-4 Regarding Environmental Impacts of Levy Units 1 and 2 on Water Resources and Ecology (June 26, 2012).

⁶ Licensing Board Memorandum and Order (Admitting Contention 4A) (Feb. 2, 2011) at 22 [Order Admitting C4A].

⁷ See Division of New Reactor Licensing, Office of New Reactors, Environmental Impact Statement for Combined Licenses (COLs) for Levy Nuclear Plant Units 1 and 2, Final Report, NUREG-1941, Vols. 1, 2, & 3 (Apr. 27, 2012) [FEIS].

B. Lack of Public Circulation of PEF's Environmental Monitoring Plan

We turn next to the portion of the NRC Staff's motion requesting that we strike the Intervenor's allegations that the FEIS violates the National Environmental Policy Act (NEPA) because the FEIS rests, in part, on a PEF Environmental Management Plan (EMP) that was never circulated for public comment.⁸ In this regard, the Intervenor states that "no EMP was submitted on the public record until PEF submitted it to the [Board] as an exhibit to its testimony." Id. at 26. Dr. Bacchus expresses this same concern in her rebuttal testimony, where she states that "the EMP should have been circulated for public comment in a [DEIS]."⁹

The NRC Staff argues that "[i]f the Intervenor thought that the EMP should have been circulated for public comment . . . they should have raised that concern in a new or amended contention. Contention 4A includes no claims regarding public comments on the EMP, or any other document." NRC Motion at 10.

Again, the NRC Staff is correct. Intervenor's argument regarding the lack of public circulation of the EMP is outside the scope of Contention 4A. Intervenor has not sought to admit a new contention on this subject or to amend Contention 4A to bring this subject within its scope. Therefore, we grant the NRC Staff's motion to strike as it relates to Intervenor's argument that the EMP should have been circulated for public comment. We will disregard those portions of Intervenor's Rebuttal Statement that discuss this issue, and we strike those portions of Dr. Bacchus's rebuttal testimony that discuss this issue. See Appendix A.

⁸ See Intervenor's Response Statement of Position Regarding Contention 4 (July 31, 2012) at 25-26 [Intervenor's Rebuttal Statement].

⁹ Rebuttal Testimony of Dr. Sydney Bacchus in Support of Contention C-4 Regarding Environmental Impacts of Levy Units 1 and 2 on Water Resources and Hydroecology (July 31, 2012) at 5.

C. Alternative Water Supplies

Finally, we turn to the assertion, by both PEF and the NRC Staff, that the Intervenor's arguments and testimony related to alternative water supplies are outside the scope of Contention 4A. Intervenor's raised this topic in their rebuttal filings. The Intervenor's Rebuttal Statement raises a number of concerns regarding the NRC Staff's consideration of water supply alternatives. Intervenor's Rebuttal Statement at 28-29. They argue, "While the NRC Staff claims that other alternatives such as waste water and desalinization will be considered in the future if adverse impacts are detected, it fails to discuss the very real potential that electing alternative service water supply options after the proposed alternative has failed will be too late to save wetlands from the adverse effects of LNP." Id. at 28. In addition, Intervenor's state, "Under NEPA, a reasonable array of alternative constitutes the 'heart' of an EIS, . . . and therefore must be considered before the action is taken, not afterwards." Id. (citation omitted) (emphasis in original).

Both PEF and the NRC Staff challenge the Intervenor's discussion of alternative water supplies. See PEF Motion at 4-6; NRC Motion at 3-8. The NRC Staff argues that "the Intervenor's never previously included alternative water supplies as part of Contention 4A" and "the Board has previously ruled that discussions of alternatives are outside the scope of the contention." NRC Motion at 3. PEF adds that "[a]rguments regarding the sufficiency of the FEIS's analysis of alternatives to groundwater pumping are outside the scope of the admitted contention and, therefore, are irrelevant and immaterial." PEF Motion at 4.

These portions of the motions are granted in part and denied in part. To the extent that Intervenor's have challenged the alternatives analysis found within Section 9 of the FEIS, we grant the motions to strike. However, to the extent that Intervenor's have challenged the NRC Staff's reliance on alternative water sources as part of a plan to mitigate adverse environmental

impacts, we deny the motions and hold that such discussions are within the scope of the admitted contention.

When the Intervenor originally filed Contention 4 and then Contention 4A, they asserted several arguments alleging that the alternatives analysis in the environmental report and the DEIS were inadequate.¹⁰ Although C4 and then C4A were admitted in part, we denied the “alternatives analysis” portions of the contentions. See LBP-09-10, 70 NRC 51, 125-38 (2009); Order Admitting C4A at 17. Since that time, the Intervenor has not sought to amend Contention 4A to expand its scope to include a challenge to the NRC Staff’s discussion of alternatives to the proposed action within the FEIS.

Accordingly, any challenge to the FEIS “alternatives analysis” contained in the Intervenor’s statements of position or pre-filed testimonies is outside the scope of this proceeding. We therefore grant PEF’s and the NRC Staff’s motions insofar as they challenge Intervenor’s discussion of alternatives to the proposed action. We will disregard those portions of Intervenor’s Rebuttal Statement that address this issue. We strike from the record those portions of Intervenor’s pre-filed testimony that address this issue. See Appendix A.

It is readily apparent to us, however, that there is an important distinction between a discussion of alternatives to the proposed action, and a discussion of the adequacy of a mitigation plan that relies, in part, on the applicant pursuing alternate water sources. The FEIS states that “PEF must monitor groundwater and, if adverse operational hydrological effects on wetlands are discovered, PEF must either mitigate or use an alternative water source.” FEIS at 5-47 (emphasis added). This portion of the FEIS discusses environmental impacts of operation of the proposed Levy plants, not alternatives to the proposed action. Intervenor appears, in

¹⁰ See Petition to Intervene and Request for Hearing by [Intervenor] (Feb. 6, 2009) at 65-67, 97-102; [Intervenor’s] Motion for Leave to Amend Contention 4 (Nov. 15, 2010), Att. 2, Affidavit of Dr. Sydney Bacchus at 24.

part, to be challenging this section of the FEIS, not section 9, which discusses impacts of alternatives. See Intervenor's Rebuttal Statement at 27. Our ruling admitting Contention 4A did not preclude Intervenor's from challenging requirements within the FEIS for PEF to mitigate adverse impacts on wetlands caused by operation. To the contrary, such a challenge is well within the scope of Contention 4A. As such, PEF's and the NRC Staff's motions are denied insofar as they challenge Intervenor's arguments regarding the use of alternative water sources as a mitigation requirement.

III. CONCLUSION

For the foregoing reasons, PEF's and the NRC Staff's motions are granted in part and denied in part. Insofar as they challenge Intervenor's discussions of Dr. Bacchus's comments on the DEIS, public circulation of the Environmental Monitoring Plan, and alternatives to the proposed action, the motions are granted. However, insofar as they challenge Intervenor's discussion of alternative water sources within the context of mitigation of environmental impacts, the motions are denied. Appendix A delineates those portions of the pre-filed testimonies that are stricken from the record.

In order to assure that the record accurately reflects the foregoing rulings, each party shall refile the documents listed on Appendix A. The refiled documents shall have the same pagination as the original filings, but shall include redline strike-outs of the portions of testimony specified on Appendix A. These documents should be filed within ten days.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 6, 2012

APPENDIX A

The following portions the parties' pre-filed testimonies are hereby stricken from the record of this proceeding:

Exhibit Number or Document Title	Page(s)	From	To
INT201	7-10	"Q.16....", line 3.	"...these problems", line 8.
INT301	71	"Despite this...", line 6.	"...saline water.", line 13.
INT501	2	"would allow...", line 20.	"...and it", line 21.
INT701	6	"The implicit...", line 10.	"...later date.", line 20.
INT801	5	"Considering the...", line 17.	"...the DEIS.", line 23.
NRC Staff Pre-filed Rebuttal Testimony	27	"Q34....", line 6.	"...at A.16.", line 13.
PEF800	6	"alternatives for...", line 24.	"...water supply," line 24.
PEF800	13-15	"Q8:...", line 13.	"...nor economical.", line 16.

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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 (GRANTING IN PART AND DENYING IN PART MOTION IN LIMINE AND MOTION TO STRIKE) have been served upon the following persons by Electronic Information Exchange.

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Office of the Secretary of the Commission

Dated at Rockville, Maryland
 this 6th day of September 2012