



ND-2012-0055
September 28, 2012

U.S. Nuclear Regulatory Commission
ATTN: David Matthews
Division of New Reactor Licensing
Office of New Reactors
Washington, DC 20555-0001

Subject: **PSEG Early Site Permit Application**
Docket No. 52-043
Waste Confidence Decision and Temporary Storage Rule

- References:
- 1) PSEG Power, LLC Letter to USNRC, Application for Early Site Permit for the PSEG Site, dated May 25, 2010
 - 2) Staff Requirements – COMSECY-12-0016 – Approach for Addressing Policy Issues Resulting from Court Decision to Vacate Waste Confidence Decision and Rule, dated Sept. 6, 2012
 - 3) COMSECY-12-0016, Approach for Addressing Policy Issues Resulting from Court Decision to Vacate Waste Confidence Decision and Rule, dated July 9, 2012
 - 4) Letter from E. Ginsberg, Nuclear Energy Institute, to the Commission, dated Sept. 6, 2012

On May 25, 2010, PSEG Power, LLC (PSEG) submitted its application (Reference 1) for an Early Site Permit (ESP) to the U.S. Nuclear Regulatory Commission (NRC). The ESP will approve the PSEG site for a period of 20 years for a possible future nuclear power facility. The ESP does not authorize PSEG to construct and operate a nuclear power facility at the site, and does not result in generation of any spent nuclear fuel. PSEG will need to submit a separate combined license (COL) application requesting permission to construct and operate the facility.

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During the NRC's ongoing review of this ESP application, the U.S. Court of Appeals for the District of Columbia Circuit issued a June 8, 2012, decision vacating and remanding the 2010 update to the NRC's Waste Confidence Decision and Temporary Storage Rule (10 C.F.R. § 51.23), as contrary to the National Environmental Policy Act (NEPA).

Following the Court decision, the Commission issued Memorandum and Order CLI-12-16, stating that it "will not issue licenses dependent upon the Waste Confidence Decision or the Temporary Storage Rule until the court's remand is appropriately addressed."¹ On September 6, 2012, the Commission issued a Staff Requirements Memorandum (SRM) for COMSECY-12-0016 (Reference 2), which provided the Commission's directions to the NRC Staff to commence a generic rulemaking to address the D.C. Circuit decision. COMSECY-12-0016 generally encompasses new reactor licensing, and in one place refers to ESPs (Reference 3, pages 2, 8).

The purpose of this letter is to set forth PSEG's view that the issues raised by the D.C. Circuit decision are unrelated to PSEG's ESP application as a legal matter. Instead, they only relate to any COL application referencing the ESP. Nonetheless, as discussed below, even if the NRC Staff concludes that the Waste Confidence Decision and the Temporary Storage Rule apply to the ESP application review, the NRC still may defer resolution of the issues raised by the D.C. Circuit decision to the COL stage. Either way, the PSEG ESP application review and issuance should continue unaffected by the D.C. Circuit Decision.

PSEG's position that the Waste Confidence Decision and the Temporary Storage Rule do not apply to its ESP application is supported by a number of different justifications:

- The Waste Confidence Decision and the Temporary Storage Rule at 10 C.F.R. § 51.23 that are at issue in the D.C. Circuit decision do not mention ESPs, but appropriately only refer to operating licenses, COLs, and independent spent fuel storage installations. This is consistent with 10 C.F.R. § 51.75, which specifically requires a Draft Environmental Impact Statement (EIS) for COLs to address spent fuel storage and 10 C.F.R. § 51.23, but does not include a similar requirement for a Draft EIS for ESPs.

¹ *Calvert Cliffs Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 NRC ___, slip op. at 4 (Aug. 7, 2012).

- The 2007 Part 52 rulemaking added COLs within the scope of 10 C.F.R. § 51.23(b), but was silent on ESPs.² This is consistent with the 2010 Waste Confidence Decision and Temporary Storage Rule update rulemaking documents, which address COLs, but not ESPs.³
- Because 10 C.F.R. § 51.23 has never encompassed construction permits (CPs),⁴ it also should not encompass ESPs, which are considered partial CPs.⁵

For these reasons, and the fact that an approved ESP does not allow PSEG to generate any spent reactor fuel at the PSEG Site governed by the ESP, PSEG concludes that its ESP is unaffected by the Commission's statement in CLI-12-16 that it "will not issue licenses dependent upon the Waste Confidence Decision or the Temporary Storage Rule until the court's remand is appropriately addressed," because, as a legal matter, the Waste Confidence Decision and the Temporary Storage Rule do not apply to the ESP application.

Nonetheless, if the NRC Staff concludes that the Waste Confidence Decision and the Temporary Storage Rule apply to the PSEG ESP application, then PSEG requests that resolution of these issues be deferred until the COL stage. The NRC has flexibility under 10 C.F.R. §§ 51.50(b) and (c)(1) to defer consideration of certain environmental effects to the COL stage, unless otherwise specifically required to be considered at the ESP stage, such as whether there is any obviously superior alternative to the proposed

² Licenses, Certifications, and Approvals for Nuclear Power Plants, 72 Fed. Reg. 49,352, 49,429, 49,509-510 (Aug. 28, 2007).

³ Waste Confidence Decision Update, 75 Fed. Reg. 81,037, 81,039, 81,060, 81,062 n.25, 81,068 (Dec. 23, 2010); Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 75 Fed. Reg. 81,032, 81,033 (Dec. 23, 2010).

⁴ The original 10 C.F.R. § 51.23(b) stated that no discussion of any environmental impact of spent fuel storage for the period following the term of the license "is required in any environmental report, environmental impact statement, environmental assessment or other analysis prepared in connection with the issuance or amendment of an operating license for a nuclear reactor or in connection with the issuance of an initial license for storage of spent fuel at an ISFSI, or any amendment thereto." Requirements for Licensee Actions Regarding the Disposition of Spent Fuel Upon Expiration of Reactor Operating Licenses, 49 Fed. Reg. 34,688, 34,694 (Aug. 31, 1984).

⁵ PSEG acknowledges that some of the ESP EISs point to the Waste Confidence Decision to support the conclusion that a repository can and likely would be developed at a site that would comply with regulatory limits for offsite releases, or that 10 C.F.R. § 51.23 can be used in the review of an ESP application. *See, e.g.,* NUREG-1872, Final Environmental Impact Statement for an Early Site Permit (ESP) at the Vogtle Electric Generating Plant Site, at 6-13, D-56 (Aug. 2008). PSEG concludes, however, that these references and discussions were discretionary, and were not required as a matter of law. Additionally, the COL EIS for the most recently-issued ESP more directly addressed waste confidence issues than in the ESP EIS. *See* NUREG-1947, Final Supplemental Environmental Impact Statement for Combined Licenses (COLs) for Vogtle Electric Generating Plant Units 3 and 4, at 6-3 to 6-4 (Mar. 2011).

site.⁶ The NRC has deferred consideration of a number of environmental issues in other ESP proceedings.⁷ The issue of long-term storage of spent fuel is a generic one, as demonstrated by the Commission's generic approach to addressing this issue in the SRM for COMSECY-12-0016, and is unrelated to the acceptability of the PSEG site or consideration of alternative sites. Additionally, the issue of long-term storage of spent fuel is a relatively narrow and discrete issue in the context of an EIS for an ESP and is suitable for deferral to the COL EIS, and PSEG does not rely upon the Waste Confidence Decision or the Temporary Storage Rule in the ESP Environmental Report. Therefore, the ESP application review and issuance should continue unaffected by the D.C. Circuit Decision.

Finally, PSEG notes that the Nuclear Energy Institute (NEI) sent a letter to the Commission on September 6, 2012, (Reference 4) requesting that the Commission continue with new reactor licensing reviews, including issuing Final EISs, notwithstanding the parallel activities related to the Waste Confidence Decision and the Temporary Storage Rule. As stated above, PSEG concludes that the issues on remand do not apply to ESPs, or if they do, then the issues can be deferred to the COL stage. If this were not the case, then PSEG fully supports the continuation of all licensing activities, as discussed in the NEI letter.

If any additional information is needed for the issues raised in this letter, please contact David Robillard, PSEG Nuclear Development Licensing Engineer, at (856) 339-7914.

Sincerely,



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Early Site Permit Manager
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PSEG Power, LLC

cc: USNRC Project Manager, Division of New Reactor Licensing, PSEG Site
USNRC Environmental Project Manager, Division of New Reactor Licensing
USNRC Region I, Regional Administrator
✓ USNRC Document Control Desk

⁶ 10 C.F.R. § 51.92(e)(6) requires the NRC in a COL proceeding to supplement the ESP EIS to “[i]nclude an analysis of any environmental issue related to the impacts of construction or operation of the facility that was not resolved in the proceeding on the early site permit.”

⁷ See, e.g., NUREG-1811, Environmental Impact Statement for an Early Site Permit (ESP) at the North Anna ESP Site, Table J-3 (Dec. 2006) (providing a table of issues not resolved in the North Anna ESP EIS).