March 21, 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of Detroit Edison Co. (Fermi Nuclear Power Plant, Unit 3)	)	Docket No. 52-033-COL
In the Matter of Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3)	)	Docket Nos. 50-247-LR and 50-286-LR
In the Matter of FirstEnergy Nuclear Operating Co. (Davis-Besse Nuclear Power Station, Unit1)	)	Docket No. 50-346-LR
In the Matter of (Florida Power & Light Co. Turkey Point Units 6 and 7)	)	Docket Nos. 52-040-COL and 52-041-COL
In the Matter of Nextera Energy Seabrook, L.L.C. (Seabrook Station, Unit 1)	)	Docket No. 50-443-LR
In the Matter of Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2)	)	Docket Nos. 50-275-LR and 50-323-LR
In the Matter of Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2)	)	Docket Nos. 52-029-COL and 52-030-COL
In the Matter of Nuclear Innovation North America, L.L.C. (South Texas Project, Units 3 and 4)	)	Docket Nos. 52-012-COL and 52-013-COL
In the Matter of Tennessee Valley Authority (Bellefonte Nuclear Power Plant, Units 3 and 4)	)	Docket Nos. 52-014-COL and 52-015-COL

In the Matter of Tennessee Valley Authority (Sequoyah Nuclear Plant, Units 1 and 2)	))))	Docket Nos. 50-327-LR, 50-328-LR
In the Matter of Tennessee Valley Authority (Watts Bar Unit 2)	)))	Docket No. 50-0391-OL
In the Matter of Virginia Electric and Power Co. d/b/a/ Dominion Virginia Power and Old Dominion Electric Cooperative (North Anna Unit 3)	))))))	Docket No. 52-017-COL

NRC STAFF ANSWER OPPOSING SUSPENSION PETITION

Richard S. Harper

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NRC STAFF ANSWER OPPOSING SUSPENSION PETITION

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c) and the March 4, 2014 Order of the Secretary,[1] the U.S. Nuclear Regulatory Commission (NRC) staff (Staff) opposes the Petitioners' request to suspend reactor licensing decisions in these proceedings.[2] In their petition, filed in most ongoing NRC adjudicatory proceedings for reactors on or about February 27, 2014,[3] the Petitioners requested the suspension of reactor licensing decisions in the captioned

[1] Order (Mar. 4, 2014) (unpublished) (ADAMS Accession No. ML14063A637).

[2] Substantially identical petitions to suspend licensing decisions were filed in the captioned proceedings. The Petitioners include: Beyond Nuclear, Blue Ridge Environmental Defense League, Don't Waste Michigan, Ecology Party of Florida, Friends of the Coast, Hudson River Sloop Clearwater, National Parks Conservation Association, New England Coalition, Nuclear Information and Resource Service, Public Citizen, San Luis Obispo Mothers for Peace, SEED Coalition, and Southern Alliance for Clean Energy. Since the suspension petitions are substantially identical, the Staff is filing substantially identical answers in opposition to the suspension petitions in each of the affected proceedings.

[3] Petition to Suspend Reactor Licensing Decisions and Reactor Re-Licensing Decisions Pending Completion of Rulemaking Proceeding Regarding Environmental Impacts of High-Density Pool Storage of Spent Fuel and Mitigation Measures (Feb. 27, 2014) (Suspension Petition). In the NextEra Energy Seabrook, L.L.C. (Seabrook Station, Unit 1) proceeding the Suspension Petition was filed on March 1, 2014.

proceedings until the NRC addresses the allegedly new and significant information described in a February 18, 2014 petition for rulemaking (Rulemaking Petition).[4]

The Commission should deny the Suspension Petition because it does not demonstrate that issuing licensing decisions before resolving the Rulemaking Petition would jeopardize the public health and safety, prove an obstacle to fair and efficient decisionmaking, or prevent appropriate implementation of any pertinent rule or policy changes that might emerge even if a rulemaking proceeding is undertaken by the Commission.[5] Further, although the Petitioners argue that information addressed in the Staff's expedited spent fuel transfer analysis[6] constitutes new and significant information for purposes of the National Environmental Policy Act of 1969, as amended (NEPA),[7] that information is neither new nor significant under NEPA. Therefore, NEPA does not require supplementation of the environmental impact statements (EISs) in proceedings with EISs, or delay of EISs currently being developed, before a licensing decision is made. Additionally, the rationale underlying the Commission's Waste Confidence

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[4] Environmental Organizations' Petition to Consider New and Significant Information Regarding Environmental Impacts of High-Density Spent Fuel Storage and Mitigation Alternatives in Licensing Proceedings for New Reactors and License Renewal Proceedings for Existing Reactors and Duly Modify all NRC Regulations Regarding Environmental Impacts of Spent Fuel Storage During Reactor Operation (Feb. 18, 2014) (ADAMS Accession No. ML14071A382) (Rulemaking Petition).

[5] The Commission has denied similar suspension petitions in the past, for these reasons. *See Union Electric Co. d/b/a Ameren Missouri* (Callaway Plant, Unit 2), *et al*., CLI-11-5, 74 NRC 141, 158-159 (2011); *Petition for Rulemaking to Amend 10 C.F.R. § 54.17(c)*, CLI-11-1, 73 NRC 1, 5 (2011); *Pacific Gas & Electric Co*. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-03-4, 57 NRC 273, 277 (2003).

[6] Consequence Study of a Beyond-Design-Basis Earthquake Affecting the Spent Fuel Pool for a U.S. Mark I Boiling Water Reactor (Oct. 2013) (ADAMS Accession No. ML13256A342) (attached to SECY-13-0112, Consequence Study of a Beyond-Design-Basis Earthquake Affecting the Spent Fuel Pool for a U.S. Mark I Boiling-Water Reactor (Oct. 9, 2013) (ADAMS Accession No. ML13256A339)) (Consequence Study); Regulatory Analysis for Japan Lessons-Learned Tier 3 Issue on Expedited Transfer of Spent Fuel (ADAMS Accession No. ML13273A628) (Regulatory Analysis) (attached to COMSECY-13-0030, Staff Evaluation and Recommendation for Japan Lessons-Learned Tier 3 Issue on Expedited Transfer of Spent Fuel (Nov. 12, 2013) (ADAMS Accession No. ML13273A601).

[7] National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (1969), *et seq*. (NEPA); s*ee* Suspension Petitions at 3-4.

suspension of final licensing decisions,[8] based on the *vacatur*[9] of the Commission's Waste Confidence Decision and accompanying Temporary Storage Rule,[10] is not applicable to the instant case because that suspension was based on the judicial invalidation of existing regulations rather than an ordinary rulemaking petition. Thus, the drastic action requested by the Petitioners is not warranted by the Commission's actions regarding the Waste Confidence Decision.[11]

LEGAL STANDARD GOVERNING SUSPENSION PETITIONS

When determining whether to suspend a proceeding or decision, the Commission considers three factors, namely whether moving forward with the adjudication will (1) jeopardize the public health and safety, (2) prove an obstacle to fair and efficient decision making, or (3) prevent appropriate implementation of any pertinent rule or policy changes.[12] This is referred to herein as the Commission's suspension standard.

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[8] *See Calvert Cliffs 3 Nuclear Project, LLC and UniStar Nuclear Operating Services, LLC*, (Calvert Cliffs Nuclear Power Plant, Unit 3), *et al*., CLI-12-16, 76 NRC 63 (2012).

[9] *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012).

[10] Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 75 Fed. Reg. 81,032 (Dec. 23, 2010) (Final rule); Waste Confidence Decision Update, 75 Fed. Reg. 81,037 (Dec. 23, 2010).

[11] Since the Petitioners explicitly cite to 10 C.F.R. § 2.802(d) and cite to the three-factor suspension standard (*see e.g.*, Suspension Petition at 9-10), the Staff is responding accordingly. However, the Petitioners also consistently use the term "stay" instead of "suspend." *See generally,* Suspension Petition. To the extent that the Suspension Petition may be construed as a motion for a stay of decisions under 10 C.F.R. § 2.342, the Petitioners do not satisfy that standard because they have not argued, let alone demonstrated, that the four factors of 10 C.F.R. § 2.342(e) compel granting a motion to stay decisions. Furthermore, the Suspension Petition was not filed "[w]ithin ten (10) days after service of a decision or action of a presiding officer," as is required by 10 C.F.R. § 2.342(a). Therefore, the Suspension Petition cannot be considered (or granted) as a request for stay of decisions.

[12] *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 380 (2001) (PFS). *See also Callaway*, *et al*., CLI-11-5, 74 NRC at 158; *Petition for Rulemaking to Amend 10 C.F.R. § 54.17(c)*, CLI-11-1, 73 NRC at 5; *Diablo Canyon Independent Spent Fuel Storage Installation*, CLI-03-4, 57 NRC at 277.

DISCUSSION

As described below, the Suspension Petition should be denied because it does not satisfy any of the three factors in the Commission's suspension standard. Further, the rationale underlying the Commission's decision to suspend final licensing decisions in light of the Court of Appeals' *vacatur* of the Waste Confidence rule does not apply here. For these reasons, the requested suspension is unwarranted.

I. The Suspension Petition Does Not Meet the First Suspension Factor Because It Does Not Show That an Imminent Threat to Public Health and Safety Exists

The Commission considers suspension to be a "'drastic' action" that is not warranted absent "immediate threats to public health and safety."[13] Absent such immediate threats, the Commission is reluctant to order suspensions in light of the substantial public interest in "'efficient and expeditious' resolution."[14] The Petitioners have not demonstrated that moving forward with licensing decisions after the Commission lifts its Waste Confidence suspension will pose an immediate threat to public health and safety.[15] In fact, the Petitioners make no public

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[13] *AmerGen Energy Company, LLC* (Oyster Creek Nuclear Generating Station), *et al*., CLI-08-23, 68 NRC 461, 484 (2008) (refusing to suspend license renewal proceedings) (quoting *Vermont Yankee Nuclear Power Corp. and AmerGen Vermont, LLC* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 173-174 (2000) (refusing to suspend license transfer proceeding)).

[14] *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 485 (2008).

[15] The Commission has already stated that it "will not issue [final] licenses dependent upon the Waste Confidence Decision or the Temporary Storage Rule until the court's remand is appropriately addressed." *Calvert Cliffs Nuclear Power Plant, Unit 3*, *et al*., CLI-12-16, 76 NRC at 67. Additionally, in each of the proceedings in which the Petitioners filed, and in view of the special circumstances of the situation and "as an exercise of [its] inherent supervisory authority," the Commission held in abeyance (or, in the case of Sequoyah, approved an Atomic Safety and Licensing Board order holding in abeyance) all contentions related to Waste Confidence "pending [the Commission's] further order." *Id*. at 68-69; see Tennessee Valley Authority (Sequoyah Nuclear Plant, Units 1 and 2), CLI-14-03, 79 NRC __ (Feb. 12, 2014) (slip op. at 8-9). As acknowledged by the Petitioners, the NRC plans to issue its Waste Confidence GEIS in October 2014, *see* Rulemaking Petition at 17, and it is unlikely that this Waste Confidence suspension could be lifted before October 2014.

health and safety argument.[16] Accordingly, the Suspension Petition cannot satisfy this part of the Commission's suspension standard.

Instead, the Petitioners argue that a suspension is warranted to ensure that the NRC complies with NEPA's procedural requirements.[17] But Petitioners fail to explain how any alleged failure to comply with NEPA could constitute an immediate threat to public health and safety. Therefore, the Suspension Petition does not establish that an imminent threat to public health and safety exists, and it should be denied.

II. The Petitioners' Claims Regarding New and Significant Information are Unsupported and Do Not Meet the Second or Third Factor of the Commission's Suspension Standard

In addition to considering whether there will be jeopardy to the public health and safety absent the granting of a suspension petition, the Commission has stated that, with respect to suspension petitions, it also considers whether moving forward with licensing proceedings or decisions will "prove an obstacle to fair and efficient decisionmaking, or prevent appropriate implementation of any pertinent rule or policy changes" that might emerge from the Commission's evaluation of potential policy (or rule) changes.[18] The Petitioners essentially argue that licensing decisions should be suspended because (1) the NRC must consider the allegedly "new and significant" information in the Staff's expedited spent fuel transfer analysis[19] and (2) that failing to consider this information prior to making any licensing decisions would

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[16] *See* Suspension Petition at 9-10 (quoting the Commission's three-factor suspension standard but then only addressing the latter two factors and not the public health and safety factor).

[17] *See* Suspension Petition at 3-4 ("Petitioners respectfully submit that suspension of reactor licensing and re-licensing decisions is necessary for compliance with NEPA's requirement that new and significant information be incorporated into reactor licensing decisions before those decisions are finalized.").

[18] *Private Fuel Storage, LLC*, CLI-01-26, 54 NRC at 380. *See also Callaway*, *et al*., CLI-11-5, 74 NRC at 158; *Petition for Rulemaking to Amend 10 C.F.R. § 54.17(c)*, CLI-11-1, 73 NRC at 5; *Diablo Canyon Independent Spent Fuel Storage Installation*, CLI-03-4, 57 NRC at 277.

[19] *See generally* Suspension Petition at 5-6 (*citing* Consequence Study (ML13256A339); Regulatory Analysis (ML13273A628)).

either preclude fair and efficient decision making or would prevent appropriate implementation of any pertinent rule or policy changes resulting from the consideration of this information.[20]

This argument fails for lack of factual support. First, as discussed below, the Petitioners' bare assertions that the Staff's expedited spent fuel transfer analysis constitutes new and significant information under NEPA are not supported by the record. Second, the Petitioners do not show how moving forward with final licensing decisions would prove an obstacle to fair and efficient decisionmaking or prevent implementation of pertinent rule or policy changes.

A. The Petitioners' Bare Assertions of New and Significant Information are Not Supported by the Record

The Suspension Petition relies on the information developed by the Staff during its analysis of whether the expedited transfer of spent fuel from spent fuel pools to dry cask storage might provide enhanced safety and be cost-justified.[21] The Staff initiated its study with Commission approval in response to concerns raised by the public after the accident at Fukushima Dai-ichi and the uncertainty, at the time, regarding the status of spent fuel in the spent fuel pools.[22] In summary, the "Consequence Study of a Beyond-Design-Basis Earthquake Affecting the Spent Fuel Pool for a U.S. Mark I Boiling Water Reactor"[23] (Consequence Study) and the "Regulatory Analysis for Japan Lessons-Learned Tier 3 Issue on Expedited Transfer of Spent Fuel"[24] (Regulatory Analysis) were performed to determine whether

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[20] Suspension Petition at 9-13.

[21] Suspension Petition at 3-4.

[22] COMSECY-13-0030, Staff Evaluation and Recommendation for Japan Lessons-Learned Tier 3 Issue on Expedited Transfer of Spent Fuel at 2-4 (Nov. 12, 2013) (ADAMS Accession No. ML13273A601)

[23] Consequence Study of a Beyond-Design-Basis Earthquake Affecting the Spent Fuel Pool for a U.S. Mark I Boiling Water Reactor (Consequence Study) (Oct. 2013) (ADAMS Accession No. ML13256A342) (attached to SECY-13-0112, Consequence Study of a Beyond-Design-Basis Earthquake Affecting the Spent Fuel Pool for a U.S. Mark I Boiling-Water Reactor (Oct. 9, 2013) (ADAMS Accession No. ML13256A339)).

[24] Regulatory Analysis for Japan Lessons-Learned Tier 3 Issue on Expedited Transfer of Spent Fuel (Regulatory Analysis) (ADAMS Accession No. ML13273A628) (attached to COMSECY-13-0030,

expedited transfer of spent fuel from spent fuel pools to dry cask storage might provide a cost-justified substantial safety benefit.[25] The Staff's plan for evaluating the expedited transfer of spent fuel originally contemplated three potential phases, depending on the analysis. The Consequence Study and Regulatory Analysis completed the first phase of the study.[26]

The Petitioners assert that this analysis has "yielded new and significant information about the environmental impacts of high-density pool storage of spent fuel and the cost-beneficial nature of some measures for mitigation of spent fuel pool fires."[27] Contrary to the Petitioners' assertions, however, this analysis does not constitute new and significant information under NEPA because it is consistent with information considered in the Staff's *previous* studies on spent fuel pool accidents.[28]

Under NEPA, the NRC must "ensure that the [environmental impact] statement contains sufficient discussion of the relevant issues and opposing viewpoints to enable the decisionmaker to take a 'hard look' at environmental factors, and to make a reasoned decision."[29] As the Commission has stated, "while there 'will always be more data that could be gathered,' agencies 'must have some discretion to draw the line and move forward with decisionmaking.'"[30] But, "[i]f the proposed action has not been taken, the NRC staff will prepare

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(footnote continued . . .)

Staff Evaluation and Recommendation for Japan Lessons-Learned Tier 3 Issue on Expedited Transfer of Spent Fuel (Nov. 12, 2013) (ADAMS Accession No. ML13273A601).

[25] Regulatory Analysis at iv.

[26] The Staff has recommended to the Commission that no additional analysis be performed based on the information developed as part of this initial phase. Regulatory Analysis at vi.

[27] Suspension Petition at 5.

[28] *See, e.g.,*NUREG-1353, *Regulatory Analysis for the Resolution of Generic Issue 82, "Beyond Design Basis Accidents in Spent Fuel Pools,"* at 4-41, 5-4 (Apr. 1989) (ADAMS Accession No. ML082330232).

[29] *Natural Resources Defense Council v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988).

[30] *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 315 (2010) (quoting *Hells Canyon Alliance v. U.S. Forest Serv.,* 227 F.3d 1170, 1185 (9th Cir. 2000)).

a supplement to a final environmental impact statement . . . if . . . [t]here are new and significant circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."[31] In *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989), the Supreme Court unanimously found that such supplementation is required only where the new information would affect the environment in a "significant manner or to a significant extent not already considered." Consequently, later-identified information that is consistent with information already presented in an environmental impact statement is not new and significant information warranting supplementation under NEPA.[32]

The Petitioners argue that the Staff's analysis constitutes new and significant information under NEPA because "it is impossible to determine what NRC assumes regarding how much land is contaminated, how many people are dislocated, or for what length of time these effects will persist" and that "it is impossible to determine how considerations of probability affected the consequence analysis in the 2013 Revised License Renewal [Generic EIS (GEIS)]."[33] Based on this, the Petitioners speculate that the frequency of spent fuel pool fires is higher than what was previously estimated and that mitigation is warranted and cost-beneficial.[34]

The Petitioners, however, fail to recognize that the Staff's expedited spent fuel transfer analysis explicitly determined that the information developed was consistent with previous studies of spent fuel pool accidents—that is, that the information was not new.[35] Additionally,

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[31] 10 C.F.R. § 51.92(a) and § 51.92(a)(1). The proceedings in which the Suspension Petition has been filed are in slightly different procedural postures, especially with respect to whether the Staff has published a draft supplemental EIS, a final supplemental EIS, or any additional supplements. However, in each proceeding, an EIS is being or has been prepared, and the Staff has not yet taken the major federal action at issue.

[32] *See, e.g., Hanson v. U.S. Forest Serv.*, 138 F. Supp. 2d 1295, 1302 (W.D. Wash. 2001).

[33] Suspension Petition at 11.

[34] Suspension Petition at 11-13.

[35] Consequence Study at iii ("The study results for the specific reference plant and earthquake analyzed are consistent with past studies' conclusions that spent fuel pools are likely to withstand severe earthquakes without leaking.").

the Petitioners are also mistaken in asserting that the Staff's analysis regarding a potentially large area of contamination is new and had not been discussed previously.[36] Although the previous studies cited in the Rulemaking Petition do not explicitly state the land area potentially contaminated by the modeled spent fuel pool accidents, those studies did give estimates of offside health effects and property damage.[37] Information about contaminated land area can be derived from the information reported in these previous studies. Therefore, the Staff's expedited spent fuel transfer analysis is not new information under NEPA.

Similarly, the Petitioners' arguments that the Staff's expedited spent fuel transfer analysis constitutes significant information under NEPA are also incorrect. The Suspension Petition's allegations of significance appear to be based on three assumptions: (1) that the calculated benefits *might* increase *if* the NRC altered its regulatory structure to include additional cost information beyond the scope of Atomic Energy Act, as implemented by the Commission's current regulations; (2) that reactor accidents *may be* initiators of spent fuel pool fires and, therefore, that the probability of such fires may be higher than previously determined; and (3) that sensitivity studies demonstrated a few worst case accident scenarios that *might* have cost-beneficial mitigation measures.[38]

Based on these assumptions, the Petitioners argue the following. First, the Petitioners argue that the benefits of mitigating a spent fuel pool fire would appear greater if the NRC undertook a regulatory change to include costs not part of the Staff's current analyses.[39] This argument is unsupported and speculative because no such change to the Commission's

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[36] Suspension Petition at 5 ("This information is 'new' because no EIS for reactor licensing, GEIS for reactor re-licensing, or EA for standardized design certification has specified the size of the area that could be contaminated ….").

[37] NUREG-1353, *Regulatory Analysis for the Resolution of Generic Issue 82, "Beyond Design Basis Accidents in Spent Fuel Pools,"* at 4-41, 5-4 (Apr. 1989) (ADAMS Accession No. ML082330232).

[38] Suspension Petition at 12-13.

[39] *Id*. at 12.

regulatory structure is requested as part of the Rulemaking Petition; rather, the Rulemaking Petition requests a suspension of existing regulations and adjustments to the NRC's NEPA process. The Rulemaking Petition does not describe how changes to the NRC's NEPA process would alter the current requirements for spent fuel pools, such that the spent fuel pool analyses would include different kinds of accidents.[40] Therefore, this argument cannot support the Suspension Petition.

Second, the Petitioners argue that the documents cited in the Rulemaking Petition indicate that the probability of a spent fuel pool fire may be greater than previously estimated, and conclude, based on this assumption, that the consequences of such fires might be greater than already accounted for in the current regulations.[41] The potential for a reactor accident to initiate another event such as a spent fuel pool fire is not new information. Therefore, this information is not new and significant under NEPA and does not support the supplementation of the NRC's previous determination that the probability weighted consequences of a spent fuel pool accident are insignificant.[42]

Finally, the Petitioners' argument that certain sensitivity studies show that mitigation measures regarding spent fuel pool fires might be cost-beneficial is not sufficient to establish new and significant information under NEPA. Although NEPA requires an agency to make a "reasonably complete discussion of possible mitigation measures," it does not require the

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[40] *See* Rulemaking Petition at 4-5.

[41] Suspension Petition at 12.

[42] *See* NUREG-1437, Vol. 1, Rev. 1, *Generic Environmental Impact Statement for License Renewal of Nuclear Plants,* Main Report, Final Report, at 1-27 to 1-29 (June 2013) (ADAMS Accession No. ML13106A241); NUREG-1437, Vol. 3, Rev. 1, *Generic Environmental Impact Statement for License Renewal of Nuclear Plants,* Appendices, Final Report, E-34 to E-39 (June 2013) (ADAMS Accession No. ML13106A244). *See, e.g.*, Environmental Assessment by the U.S. Nuclear Regulatory Commission Relating to the Certification of the AP1000 Standard Plant Design, Docket No. 52-006 (2006) (ADAMS Accession No. ML053630176); Environmental Assessment by the U.S. Nuclear Regulatory Commission Relating to the Certification of the Amendment to the AP1000 Standard Plant Design, Docket No. 52-006 (2011) (ADAMS Accession No. ML113480019).

formulation of a complete mitigation plan before the agency can act.[43] Thus, NEPA does not require that agencies develop or evaluate every potential mitigation measure that might serve to reduce the impact of a particular agency action. As such, the expedited spent fuel transfer analysis' discussion of certain sensitivity studies indicating that cost-beneficial mitigation measures may exist is insufficient to support a suspension action of all NRC reactor licensing actions.

B. Denying the Suspension Petition Would Not Prove an Obstacle to Fair and Efficient Decisionmaking

The Commission has stated that a petition to suspend may be granted if the petitioner demonstrates that denying the requested suspension would "prove an obstacle to fair and efficient decisionmaking."[44] Since the NRC engages in a "dynamic regulatory process" the appropriate balance must be struck to "promote the Commission's dual goals of public safety and timely adjudication."[45] In fact, the Commission has stated that this consideration may favor denying a petition to suspend. Specifically, with respect to petitions to suspend related to the Fukushima Dai-ichi accident, the Commission stated, "[i]nstead of finding obstacles to fair and efficient decisionmaking, we see benefits from allowing our processes to continue so that issues unrelated to [Fukushima Dai-ichi] can be resolved."[46]

The Petitioners argue that, by failing to consider the information in the expedited spent fuel transfer analysis, the Staff would fail to consider important environmental impacts as part of its licensing decisions and, thus, preclude the decisionmaking process from being either fair or

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[43] *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 352-353 (1989).

[44] *Callaway*, *et al*., CLI-11-5, 74 NRC at 158; *Petition for Rulemaking to Amend 10 C.F.R. § 54.17(c)*, CLI-11-1, 73 NRC at 5; *Diablo Canyon Independent Spent Fuel Storage Installation*, CLI-03-4, 57 NRC at 277.

[45] *Petition for Rulemaking to Amend 10 C.F.R. § 54.17(c)*, CLI-11-1, 73 NRC at 4 (quoting *Private Fuel Storage, LLC,* CLI-01-26, 54 NRC at 381).

[46] *Callaway, et al*., CLI-11-5, 74 NRC at 166; *see also Diablo Canyon Independent Spent Fuel Storage Installation*, CLI-03-4, 57 NRC at 277.

efficient.[47] The Petitioners are incorrect. First, as discussed above, the Rulemaking Petition does not present new and significant information under NEPA because the information upon which it relies is consistent with information that was previously considered by the Staff with respect to spent fuel pool accidents.[48]

Second, fair and efficient decisionmaking would actually be better served by denying the Suspension Petition because the Suspension Petition is premature. The Commission has not yet decided whether it will grant the Rulemaking Petition, and the merits of the Rulemaking Petition have not yet been scrutinized by the agency or the public. The Commission has denied suspension petitions related to Fukushima[49] as premature because the Commission did "not know today the full implications of the Japan events for U.S. facilities" and, therefore, "any generic NEPA duty – if one were appropriate at all – does not accrue now."[50] The Commission also denied a suspension petition because "the particulars of [the associated] rulemaking petition" had not yet "been scrutinized by public comment and agency review."[51] Inasmuch as the Commission has not yet decided whether it will pursue rulemaking with respect to the issues raised in the Rulemaking Petition, and the merits of the Rulemaking Petition have not yet been

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[47] Suspension Petitions at 10-11.

[48] Even though the content of the Rulemaking Petition does not constitute new and significant information under NEPA, this does not mean that the NRC will not consider rulemaking consistent with the Rulemaking Petition because the standard for rulemaking is different than the NEPA standard for supplementing environmental impact statements. *See* 10 C.F.R. § 2.803 ("No hearing will be held on the petition unless the Commission deems it advisable. If the Commission determines that sufficient reason exists, it will publish a notice of proposed rulemaking. In any other case, it will deny the petition …").

[49] *Compare Callaway*, *et al*., CLI-11-5, 74 NRC at 167 (where the petitioners argued that, through its review of the Fukushima accident, the NRC had "admitted that it has new information that concededly could have a significant effect on its regulatory program and the outcome of its licensing decisions for individual reactors" and that this information must be considered before making new reactor and license renewal decisions) (quotations omitted) *with* Suspension Petition at 10 ("Here, by its own admission, the NRC has new information that concededly could have a significant effect on its regulatory program and the outcome of its licensing decisions for individual reactors.").

[50] *Callaway*, *et al*., CLI-11-5, 74 NRC at 167.

[51] *Petition for Rulemaking to Amend 10 C.F.R. § 54.17(c)*, CLI-11-1, 73 NRC at 5.

scrutinized by the agency or the public, the Commission should deny the Suspension Petition as premature.

The Suspension Petition should also be denied because denying the petition does not prove an obstacle to fair and efficient decisionmaking. At this point in time, the relief that it seeks, namely the suspension of licensing decisions, is already in effect as a result of the Commission's suspension of licensing decisions during its Waste Confidence rulemaking activities. Indeed, as acknowledged by the Petitioners, their requested relief is similar to the relief granted by the Waste Confidence suspension[52] and that suspension is unlikely to be lifted before October 2014.[53] The Petitioners have not demonstrated that the requested suspension is necessary, given the existing Waste Confidence suspension, to fair and efficient decisionmaking by the Commission.

C. The Continuation of Licensing Activities Would Not Prevent Appropriate Implementation of Any Pertinent Rule or Policy Changes that Might Emerge from the Rulemaking Petition

As noted above, the Commission has stated that a suspension petition may be granted if the petitioner demonstrates that not granting the suspension would "prevent appropriate implementation of any pertinent rule or policy changes that might emerge from" the associated petition for rulemaking.[54] The Commission has also stated that the conclusion of a licensing proceeding need not await the outcome of a rulemaking petition to ensure that a proposed

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[52] Suspension Petition at 4.

[53] *See* Rulemaking Petition at 17.

[54] *Callaway*, *et al.*, CLI-11-5, 74 NRC at 158 (quoting *Private Fuel Storage, LLC,* CLI-01-26, 54 NRC at 380); *Petition for Rulemaking to Amend 10 C.F.R. § 54.17(c)*, CLI-11-1, 73 NRC at 5; *Diablo Canyon Independent Spent Fuel Storage Installation*, CLI-03-4, 57 NRC at 277.

facility can accommodate any changes resulting from the rulemaking proposal because "*every license* the Commission issues is subject to the possibility of additional requirements."[55]

Here, the rule or policy changes sought by the Rulemaking Petition are modifications of current "NRC [NEPA] regulations that make or rely on findings regarding the environmental impacts of spent fuel storage during reactor operation, including Table B-1 [of Appendix B to Subpart A of 10 C.F.R. Part 51] and all regulations approving standardized reactor designs."[56] Thus, the Rulemaking Petition does not seek to make substantive changes to the operational requirements for spent fuel pools. Further, the Staff has determined that the Consequence Study and Regulatory Analysis were consistent with previous studies of spent fuel pool accidents. Therefore, the Staff's analysis in each of the affected proceedings would not need to be altered or revised to reflect the information Petitioners allege is new and significant. And because final licensing decisions are already suspended in these proceedings, no actions are imminent that may preclude or prevent any appropriate implementation of changes contemplated by the Rulemaking Petition.

In essence, the Rulemaking Petition requests that the Commission reevaluate its rules regarding the environmental impacts of reactor licensing.[57] The Rulemaking Petition alleges potential environmental impacts that might result from high-density spent fuel pool storage and requests that these alleged impacts be included with the impacts already considered by the NRC under NEPA.[58] As discussed above, these allegedly new impacts have been previously analyzed in EISs for license renewal, operating licenses, combined operating licenses, and

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[55] *Diablo Canyon Independent Spent Fuel Storage Installation*, CLI-03-4, 57 NRC at 277 (quoting *Pacific Gas and Electric Co*. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-02-23, 56 NRC 230, 240 (2002)).

[56] Rulemaking Petition at 5.

[57] *See* Rulemaking Petition at 4-5.

[58] *Id.* at 30-34. As previously discussed, the Staff has previously looked at this information and, with respect to the information contained in the expedited spent fuel transfer analysis, determined that it is consistent with previous analyses.

design certifications.[59] The Petitioners do not demonstrate how a failure to suspend licensing decisions now could prevent the appropriate implementation of any rule or policy change that might emerge from consideration of the rulemaking issues discussed in the Suspension Petition in light of the procedural posture of these cases. Thus, the Suspension Petition should be denied.

III. The Existing Waste Confidence Suspension Does Not Alter the Fact that the Suspension Petition Must Satisfy the Commission's Suspension Standard

Although acknowledging the applicability of the suspension standard, the Petitioners alternatively argue that, even if they fail to satisfy the standard, the Suspension Petition should be granted in a manner analogous to the Commission's Waste Confidence suspension.[60] That argument should be rejected, because the special circumstances surrounding the Waste Confidence suspension do not apply here.

In *Calvert Cliffs et al.*, the Commission responded to petitions to suspend final licensing decisions based on the Court of Appeals' decision in *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012), vacating the Commission's 2010 update to the Waste Confidence Decision and accompanying Temporary Storage Rule.[61] The Commission stated that, "Waste confidence undergirds certain agency licensing decisions, in particular new reactor licensing and reactor license renewal."[62] The Commission did not address the suspension standard; instead, it stated that, based on the NRC's regulatory structure and "in recognition of [the Commission's] duties under the law," the Commission "will not issue licenses dependent upon the Waste Confidence

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[59] *See supra* at 7-11.

[60] Suspension Petition at 4, 9.

[61] *Calvert Cliffs 3 Nuclear Project, LLC and UniStar Nuclear Operating Services, LLC*, (Calvert Cliffs Nuclear Power Plant, Unit 3), *et al.*, CLI-12-16, 76 NRC 63, 65-66 (2012). *See also* Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 75 Fed. Reg. 81,032 (Dec. 23, 2010) (Final rule); Waste Confidence Decision Update, 75 Fed. Reg. 81,037 (Dec. 23, 2010).

[62] *Id. at 66*.

Decision or the Temporary Storage Rule until the court's remand is appropriately addressed."[63] Thus, the relief provided by the Waste Confidence suspension was dictated by the *vacatur* of the Commission rules that undergirded, in part, the licensing decisions at issue and not by any discussion specific to the suspension standard.

The Commission has previously indicated that it disfavors "upset[ting] the status quo by effectively overturning a rule … that was the product of carefully considered rulemaking."[64] The Waste Confidence suspension is distinguishable, however, in that the Court of Appeals overturned an existing rule, effectively preventing the NRC from proceeding with actions in reliance upon that rule. In contrast, the current Rulemaking Petition only *proposes* a change to the existing rule, which proposal has not been considered or acted upon by the Commission, and does not overturn any rule. Thus, the Commission's suspension standard should apply and because the Suspension Petition does not meet any of the three suspension factors, it should be denied.

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[63] *Id*. at 66-67.

[64] *Petition for Rulemaking to Amend 10 C.F.R. § 54.17(c)*, CLI-11-1, 73 NRC at 5.

CONCLUSION

For the reasons stated above, the Suspension Petition does not provide a sufficient justification for the suspension of all NRC licensing decisions pending agency consideration of the matters proposed for rulemaking. Accordingly, the Suspension Petition should be denied.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 21st day of March, 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
FLORIDA POWER & LIGHT COMPANY	)	Docket Nos. 52-040-COL & 52-041-COL
	)	
(Turkey Point Units 6 and 7)	)	

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R § 2.305 (as revised), I hereby certify that copies of the foregoing "NRC STAFF ANSWER OPPOSING SUSPENSION PETITION" dated March 21, 2014 have been served upon the Electronic Information Exchange, the NRC's E-Filing System, in the above-captioned proceeding, this 21st day of March, 2014.

/Signed (electronically) by/

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Dated at Rockville, Maryland
This 21st day of March, 2014