

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
FIRSTENERGY NUCLEAR OPERATING COMPANY) Docket No. 50-346-LR
(Davis-Besse Nuclear Power Station, Unit 1)) March 21, 2014
)

**FIRSTENERGY NUCLEAR OPERATING COMPANY RESPONSE TO PETITION TO
SUSPEND LICENSING DECISIONS PENDING COMPLETION OF RULEMAKING**

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. BACKGROUND	2
A. Current Status of the Davis-Besse License Renewal Proceeding.....	2
1. The NRC's Ongoing Review of the License Renewal Application	2
2. The Related Adjudicatory Proceeding	3
B. NRC Staff's Evaluation of Expedited Transfer of Spent Fuel to Dry Cask Storage	5
C. The Petition for Rulemaking.....	7
D. The Petition to Suspend NRC Licensing Decisions	9
III. THE SUSPENSION PETITION SHOULD BE REJECTED.....	9
A. The Suspension Petition Does Not Provide an Adequate Basis to Suspend the NRC's License Renewal Decision.....	9
1. Moving Forward with the Renewed License Will Not Jeopardize Public Health and Safety.....	10
2. Suspending the Davis-Besse License Renewal Decision Would Frustrate Fair and Efficient Decisionmaking.....	11
3. Moving Forward with the Renewed License Will Not Hamper Implementation of Any Potential Rule or Policy Changes.....	14
B. The Suspension Petition Does Not Identify New and Significant Information	15
1. NEPA Imposes a High Standard with Respect to the Need for Supplemental Environmental Analyses or Documentation	15
2. The Suspension Petition and Rulemaking Petition Have Not Identified Any New and Significant Information Related to Davis-Besse License Renewal.....	17
3. The Information in the Expedited Fuel Transfer Proceeding Is Not New and Significant as Evaluated Under NEPA	17
C. The Suspension Petition Also Should Be Rejected for Procedural Deficiencies.....	27
IV. CONCLUSION.....	28

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I. INTRODUCTION

In accordance with 10 C.F.R. § 2.323(c) and the Secretary of the Commission’s March 4, 2014 Order, FirstEnergy Nuclear Operating Company (“FENOC”) files this Answer opposing the Suspension Petition filed by the Intervenors on February 27, 2014.¹ Intervenors request that the Commission suspend the issuance of the renewed operating license for the Davis-Besse Nuclear Power Station, Unit 1 (“Davis-Besse”) pending the Nuclear Regulatory Commission’s (“NRC”) completion of a *requested* rulemaking proceeding concerning the environmental impacts of accidents involving fires in “high-density” spent fuel pools (“SFP”) and related mitigation measures.² Intervenors contend that such extraordinary action is necessary for compliance with the National Environmental Policy Act’s (“NEPA”) requirement that “new and

¹ See 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”). The Introduction to the Suspension Petition only identifies two of the Davis-Besse license renewal Intervenors (Beyond Nuclear and Don’t Waste Michigan) as submitting the petition. *Id.* at 2. However, the signature block for Terry Lodge, counsel for Intervenors, also lists the two remaining Intervenors (Citizens Environment Alliance of Southwestern Ontario and the Green Party of Ohio). *Id.* at 16. For ease of reference, this Answer uses the phrase “Intervenors.”

² See 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) (“Rulemaking Petition”) (attached to Suspension Petition).

significant information” be incorporated into reactor licensing decisions before those decisions are finalized.³

As set forth below, the Suspension Petition should be denied in its entirety. First, the Suspension Petition seeks relief that is premature, unwarranted, and contrary to Commission precedent that disfavors holding adjudicatory proceedings and licensing decisions in abeyance. Second, Intervenors fail to support their core claim; *i.e.*, that “new and significant” information on the environmental impacts of “high-density” SFP storage warrants supplemental rulemaking by the NRC and a concomitant suspension of NRC licensing decisions. To the contrary, the environmental impacts of SFP fires have long been well understood and have been determined to be small. The NRC Staff Consequence Study⁴ relied upon by Intervenors provides information that is consistent with previous studies; thus, no further NEPA evaluation or rulemaking is warranted. Furthermore, the Suspension Petition is procedurally deficient because it is untimely.

II. BACKGROUND

A. Current Status of the Davis-Besse License Renewal Proceeding

1. The NRC’s Ongoing Review of the License Renewal Application

In August 2010, FENOC filed an application to renew the 10 C.F.R. Part 50 operating license for Davis-Besse for an additional 20-year term.⁵ The NRC Staff published its Safety Evaluation Report (“SER”) with open items on July 31, 2012, and its final SER on September 3, 2013. The Advisory Committee on Reactor Safeguards still must meet on the final SER. The

³ Suspension Petition at 4.

⁴ See Consequence Study of a Beyond-Design-Basis Earthquake Affecting the Spent Fuel Pool for a U.S. Mark I Boiling Water Reactor (Oct. 2013) (“Consequence Study”) (attached to SECY-13-0112 (Oct. 9, 2013)), available at ADAMS Accession No. ML13256A334 (package); Suspension Petition at 3-5, 13.

⁵ License Renewal Application; Davis-Besse Nuclear Power Station at 1.0-1 (Aug. 2010). The current operating license for Davis-Besse expires on April 22, 2017.

Staff published the Draft Supplemental Environmental Impact Statement (“SEIS”) in February 2014, and anticipates that it will publish the Final SEIS in September 2014.⁶

2. The Related Adjudicatory Proceeding

On December 27, 2010, Intervenors petitioned to intervene in this proceeding, proffering four contentions.⁷ On April 26, 2011, the Atomic Safety and Licensing Board (“Board”) admitted Contention One; a reformulated and consolidated version of Contentions One, Two, and Three regarding renewable energy alternatives; and Contention Four, a narrowed version of a contention concerning FENOC’s severe accident mitigation alternatives (“SAMAs”) analysis.⁸

FENOC appealed the Board’s ruling admitting the two contentions and, on March 27, 2012, the Commission reversed the Board’s admission of Contention One, and reversed, in part, the Board’s admission of Contention Four.⁹ FENOC later moved for summary disposition as to the remaining part of Contention Four.¹⁰

On January 10, 2012, Intervenors moved to admit proposed Contention Five concerning laminar concrete cracking of the Davis-Besse shield building.¹¹ Subsequently, Intervenors submitted five motions to amend and/or supplement the proposed cracking contention.

On November 5 and 6, 2012, the Board held oral argument on FENOC’s motion for summary disposition of Contention Four, the admissibility of proposed Contention Five, and the

⁶ See Davis-Besse Nuclear Power Station, Unit 1 – License Renewal Application, available at <http://www.nrc.gov/reactors/operating/licensing/renewal/applications/davis-besse.html>.

⁷ See Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario, Don’t Waste Michigan, and the Green Party of Ohio Request for Public Hearing and Petition for Leave to Intervene (Dec. 27, 2010).

⁸ See FirstEnergy Nuclear Operating Co. (Davis-Besse Nuclear Power Station), LBP-11-13, 73 NRC 534, 588–89 (2011).

⁹ See generally FirstEnergy Nuclear Operating Co. (Davis-Besse Nuclear Power Station), CLI-12-8, 75 NRC 393 (2012).

¹⁰ See FirstEnergy’s Motion for Summary Disposition of Contention 4 (SAMA Analysis Source Terms) (July 26, 2012).

¹¹ See Motion for Admission of Contention No. 5 on Shield Building Cracking (Jan. 10, 2012).

five motions to supplement or amend. On December 28, 2012, the Board granted FENOC's motion for summary disposition of Contention Four,¹² and denied Intervenors' motion to admit proposed Contention Five.¹³

In the interim, Intervenors also filed with the Board a motion to admit a new environmental contention that challenges the alleged failure of FENOC's Environmental Report to address the environmental impacts that may occur if a spent fuel repository does not become available.¹⁴ The proposed contention is based on the U.S. Court of Appeals for the District of Columbia Circuit's decision in *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012),¹⁵ which invalidated and remanded the NRC's Waste Confidence Decision Update¹⁶ and related final rule.¹⁷

On August 7, 2012, the Commission issued CLI-12-16, in which it directed all licensing boards to hold numerous pending waste confidence contentions in abeyance pending further Commission order.¹⁸ Consequently, in an August 8, 2012 Order, the Board held any participant or Board activity concerning Intervenors' proposed waste confidence contention in abeyance pending further Commission direction.¹⁹

¹² *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station), LBP-12-26, 76 NRC 559 (2012).

¹³ *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station), LBP-12-27, 76 NRC 583 (2012).

¹⁴ See Intervenors' Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Davis-Besse Nuclear Power Station (July 9, 2012).

¹⁵ *See id.*

¹⁶ Waste Confidence Decision Update, 75 Fed. Reg. 81,037 (Dec. 23, 2010).

¹⁷ Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 75 Fed. Reg. 81,032 (Dec. 23, 2010).

¹⁸ See *Calvert Cliffs Nuclear Project, LLC, et al.* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 NRC 63, 68-69 (2012).

¹⁹ See Licensing Board Order (Suspending Procedural Date Related to Proposed Waste Confidence Decision) at 1 (Aug. 8, 2012) (unpublished).

On September 23, 2013, FENOC filed with the Board a petition seeking certification of a waste confidence-related question to the Commission.²⁰ Specifically, FENOC sought clarification as to whether the Commission intended to authorize the Board to lift the abeyance on Intervenors' proposed waste confidence issues. The Board denied FENOC's certification petition on November 18, 2013.²¹ Thus, the Commission-ordered abeyance remains in place.²²

B. NRC Staff's Evaluation of Expedited Transfer of Spent Fuel to Dry Cask Storage

Intervenors' Suspension Petition stems from their belief that the NRC Staff has identified "new and significant information" as part of ongoing post-Fukushima review activities related to SFP storage.²³ Specifically, in a May 7, 2013 memorandum to the Commission, the Staff outlined a plan for evaluating whether the NRC should undertake a regulatory action to require the expedited transfer of spent fuel from pools to dry cask storage containers at U.S. nuclear power plants.²⁴ As part of that effort, the NRC Staff performed the aforementioned Consequence Study to examine the risks and consequences of postulated SFP accidents. The Consequence Study (one of many SFP-related studies performed by the NRC over the years) is the principal focus of Intervenors' Suspension Petition.

²⁰ See FENOC's Petition for Certification of Waste Confidence-Related Question to the Commission Pursuant to 10 C.F.R. § 2.323(f)(2) (Sept. 23, 2013).

²¹ See Order (Denying FENOC's Petition for Certification of Waste Confidence-Related Question to the Commission) (Nov. 18, 2013) (unpublished).

²² In the *Sequoyah* license renewal proceeding, the Commission stated that the direction it provided in *Calvert Cliffs* (CLI-12-16) remains in place, and that the Commission will provide further direction regarding pending waste confidence contentions concurrent with issuance of the NRC's final waste confidence rule in Fall 2014. See *Tenn. Valley Auth.* (*Sequoyah Nuclear Plant, Units 1 & 2*), CLI-14-03, 79 NRC __, slip op. at 8-9 (Feb. 12, 2014).

²³ The Suspension Petition refers to these NRC activities collectively as the NRC's "Expedited Spent Fuel Pool Transfer Proceeding." Suspension Petition at 3.

²⁴ Memorandum from Michael R. Johnson, Deputy Executive Director for Reactors and Preparedness Programs, NRC, to the Commissioners, Updated Schedule and Plans for Japan Lessons-Learned Tier 3 Issue on Expedited Transfer of Spent Fuel (May 7, 2013), available at ADAMS Accession No. ML13105A122.

On June 24, 2013, the NRC Staff published a draft version of its Consequence Study for public comment, which was followed by the Staff's publication of the final version of the Consequence Study in October 2013.²⁵ The Consequence Study is intended to help the NRC Staff evaluate whether the accelerated transfer of spent fuel from the SFP to dry cask storage would significantly reduce risks to public health and safety.²⁶ The study provides consequence estimates for a hypothetical SFP accident initiated by a low-likelihood seismic event at a reference plant for both a fully loaded (high-density) and minimally loaded (low-density) SFP.²⁷ The postulated accident scenario involved a failure of the SFP liner, drainage of the pool, and initiation of a fire involving the Zircaloy cladding of the spent fuel.²⁸

The NRC Staff concluded that SFPs are likely to withstand severe earthquakes without leaking.²⁹ Further, the regulatory analysis included in the study indicates that expediting movement of spent fuel from the pool does not provide a cost-justified substantial safety enhancement (*i.e.*, backfit) for the reference plant.³⁰ Based on the Consequence Study and previous studies,³¹ the NRC Staff reiterated its conclusion that high-density storage of spent fuel in pools ensures adequate protection of public health and safety.³²

²⁵ See Draft Report; Request for Comment, Consequence Study of a Beyond-Design-Basis Earthquake Affecting the Spent Fuel Pool for a U.S. Mark I Boiling Water Reactor (June 2013), available at ADAMS Accession No. ML13133A132; Consequence Study (attached to SECY-13-0112 (Oct. 9, 2013)). The NRC sought comments on the draft report via a notice published in the *Federal Register*. See Consequence Study of a Beyond-Design-Basis Earthquake Affecting the Spent Fuel Pool for a U.S. Mark I Boiling Water Reactor, 78 Fed. Reg. 39,781 (July 2, 2013).

²⁶ See Consequence Study at vi. The NRC plans to use the Consequence Study results to inform its broader regulatory analysis of the SFPs at all U.S. operating nuclear reactors as part of its Japan Lessons-Learned Tier 3 plan. *Id.* at v.

²⁷ See *id.* at v.

²⁸ See *id.* at D-16.

²⁹ See *id.* at v.

³⁰ See *id.*

³¹ See, e.g., NUREG-1353, Regulatory Analysis for the Resolution of Generic Issue 82, Beyond Design Basis Accidents in Spent Fuel Pools (Apr. 1989); NUREG/CR-6451, A Safety and Regulatory Assessment of

After the Consequence Study, the NRC Staff submitted a memorandum (COMSECY-13-0030) to the Commission, setting forth the Staff's overall evaluation and recommendation related to expedited transfer of spent fuel.³³ Therein, the Staff concluded that the expedited transfer of spent fuel to dry cask storage would provide only a minor or limited safety benefit, and that its expected implementation costs would not be warranted.³⁴ The Staff recommended no further generic assessments be pursued related to possible regulatory actions to require the expedited transfer of spent fuel to dry cask storage, and that this Tier 3 Japan lessons-learned activity be closed.³⁵ The Commission's response to COMSECY-13-0030 is pending.

C. **The Petition for Rulemaking**

On February 18, 2014, Intervenors and numerous other groups submitted their Rulemaking Petition to the NRC.³⁶ The Rulemaking Petition claims that following the Fukushima accident, the NRC Staff generated "new and significant information" regarding purportedly adverse environmental impacts of high-density SFP storage and alternatives for avoiding those impacts.³⁷ The Rulemaking Petition asserts that the NRC Staff has revealed for the first time that: (1) as many as 9,400 square miles could be rendered uninhabitable by a relatively small SFP fire, displacing over 4 million people for decades; (2) reducing the density of spent fuel storage in reactor pools may be a cost-beneficial mitigation alternative; and (3) the

Generic BWR and PWR Permanently Shutdown Nuclear Power Plants (Apr. 1997); NUREG-1738, Technical Study of Spent Fuel Pool Accident Risk at Decommissioning Nuclear Power Plants (Feb. 2001).

³² See Consequence Study at v.

³³ See COMSECY-13-0030, Staff Evaluation and Recommendation for Japan Lessons-Learned Tier 3 Issue on Expedited Transfer of Spent Fuel (Nov. 12, 2013).

³⁴ See *id.* at 1-2.

³⁵ See *id.* at 10.

³⁶ See generally Rulemaking Petition.

³⁷ *Id.* at 1-2.

likelihood of SFP fires could be affected by reactor accidents.³⁸ The Rulemaking Petition cites the Consequence Study and its associated Regulatory Analysis as the sources of that allegedly new and significant information.³⁹

The Rulemaking Petition suggests that this information is “new” because it has not been previously addressed by the NRC Staff in any environmental impact statement (“EIS”) for reactor licensing, the generic EIS (“GEIS”) for license renewal, or any environmental assessment for standardized design certification.⁴⁰ It further states that the information is “significant” because it undermines the NRC’s conclusion in previous environmental studies for reactor licensing and license renewal that the impacts of spent fuel storage during reactor operation are small.⁴¹

The Rulemaking Petition claims that this purportedly new and significant information must be considered now under NEPA, and requests that the Commission: (1) modify NRC’s regulations that make or rely on findings regarding the environmental impacts of spent fuel storage during reactor operation; (2) suspend the effectiveness of NRC regulations related to the environmental impacts of spent fuel storage during the license renewal term; (3) re-publish for public comment the NRC’s GEIS for license renewal and the EISs for all new reactors; and (4) suspend all new reactor licensing decisions and license renewal decisions pending completion of the rulemaking.⁴²

³⁸ See *id.* at 2-3.

³⁹ See *id.* at 2-3 nn. 5, 7, & 9 (citing Consequence Study at 29, 162 (Table 33) & 232 (Table 62)); Regulatory Analysis for Japan Lessons-Learned Tier 3 Issue on Expedited Transfer of Spent Fuel (Attachment 1 to COMSECY-13-0013) at 7, 46-51 (Nov. 12, 2013) (“Regulatory Analysis”), available at ADAMS Accession No. ML13273A628).

⁴⁰ Rulemaking Petition at 2-3, 27.

⁴¹ *Id.*

⁴² See *id.* at 4-5, 35-36. The Suspension Petition (sponsored by Intervenors in this proceeding) is narrower in scope, insofar as it is confined to a limited number of pending licensing and license renewal adjudications.

D. The Petition to Suspend NRC Licensing Decisions

On February 27, 2014, Intervenors and various other adjudicatory participants filed the instant Suspension Petition pursuant to 10 C.F.R. § 2.802(d), seeking to suspend certain final NRC licensing decisions until the NRC Staff addresses the allegedly “new and significant” information identified in the February 18, 2014 Rulemaking Petition (as summarized above). Intervenors cite, and incorporate by reference, the Rulemaking Petition as support for the Suspension Petition.⁴³ Thus, the Suspension Petition is fundamentally generic, and does not address any specific issues or concerns for Davis-Besse.

III. THE SUSPENSION PETITION SHOULD BE REJECTED

A. The Suspension Petition Does Not Provide an Adequate Basis to Suspend the NRC’s License Renewal Decision

The Suspension Petition should be rejected for failure to include adequate bases and justification for suspension of the Davis-Besse license renewal decision. The Commission considers the suspension of licensing proceedings or decisions to be a “drastic action that is not warranted absent immediate threats to public health and safety, or other compelling reason.”⁴⁴ As discussed in *Callaway*, the Commission applies three criteria in determining whether to suspend an adjudication or licensing decision: (1) whether moving forward “will jeopardize the public health and safety”; (2) whether continuing the review process will “prove an obstacle to fair and efficient decisionmaking”; and (3) whether going forward will “prevent appropriate implementation of any pertinent rule or policy changes that might emerge from [the NRC’s] . . .

This was confirmed by the Secretary of the Commission’s March 4, 2014 Order, which likewise only applied to a limited number of proceedings.

⁴³ See Suspension Petition at 3.

⁴⁴ *Union Elec. Co. d/b/a Ameren Missouri* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC 141, 158 (2011) (quoting *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 484 (2008)) (internal quotation marks omitted).

ongoing evaluation.”⁴⁵ As set forth below, the Suspension Petition satisfies none of the three criteria for suspension of a licensing action.⁴⁶

1. Moving Forward with the Renewed License Will Not Jeopardize Public Health and Safety

Although Intervenors acknowledge the three-pronged *Callaway* test for evaluating suspension requests,⁴⁷ nowhere in their Suspension Petition do they explicitly address the first criterion. Instead, Intervenors assert only 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.”⁴⁸ Accordingly, they do not challenge the adequacy of the NRC’s safety regulations, or the NRC’s ability to ensure adequate protection of the public health and safety.⁴⁹ Intervenors thus fail to show that issuance of the renewed license before resolution of the Rulemaking Petition poses “an imminent risk to public health and safety.”⁵⁰ Further, as discussed below, Intervenors have not identified any new and significant information that requires supplemental agency analysis under NEPA. Therefore, Intervenors have presented no information or argument to suggest that the first *Callaway* criterion is met, or that suspension of the NRC’s license renewal decision is warranted.

⁴⁵ *Id.* at 158-59 (quoting *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 380 (2001)).

⁴⁶ NRC regulations also address stays in 10 C.F.R. §§ 2.342 and 2.1213, but those regulations are not applicable in this situation. Even if these regulations did apply, Intervenors have not addressed the factors for a stay. For example, Intervenors have not demonstrated that they will prevail in this proceeding or that they will be irreparably injured if the licensing decisions were to move forward.

⁴⁷ See Suspension Petition at 9.

⁴⁸ *Id.* at 3-4 (emphasis added).

⁴⁹ See *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plants, Units 3 & 4), CLI-01-17, 54 NRC 3, 13 (2001) (citing *Limerick Ecology Action v. NRC*, 869 F.2d 719, 729-31 (3d Cir. 1989) (“The AEA and NEPA contemplate separate NRC reviews of proposed licensing actions.”)).

⁵⁰ *Callaway*, CLI-11-5, 74 NRC at 163, 166.

2. Suspending the Davis-Besse License Renewal Decision Would Frustrate Fair and Efficient Decisionmaking

With regard to the second *Callaway* criterion, Intervenors aver that because the “well-established legal standard for new and significant information is easily satisfied by NRC’s own documents . . . , to refuse to stay licensing decisions that are affected by that information would frustrate fair and effective decisionmaking under NEPA.”⁵¹ Even *assuming* that the Suspension Petition identified new and significant information (which it does not), it still fails to demonstrate that a stay of the NRC’s license renewal decision is warranted in these circumstances.

The suspension of licensing actions runs counter to the Commission’s long-standing commitment to efficient and expeditious processing of applications and associated hearings.⁵² The unnecessary postponement of licensing adjudications and decisions “contravenes the Commission’s interest in ‘regulatory finality’ and ‘sound case management.’”⁵³ Here, the NRC has not had an opportunity to review the Rulemaking Petition to assess its merit and the potential need for rulemaking. As the Commission has ruled under similar circumstances, proceedings should not be suspended absent this threshold determination.⁵⁴ Indeed, staying licensing actions

⁵¹ Suspension Petition at 10.

⁵² See, e.g., *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 18, 24 (1998).

⁵³ See *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-01-27, 54 NRC 385, 390-91 (2001) (citing *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC at 24); *Hydro Res., Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 39 (2001)).

⁵⁴ See, e.g., *Petition for Rulemaking to Amend 10 C.F.R. § 54.17(c)*, CLI-11-1, 73 NRC 1, 5 (2011) (quoting *Private Fuel Storage*, CLI-01-26, 54 NRC at 383) (stating that “Petitioners’ concerns are untested and remain to be examined after receipt of comments on the rulemaking petition,” and that “holding up these proceedings is not necessary to ensure that the public will realize the full benefit of our ongoing regulatory review” of Petitioners’ concerns).

in these circumstances would frustrate—not advance—the Commission’s objective of promoting expeditious decision-making and regulatory certainty.⁵⁵

Here, the drastic relief sought by Intervenors—suspension of the Commission’s license renewal decision—is premature given the current status of both the Rulemaking Petition and the Davis-Besse proceeding. Although NRC regulations in 10 C.F.R. § 2.802(d) permit the concurrent filing of rulemaking petitions and suspension requests, such suspension requests are not, *ipso facto*, warranted. Indeed, Intervenors acknowledge that “[s]ome NRC cases have suggested that a motion under 10 C.F.R. § 2.802 should not be submitted *until the conclusion of the rulemaking proceeding*,”⁵⁶ thereby allowing the rulemaking petitioners’ concerns to be “scrutinized by public comment and agency review.”⁵⁷ The Rulemaking Petition on which Intervenors rely has not even been docketed by the NRC, much less made available for public comment.

The Commission also has expressly stated that suspension requests are premature when no final licensing decision is imminent:

The [petitioner’s] rulemaking petition [] asked the NRC to withhold final decisions in the *Vermont Yankee* and *Pilgrim* license renewal proceedings until the rulemaking petition is resolved. But final decisions in those proceedings are not expected for another year or more. Those proceedings involve many issues unrelated to the [petitioner’s] rulemaking petition. *It is therefore premature to consider suspending proceedings or delaying final decisions.*⁵⁸

⁵⁵ See *id.* at 4 (“Absent extraordinary cause, however, seldom do we interrupt licensing reviews or our adjudications—particularly by an indefinite or very lengthy stay as contemplated here—on the mere possibility of change. Otherwise, the licensing process would face endless gridlock.”).

⁵⁶ Suspension Petition at 14 (citing *Petition for Rulemaking to Amend 10 C.F.R. § 54.17(c)*, CLI-11-1, 73 NRC at 4-5) (emphasis added).

⁵⁷ *Petition to Amend 10 C.F.R. § 54.17(c)*, CLI-11-1, 73 NRC at 5.

⁵⁸ *Entergy Nuclear Vt. Yankee, LLC* (Vt. Yankee Nuclear Power Station; Pilgrim Nuclear Power Station), CLI-07-3, 65 NRC 13, 22 n.37 (2007), *aff’d*, *Mass. v. United States*, 522 F.3d 115 (1st Cir. 2008) (emphasis added).

In the multi-docket *Callaway* proceeding, the Commission similarly rejected various petitioners' requests to suspend licensing proceedings pending disposition of their post-Fukushima rulemaking petitions.⁵⁹ Citing its ruling in *Vermont Yankee* and *Pilgrim*, and to its finding that none of the implicated license applications was "on the verge of being granted," the Commission ruled that the petitioners' request to suspend was "premature."⁶⁰

In *Callaway*, the Commission also emphasized the ongoing nature of its post-Fukushima review. It noted that "until we have a complete understanding of the Fukushima events, and have provided direction as to potential changes to regulatory requirements, we will not know whether, or the extent to which, an individual NEPA review might be impacted."⁶¹ The Commission further explained that if changes to its current environmental assessment rules are warranted, then it can "revisit whether an individual licensing review or adjudication should be held in abeyance pending the outcome of a relevant rulemaking."⁶²

This Commission precedent governs the disposition of Intervenors' Suspension Petition. First, the Rulemaking Petition on which it is based stems from the NRC's ongoing post-Fukushima evaluations. Second, Intervenors seek to "suspend the effectiveness" of NRC regulations related to the environmental impacts of spent fuel storage.⁶³ Finally, issuance of the Davis-Besse renewed operating license is not imminent in view of ongoing adjudicatory activities. Accordingly, the Commission's rulings in the *Vermont Yankee* and *Callaway* decisions control here and compel denial of the Suspension Petition.

⁵⁹ *Callaway*, CLI-11-5, 74 NRC at 173-75. Not unlike the instant rulemaking petitioners, the petitioners in *Callaway* sought to rescind regulations in 10 C.F.R. Part 51 that "draw generic conclusions about the environmental impacts of severe reactor and spent fuel pool accidents and that preclude consideration of those issues in individual licensing proceedings." *Id.* at 173.

⁶⁰ *Id.* at 174 (citing *Vt. Yankee*, CLI-07-3, 65 NRC at 22 n.37).

⁶¹ *Id.*

⁶² *Id.* (emphasis added).

⁶³ Suspension Petition at 8.

3. Moving Forward with the Renewed License Will Not Hamper Implementation of Any Potential Rule or Policy Changes

Intervenors also fail to explain why suspension of the Davis-Besse license renewal decision is necessary under the third *Callaway* criterion. Issuance of the Davis-Besse renewed operating license is not imminent for the reasons stated above.⁶⁴ Thus, there is time for the NRC Staff to review the Rulemaking Petition, evaluate its merits, and determine whether rulemaking is warranted—all without the need to suspend the final licensing decision.⁶⁵

As Intervenors fully acknowledge, the Consequence Study is part of the NRC's continuing post-Fukushima reviews.⁶⁶ As explained in *Callaway*, the NRC has well-established processes for imposing any new requirements necessary to protect public health and safety and the common defense and security.⁶⁷ Further, with respect to its post-Fukushima NEPA review obligations, the Commission has noted that “[i]f the NRC determines that changes to its current environmental assessment rules are warranted, then [i]t can revisit whether an individual licensing review or adjudication should be held in abeyance pending the outcome of a relevant rulemaking.”⁶⁸ Therefore, “[m]oving forward with [its] decisions and proceedings will have no effect on the NRC’s ability to implement necessary rule or policy changes that might come out of [its] review of the Fukushima Daiichi events.”⁶⁹

⁶⁴ In this regard, the Commission already suspended licensing decisions when it stated that it will not issue licenses dependent on the Waste Confidence Decision or the Temporary Storage Rule until the D.C. Circuit’s remand in *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012) has been appropriately addressed. See *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 NRC 63 (2012).

⁶⁵ See *Callaway*, CLI-11-5, 74 NRC at 174-75; *Petition to Amend 10 C.F.R. § 54.17(c)*, CLI-11-1, 73 NRC at 5; *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-13, 67 NRC 396, 399-400 (2008); *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation), CLI-03-4, 57 NRC 273, 277 (2003).

⁶⁶ See Suspension Petition at 13.

⁶⁷ See *Callaway*, CLI-11-5, 74 NRC at 166.

⁶⁸ See *id.* at 174.

⁶⁹ *Id.* at 166. See also *Diablo Canyon*, CLI-03-4, 57 NRC at 277 (“As ‘every license the Commission issues is subject to the possibility of additional requirements,’ moving forward with the current . . . licensing proceeding

For all of the above reasons, the Suspension Petition fails to demonstrate that staying the Davis-Besse license renewal decision pending the NRC’s disposition of the Rulemaking Petition is necessary to protect the public health and safety, to facilitate fair and efficient decisionmaking, or to ensure appropriate implementation of any pertinent rule or policy changes. Accordingly, the Suspension Petition can be rejected on this ground alone.

B. The Suspension Petition Does Not Identify New and Significant Information

Contrary to Intervenors’ claims, the Rulemaking Petition does not identify any new and significant information that would affect the site-specific environmental review for Davis-Besse license renewal or the NRC’s generic determinations regarding the environmental impacts of spent fuel storage. Thus, there is no factual or legal foundation for Intervenors’ claim that suspension of this proceeding is necessary to ensure that the NRC Staff supplements its environmental review to account for the purportedly new and significant information.⁷⁰

1. NEPA Imposes a High Standard with Respect to the Need for Supplemental Environmental Analyses or Documentation

Under NEPA and NRC regulations, the NRC Staff is obligated to undertake a supplemental EIS only when it is presented with “substantial changes in the proposed action that are relevant to environmental concerns” or “new and significant circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts” after the EIS is assembled.⁷¹ The U.S. Supreme Court has held that an agency need not supplement an

does not foreclose implementation of any new rules originating from the pending rulemaking petition.”) (quoting *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation), CLI-02-23, 56 NRC 230, 240 (2002)).

⁷⁰ See Suspension Petition at 4.

⁷¹ See 10 C.F.R. §§ 51.92(a)(1)-(2), 51.72(a)(1)-(2).

EIS every time new information comes to light after the EIS is finalized.⁷² In determining whether new information requires supplementation, courts apply a “rule of reason” that “turns on the value of the new information to the still pending decision-making process.”⁷³ Specifically, if there remains major federal action to occur, and if the new information is sufficient to show that the remaining action will “affec[t] the quality of the human environment *in a significant manner or to a significant extent not already considered*, a supplemental EIS must be prepared.”⁷⁴

The Commission has looked to federal jurisprudence in construing its obligation to prepare supplemental environmental analyses in response to potentially new and significant information. It has summarized the applicable standard as follows: “A supplemental EIS is needed where new information ‘raises new concerns of sufficient gravity such that another, formal in-depth look at the environmental consequences of the proposed action is necessary.’ The new information must paint a ‘seriously different picture of the environmental landscape.’”⁷⁵

Thus, not all new information that might emerge following issuance of an EIS requires a supplement to the impacts analysis—only that which “significantly alters” the findings and conclusions in the EIS.⁷⁶ “It is not enough that the information may be worthy of further inquiry

⁷² See *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 373 (1989) (stating that a requirement to supplement an EIS every time new information comes to light “would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made”).

⁷³ *Id.* at 374.

⁷⁴ *Id.* (emphasis added).

⁷⁵ *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 28 (2006) (quoting *Wisconsin v. Weinberger*, 745 F.2d 412, 418 (7th Cir. 1984) (holding that new information regarding biological effects of extremely low frequency electromagnetic radiation was not of such significance as to find that the Navy was arbitrary or capricious in not responding with a supplemental environmental impact statement)); *Friends of the River v. FERC*, 720 F.2d 93, 109 (D.C. Cir. 1983) (holding that a decision to grant a license for the construction of a hydroelectric power plant would not have to be continually reassessed every time new forecasts for power consumption came to light if such forecasts were speculative and subject to frequent changes, because “review and reassessment of [a licensing] decision, absent sufficient reason, should not continue indefinitely”).

⁷⁶ *Hydro Res., Inc.* (P.O. Box 777, Crownpoint, NM 87313), CLI-06-29, 64 NRC 417, 419, 421-22 (2006).

or may be considered important research.”⁷⁷ Similarly, a petitioner’s mere pointing to a piece of information and “speculating that the results of the environmental risk analysis may be different” is insufficient to trigger the need for supplemental NEPA analyses or documentation.⁷⁸

2. The Suspension Petition and Rulemaking Petition Have Not Identified Any New and Significant Information Related to Davis-Besse License Renewal

As a threshold matter, the Suspension Petition and the Rulemaking Petition have not identified any “new and significant” information related to Davis-Besse license renewal. Neither of the petitions addresses the environmental documents for Davis-Besse (e.g., the Draft SEIS) to show how those documents are affected, and why the information identified by Intervenors is significant. In particular, Intervenors have not shown that the Rulemaking Petition “raises environmental impacts that differ significantly from the impacts that the NRC has already reviewed and addressed” in the Draft SEIS for Davis-Besse license renewal.⁷⁹ Notably, Intervenors do not even allege that the type of event evaluated in the Consequence Study (a low-likelihood seismic event leading to draining of the SFP) is even possible at Davis-Besse. Instead, they reference general information without applying it to this specific licensing action.⁸⁰

3. The Information in the Expedited Fuel Transfer Proceeding Is Not New and Significant as Evaluated Under NEPA

The Suspension Petition does not meet the high standard imposed by NEPA and related case law regarding the need for supplemental environmental analyses or documentation. It relies

⁷⁷ *Wisconsin*, 745 F.2d at 420.

⁷⁸ *Blue Ridge Envtl. Def. League v. NRC*, 716 F.3d 183, 199 (D.C. Cir. 2013) (quoting *Mass. v. NRC*, 708 F.3d 63, 76-77 (1st Cir. 2013)).

⁷⁹ *S. Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 & 4), CLI-12-11, 75 NRC 523, 533 (2012); *see also id.* at 534 (“Petitioners simply have not shown, from a NEPA perspective, that the Fukushima events or our potential regulatory responses to those events reveal environmental impacts that differ significantly from those the NRC has already studied.”).

⁸⁰ *See id.* at 533-34 (“Petitioners’ stay motion never even refers to the analyses in the ESP FEIS and the COL FSEIS.”).

almost exclusively on information in the NRC Staff's Consequence Study. As the Suspension Petition itself acknowledges,⁸¹ the environmental impacts (or risks) of an accident are a product of the probability of the accident and the consequences of the accident.⁸² As discussed below, the Consequence Study does not contain any information that is significantly different than information previously available regarding the probability and consequences of SFP fires. If anything, the Consequence Study indicates that the environmental impacts of a SFP fire are less than previously estimated.

a. Probability of a Spent Fuel Pool Fire

The Consequence Study states that the probability of a SFP fire is 1.1×10^{-7} per year without accounting for the SFP mitigation required by 10 C.F.R. § 50.54(hh)(2).⁸³ It further states that the probability is a factor of 20 lower when mitigation is credited.⁸⁴ Thus, when accounting for § 50.54(hh)(2) mitigation measures, which have been deployed at Davis-Besse, the Consequence Study indicates that the probability of a SFP fire is approximately 6×10^{-9} per year.⁸⁵ Therefore, when determining the probability of SFP fires at Davis-Besse based upon the Consequence Study, the appropriate probability is approximately 6×10^{-9} per year. That probability is substantially less than the probabilities of SFP fires estimated in previous NRC studies.⁸⁶ Thus, the probabilities of a SFP fire as used in the Consequence Study cannot be

⁸¹ See Suspension Petition at 12.

⁸² See, e.g., *City of New York v. Dep't of Transp.*, 715 F.2d 732, 738 (2d Cir. 1983) ("The concept of overall risk incorporates the significance of possible adverse consequences discounted by the improbability of their occurrence.").

⁸³ See Consequence Study at x, 151-52 (including Table 31), 247.

⁸⁴ See *id.* at x, 171, 247.

⁸⁵ See *id.* at 152, 247.

⁸⁶ For example, NUREG-1353 estimated that the probability of a SFP fire was 2×10^{-6} per year "for two older spent fuel pools." NUREG-1353 at ES-2 and -3. NUREG-1738 estimated the probability of a SFP fire to be 6×10^{-7} to 2×10^{-6} per year for a SFP that has a decay time of one year. NUREG-1738 at 3-7.

considered significant new information when determining whether there is a need for a supplemental EIS.⁸⁷

Furthermore, the probabilities of a SFP fire, as discussed in the Consequence Study, are so small that they render it unnecessary even to consider the potential for a SFP fire under NEPA. As both the courts and the NRC long have recognized, it is not necessary under NEPA to consider those severe accidents that are “remote and speculative.”⁸⁸ Although the Commission has not specified a particular threshold probability for designating an accident as “remote and speculative,” the licensing board in the *Calvert Cliffs* combined license proceeding held that only events with frequencies of greater than one in a million (1×10^{-6} per year) need to be considered under NEPA.⁸⁹ Based upon that criterion, a SFP fire as evaluated in the Consequence Study is remote and speculative for purposes of NEPA evaluation.

Also, in 2008, when the Commission denied two rulemaking petitions filed by the Attorney Generals of Massachusetts and California related to SFP accidents,⁹⁰ it relied on, *inter*

⁸⁷ Citing the Consequence Study, Intervenors also assert that “the NRC Staff concluded for the first time that the likelihood of [SFP] fires could be affected by reactor accidents.” Suspension Petition at 6. As an initial matter, the portion of the study cited by Intervenors does not support that claim. Instead, it only describes the “four broad interplays that can be defined between the SFP and the reactor,” and states that “[t]o the extent practicable, this study has attempted to qualitatively account for some of these effects.” Consequence Study at 28-29. In any event, the Consequence Study does not speak to the effects of reactor accidents on the probability of SFP fires, much less suggest that reactor accidents increase that probability to any appreciable degree.

⁸⁸ See, e.g., *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 739 (3d Cir. 1989) (“It is undisputed that NEPA does not require consideration of remote and speculative risks.”); *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1300-01 (D.C. Cir. 1984), *reh’g en banc granted on other grounds*, 760 F.2d 1320 (D.C. Cir. 1985), *aff’d on reh’g en banc*, 789 F.2d 26 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 923 (1986); *Carolina Envtl. Study Grp. v. United States*, 510 F.2d 796, 799 (D.C. Cir. 1975); *Vt. Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-90-4, 31 NRC 333, 335 (1990).

⁸⁹ See *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-4, 69 NRC 170, 209 (2009).

⁹⁰ See The Attorney General of Commonwealth of Massachusetts, The Attorney General of California; Denial of Petitions for Rulemaking, 73 Fed. Reg. 46,204 (Aug. 8, 2008) (“2008 Rulemaking Denial”). Similar to Intervenors’ Rulemaking Petition, rulemaking petitions requested that the Commission consider purported “new and significant information” showing that the license renewal GEIS mischaracterized the impacts of spent fuel storage as insignificant, and revoke the regulations that codify this conclusion so as to exclude consideration of spent fuel storage impacts in plant-specific NEPA review documents. See *id.* at 46,205.

alia, its decision in the Shearon Harris SFP expansion proceeding.⁹¹ In that proceeding, the licensing board concluded that the probability of the postulated sequence of events resulting in a SFP zirconium fire was “conservatively in the range described by the Staff: 2.0E-7 per year (two occurrences in 10 million reactor years) or less.”⁹² The Board concluded that an event having this probability of occurrence “falls within the category of remote and speculative matters.”⁹³ The Commission affirmed the board’s decision, and the U.S. Court of Appeals for the D.C. Circuit upheld the Commission’s decision.⁹⁴ Thus, by any reasonable standard, an accident with a probability of 6×10^{-9} per year is remote and speculative. In fact, the Commission itself has found that SFP accidents are “remote.”⁹⁵

In summary, given prior NRC determinations that SFP fires are “remote” events, and given the substantially *lower* probability of a SFP fire as identified in the Consequence Study and resulting from the protective and mitigative features for Davis-Besse, it is evident that the potential for a SFP fire at Davis-Besse is remote and speculative. As a result, the Commission may reject the Suspension Petition on that basis alone, without considering any further information from the Consequence Study related to SFP fires. Nevertheless, even if that information is considered, it would not represent significant new information, as discussed below.

⁹¹ See *id.* at 46,210 (citing *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-01-9, 53 NRC 239, 244–45 (2001)).

⁹² *Shearon Harris*, LBP-01-9, 53 NRC at 267.

⁹³ *Id.* at 268.

⁹⁴ *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370 (2001), *pet. for review denied, sub nom, Orange County, NC v. NRC*, 2002 WL 31098379 (D.C. Cir. 2002).

⁹⁵ For example, the Commission recently stated that “the likelihood of major accidents at spent fuel pools resulting in offsite consequences is *remote*.” Waste Confidence—Continued Storage of Spent Nuclear Fuel, 78 Fed. Reg. 56,776, 56,797 (Sept. 13, 2013) (“Proposed Waste Confidence Rule”) (emphasis added). Notably, that finding was based on the probabilities presented in NUREG-1738, not on the even lower probabilities identified in the Consequence Study.

b. Consequences of a Spent Fuel Pool Fire

Intervenors also fail to identify any information indicating that SFP fire consequences “differ significantly from those the NRC has already studied.”⁹⁶ The environmental consequences of a SFP fire are largely dependent on the amount of radioactive material released during the accident. As stated in the Consequence Study, “[t]he releases of radioactive material [calculated by the Consequence Study] are generally comparable to past studies.”⁹⁷

Table 62 of the Consequence Study provides a line-by-line comparison of five evaluations of SFP accidents, including the Consequence Study.⁹⁸ In each case, the consequences calculated by the Consequence Study are similar to, or substantially less than, the previously-estimated consequences.⁹⁹ For example, the Consequence Study notes that “[t]he collective dose values predicted in this study are consistent with the *lower* end of the range reported in past SFP studies.”¹⁰⁰

The Suspension Petition claims that the Consequence Study contains new and significant information related to land contamination.¹⁰¹ It is true that, unlike previous SFP evaluations, the Consequence Study includes a quantitative estimate of land “interdiction” (*i.e.*, land from which individuals would be *temporarily* relocated following an accident) as opposed to “condemnation” (*i.e.*, land from which individuals would be *permanently* relocated if decontamination and natural processes cannot reduce contamination levels to habitability

⁹⁶ *Vogtle*, CLI-12-11, 75 NRC at 534.

⁹⁷ Consequence Study at x.

⁹⁸ *See id.* at 232.

⁹⁹ *See id.*

¹⁰⁰ *Id.* at 233 (emphasis added).

¹⁰¹ *See* Suspension Petition at 5.

limits).¹⁰² However, the Consequence Study makes clear that this information is not “significant” for purposes of NEPA.

Specifically, Table 62 of the Consequence Study compares the study’s results to the results of several previous evaluations with respect to condemned land from a SFP accident.¹⁰³ The study states that “it is clear that both this study and past studies have predicted that SFP accidents can lead to significant land contamination.”¹⁰⁴ Thus, the observation that a postulated SFP fire could result in significant land contamination is not new or previously undocumented. Moreover, Table 62 shows that the Consequence Study predicts substantially *less* land condemnation (and permanent dislocation of individuals) than previous NRC studies reported in the table.¹⁰⁵

In summary, the Consequence Study does not contain significant new information regarding the consequences of a SFP fire, especially as applied to Davis-Besse. On the contrary, the study concludes that the consequences of a SFP fire are similar to, or substantially less than, the consequences of a SFP fire as calculated in previous NRC studies and reflected in 10 C.F.R. Part 51.

¹⁰² See Consequence Study at 233-34 (including Table 62).

¹⁰³ See *id.* at 232 (Table 62).

¹⁰⁴ *Id.* at 169.

¹⁰⁵ See *id.* at 232 (Table 62). Furthermore, the Consequence Study reports the interdicted land as a range, spanning from 170 to 9,400 square miles. See *id.* Intervenors cite the upper end of that range, and fail to note that the underlying calculation does not credit the mitigation provided by the equipment required by 10 C.F.R. § 50.54(hh)(2). When such equipment is credited, the value drops substantially—to only 230 square miles. *Id.* at 168 (Table 35). As noted above, Davis-Besse includes the mitigation required by 10 C.F.R. § 50.54(hh)(2); therefore, the smaller value is the appropriate measure—not the “thousands of square miles” cited in the Suspension Petition. Suspension Petition at 11. In particular, the 230 square miles of *interdicted* land is comparable to or less than the amount of *condemned* land predicted in previous studies. See Consequence Study at 232 (Table 62).

c. Environmental Impacts of a Spent Fuel Pool Fire

Intervenors claim that the NRC Staff made a “*prima facie* case” or an “admission” that the environmental impacts of a SFP fire are greater than previously estimated, and that mitigation is likely to be cost-effective.¹⁰⁶ However, as the Suspension Petition acknowledges,¹⁰⁷ the environmental impacts (or risk) of an accident are a product of the accident’s probability and consequences. Thus, even if the consequences of a potential accident are high, the environmental impacts of the accident may still be low if the probability of the accident is low.

Consistent with the findings of previous NRC studies, the Consequence Study indicates that the environmental impacts (*i.e.*, probability times consequences) of a SFP fire are small:

In conclusion, past SFP risk studies have shown that high-density spent fuel storage is safe and *risk of a release due to an accident is low*. This study is consistent with earlier research conclusions that spent fuel pools are robust structures that are likely to withstand severe earthquakes without leaking.¹⁰⁸

This conclusion also is reflected in the NRC’s proposed waste confidence rule, which states that the NRC has determined that the risk of a SFP zirconium fire, whether caused by an accident or a terrorist attack, is very low.¹⁰⁹

With respect to land interdiction and displacement of individuals, the Consequence Study also demonstrates that the impacts are low.¹¹⁰ As stated in the Consequence Study: “High-

¹⁰⁶ Suspension Petition at 9-10.

¹⁰⁷ *See id.* at 12.

¹⁰⁸ Consequence Study at xii (emphasis added). *See also Turkey Point*, CLI-01-17, 54 NRC at 22 (stating, in the context of a contention regarding the need for an environmental evaluation of SFP accidents, that past studies have demonstrated that the risk of such accidents is acceptably small).

¹⁰⁹ Proposed Waste Confidence Rule, 78 Fed. Reg. at 56,797.

¹¹⁰ Consequence Study at 168, 169 (When the number of displaced individuals is weighted by the annual likelihood of occurrence (no greater than 1×10^{-7} per year, and 6×10^{-9} when 10 C.F.R. § 50.54(h)(2) mitigation is credited) “the expected impact is relatively low”).

density loading releases without 10 CFR 50.54(hh)(2) mitigation measures are calculated to result in release frequency-weighted land interdiction values of 0.001 mi² per year and 0.5 displaced individuals per year which are arrived at by multiplying the estimated frequency and the estimated consequence.”¹¹¹ As discussed above, with 10 C.F.R. § 50.54(hh)(2) mitigation measures (such as deployed by Davis-Besse), the probability of an SFP fire is lower by a factor of approximately 20.¹¹² When that factor is taken into account, the frequency-weighted impacts due to land contamination are approximately 0.00005 mi² of interdicted land per year and 0.025 displaced individuals per year. Such impacts are not “significant” and do not warrant a supplemental EIS under NEPA.

In short, the Consequence Study’s overall conclusions regarding the impacts of a SFP fire are consistent with the conclusions of previous studies on SFP fires. NEPA “requires EIS supplementation only where new information identifies a ‘previously unknown’ environmental concern, but not where the new information ‘amounts to mere additional evidence supporting one side or the other of a disputed environmental effect.’”¹¹³ The Consequence Study does not identify a “previously unknown” environmental concern that requires EIS supplementation. Accordingly, the Suspension Petition is without basis and should be denied for that reason too.

d. Environmental Impacts of a Spent Fuel Pool Fire Versus a Reactor Accident

The NRC has long excluded explicit evaluation of SFP fires in its EISs for nuclear power plants. Instead, the NRC’s EISs for nuclear power plants address severe accidents involving the reactor core.¹¹⁴ The reasons for this are readily apparent. As the NRC has stated, “even under

¹¹¹ *Id.* at x-xi.

¹¹² *See id.* at x.

¹¹³ *Vogtle*, CLI-12-11, 75 NRC at 533 n.53 (quoting *Private Fuel Storage*, CLI-06-3, 63 NRC at 28).

¹¹⁴ *See, e.g.*, NUREG-1555, Environmental Standard Review Plan (Oct. 1999), Section 7.2, *Severe Accidents*.

the worst probable cause of a loss of spent-fuel pool coolant (a severe seismic-generated accident causing a catastrophic failure of the pool), the likelihood of a fuel-cladding fire is highly remote (55 FR 38474).¹¹⁵ In other words, the NRC has determined that the probability of SFP accidents is less than reactor accidents.¹¹⁶

Furthermore, the NRC has reached similar conclusions when looking at the environmental impacts of SFP fires versus the impacts of reactor severe accidents. For example, the 1996 GEIS for license renewal discussed qualitatively “the reasons why the impact of accidents at SFPs would be much less than that from reactor accidents.”¹¹⁷ The 2013 update of the GEIS, which accounts for more recent studies such as NUREG-1738, reached the same conclusion:

[I]t is concluded that the environmental impacts from accidents at SFPs (as [conservatively] quantified in NUREG-1738) can be comparable to those from reactor accidents at full power (as estimated in NUREG-1150[NRC 1990b]). Subsequent analyses performed, and mitigative measures employed since 2001, have further lowered the risk of this class of accidents. In addition, even the conservative estimates from NUREG-1738 are *much less* than the impacts from full power reactor accidents as estimated in the 1996 GEIS. *Therefore, the environmental impacts stated in the 1996 GEIS bound the impact from SFP accidents.*¹¹⁸

This is an important point, given that Intervenors assert that the NRC should republish the 2013 revised GEIS for license renewal for public comment.¹¹⁹ But Intervenors present no information in the Suspension Petition or Rulemaking Petition to undermine the GEIS

¹¹⁵ NUREG-1437, Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Main Report (May 1996), Section 6.4.6.1.

¹¹⁶ See, e.g., NUREG-1353, at ES-3 and -4. See also Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station, CLI-10-14, 71 NRC 449, 475 (2010) (quoting 2008 Rulemaking Denial, 73 Fed. Reg. at 46,207-208, 46,211-212) (stating that “[spent fuel pool] accidents would not be expected to have a significant impact on total risk for the site because the spent fuel pool accident ‘risk level is less than that for a reactor accident’”)).

¹¹⁷ NUREG-1437, Rev. 1, App. E at E-34.

¹¹⁸ *Id.* at E-39 (internal citations omitted; emphasis added).

¹¹⁹ See Suspension Petition at 8.

conclusions that (1) the environmental impacts of a full-power reactor accident bound those of a SFP accident, and (2) SFP storage impacts are appropriately treated as a Category 1 issue (for which generic analysis is appropriate) in Table B-1 of the NRC’s Part 51 regulations. Furthermore, there is nothing in the Consequence Study that would indicate that the environmental impacts of SFP fires are comparable to the environmental impacts of severe reactor accidents. As a result, there is no reason for the NRC to supplement its FSEIS, or to republish the 2013 revised license renewal GEIS, to account for the information in the Consequence Study on SFP fires, as the environmental impacts of a SFP fire are bounded by the environmental impacts of a severe reactor accident.

e. Spent Fuel Pool Mitigation Measures

In its Suspension Petition, Intervenors also claim that the NRC Staff has newly acknowledged that a combination of reduced-density pool storage and dry storage constitutes a reasonable alternative for mitigating the risks of high-density pool storage of spent fuel.¹²⁰ That argument is both factually and legally unfounded. First and foremost, it runs counter to the NRC Staff’s overarching conclusion that “the expedited transfer of spent fuel to dry cask storage would provide only a marginal increase in the overall protection of public health and safety, and would not be warranted due to the expected implementation costs.”¹²¹

¹²⁰ See *id.* at 6; Rulemaking Petition at 3. Intervenors also point to an NRC Staff non-concurrence, which claims a billion dollars of benefit from removing spent fuel from pools. See Suspension Petition at 12-13. However, that non-concurrence is not the agency’s position. Additionally, it appears that the non-concurrence discusses certain data associated with the “high estimates” for the combined sensitivity analyses and uses the worst net present value assumptions. This represents a “worst case” scenario that need not be evaluated under NEPA. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 354 (1989). Furthermore, Intervenors ignore the results of other sensitivity analyses that support the NRC Staff’s ultimate conclusion that the costs outweigh the benefits (see COMSECY-13-0030, Encl. 1, at 50-53) such that “the expedited transfer of spent fuel to dry cask storage would provide only a minor or limited safety benefit, and that its expected implementation costs would not be warranted.” COMSECY-13-0030, at 10.

¹²¹ Regulatory Analysis at 54. Intervenors cite the Staff’s Regulatory Analysis as the basis for its claim, namely sensitivity studies performed as part of the Staff’s cost-benefit analyses. See Suspension Petition at 6 (citing Regulatory Analysis at 7, 46-51). The Staff performed sensitivity analyses on key factors to measure each

Intervenors' argument also fails when viewed within NEPA's legal framework. NEPA requires that possible mitigation measures "be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated."¹²² Given the remote and speculative likelihood of a SFP fire, and thus the very low probability-weighted environmental impacts of a SFP fire, there is no need for the SEIS to consider mitigation alternatives of the type suggested by Intervenors. As the D.C. Circuit has held, an agency may decline to discuss mitigation measures when it believes an action's environmental impact will be minor or fall within the scope of the original NEPA analysis.¹²³

In view of the above, there is no factual or legal basis for Intervenors' claim of new and significant information related to SFP risk mitigation strategies.

C. **The Suspension Petition Also Should Be Rejected for Procedural Deficiencies**

Finally, Intervenors claim that the Suspension Petition is timely because "it is being filed within ten days of the filing of Petitioners' Rulemaking Petition, *i.e.*, the event or circumstance from which the petition arises. 10 C.F.R. 2.323."¹²⁴ But that assertion is misleading and reflects

attribute's effect on the overall result. For each sensitivity analysis, the Staff provided a low and a high estimate that combines the range of expected SFP attributes with conservative assumptions to model the range of pool accidents postulated. The Regulatory Analysis states that "[t]hese high and low estimates are expected to over and under estimate the consequences from SFP accidents," and that even the "high estimate" sensitivity cases yielded "only a marginal safety improvement in terms of public health and safety." Regulatory Analysis at 44, 54. Thus, the Regulatory Analysis in no way suggests the existence of "reasonable" mitigation alternatives.

¹²² *Methow Valley*, 490 U.S. at 352.

¹²³ See, e.g., *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 737 (D.C. Cir. 2000) (upholding agency's decision to "decline to adopt mitigation measures to address a problem that it believed might not even develop"). See also *Pilgrim*, CLI-10-14, 71 NRC at 475 (quoting 2008 Rulemaking Petition Denial, 73 Fed. Reg. at 46,212 (stating that a mitigation measure that addresses SFP accidents "would not be expected to have a significant impact on total risk for the site because the spent fuel pool accident 'risk level is less than that for a reactor accident.'")); *Sierra Club v. Van Antwerp*, 526 F.3d 1353, 1360 (11th Cir. 2008) (finding that where a proposed action is a "minimizing measure," the agency does not need to supplement the EIS because "a minimizing measure's effects on the environment will usually fall within the scope of the original NEPA analysis").

¹²⁴ Suspension Petition at 14. In the past, the Commission has treated suspension petitions as general motions. See *Diablo Canyon*, CLI-02-23, 56 NRC at 237; *Oyster Creek*, CLI-08-23, 68 NRC at 484-85.

Intervenors' attempt to rehabilitate an otherwise untimely filing. Intervenors state that the Rulemaking Petition is based exclusively on purportedly "new and significant" information contained in NRC Staff documents.¹²⁵ The specific sources of that information—as cited in the Suspension Petition itself—include the NRC Staff's Consequence Study and associated Regulatory Analysis, issued in October and November 2013, respectively.¹²⁶ Thus, the documents on which Intervenors rely have been available for four to five months, with drafts of those documents available even earlier.¹²⁷ Intervenors are not "timely" in their filing.¹²⁸ Basic fairness dictates that Intervenors should not be permitted to delay the submittal of their suspension request under the guise that it is timely filed because it is based on a generic rulemaking petition. Accordingly, the Suspension Petition should be rejected as untimely.

IV. CONCLUSION

Suspending the NRC's final license renewal decision is an extraordinary remedy that is not warranted and should not be granted under the present circumstances. Intervenors have not substantiated that such extraordinary relief is warranted in this proceeding, as their Suspension Petition is marred by the numerous substantive and procedural deficiencies discussed above. For all of these reasons, the Suspension Petition should be denied in its entirety.

¹²⁵ See Suspension Petition at 9 (citing Section III of the Rulemaking Petition).

¹²⁶ See *id.* at 5-6.

¹²⁷ Drafts of the Consequence Study and Regulatory Analysis were available even in July 2013 and September 2013, respectively. See COMSECY-13-0030 at 9, *available at* ADAMS Accession Nos. ML13133A132 (draft Consequence Study) & ML13256A348 (draft Regulatory Analysis).

¹²⁸ Additionally, even if Intervenors had filed a contention, which they have not, they still would be untimely. According to the Initial Scheduling Order in this proceeding, new or amended contentions must be filed within 60 days of the date when the material information on which it is based first becomes available. See Initial Scheduling Order at 12 (June 15, 2011) (unpublished). Intervenors' filing was well past that deadline.

Respectfully submitted,

Executed in Accord with 10 C.F.R. § 2.304(d)

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Dated in Washington, D.C.
this 21st day of March 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
)
 FIRSTENERGY NUCLEAR OPERATING COMPANY) Docket No. 50-346-LR
)
 (Davis-Besse Nuclear Power Station, Unit 1)) March 21, 2014
)
 _____)

CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of “FirstEnergy Nuclear Operating Company Response to Petition to Suspend Licensing Decisions Pending Completion of Rulemaking” was submitted through the NRC’s E-filing system.

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