

## Docket, Hearing

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**From:** Bob Eye <bob@kauffmaneye.com>  
**Sent:** Tuesday, January 13, 2015 11:49 AM  
**To:** frantz, Steven P.; Docket, Hearing  
**Subject:** STP 1&2

ear counsel,

This is a consultation pursuant to 10 C.F.R. § 2.323(b). The primary purpose of this consultation is to ask NRC Staff counsel whether – and if so, when – the Staff plans to supplement the environmental impact statements (EISs) for individual reactors to incorporate and summarize the content of the Continued Spent Fuel Storage GEIS, as required by NRC regulations for implementation of NEPA. (We use the term “final EIS” broadly to include final EISs in combined license and operating license proceedings and final supplements to the License Renewal GEIS in license renewal proceedings.) We also ask other counsel to state whether, in the event the NRC Staff refuses to supplement the EISs, they would oppose a petition to the NRC Commissioners to require such supplementation.

As you know, recently-promulgated 10 C.F.R. § 51.23(b) states that the Final Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel (NUREG-2157, Sept. 2014) (“Continued Spent Fuel Storage GEIS”) is deemed incorporated into individual reactor EISs. 79 Fed. Reg. 56,238, 56,260 (Sept. 19, 2014). But the NRC has failed to take the additional step, required by NRC regulations, of incorporating by reference and summarizing the Continued Spent Fuel Storage GEIS in the text of final EISs for individual reactors:

Agencies shall incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action. *The incorporated material shall be cited in the statement and its content briefly described.*

10 C.F.R. Part 51, Subpart A, Appendix A, Section (b), note 1 and Discussion of footnotes (quoting 40 C.F.R. § 1502.21) (emphasis added). The nine pending reactor licensing and re-licensing proceedings in which the NRC has failed to supplement and correct the final EIS are: Fermi Unit 2, W.S. Lee Units 1 and 2, Comanche Peak Units 3 and 4, South Texas Units 1 and 2, South Texas Units 3 and 4, Levy County Units 1 and 2, Watts Bar Unit 2, North Anna Unit 3, and Indian Point Units 2 and 3.

Supplementation of the individual reactor final EISs is required by NEPA in order to ensure that the EISs for individual reactor licensing decisions are complete, accurate, and up-to-date sources of information for members of the public and state and local governments who rely on such EISs for environmental information. It is also necessary to allow members of the public to lodge “placeholder” contentions challenging

the NRC's reliance, in individual licensing proceedings, on the Continued Spent Fuel Storage GEIS which is now on appeal before the U.S. Court of Appeals for the D.C. Circuit in *New York v. NRC*, No. 14-1210 (Consolidated with Nos. 14-1212, 14-1216, NS 14-1217)). Such placeholder contentions are needed to ensure that if the Court reverses the Continued Spent Fuel Storage GEIS or Continued Spent Storage Rule, the NRC must also reverse any licensing decision that depends on the GEIS or Rule. Under NRC regulations for the admissibility of contentions, it would not be possible to submit such placeholder contentions until the Continued Spent Fuel Storage GEIS is actually incorporated into the site-specific EISs. This is because NRC regulations 10 C.F.R. §§ 2.309(f)(1)(vi) 2.309(f)(2) strictly require contentions to dispute the specific content of a license application or GEIS. *See also Strata Energy, Inc.* (Ross In Situ Uranium Recovery Project), LBP-12-03, 75 NRC 164, 192 (2012) (citing *Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 557 (2009); *USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 462-63 (2006)).

Almost three months have passed since the Continued Spent Fuel Storage Rule became effective, with no action by the NRC to comply with 10 C.F.R. Part 51, Subpart A, Appendix A, Section (b), note 1 in the nine proceedings listed above. Therefore, the Intervenors in all of those proceedings are contemplating a joint petition to the NRC Commissioners to require the supplementation of the final EISs in those cases to reflect the incorporation by reference of the Continued Spent Fuel Storage GEIS. Before filing such a petition, we are consulting the Staff to determine whether the Staff plans to come into compliance with the NRC's NEPA regulation; and if so, when. If the Staff believe that supplementation of the EISs in individual proceedings is not required, please explain the basis for your position.

We also ask other counsel to state whether, in the event the NRC Staff refuses to supplement the EISs, they would oppose a petition to the NRC Commissioners to require such supplementation.

Please respond to this consultation by Tuesday January 20, 2015. If we have not heard from you by then, this is to inform you that we may file a petition with the NRC Commissioners as early as January 21.

Thank you.  
Bob Eye

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Bob Eye  
Robert V. Eye Law Office  
The Dibble Building  
123 SE 6th Avenue, Suite 200  
Topeka, Kansas 66603  
785-234-4040 phone  
785-234-4260 fax