

January 28, 2015

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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In the Matters of	)	
DTE ELECTRIC CO.	)	Docket No. 52-033-COL
(Fermi Nuclear Power Plant, Unit 3)	)	
	)	
DUKE ENERGY CAROLINAS, LLC	)	Docket Nos. 52-018-COL,
(William States Lee III Nuclear Station,	)	52-019-COL
Units 1 and 2)	)	
	)	
LUMINANT GENERATION CO. LLC	)	Docket Nos. 52-034-COL,
(Comanche Peak Nuclear Power Plant,	)	52-035-COL
Units 3 and 4)	)	
	)	
NUCLEAR INNOVATION	)	Docket Nos. 52-012-COL,
NORTH AMERICA LLC	)	52-013-COL
(South Texas Project Units 3 and 4)	)	
	)	
PROGRESS ENERGY FLORIDA, INC.	)	Docket Nos. 52-029-COL,
(Levy County Nuclear Power Plant,	)	52-030-COL
Units 1 and 2)	)	
	)	
SOUTH TEXAS PROJECT	)	Docket Nos. 50-498-LR,
NUCLEAR OPERATING CO.	)	50-499-LR
(South Texas Project Units 1 and 2)	)	
	)	
TENNESSEE VALLEY AUTHORITY	)	Docket No. 50-391-OL
(Watts Bar Nuclear Plant, Unit 2)	)	
	)	
VIRGINIA ELECTRIC AND POWER CO.	)	Docket No. 52-017-COL
d/b/a DOMINION VIRGINIA POWER and	)	
OLD DOMINION ELECTRIC COOPERATIVE	)	
(North Anna Power Station, Unit 3)	)	

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**PETITION TO SUPPLEMENT REACTOR-SPECIFIC  
ENVIRONMENTAL IMPACT STATEMENTS TO  
INCORPORATE BY REFERENCE THE  
GENERIC ENVIRONMENTAL IMPACT STATEMENT FOR  
CONTINUED SPENT FUEL STORAGE**

## I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(b), the National Environmental Policy Act (“NEPA”) and U.S. Nuclear Regulatory Commission (“NRC” or “Commission”) regulations for the implementation of NEPA, Petitioners Beyond Nuclear, Blue Ridge Environmental Defense League, Nuclear Information and Resource Service, Southern Alliance for Clean Energy, and SEED Coalition hereby request the Commission to order the supplementation of the Final Environmental Impact Statement (“FEIS”)<sup>1</sup> in each of the above-captioned proceedings to incorporate by reference the Generic Environmental Impact Statement for Continued Spent Fuel Storage (NUREG-2157, noticed at 79 Fed. Reg. 56,263, Sept. 2014) (“Continued Spent Fuel Storage GEIS” or “GEIS”). Supplementation of the individual reactor FEISs is required by NEPA and NRC implementing regulations in 10 C.F.R. Part 51, Appendix A, in order to ensure that the FEISs 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 FEISs for environmental information. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

Supplementation of these FEISs to correctly cross-reference and summarize the Continued Spent Fuel Storage GEIS and the Continued Spent Fuel Storage Rule (79 Fed. Reg. 56,238, Sept. 2014) (the “Rule”) must also be done in order to allow members of the public to lodge, with the requisite level of specificity, “placeholder” contentions challenging the NRC’s reliance, in individual licensing proceedings, on the GEIS and

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<sup>1</sup> We use the terms “FEIS” broadly to include final EISs in combined license and operating license proceedings and final supplements to the License Renewal GEIS in license renewal proceedings.

Rule. Petitioners are parties to the pending appeal of the Rule and GEIS 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, 14-1217)); and they seek to ensure that if the Court overturns the Rule and/or the GEIS, NRC licensing decisions that rely on them will also be overturned.

## II. FACTUAL BACKGROUND

In *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012), the U.S. Court of Appeals for the D.C. Circuit vacated the NRC’s Waste Confidence Decision and Temporary Storage Rule for failure to comply with NEPA. The Court found that the NRC had violated NEPA by failing to consider the long-term environmental impacts of spent fuel storage, including the impacts of indefinite spent fuel storage, pool fires, and pool leaks. In response to the Court’s decision, on September 19, 2014, the NRC issued the Continued Spent Fuel Storage GEIS and promulgated the Final Continued Spent Fuel Storage Rule.

Section 51.23(b) of the Continued Spent Fuel Storage GEIS states:

The environmental reports described in §§ 51.50, 51.53, and 51.61 are not required to discuss the environmental impacts of spent nuclear fuel storage in a reactor facility storage pool or an ISFSI for the period following the term of the reactor operating license, or ISFSI license. *The impact determinations in NUREG-2157 regarding continued storage shall be deemed incorporated into the environmental impact statements described in §§ 51.75, 51.80(b), 51.95, and 51.97(a).*  
(emphasis added).

While the Continued Spent Fuel Storage Rule states that the impact determinations in the Continued Spent Fuel Storage GEIS are “deemed incorporated” into individual reactor FEISs, in fact they are *not* incorporated into individual reactor FEISs: the NRC has taken no steps to ensure that reactor-specific FEISs, issued in

pending NRC licensing and re-licensing cases, cross-reference or summarize the Continued Spent Fuel Storage GEIS.<sup>2</sup>

Prior to issuing the Continued Spent Fuel Storage GEIS and Rule, the NRC issued FEISs in the above-captioned reactor licensing and re-licensing cases for Fermi Unit 3, 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, and North Anna Unit 3. None of the FEISs in these proceedings cross-references the Continued Spent Fuel Storage GEIS.

- In the case of North Anna Unit 3, the NRC issued a FEIS for the Early Site Permit (“ESP”) in 2006. Final Environmental Impact Statement for an Early Site Permit (ESP) at the North Anna ESP Site (NUREG-1811, Dec. 2006) (ML063470330). That FEIS made no findings about the environmental impacts of spent fuel storage. *See id.*, Chapter 6. The NRC issued a supplemental FEIS in 2010, cross-referencing the 1990 Waste Confidence Decision (55 Fed. Reg. 38,474 (Sept. 18, 1990)) for findings regarding the safety and environmental impacts of spent fuel storage for a 30-year period following the end of the reactor’s operating license and the feasibility and sufficiency of repository capacity at that point. Supplemental Environmental Impact Statement for the Combined License for North Anna Power Station Unit 3 at D-80 (NUREG-1917, Feb. 2010) (ML100680117).

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<sup>2</sup> There is only one possible exception to this rule: the NRC has agreed to supplement the FEIS in the Indian Point license renewal proceeding to reflect incorporation by reference of the Continued Spent Fuel Storage GEIS. *See* NRC Staff’s 35th Status Report in Response to the Atomic Safety and Licensing Board’s Order of February 16, 2012 (Jan. 2, 2015).

- The FEISs for the combined operating license (“COL”) applications for Comanche Peak Units 3 and 4, South Texas Project Units 3 and 4, and Levy County Units 1 and 2, were issued in 2011 and 2012, respectively -- after the NRC had promulgated the 2010 Waste Confidence Decision and before it was vacated by the U.S. Court of Appeals. These FEISs cross-reference the 2010 Waste Confidence Decision for findings regarding the safety and environmental impacts of storing and disposing of spent fuel. Final Environmental Impact Statement for Combined Licenses (COLs) for Comanche Peak Units 3 and 4 at 6-12 – 6-13 (NUREG-1943, May 2011) (ML11131A001); Final Environmental Impact Statement for Combined Licenses (COLs) for South Texas Project Units 3 and 4 at 6-14 – 6-15 (NUREG-1937, Feb. 2011) (ML11049A000); Final Environmental Impact Statement for Combined Licenses (COLs) for Levy Nuclear Plant, Units 1 and 2 at 6-15 (NUREG-1941, Apr. 2012) (ML12100A068).
- The FEISs for the W.S. Lee COL application, the Watts Bar Unit 2 operating license application, the Fermi Unit 3 COL application, and the South Texas Project Units 1 and 2 license renewal application were issued in 2013, after the Court of Appeals vacated the 2010 Waste Confidence Decision but before the NRC promulgated the Continued Spent Fuel Storage Rule and GEIS. These FEISs rely in part on the safety and environmental findings of the vacated Waste Confidence Decision and state that they will be supplemented “if the results of the Waste Confidence EIS identify information that requires a supplement.” Final Environmental Impact Statement for Combined Licenses (COLs) for William

States Lee Units 1 and 2 at 6-16 – 6-18 (NUREG-2111, Dec. 2013)  
(ML13340A005); Environmental Impact Statement Related to the Operation of  
Watts Bar Unit 2 at 4-48 – 4-69 (NUREG-0492, Supp. 2, May 2013)  
(ML13144A092); Final Environmental Impact Statement for Combined License  
(COL) for Fermi Unit 3 at 6-16 – 6-18 (NUREG-2105, Jan. 2013)  
(ML12307A172); Generic Environmental Impact Statement for License Renewal  
of Nuclear Plants: South Texas Project, Units 1 and 2 – Final Report (NUREG-  
1437, Supplement 48) at 6-2 – 6-3 (Nov. 2013) (ML13322A890).

### **III. ARGUMENT**

Over three months have passed since the Final Continued Spent Fuel Storage Rule and GEIS became effective on October 20, 2014. *See* 79 Fed. Reg. at 56,238. While the Final Continued Spent Fuel Storage Rule states that the Continued Spent Fuel Storage GEIS is “deemed incorporated” into reactor-specific FEISs, that statement, by itself, is insufficient to comply with NEPA or NRC’s implementing regulations. The NRC must take the additional step of incorporating by reference and summarizing the Continued Spent Fuel Storage GEIS in the text of FEISs for individual reactors. By failing to supplement these reactor-specific FEISs, the NRC violates its own regulations for incorporating information by reference into FEISs. *See* 10 C.F.R. Part 51, Appendix A, § 1(b). These regulations are designed to ensure that NRC meets NEPA’s requirement that FEISs must be accurate and informative. By failing to incorporate the GEIS into individual FEISs, the NRC also renders it impossible for interested members of the public to invoke their rights under Section 189a of the Atomic Energy Act and 10 C.F.R. § 2.309 to file “place-holder” contentions challenging the NRC’s reliance, in reactor-

specific FEISs, on the Continued Spent Fuel Storage GEIS.

**A. The NRC’s Failure to Supplement FEISs Violates NEPA and NRC and CEQ Implementing Regulations.**

As the Supreme Court has observed, an FEIS does more than inform the federal agency responsible for making a decision regarding a major federal action. An FEIS also “guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). *See also DOT v. Public Citizen*, 541 U.S. 752, 768 (2004). In order to fulfill that purpose, an EIS “must stand on its own as an analytical document which fully informs decisionmakers and the public of the environmental effects of the proposal and those of the reasonable alternatives.” Forty Most Asked Questions Concerning [Council on Environmental Quality’s (“CEQ’s”)] National Environmental Policy Act Regulations, 55 Fed. 18,026, 18,032 (Mar. 23, 1981).

Recognizing that very lengthy EISs can be difficult to use, NRC and CEQ have promulgated NEPA implementing regulations that allow for tiering and incorporation of information by reference into an FEIS. As stated in 10 C.F.R. Part 51, Appendix A, § 1(b):

The techniques of tiering and incorporation by reference described respectively in 40 CFR 1502.20 and 1508.28 and 40 CFR 1502.21 of CEQ’s NEPA regulations may be used as appropriate to aid in the presentation of issues, eliminate repetition or reduce the size of an environmental impact statement.

[footnotes omitted]. But these tools for shortening an EIS may not be used in a way that diminishes the accuracy or completeness of the EIS. *Pac. Rivers Council v. U.S. Forest Serv.* 689 F.3d 1012 (9th Cir. 2012). Material may be incorporated by reference into an

EIS only if it is done in a manner that ensures that “its omission from the EIS does not “imped[e] agency and public review.” *Id.* (citing § 1502.21; Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations, 46 Fed. Reg. 18026, 18033-34 (March 17, 1981)) (emphasis added). Otherwise, the analysis must be included in the EIS in full, or at the very least in an appendix. *Id.*<sup>3</sup>

Accordingly, in order to ensure the integrity of an FEIS that incorporates information by reference, NRC regulations -- incorporating CEQ regulations verbatim -- require that “material” incorporated by reference into an FEIS “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). As the Ninth Circuit explained in *Pac. Rivers Council*, compliance with these requirements is not a “mere formality,” but rather is essential to allow meaningful use of the FEIS by decision-makers. *Id.* at 1031. *See also Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 100 n.12 (quoting *NRDC v. NRC*, 685 F.2d 459, 484 (D.C. Cir. 1982) (rev’d on other grounds, *Balt. Gas & Elec. Co.*) (NEPA requires an agency to “do more than to scatter its evaluation of environmental damage among various public documents”).

Contrary to the requirements of NRC’s own regulations, the FEISs for Fermi Unit 3, W.S. Lee Units 1 and 2, Comanche Peak Units 3 and 4, South Texas Units 1 and 2,

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<sup>3</sup> In correspondence with Petitioners pursuant to 10 C.F.R. § 2.323(b), the NRC Staff suggested that the statement in 10 C.F.R. Part 51, Appendix A, § 1(b) that incorporation by reference “may be used as appropriate” allows the NRC discretion to decide not to cite and summarize the contents of the Continued Storage GEIS in individual FEISs. But the Staff’s reasoning is inconsistent with NEPA, NRC and CEQ implementing regulations, and the judicial interpretations cited above. The word “may” does not give the NRC discretion to issue an incomplete or misleading FEIS for individual reactors. Rather, it refers to the choice between incorporating the entire Continued Spent Fuel Storage GEIS into individual FEISs or citing it and summarizing it in those FEISs.



South Texas Units 3 and 4, Levy County Units 1 and 2, Watts Bar Unit 2, and North Anna Unit 3 completely fail to identify or describe the content of the Continued Spent Fuel Storage GEIS. Under the circumstances, state or local government officials and members of the public -- who are entitled under NEPA to rely on these FEISs as the NRC's decision-making document for licensing or re-licensing of each reactor -- are given no hint that the NRC relies on the Continued Spent Fuel Storage GEIS for any part of that FEIS's environmental analysis. Instead, they are directed to environmental analyses that have been outdated; or worse, vacated by the U.S. Court of Appeals for failure to comply with NEPA.

As a result, state and local decision-makers and members of the public are left with empty assurances that the environmental impacts of continued spent fuel storage are insignificant, and deprived of any information regarding the NRC's current analysis of the matter. NEPA does not require these state and local government officials and members of the public to take the NRC's word for it regarding the environmental impacts of reactor licensing decisions; rather, they are entitled to review the agency's analysis. Without a citation to the Continued Spent Fuel Storage GEIS and a summary of its findings, these FEISs fall far short of satisfying NEPA's requirements for full disclosure of the NRC's environmental analysis in support of its proposed licensing decisions. The Commission should take immediate action to rectify this situation, in order to ensure that each FEIS allows state and local decision-makers to make a meaningful evaluation under NEPA of the NRC's proposal to license or re-license the reactors in the above-captioned proceedings.

**B. Supplementation of the FEISs to Incorporate the Continued Spent Fuel Storage GEIS by Reference is Necessary for Public Participation in These Licensing Proceedings.**

Supplementation of the FEISs to incorporate the Continued Spent Fuel Storage GEIS by reference is also necessary for public participation in these licensing proceedings. Petitioners seek an opportunity 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.<sup>4</sup>

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) and 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)).

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<sup>4</sup> For example, on December 8, 2014, Missouri Coalition for the Environment filed such a place-holder contention in the license renewal proceeding for Callaway Unit 1. *See Missouri Coalition for the Environment’s Hearing Request and Petition to Intervene in License Renewal Proceeding for Callaway Nuclear Power Plant.*

Accordingly, the NRC should supplement the FEISs in the above-captioned proceedings in order to ensure the accuracy of these FEISs for purposes of permitting members of the public to exercise their right to challenge the FEISs in contentions submitted under NRC regulations.

#### **IV. CONCLUSION**

For the foregoing reasons, the Commission should grant Petitioners' request to supplement the FEISs for the above-captioned licensing and re-licensing proceedings to incorporate by reference the Continued Spent Fuel Storage GEIS.

#### **V. CERTIFICATE OF CONSULTATION**

Pursuant to 10 C.F.R. § 2.323(b), we, the undersigned counsel or representative for each of the Petitioners, certify that we have consulted counsel for the applicants and the NRC Staff in each of the above-captioned proceedings. Counsel for the applicants stated that they would oppose this Petition. Counsel for the NRC Staff stated that the Staff would take a position on the Petition after reviewing it.

Respectfully submitted,

*Signed (electronically) by:*

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January 28, 2015

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of	)	
Progress Energy Florida, Inc.	)	Docket Nos. 52-029-COL
(Levy County Nuclear Power Plant,	)	and 52-030-COL
Units 1 and 2)	)	

**CERTIFICATE OF SERVICE**

I certify that on January 28, 2015, on behalf of Nuclear Information and Resource Service, I posted on the NRC's Electronic Information Exchange PETITION TO SUPPLEMENT REACTOR-SPECIFIC ENVIRONMENTAL IMPACT STATEMENTS TO INCORPORATE BY REFERENCE THE GENERIC ENVIRONMENTAL IMPACT STATEMENT FOR CONTINUED SPENT FUEL STORAGE. It is my understanding that as a result, the NRC Commissioners, Atomic Safety and Licensing Board, and parties to this proceeding were served.

Respectfully submitted,

*Electronically signed by*  
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