

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of)	
)	
LUMINANT GENERATION COMPANY LLC)	Docket Nos. 52-034-COL
)	52-035-COL
(Comanche Peak Nuclear Power Plant Units 3 and 4))	February 12, 2015
)	

**LUMINANT RESPONSE OPPOSING PETITION TO SUPPLEMENT
ENVIRONMENTAL IMPACT STATEMENTS**

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I. INTRODUCTION

In accordance with 10 C.F.R. § 2.323(c) and the Commission’s January 29, 2015 scheduling order,¹ Luminant Generation Company, LLC (“Luminant”) files this Answer opposing the Petition jointly filed by Sustainable Energy and Economic Development Coalition, Inc. (“SEED”) and petitioners in other reactor licensing proceedings (collectively, “Petitioners”) on January 28, 2015.² The Petition requests that the Commission order the Nuclear Regulatory Commission (“NRC”) Staff to supplement the Final Environmental Impact Statement (“FEIS”)³ for the issuance of the combined licenses (“COLs”) for Comanche Peak Nuclear Power Plant, Units 3 and 4 (“Comanche Peak”), as well as the FEISs in seven other reactor licensing proceedings, to incorporate the Generic Environmental Impact Statement for Continued Spent

¹ Order at 2 (Jan. 29, 2015) (unpublished).

² Petition to Supplement Reactor-Specific Environmental Impact Statements to Incorporate by Reference the Generic Environmental Impact Statement for Continued Spent Fuel Storage (Jan. 28, 2015) (“Petition”).

³ Consistent with the Petition, this response uses “FEIS” to refer to the Final Environmental Impact Statements for the new reactor licensing proceedings and to the Final Supplement Environmental Impact Statements used in reactor license renewal proceedings. *See id.* at 2 n.1.

Fuel Storage (“GEIS”).⁴ Petitioners claim that a supplement is needed to comply with the National Environmental Policy Act (“NEPA”) and NRC implementing regulations, and to provide them with the opportunity to file “placeholder” contentions challenging the NRC’s reliance on the GEIS in individual licensing proceedings.⁵ For the reasons discussed below, the Petition should be rejected as procedurally deficient and lacking substantive merit.

First, as demonstrated in Section III.A below, Petitioners’ request for the Commission to order the NRC Staff to supplement FEISs is procedurally deficient. The Petition is untimely because it was filed months after the events purportedly giving rise to it. Additionally, Petitioners are not parties to this proceeding, they have failed to submit any request to reopen the closed record in this proceeding to allow them to seek the new relief in the Petition, and they would not satisfy the strict requirements for such a request even had they submitted one. Moreover, if Petitioners are concerned about the NRC’s issuance of the Luminant COLs based on the new Continued Storage Rule, then they could have requested that the Commission stay the effectiveness of the Rule or suspend future licensing decisions pending judicial review of the Rule. They chose to do neither. Instead, they propose filing the aforementioned placeholder contentions, which are not permitted under NRC’s practice.

Second, as shown in Section III.B, Petitioners’ arguments concerning the alleged need to supplement plant-specific FEISs lack legal and factual merit. In this case, the NRC is not required to supplement plant-specific FEISs to ensure agency compliance with NEPA and NRC regulations. The NRC prepared the GEIS and codified its generic determinations on continued spent fuel storage impacts in 10 C.F.R. § 51.23 through the rulemaking process. That process

⁴ See *id.* at 2; NUREG-2157, Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel (Sept. 2014) (“GEIS”).

⁵ See Petition at 2.

allowed for extensive public participation and the “full disclosure” required by NEPA. Since the Commission has deemed those generic impact determinations to be incorporated into plant-specific FEISs, there is no need for further exploration of these issues in individual licensing proceedings, including adjudication of related contentions. Thus, Petitioners’ arguments improperly challenge the Continued Storage Rule, and Petitioners’ requested relief—administrative supplementation to refer to the GEIS—elevates form over substance.

Petitioners also misconstrue NRC regulations related to incorporation by reference and FEIS supplementation. By their very terms, those regulations refer to situations in which a document is “referenced” in the FEIS and incorporated by that reference. That is not the case here. Instead, the NRC has evaluated generically the environmental impacts of continued spent fuel storage and, by a duly-promulgated rule, deemed those impact determinations to be incorporated into plant-specific FEISs. Furthermore, NRC regulations require supplementation of FEISs only when, unlike the present case, new information significantly alters the findings and conclusions in the FEIS.

Finally, as discussed in Section III.C, there is no support for Petitioners’ claim that NRC supplementation of plant-specific FEISs is necessary to protect their adjudicatory rights or ensure adequate public participation in NRC licensing proceedings that rely on the Continued Storage Rule and GEIS. In short, Petitioners’ proposed filing of a placeholder contention ignores the Commission’s decision to proceed through a generic rulemaking, signals their clear intent to challenge the Continued Storage Rule, and is contrary to NRC rules and precedent.

For these reasons, the Petition lacks procedural and substantive merit. Therefore, it should be denied in its entirety.

II. BACKGROUND

A. The NRC's Ongoing Review of the COL Application

Luminant filed the Comanche Peak COL application in 2008. The Staff published the Draft Environmental Impact Statement in August 2010, and the FEIS in May 2011.⁶ The safety review has not been completed.

B. Adjudicatory Proceeding

SEED (and other individuals and organizations) were initially admitted as intervenors to the COL proceeding, but the Board subsequently dismissed all admitted contentions.⁷ The Commission denied the intervenors' subsequent appeal, thereby terminating the contested portion of this proceeding in 2011.⁸

In 2012, SEED filed with the Board a motion to admit a new environmental contention that challenged the alleged failure of the Environmental Report to address the environmental impacts that may occur if a spent fuel repository does not become available.⁹ The proposed contention was 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),¹⁰ which invalidated and remanded the NRC's Waste Confidence Decision Update¹¹ and related final rule.¹² Following approval of

⁶ See <http://www.nrc.gov/reactors/new-reactors/col/comanche-peak/review-schedule.html>.

⁷ See *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant Units 3 & 4), LBP-11-4, 73 NRC 91, 128 (2011) (dismissing Contention 18 and Alternatives Contention A and terminating the proceeding before the Board); *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant Units 3 & 4), LBP-10-10, 71 NRC 529, 600 (2010) (dismissing Contention 13).

⁸ *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant Units 3 & 4), CLI-11-9, 74 NRC 233 (2011).

⁹ See Intervenors' Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Comanche Peak Nuclear Power Plant (July 9, 2012).

¹⁰ See *id.*

¹¹ Waste Confidence Decision Update, 75 Fed. Reg. 81,037 (Dec. 23, 2010).

the final Continued Storage Rule and the associated GEIS, the Commission dismissed the proposed contention.¹³ On September 19, 2014, the NRC issued the final Continued Storage Rule¹⁴ and published a notice of the availability of the GEIS.¹⁵

On September 29, 2014, SEED and other petitioners filed a new contention, a suspension petition, and a motion to reopen related to their claim that the NRC is required by the Atomic Energy Act of 1954, as amended, to make “predictive safety findings” regarding the safety of permanent spent nuclear fuel disposal before issuing any reactor licensing decision.¹⁶ On October 31, 2014, both Luminant and the NRC Staff opposed these requests in their entirety as both procedurally and substantively deficient.¹⁷ Petitioners subsequently submitted their reply on November 7, 2014.¹⁸ The Commission issued its Order CLI-14-09 on October 7, 2014 to consolidate these issues before it.

Finally, Petitioners submitted the current Petition to the Commission on January 28, 2015. It argues that the NRC’s failure to supplement FEISs to “cross-reference and summarize”

¹² Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 75 Fed. Reg. 81,032 (Dec. 23, 2010).

¹³ See *Calvert Cliffs 3 Nuclear Project, LLC, & UniStar Nuclear Operating Servs., LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-14-08, 80 NRC ___, slip op. at 12 (Aug. 26, 2014).

¹⁴ Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238 (Sept. 19, 2014).

¹⁵ Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,263 (Sept. 19, 2014).

¹⁶ See Petitioners’ Motion for Leave to File a New Contention Concerning the Absence of Required Waste Confidence Safety Findings in the Licensing Proceeding at Comanche Peak Units 3 & 4 (Sept. 29, 2014); Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Issuance of Waste Confidence Safety Findings (Sept. 29, 2014); Motion to Reopen the Record for Comanche Peak Units 3 & 4 Nuclear Power Plant (Sept. 29, 2014).

¹⁷ See Luminant Combined Response to Proposed Contention and Petition to Suspend Related to Alleged Need for Issuance of Waste Confidence Safety Findings (Oct. 31, 2014); NRC Staff Consolidated Answer to Petitions to Suspend Final Reactor Licensing Decisions, Motions to Admit a New Contention, and Motions to Reopen the Record (Oct. 31, 2014).

¹⁸ Petitioners’ and Intervenors’ Consolidated Reply to Answers to Petitions to Suspend Final Reactor Licensing Decisions, Motions to Admit a New Contention, and Motions to Reopen the Record (Nov. 7, 2014).

the GEIS and the Continued Storage Rule violates NEPA, NRC regulations, and Council on Environmental Quality (“CEQ”) regulations.¹⁹ It also argues that the supplementation is necessary to allow for public participation in the licensing proceedings and to allow Petitioners the opportunity to submit “placeholder” contentions challenging reliance on the GEIS and the Continued Storage Rule in individual licensing proceedings.²⁰

III. THE PETITION SHOULD BE REJECTED

As discussed below, the Petition is both procedurally and substantively deficient for many independent reasons. Accordingly, it should be rejected in its entirety.

A. The Petition Is Procedurally Deficient

1. The Petition Is Untimely

The Petition, which was filed pursuant to 10 C.F.R. § 2.323,²¹ should be treated as a general motion for procedural purposes.²² Such motions must be made no later than 10 days after the occurrence or circumstance from which the motion arises.²³ Although Petitioners do not identify a specific trigger giving rise to the Petition, they focus on the Staff’s actions in response to the GEIS. The GEIS was published in September 2014,²⁴ months before Petitioners filed the Petition, rendering the Petition untimely. These circumstances are similar to those that

¹⁹ See Petition at 2, 7-9.

²⁰ See *id.* at 10-11.

²¹ See *id.* at 2, 11.

²² See 10 C.F.R. § 2.323 (procedures for general motions); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 476 (2008) (stating that when “Petitioners’ requests do not fit cleanly within any of the procedures described within [NRC] rules of practice,” the NRC will treat them “as general motions brought under the procedural requirements of 10 C.F.R. § 2.323.” (citations omitted)).

²³ 10 C.F.R. § 2.323(a)(2).

²⁴ See Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. at 56,263.

led the Commission to conclude in *Oyster Creek* (CLI-08-23) that a petition filed four months after the information on which it was based was not timely.²⁵ A similar result is warranted here.

Petitioners have no justification for their delay in filing the Petition. The Continued Storage Rule was issued in September of last year. In addition to the straightforward language in 10 C.F.R. § 51.23(b), the Staff's intention not to issue an FEIS supplement was publicly implemented months ago. For example, the NRC issued the Limerick renewed licenses in October 2014 without supplementing the FEIS to incorporate by reference the GEIS.²⁶ Indeed, the NRC Staff published a detailed evaluation on October 15, 2014 explaining why a supplement was unnecessary.²⁷ Similarly, the Staff issued an evaluation on November 20, 2014 considering this same issue for the Fermi COL proceeding and concluded that a supplement was not necessary.²⁸ Accordingly, it has long been apparent that the Staff was not planning to

²⁵ *Oyster Creek*, CLI-08-23, 68 NRC at 485.

²⁶ Exelon Generation Company, LLC; Limerick Generating Station, Units 1 and 2, 79 Fed. Reg. 63,650 (Oct. 24, 2014).

²⁷ The U.S. Nuclear Regulatory Commission Staff Evaluation of the Final Rule for Continued Storage of Spent Nuclear Fuel for the License Renewal Environmental Review for Limerick Generating Station (Oct. 15, 2014), *available at* ADAMS Accession No. ML14281A237 (“[A] supplement to the LGS FSEIS is not required.”); *see also* Record of Decision, U.S. Nuclear Regulatory Commission, Docket Nos. 50-352 and 50-353, License Renewal Application for the Limerick Generating Station, Units 1 & 2 at 10 (Oct. 2014), *available at* ADAMS Accession No. ML14281A259 (“NUREG-2157 and the revised rule do not constitute new and significant information because they do not present a ‘seriously different picture’ of the environmental impacts of the proposed action (license renewal) as compared to the impacts analysis presented in the August 2014 LGS FSEIS.”).

²⁸ SECY-14-0132, Staff Statement in Support of the Uncontested Hearing for Issuance of Combined License for the Fermi Nuclear Plant Unit 3, at 20 (Nov. 20, 2014) (“[T]he staff concluded that the information in NUREG-2157 does not present a seriously different picture of the environmental impacts of the proposed action when compared to the impacts that were described in the FEIS for Fermi 3. Therefore, this information does not warrant a supplement to the FEIS for Fermi 3.”), *available at* ADAMS Accession No. ML14282A639; *see also* Consideration of New Information Regarding the Impacts of the Continued Storage of Spent Fuel for the Fermi Nuclear Power Plant, Unit 3, Combined License Application, *available at* ADAMS Accession No. ML14318A477.

supplement the FEISs; the Petition is therefore untimely and should be rejected for failure to satisfy 10 C.F.R. § 2.323(a)(2).²⁹

2. Petitioners Are Not Parties to this Proceeding

Among the Petitioners, only SEED has participated in this proceeding in the past. SEED, however, is not currently a party to this proceeding. It therefore does not have the right to submit this Petition seeking Commission relief. Under these circumstances, Petitioners are required to submit a request for hearing satisfying the requirements of 10 C.F.R. § 2.309(a), including a demonstration of their standing under 10 C.F.R. § 2.309(d), in order to participate.³⁰

Petitioners have not addressed the requirements of 10 C.F.R. § 2.309. The fact that SEED supplied such information years ago is not sufficient.³¹ Accordingly, the Petition should be denied for failure to satisfy 10 C.F.R. § 2.309(a).

3. Petitioners Have Not Submitted a Motion to Reopen the Record of this Proceeding

The record of this proceeding is closed.³² Petitioners are required by 10 C.F.R. § 2.326 to submit a motion to reopen the record before requesting that the Commission consider new information and provide new relief. They have not done so.

²⁹ During the consultation on the Petition, counsel for the NRC Staff informed counsel for Petitioners on January 16, 2015 that the issues raised by Petitioners did not support the claim that the FEISs must be supplemented. Even these statements during consultation were made more than 10 days before Petitioners filed the Petition on January 28, 2015, providing further evidence that the Petition is untimely.

³⁰ As stated by the *Vogtle* COL licensing board: “With the first licensing board’s May 2010 unchallenged summary disposition ruling in favor of SNC regarding the sole admitted contention in this proceeding (i.e., contention SAFETY-1), the contested portion of this case was terminated. As a consequence, to interpose a new contention now requires the submission of a ‘fresh intervention petition’ that fulfills the applicable standards that govern such filings, presumably including an appropriate standing demonstration.” *S. Nuclear Operating Co.* (Vogtle Elec. Generating Plant, Units 3 & 4), LBP-10-21, 72 NRC 616, 640 (2010), *aff’d*, CLI-11-8, 74 NRC 214 (2011).

³¹ For example, with respect to the requirements on standing, the Commission has explained that a petitioner may rely on prior determinations of standing only if the petitioner: (1) specifically identifies its prior standing determinations, and (2) shows that its prior standing determinations correctly reflect the current status of its standing. *Tex. Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 163 (1993).

Moreover, any motion to reopen the record based on Petitioners' arguments here would be deficient. Motions to reopen the record are governed by 10 C.F.R. § 2.326, which requires such motions to "address a significant safety or environmental issue," show that a "materially different result would be or would have been likely had the newly proffered evidence been considered initially," be timely, and be accompanied by supporting affidavits. Those requirements have not been satisfied in this case.³³

First, a motion related to the Petition would not address a significant safety or environmental issue. The relief requested by the Petition is the administrative act of incorporating the GEIS by reference. That is not a significant safety or environmental issue.

Second, a motion related to the Petition could not demonstrate that a materially different result would have occurred if the information in the Petition had been considered previously. As discussed in Section III.B below, the NRC is not required to supplement the FEIS to incorporate by reference the GEIS. Additionally, the GEIS is public and, per the Commission's explicit directive, will be considered by the NRC to determine whether to issue the Comanche Peak COLs.

Third, the motion to reopen would not be timely. As discussed above, Petitioners could have raised their supplementation argument months ago when the NRC issued the Continued

³² SEED also is aware of this requirement for a motion to reopen, because it submitted one on September 29, 2014 related to its claims regarding waste confidence "safety findings." Motion to Reopen the Record for Comanche Peak Units 3 & 4 Nuclear Power Plant (Sept. 29, 2014).

³³ In codifying this standard, the Commission emphasized "the heavy burden involved" and characterized these requirements as "high" and "stringent." Final Rule, Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,538 (May 30, 1986).

Storage Rule, or at least after public statements or actions by the NRC Staff indicating that the Staff did not plan to supplement the FEISs.³⁴

Finally, a motion to reopen must be supported by “affidavits that set forth the factual and/or technical bases for the movant’s claim” that a significant and material safety and environmental issue exists.³⁵ Petitioners have not provided such affidavits.

4. The Petition Is Procedurally Deficient in Seeking a Placeholder Contention

Insofar as Petitioners claim that “placeholder” contentions are necessary to preclude near-term licensing actions that rely on the Continued Storage Rule and GEIS, they invoke the wrong procedural mechanism. If Petitioners wished to foreclose Commission reliance on the Rule in support of site-specific licensing actions, then they should have requested that the Commission and/or the Court of Appeals stay the effectiveness of the Rule pending judicial review.³⁶

Petitioners’ current proposal—an ill-defined placeholder contention—cannot remedy that procedural oversight.³⁷ Similarly, if Petitioners are seeking suspension of the issuance of reactor

³⁴ *Id.* For a reopening motion to be timely, the movant must show that the issue sought to be raised could not have been raised earlier. *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-775, 19 NRC 1361, 1366 (1984), *aff’d sub. nom. San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287 (D.C. Cir. 1984), *aff’d on reh’g en banc*, 789 F.2d 26 (1986).

³⁵ 10 C.F.R. § 2.326(b).

³⁶ As the Commission noted in the *Vogtle* COL proceeding: “While we have no specific rule governing stays of agency action pending judicial review, federal law requires parties seeking such stays in court to come to the agency first, and we traditionally have entertained such motions.” *Southern Nuclear Operating Co.* (Vogtle Elec. Generating Plant, Units 3 & 4), CLI-12-11, 75 NRC 523, 528 (2012). The Commission specifically cited Rule 18(a)(1) of the Federal Rules of Appellate Procedure, which states that “[a] petitioner must ordinarily move first before the agency for a stay pending review of its decision or order.” Rule 18(a)(2) states that a motion for a stay may be made to the court of appeals or one of its judges, but the motion *must*: (i) show that moving first before the agency would be impracticable; or (ii) state that, a motion having been made, the agency denied the motion or failed to afford the relief requested and state any reasons given by the agency for its action. FED. R. APP. P. 18(a)(2); *see also Fire Protection for Operating Nuclear Power Plants (10 CFR 50.48)*, CLI-81-11, 13 NRC 778 (1981) (considering and rejecting request by several licensees to stay the effectiveness of a final rule).

³⁷ Even if the Petition were to be considered a permissible stay request, it should be rejected because it neither addresses nor satisfies the standards for seeking a stay. The most important stay factor is the requirement to show “imminent irreparable harm that is both ‘certain and great.’” *Vogtle*, CLI-12-11, 75 NRC at 529.

licenses, then they fail to address, much less satisfy, the Commission’s well-established standard for such requests.³⁸

* * *

In summary, Petitioners are not parties to this proceeding and therefore are not entitled to the relief sought in their Petition. In any case, the Petition is procedurally defective for several independent reasons: it is untimely; it fails to address the NRC’s reopening criteria in 10 C.F.R. § 2.326; and it is procedurally misplaced.

B. NRC Supplementation of Plant-Specific FEISs Is Not Necessary to Ensure Agency Compliance with NEPA and NRC Regulations

Petitioners request that the NRC supplement the FEIS by incorporating by reference and summarizing the GEIS.³⁹ They claim that this action is required by NEPA and NRC regulations.

Petitioners’ request should be rejected because the NRC is not required to supplement the FEIS. First, Petitioners’ arguments constitute an improper challenge to the Continued Storage

Petitioners clearly face no imminent, irreparable harm. Indeed, any Commission decision on the Comanche Peak COL proceeding is not imminent. Since Petitioners have failed to make a showing of irreparable injury, they must “make an overwhelming showing of likely success on the merits” for the Commission to consider granting its stay request. *Id.* (internal quotation marks and citation omitted). Petitioners, however, have made no such showing. As discussed below, there is no requirement to supplement the EIS, and Petitioners have not even explained their arguments for why the Continued Storage Rule is deficient. Thus, since Petitioners have failed to make either of the first two showings required by 10 C.F.R. § 2.342(e), the Commission need not consider the remaining factors. *Id.*

³⁸ The Commission’s criteria for suspending a licensing proceeding are well-established. *See DTE Elec. Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-14-07, 80 NRC ___, slip op. at 8-11 (July 17, 2014); *Union Elec. Co. d/b/a Ameren Missouri* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC 141, 158–59 (2011). As discussed in *Fermi* and *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] . . . ongoing evaluation.” Conspicuously, Petitioners fail even to identify—much less satisfy—the well-established criteria that govern requests to suspend licensing actions.

³⁹ Petition at 2, 6.

Rule and can be rejected on that basis alone.⁴⁰ The Commission’s authority and discretion to resolve issues generically through rulemaking rather than through plant-specific adjudications is unassailable. Second, contrary to Petitioners’ claim, FEIS supplements are not needed in this case to ensure “full disclosure” of the NRC’s environmental analysis and “meaningful evaluation” of the analysis results by state and local decision-makers.⁴¹ Third, Petitioners misconstrue NRC regulations related to incorporation by reference. Finally, Petitioners ignore the relevant NRC regulations and case law governing supplementation of an EIS, neither of which mandates issuance of FEIS supplements in the present circumstances.

1. The Petition Impermissibly Challenges the Continued Storage Rule

As a threshold matter, Petitioners’ arguments constitute an improper challenge to the Continued Storage Rule and its underlying objectives. As they readily acknowledge, 10 C.F.R. § 51.23(b) states that the impact determinations in the GEIS regarding continued spent fuel storage “shall be deemed incorporated into the environmental impact statements” for individual reactor licensing proceedings.⁴² Yet Petitioners contend that this provision, “by itself, is insufficient to comply with NEPA or NRC’s implementing regulations.”⁴³ Petitioners thus suggest that the Rule is somehow defective on its face, and that the Commission must “rectify” that alleged deficiency by including supplemental discussion of the Continued Storage Rule in plant-specific FEISs.⁴⁴

⁴⁰ See 10 C.F.R. § 2.335(a).

⁴¹ Petition at 9.

⁴² See *id.* at 3, 6 (quoting 10 C.F.R. § 51.23(b)).

⁴³ *Id.* at 6.

⁴⁴ *Id.* at 9.

When it issued the Continued Storage Rule, however, the Commission made clear that it did not envision the preparation of new or revised discussions of the environmental impacts of continued storage in individual EISs:

Section 51.23(b) is revised to state that the impact determinations in NUREG–2157 [the GEIS] are *deemed to be incorporated into EISs* This means that the NRC will use the impact determinations in NUREG–2157 to evaluate the contribution of the environmental impacts of continued storage as part of the overall NEPA analysis. For agency actions that have already been taken, the NRC will not prepare new analyses or revise the existing analyses with respect to the environmental impacts of continued storage; rather, when preparing EAs [environmental assessments] and EISs for pending and future licensing actions, *the NRC’s review will simply consider the incorporated impact determinations along with the other environmental impacts associated with the proposed action.*⁴⁵

Thus, in asserting that the NRC “must” supplement reactor-specific FEISs to cross-reference and summarize the Continued Storage Rule and GEIS, Petitioners directly challenge a final rule, contrary to the provisions of 10 C.F.R. § 2.335.⁴⁶

In this regard, Petitioners’ argument also contravenes a settled tenet of administrative law that “the choice between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.”⁴⁷ The NRC’s authority to resolve issues generically by rule rather than through individual adjudications is well-established. Moreover, that authority is fully applicable to NEPA matters, as the Supreme Court has upheld

⁴⁵ Continued Storage Rule, 79 Fed. Reg. at 56,250 (emphasis added).

⁴⁶ See also *Calvert Cliffs*, CLI-14-08, slip op. at 5 n.8 (“The rule, which adopts the generic impact determinations made in the GEIS, satisfies the NRC’s NEPA obligations with respect to continued storage for initial, renewed, and amended licenses for reactors Further, consistent with the rule, these determinations generally may not be challenged in individual licensing proceedings.”).

⁴⁷ *SEC v. Chenery*, 332 U.S. 194, 203 (1947); see also *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).

the NRC’s authority to discharge its responsibilities under NEPA through generic rulemaking.⁴⁸

As the Court observed in *Baltimore Gas* in the context of a previous NRC generic rulemaking:

. . . NEPA does not require agencies to adopt any particular internal decisionmaking structure. Here, the agency has chosen to evaluate generically the environmental impact of the fuel cycle and inform individual licensing boards, *through the Table S-3 rule*, of its evaluation. *The generic method chosen by the agency is clearly an appropriate method of conducting the hard look required by NEPA.* . . . Administrative efficiency and consistency of decision are both furthered by a generic determination of these effects without needless repetition of the litigation in individual proceedings, which are subject to review by the Commission in any event.⁴⁹

Petitioners’ request, if granted, would lead to such “needless repetition” and undermine the efficiency the Commission has sought to achieve by incorporating the GEIS impact determinations into FEISs by rule.

2. FEIS Supplements Are Not Necessary to Ensure Full Disclosure Under NEPA or Meaningful Evaluation by State and Local Decision-Makers

Contrary to Petitioners’ assertions, plant-specific FEIS supplements are not necessary to “allow[] state and local decision-makers to make a meaningful evaluation under NEPA of the NRC’s proposal to license or re-license the reactors.”⁵⁰ As discussed in the Statement of Considerations for the Continued Storage Rule, the Commission specifically intended that generic impact determinations discussed in the GEIS and codified in 10 C.F.R. § 51.23 be used to support individual reactor licensing decisions:

⁴⁸ See *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 100-01 (1983); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 535 n.13 (1978).

⁴⁹ *Baltimore Gas*, 462 U.S. at 100-01 (internal citations omitted); see also *id.* at 101 (stating that “the Commission has discretion to evaluate generically the environmental effects of the fuel cycle and require that these values be ‘plugged into’ individual licensing decisions”); *Ecology Action v. AEC*, 492 F.2d 998, 1002 (“[T]he idea that a licensing agency should endeavor to identify environmental issues common to many applications and handle them in ‘generic’ proceedings would seem to benefit all parties . . .”).

⁵⁰ Petition at 9.

Taken together, the GEIS, the site-specific environmental review, and other applicable environmental reviews will provide the decision-maker in a licensing proceeding with a complete environmental analysis of the impacts associated with spent fuel storage prior to disposal in a geologic repository. Under final 10 CFR 51.23, the impact determinations in NUREG–2157 are deemed incorporated into an EIS that is prepared to support a licensing action for a power reactor or ISFSI.⁵¹

In view of the above, Petitioners’ statement that state or local governments and members of the public “are given no hint that the NRC relies on the Continued Spent Fuel Storage GEIS for any part of [a plant-specific] FEIS’s environmental analysis” is completely unfounded.⁵²

Furthermore, because 10 C.F.R. § 51.23(b) explicitly states that “[t]he impact determinations in NUREG–2157 regarding continued storage shall be deemed incorporated into the environmental impact statements,” members of the public and state and local governments are on legal notice that the NRC is relying on the GEIS.

Petitioners’ related claim that state and local decision-makers have been “deprived of any information” regarding the NRC’s current analysis of continued spent fuel storage impacts, in alleged violation of NEPA’s full disclosure requirement, also is groundless.⁵³ The Continued Storage Rule is the culmination of one of the most visible and publicly-vetted rulemaking proceedings in the Commission’s history—one which included “a robust public comment period that included an extensive campaign of public meetings across the United States.”⁵⁴ In CLI-14-08, the Commission cited the numerous opportunities for public participation and the extensive body of public comments, concluding that the NRC Staff had “amply fulfilled” the

⁵¹ Continued Storage Rule, 79 Fed. Reg. at 56,243; *see also id.* at 56,249 (“The NRC will use the impact determinations in NUREG–2157 to inform the decision-makers in licensing proceedings of the impacts of continued storage.”).

⁵² Petition at 9.

⁵³ *Id.*

⁵⁴ *Calvert Cliffs*, CLI-14-08, slip op. at 6.

Commission's previous assurances of public participation in the rulemaking proceedings.⁵⁵

Thus, interested stakeholders, including representatives of states and local communities hosting nuclear power plants, were fully apprised of the NRC's environmental impact analysis for continued spent fuel storage. As such, they have in fact been given the opportunity to make a meaningful evaluation under NEPA of the issues addressed in the GEIS.⁵⁶

3. The NRC Has Not Violated Its Own Regulations for Incorporating Information by Reference into FEISs

Petitioners also misconstrue the NRC's 10 C.F.R. Part 51 regulations concerning tiering and incorporation by reference, stating that the NRC may not use incorporation by reference to diminish the accuracy or completeness of an EIS or in a manner that impedes agency and public review. Here, the NRC has not used incorporation by reference in the sense contemplated by the 10 C.F.R. Part 51 and CEQ regulations cited by Petitioners.⁵⁷ By their very terms, those regulations refer to situations in which a document is "referenced" in the FEIS and incorporated by that reference.⁵⁸ In contrast, in this proceeding, the NRC has used the notice-and-comment

⁵⁵ *Id.* at 11. The proposed rule was published for a 75-day comment period on September 13, 2013; the comment period ultimately was extended until December 20, 2013. *See* Proposed Continued Storage Rule, 78 Fed. Reg. 56,776 (Sept. 13, 2013); Proposed Rule, Waste Confidence—Continued Storage of Spent Nuclear Fuel, 78 Fed. Reg. 66,858 (Nov. 7, 2013) (extension of comment period). During the comment period, the NRC Staff held 13 public meetings across the country. Overall, the NRC received over 33,000 comment submissions and recorded approximately 1,600 pages of public meeting transcripts. Continued Storage Rule, 79 Fed. Reg. at 56,253; GEIS at 1-12, C-1 to C-18, D-1 to D-3. The Petition reads as if the NRC developed the Continued Storage Rule in a vacuum, and that none of this public outreach and participation ever occurred. Clearly, that is not the case.

⁵⁶ Thus, it strains credulity to suggest that interested stakeholders have been "deprived of any information regarding the NRC's current analysis" of the environmental impacts of continued spent fuel storage, or "left with empty assurances" that the NRC has appropriately analyzed such impacts. Petition at 9.

⁵⁷ In particular, Petitioners cite 10 C.F.R. Part 51, Appendix A, § 1(b), which states, in pertinent part:

The techniques of tiering and incorporation by reference described respectively in 40 CFR 1502.20 and 1508.28 and 40 CFR 1502.211 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.

⁵⁸ To the extent that Petitioners claim that the FEISs must be supplemented to include such a reference, the following section of this brief demonstrates that such supplementation is not required.

rulemaking process to assess generically (in the GEIS) the impacts of continued storage of spent fuel at U.S. power reactors, codified its generic impact determinations in a rule (10 C.F.R. § 51.23) and, through that rule, incorporated those determinations into individual EISs for pending and future reactor licensing proceedings.⁵⁹ As discussed above, all of this was accomplished through a very public process that involved extensive participation by interested stakeholders.

As a result, there has been no violation of NRC or CEQ regulations concerning incorporation by reference. The NRC has not “imped[ed] agency and public review” of any proposed licensing action, and the GEIS analysis of continued storage impacts is “reasonably available for inspection by potentially interested persons.”⁶⁰ Consistent with NEPA’s objectives, the Continued Storage Rule has fostered—not diminished—completeness and accuracy as well as public participation. Petitioners thus cannot credibly claim that they or any other party has been denied access to any information or any ability to participate in the NRC’s environmental review. As such, their request for an administrative supplement citing the GEIS and summarizing its contents elevates form over substance. Indeed, even assuming there was a legal requirement that the GEIS be incorporated by reference into plant-specific FEISs in the manner described in 40 C.F.R. § 1502.21 (*i.e.*, “cited in the statement and its content briefly described”),

⁵⁹ On this point, the *Pacific Rivers Council* decision cited by Petitioners, Petition at 7-8, is readily distinguished. In that case, which has since been vacated as moot, the U.S. Forest Service incorporated into an EIS, by reference, two Biological Assessments (“BAs”) prepared by the U.S. Fish and Wildlife Service. *See Pac. Rivers Council v. U.S. Forest Serv.*, 689 F.3d 1012 (9th Cir. 2012), *vacated as moot*, 133 S. Ct. 2843 (2013). The court held that if the BAs were intended to serve as the analysis of the environmental consequences for certain fish, then the Forest Service should have described and analyzed them in the EIS and included them in an appendix. *Id.* at 1031. The court also found that the Forest Service had failed to take a “hard look” at the environmental consequences on fish, because the BAs lacked analysis of the manner or degree to which the alternatives may have affected the fish and applied to only one group of fish species. *Id.* at 1032. Here, in contrast, the NRC has prepared a very detailed, publicly-vetted, bounding analysis of continued spent fuel storage impacts that satisfies NEPA’s “hard look” requirement and, by rule, applies to all reactor licensing proceedings. The NRC has not cryptically “scatter[ed]” its environmental analyses among various public documents, as Petitioners wrongly suggest. *See* Petition at 8 (quoting *Baltimore Gas*, 462 U.S. at 100 n.12).

⁶⁰ 10 C.F.R. Part 51, subpt. A, app. A, sec. (b), n.1 & Discussion of Footnotes (quoting 40 C.F.R. § 1502.21).

the NRC's alleged failure to do so does not constitute a material violation of NEPA or CEQ regulations. Thus, even if Petitioners' claims were assumed to be valid (which they are not), the claims should be rejected per 40 C.F.R. § 1500.3 as a "trivial violation" of these regulations that does not give rise to any independent cause of action.⁶¹

4. NEPA and NRC Regulations Do Not Require Supplementation of Site-Specific FEISs to Reflect Issuance of the Continued Storage Rule

Petitioners' request should be rejected because NEPA and NRC regulations do not require supplementation of individual reactor FEISs to reflect issuance of the Continued Storage Rule.⁶² As an initial matter, NEPA and NRC regulations do not impose on the NRC a compulsory duty to supplement a FEIS in response to any new information or analysis. Indeed, the U.S. Supreme Court reached this conclusion in *Marsh v. Oregon Natural Resources Council*, the seminal case addressing the duty of agencies to prepare supplemental EISs.⁶³ Therein, the Court specifically noted that "an agency need not supplement an EIS every time new information comes to light after the EIS is finalized."⁶⁴ Rather, 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."⁶⁵ Specifically, "[i]f there remains major federal action to occur, and if the new information is sufficient to show that the remaining action will affect the quality of the human environment *in a significant manner or to a significant extent not already considered*, a supplemental [EIS] must be prepared."⁶⁶

⁶¹ See 40 C.F.R. § 1500.3 ("[I]t is the Council's intention that any trivial violation of these regulations not give rise to any independent cause of action.").

⁶² Petition at 2.

⁶³ See *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 370 (1989).

⁶⁴ *Id.* at 373.

⁶⁵ *Id.* at 374.

⁶⁶ *Id.* at 373-74 (emphasis added) (internal quotation marks omitted).

NRC regulations at 10 C.F.R. § 51.92(a) concerning FEIS supplementation (which mirror CEQ regulations) state that the NRC Staff will prepare a supplement to a final EIS only if: “(1) There are substantial changes in the proposed action that are relevant to environmental concerns; or (2) There are new and significant circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.”⁶⁷ The Commission has construed this regulation consistently with federal case law, including *Marsh*, and summarized the relevant 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.”⁶⁸

Similarly, the Commission has stated that “not all new information that might emerge following issuance of an environmental impact statement requires a supplement to the impacts analysis”—only that which “significantly alters” the findings and conclusions in the FEIS.⁶⁹ In short, neither NEPA nor NRC regulations impose on the NRC an absolute or unqualified duty to supplement site-specific FEISs in response to new information or analysis.

Conspicuously, Petitioners fail to cite 10 C.F.R. § 51.92 or judicial and Commission case law discussing the legal standard for EIS supplementation, much less demonstrate that such supplementation is required in the present circumstances. In particular, they have not argued that the NRC’s issuance of the final Continued Storage Rule and GEIS “significantly alters” the

⁶⁷ 10 C.F.R. § 51.92(a)(1)-(2).

⁶⁸ *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 28 (2006) (quoting *Wis. v. Weinberger*, 745 F.2d 412, 418 (7th Cir. 1984); *Nat’l Comm. for the New River, Inc. v. Federal Energy Regulatory Comm’n*, 373 F.3d 1323, 1330 (D.C. Cir. 2004) (citing *Marsh*, 490 U.S. at 373)).

⁶⁹ *Hydro Resources, Inc.* (P.O. Box 777, Crownpoint, NM 87313), CLI-06-29, 64 NRC 417, 419-22 (2006).

findings and conclusions in the current FEISs for those licensing actions. Consequently, they have not provided any acceptable basis for supplementing the FEISs.

It also bears mention that 10 C.F.R. § 51.92 states that the NRC Staff “*may* prepare a supplement to a [FEIS] when, *in its opinion*, preparation of a supplement will further the purposes of NEPA.”⁷⁰ For the reasons discussed above in Section III.B.2, supplementation of FEISs for pending reactor licensing proceedings would not further the purposes of NEPA, because the NRC took great pains to ensure that NEPA’s full disclosure and public participation requirements were met through the generic rulemaking process.

5. FEIS Supplements Are Not Necessary to Implement the Continued Storage Rule for Pending Reactor Licensing Proceedings

In CLI-14-08, the Commission also specifically directed the NRC Staff to implement the Continued Storage Rule for each affected application, and to account for the results of the rulemaking proceeding before finalizing licensing decisions.⁷¹ Thus, contrary to Petitioners’ suggestion, the NRC is properly discharging its duties under NEPA by evaluating the impacts of continued storage as determined in the generic continued storage rulemaking in reactor-specific licensing proceedings.⁷²

Significantly, the NRC Staff already has begun implementing the Commission’s directive in CLI-14-08 in individual proceedings. In the Limerick license renewal proceeding, the Staff analyzed whether the revised rule at 10 C.F.R. § 51.23 and associated GEIS present new and significant information, such that a supplement to the August 2014 FEIS for Limerick license

⁷⁰ 10 C.F.R. § 51.92(c) (emphasis added). Thus, any decision to supplement a FEIS pursuant to Section 51.92(c) lies within the sound discretion of the NRC Staff and is not mandated by NEPA.

⁷¹ *Calvert Cliffs*, CLI-14-08, slip op. at 7.

⁷² Continued Storage Rule, 79 Fed. Reg. at 56,250.

renewal is required.⁷³ As documented in the Staff’s evaluation, the Staff concluded that the revised rule and GEIS do not constitute new and significant information because they do not present a “seriously different picture” of the environmental impacts of the proposed action as compared to the impacts analysis presented in the August 2014 FEIS.⁷⁴ The Staff also determined that the revised rule and the impact determinations related to continued storage in the GEIS do not alter the NRC Staff’s recommendation in the August 2014 Limerick FEIS that the adverse environmental impacts of license renewal for Limerick are not great enough to deny the option of license renewal for energy planning decision-makers.⁷⁵ The NRC also summarized the results of these analyses in the Record of Decision for the Limerick license renewal.⁷⁶

In the Fermi Unit 3 COL proceeding, the NRC Staff performed a similar evaluation. Based on that analysis, the Staff concluded that no supplement to the Fermi Unit 3 FEIS is necessary, because the information in the GEIS does not present a seriously different picture of the environmental impacts of the proposed action.⁷⁷ The Staff also noted that the revised rule and GEIS do not alter its recommendation that the Fermi Unit 3 COL should be issued.⁷⁸

⁷³ See Memorandum from David Wrona, NRC, to Exelon Generation Company, LLC, The U.S. Nuclear Regulatory Commission Staff Evaluation of the Final Rule for Continued Storage of Spent Nuclear Fuel for the License Renewal Environmental Review for Limerick Generating Station (Oct. 15, 2014), *available at* ADAMS Accession No. ML14281A237 (enclosing NRC Staff evaluation).

⁷⁴ *See id.*, encl. at 5-6.

⁷⁵ *See id.* at 6.

⁷⁶ See Record of Decision, U.S. Nuclear Regulatory Commission, Docket Nos. 50-352 & 50-353, License Renewal Application for the Limerick Generating Station, Units 1 & 2 (Oct. 2014), *available at* ADAMS Accession No. ML14281A259; Exelon Generation Company, LLC; Limerick Generating Station, Units 1 and 2, 79 Fed. Reg. 63,650 (Oct. 24, 2014).

⁷⁷ See Consideration of New Information Regarding the Impacts of the Continued Storage of Spent Fuel for the Fermi Nuclear Power Plant, Unit 3, Combined License Application at 6, *available at* ADAMS Accession No. ML14318A477.

⁷⁸ *See id.* at 7.

Thus, the Staff has established and is implementing a process that provides for the consideration of whether the impacts identified in the GEIS affect the conclusions in the FEISs. NEPA and Part 51 require nothing more.

* * *

In summary, Petitioners provide no remotely tenable basis for their claim that only by supplementing FEISs for individual licensing proceedings can the NRC comply with NEPA and related Commission regulations. The Petition is an attack on the Continued Storage Rule itself, in that it openly asserts that the Rule is insufficient to comply with the NRC’s NEPA obligations. The Petition also rests on a patent misreading of NRC and CEQ regulations, including those relating to incorporation by reference and FEIS supplementation. Furthermore, as demonstrated above, there is no need for the NRC to supplement plant-specific FEISs in the present circumstances, where the agency has met NEPA’s “hard look,” full disclosure, and public participation requirements through the generic rulemaking process, and already proceeded to implement the Continued Storage Rule for each affected application.

C. Petitioners’ Plans to Submit Placeholder Contentions Should Be Rejected as Contrary to Commission Rules and Precedent

Petitioners’ request that the NRC supplement the FEIS so that they may file placeholder contentions is purposeless because the NRC does not allow such placeholder contentions. Moreover, any such placeholder contention would impermissibly challenge the Continued Storage Rule.

1. The Commission Does Not Permit the Use of Placeholder Contentions

The Commission does not permit placeholder contentions. The Commission has rejected pleadings intended to function as “placeholders” for future pleadings, stating that “our regulations do not contemplate such filings, which are tantamount to impermissible ‘notice

pleadings.”⁷⁹ The Commission recently reiterated this principle in *Byron/Braidwood*, rejecting the use of “placeholder” motions as impermissible under its Rules of Practice and “inconsistent with [its] longstanding interest in sound case management and regulatory finality.”⁸⁰ Similarly, NRC licensing boards repeatedly have rejected “placeholder” contentions based on future developments as contrary to the NRC’s contention pleading and admissibility requirements.⁸¹

Petitioners specifically characterize their future contention as a placeholder contention. Such a contention would be subject to dismissal under the Commission’s hearing rules and precedent. Accordingly, there is no reason for the NRC to supplement the FEIS in order to enable Petitioners to file an inadmissible placeholder contention.

Moreover, Petitioners’ asserted need for a placeholder contention is baseless. If Petitioners believe that the Continued Storage Rule does not adequately address site-specific concerns, they should have filed a contention at the time the NRC issued the Rule. Although NRC regulations typically require contentions to be based on the content of the license application, they also permit the filing of “contentions of omission” to claim that some topic is inappropriately excluded. Specifically, 10 C.F.R. § 2.309(f)(1)(vi) states: “if the petitioner believes that the application fails to contain information on a relevant matter as required by law, [the contention must include] the identification of each failure and the supporting reasons for the

⁷⁹ *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 120 (2009).

⁸⁰ *See, e.g., Exelon Generation Co., LLC* (Byron Nuclear Station, Units 1 & 2; Braidwood Nuclear Station, Units 1 & 2), CLI-14-06, 80 NRC ___, slip op. at 5 (May 2, 2014).

⁸¹ *See, e.g., S. Nuclear Operating Co.* (Vogtle Elec. Generating Plant, Units 3 & 4), LBP-09-3, 69 NRC 139, 155-58 (2009) (rejecting proposed contentions that were “open-ended, placeholder contentions” that are not based on “documentary material or expert analysis,” but on future developments); *Shaw Areva MOX* (Mixed Oxide Fuel Fabrication Facility), LBP-08-11, 67 NRC 460, 489-90 (2008) (rejecting a contention as a “placeholder for the future”).

petitioner's belief.”⁸² Since Petitioners claim that the FEIS fails to address the GEIS, they should have filed a contention of omission earlier.

2. Any Placeholder Contention Would Challenge the Continued Storage Rule

The Commission stated unequivocally that its “generic determinations will not be revisited and may not be challenged in individual licensing proceedings without the grant of a waiver under 10 CFR 2.335.”⁸³ Contrary to that explicit prohibition, Petitioners seek to submit contentions challenging the Continued Storage Rule.

Specifically, Petitioners ask the Commission to issue *site-specific* supplements to FEISs so that they may challenge—through site-specific contentions—the Commission's *generic* determinations in the GEIS. In this regard, Section 51.23(a) of the Rule directly states that “[t]he Commission has generically determined that the environmental impacts of continued storage of spent nuclear fuel beyond the licensed life for operation of a reactor are those impacts identified in NUREG–2157, ‘Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel.’”⁸⁴ Moreover, Section 51.23(b) of the Rule states that the impact determinations in the GEIS “shall be deemed incorporated” into the EISs for individual projects.⁸⁵ Petitioners’ plans to utilize a placeholder contention to challenge NRC’s reliance on the GEIS in individual licensing proceedings, therefore, is a direct challenge to the Continued Storage Rule.

As provided in 10 C.F.R. § 2.335(a), a proposed contention that challenges an NRC rule is outside the scope of this proceeding because, absent a waiver, “no rule or regulation of the

⁸² The regulations further allow contentions based on the FEIS if it complies with the late-filing standards. *See* 10 C.F.R. § 2.309(f)(2).

⁸³ Continued Storage Rule, 79 Fed. Reg. at 56,243.

⁸⁴ *Id.* at 56,260.

⁸⁵ *Id.*

Commission . . . is subject to attack . . . in any adjudicatory proceeding.”⁸⁶ Accordingly, the placeholder contention would be inadmissible.⁸⁷ There is no reason for the Commission to supplement the FEISs in order to enable Petitioners to submit contentions that would be inadmissible.

Petitioners’ arguments also run directly counter to the express purpose of the Continued Storage Rule. The Commission developed the Continued Storage Rule to assess generically—rather than on a site-by-site basis—the environmental impacts of continued storage of spent nuclear fuel beyond a reactor’s licensed operating life.⁸⁸ The Commission emphasized the efficiency inherent in such an approach:

Historically, the NRC and license applicants have relied on 10 CFR 51.23 to conclusively address the environmental impacts of continued storage in environmental reports, EISs, and EAs. The NRC’s use of 10 CFR 51.23 to satisfy its NEPA obligations with respect to continued storage will *enhance efficiency in individual licensing reviews by incorporating the determinations from the*

⁸⁶ The Commission consistently has affirmed licensing boards’ rejections of proposed contentions that challenge generically-applicable rulemaking determinations, including those codified in 10 C.F.R. § 51.23. *See, e.g., Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), CLI-10-19, 72 NRC 98, 100 (2010) (directing the board, upon certification of the issue, to deny admission of a proposed contention due to the NRC’s then-pending rulemaking on waste confidence issues); *Entergy Nuclear Vt. Yankee, LLC* (Vt. Yankee Nuclear Power Station) & *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-07-3, 65 NRC 13, 20 (2007), *reconsid. denied*, CLI-07-13, 65 NRC 211 (2007) (holding that “any contention on a [license renewal] ‘Category 1’ issue amounts to a challenge to our regulation that bars challenges to generic environmental findings”); *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-04-4, 59 NRC 31, 39 (2004) (finding that an intervenor impermissibly challenged the NRC’s “rulemaking-associated determinations” that spent fuel cladding, once encased in a canister, is no longer important to safety); *Curators of the Univ. of Missouri*, CLI-95-1, 41 NRC 71, 170 (1995) (“Intervenors are, in essence, contending that those regulatory provisions are themselves insufficient to protect the public health and safety. This assertion constitutes an improper collateral attack upon our regulations.”); *see also Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 & 2), CLI-12-19, 76 NRC 377, 384 (2012).

⁸⁷ The NRC has interpreted Section 2.335 to require a waiver petitioner to meet four factors: (1) the rule’s strict application would not serve the purpose for which it was adopted; (2) there are special circumstances that were not considered, explicitly or implicitly, in the rulemaking proceeding; (3) those circumstances are “unique” to the facility and not common to a large class of facilities; and (4) a waiver is necessary to reach a significant safety problem. *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-05-24, 62 NRC 551, 559-60 (2005). Among other reasons, the generic nature of any placeholder contention would require rejection of a related waiver petition submitted under Section 2.335.

⁸⁸ *See* Continued Storage Rule, 79 Fed. Reg. at 56,239, 56,244; *Calvert Cliffs*, CLI-14-08, slip op. at 3-4.

generic analysis of the environmental impacts of continued storage into environmental impact statements that need to address continued storage.⁸⁹

As the GEIS notes, “requiring the NRC to prepare site-specific discussions of generic issues, like those associated with continued storage, would result in the considerable expenditure of public, NRC, and applicant resources” with no added benefit.⁹⁰ Also, permitting related plant-specific contentions would result in unnecessarily duplicative litigation on those generic issues.

* * *

In summary, Petitioners have provided no credible support for their claim that NRC supplementation of plant-specific FEISs is necessary to protect their adjudicatory rights or ensure adequate public participation in NRC licensing proceedings that rely on the Continued Storage Rule and supporting GEIS. In fact, the approach advocated by Petitioners is entirely inconsistent with the Commission’s decision to proceed through a generic rulemaking—a choice that is well within the Commission’s informed discretion. Moreover, Petitioners’ proposed approach, if adopted, would severely undermine the “NRC’s purpose of preserving the efficiency of its licensing proceedings with respect to the analysis of the impacts of continued storage.”⁹¹

IV. CONCLUSION

As demonstrated above, Petitioners are not parties to this proceeding and the Petition is otherwise procedurally defective because it was untimely, Petitioners have not filed a motion to

⁸⁹ Continued Storage Rule, 79 Fed. Reg. at 56,244 (emphasis added).

⁹⁰ GEIS at 1-7. As discussed above, the Commission provided extensive, if not unprecedented, opportunities for public participation in the rulemaking for the Continued Storage Rule. Indeed, Petitioners participated in public meetings and submitted comments on the proposed Rule and GEIS. *See, e.g.*, Comments by Environmental Organizations on Draft Waste Confidence Generic Environmental Impact Statement and Proposed Waste Confidence Rule (Dec. 20, 2013). The NRC in no way denied them an opportunity for meaningful participation. Therefore, neither site-specific FEIS supplements nor “placeholder” contentions are necessary to ensure adequate public participation with respect to continued spent fuel storage issues that have been evaluated generically by the Commission.

⁹¹ Continued Storage Rule, 79 Fed. Reg. at 56,259.

reopen the record, and it is procedurally misplaced. Additionally, contrary to Petitioners' claims, NRC supplementation of plant-specific FEISs is not necessary to ensure agency compliance with NEPA and NRC regulations or to ensure adequate public participation on these issues. Finally, Petitioners' plans to submit placeholder contentions are legally deficient. For these reasons, the Petition should be rejected in its entirety.

Respectfully submitted,

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

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Dated in Washington, D.C.
this 12th day of February 2015

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

_____)	
In the Matter of)	
LUMINANT GENERATION COMPANY LLC)	Docket Nos. 52-034-COL
(Comanche Peak Nuclear Power Plant Units 3 and 4))	52-035-COL
_____)	February 12, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the “Luminant Response Opposing Petition to Supplement Environmental Impact Statements” was submitted through the NRC’s E-filing system.

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