

February 12, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

DTE ELECTRIC CO.	)	52-033-COL
(Fermi Nuclear Power Plant, Unit 3))	
)	
DUKE ENERGY CAROLINAS, LLC	)	52-018-COL
(William States Lee III Nuclear Station, Units 1 and 2)	)	52-019-COL
)	
LUMINANT GENERATION CO. LLC	)	52-034-COL
(Comanche Peak Nuclear Power Plant, Units 3 and 4)	)	52-035-COL
)	
NUCLEAR INNOVATION NORTH AMERICA LLC	)	52-012-COL
(South Texas Project Units 3 and 4)	)	52-013-COL
)	
PROGRESS ENERGY FLORIDA, INC.	)	52-029-COL
(Levy County Nuclear Power Plant, Units 1 and 2)	)	52-030-COL
)	
STP NUCLEAR OPERATING CO.	)	50-498-LR
(South Texas Project, Units 1 and 2)	)	50-499-LR
)	
TENNESSEE VALLEY AUTHORITY	)	50-391-OL
(Watts Bar Nuclear Plant, Unit 2))	
)	
VIRGINIA ELECTRIC AND POWER CO.	)	52-017-COL
d/b/a DOMINION VIRGINIA POWER and)	
OLD DOMINION ELECTRIC COOPERATIVE)	
(North Anna Power Station, Unit 3))	

**NUCLEAR ENERGY INSTITUTE, INC.'S UNOPPOSED MOTION
FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF**

Pursuant to 10 C.F.R. § 2.323 and the Commission's order dated January 29, 2015, the Nuclear Energy Institute, Inc. (NEI) moves for leave to file the attached brief as *amicus curiae* addressing eight identical petitions asking the Commission to order the NRC Staff to supplement site-specific environmental impact statements (EISs) in the above-captioned proceedings so they incorporate by reference and summarize the Commission's Continued Storage Rule and Generic

Environmental Impact Statement (GEIS).¹ Pursuant to the Continued Storage Rule, determinations in the GEIS are “deemed incorporated” into site-specific EISs.² Petitioners challenge this provision in proceedings where the NRC issued site-specific final EISs before it issued the Continued Storage Rule and GEIS. In these cases, petitioners argue the NRC must do more to comply with the National Environmental Policy Act (NEPA) and NRC’s implementing regulations. According to petitioners, the NRC must cite and summarize the GEIS in site-specific EISs to allow decision-makers to evaluate the agency’s proposed actions. Petitioners also claim they need site-specific EISs referencing the GEIS to allow them to file “placeholder” contentions challenging NRC’s reliance on the Continued Storage Rule.

NEI’s attached brief will complement the filings in these proceedings and assist the Commission in deciding whether to order preparation of supplemental EISs. NEI is the Washington-based policy organization responsible for representing the commercial nuclear energy industry on generic regulatory, legal, and technical issues.³ NEI is in a unique position to address the legal and policy implications presented by the petitions. NEI actively participated in the Continued Storage rulemaking and has intervened in support of the agency in the ongoing challenges to the Rule and GEIS in the D.C. Circuit. Moreover, many NEI members are not parties in the above-captioned proceedings yet could be adversely impacted if, among other things, the Commission departs from its precedent addressing when the NRC must prepare a supplemental EIS and the process by which a request for a supplemental EIS must be lodged.

¹ See Petition to Supplement Reactor-Specific Environmental Impact Statements to Incorporate by Reference the Generic Environment Impact Statement for Continued Spent Fuel Storage (Jan. 28, 2014).

² 10 C.F.R. § 51.23(b).

³ NEI’s members include all entities licensed by the NRC to operate commercial nuclear power plants, as well as nuclear plant designers, major architect-engineer firms, fuel cycle facilities, nuclear materials licensees, universities, and other organizations and entities involved in the nuclear industry.

Accordingly, NEI, on behalf of its members, has a clear and substantial interest in ensuring the Commission appropriately implements the Continued Storage Rule and its regulations governing supplemental EISs.

Accepting NEI's perspective on the issues presented through its participation in this matter as *amicus curiae* will not prejudice or unduly burden any other participant or result in delay.⁴ NEI is filing this motion pursuant to the same deadline for applicants and the NRC Staff to submit their responses to the petitions.⁵ Furthermore, as shown in the attached consultation certification, other participants do not oppose NEI's submitting this brief. As an *amicus*, NEI necessarily takes these proceedings as it finds them and does not propose to inject any new issues into these proceedings.⁶ For the foregoing reasons, NEI respectfully requests that the Commission accept its accompanying *amicus* brief.

Respectfully submitted,

Signed (electronically) by Jonathan M. Rund
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COUNSEL FOR THE NUCLEAR
ENERGY INSTITUTE, INC.

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

⁴ See *La. Energy Servs.* (Claiborne Enrichment Ctr.), CLI-97-4, 45 NRC 95, 96 (1997).

⁵ Cf. 10 C.F.R. § 2.315(d) (requiring a person seeking to participate as *amicus* on a matter taken up by the Commission under 10 C.F.R. § 2.341 or *sua sponte* to file their brief together with a motion requesting leave to do so within the time allowed to the party whose position the brief will support).

⁶ See *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), ALAB-862, 25 NRC 144, 150 (1987).

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VIRGINIA ELECTRIC AND POWER CO. d/b/a DOMINION VIRGINIA POWER and OLD DOMINION ELECTRIC COOPERATIVE (North Anna Power Station, Unit 3)))))	52-017-COL

CERTIFICATION OF CONSULTATION UNDER 10 C.F.R. § 2.323(b)

Pursuant to 10 C.F.R. § 2.323(b), I certify that I have made a sincere effort to contact other parties in the proceeding and resolve the issues raised in the motion, and that my efforts to resolve the issues have been successful. Counsel for NEI emailed all counsel and duly authorized representatives for the applicants, petitioners, and NRC Staff about the issues raised in the motion. Applicants all support NEI's motion. Diane Curran, on behalf of all petitioners,

stated petitioners do not oppose NEI's motion. The NRC Staff does not oppose the filing of the motion, but reserves the right to respond once it has reviewed the motion.

Respectfully submitted,

Signed (electronically) by Jonathan M. Rund

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

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AMICUS CURIAE BRIEF OF THE
NUCLEAR ENERGY INSTITUTE, INC. IN RESPONSE TO
PETITIONS TO SUPPLEMENT SITE-SPECIFIC ENVIRONMENTAL IMPACT
STATEMENTS TO REFERENCE THE CONTINUED STORAGE GENERIC
ENVIRONMENTAL IMPACT STATEMENT

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**AMICUS CURIAE BRIEF OF THE NUCLEAR ENERGY INSTITUTE, INC. IN
RESPONSE TO PETITIONS TO SUPPLEMENT SITE-SPECIFIC ENVIRONMENTAL
IMPACT STATEMENTS TO REFERENCE THE CONTINUED STORAGE GENERIC
ENVIRONMENTAL IMPACT STATEMENT**

I. INTRODUCTION

Petitioners have filed identical petitions asking the Commission to order the NRC Staff to prepare site-specific supplemental environmental impact statements (EISs) in the above-captioned proceedings incorporating by reference and summarizing the Continued Storage Rule

and Generic Environmental Impact Statement (GEIS).¹ By regulation, GEIS determinations are already “deemed incorporated” into site-specific EISs.² Petitioners challenge this provision in proceedings where the NRC issued site-specific final EISs before it issued the Continued Storage Rule and GEIS. In these cases, petitioners argue the NRC must do more to comply with the National Environmental Policy Act (NEPA) and NRC’s implementing regulations. According to petitioners, the NRC must cite and summarize the GEIS in site-specific EISs to allow decision-makers to evaluate the agency’s proposed actions. Petitioners also claim they need site-specific EISs referencing the GEIS to allow them to file “placeholder” contentions challenging NRC’s reliance on the Continued Storage Rule.

The Nuclear Energy Institute, Inc. (NEI) submits this brief as *amicus curiae* because petitioners impermissibly seek to challenge the Continued Storage Rule. The Rule’s purpose is to “preserve the efficiency of the NRC’s licensing process,” while satisfying the agency’s NEPA obligations with respect to continued spent fuel storage.³ Petitioners’ proposal ignores the Rule’s plain language incorporating the GEIS into site-specific EISs and would defeat the Rule’s purpose. The Commission should not embark on the unnecessary and academic exercise of preparing supplemental EISs referencing the Continued Storage GEIS. Nothing in NEPA or NRC’s implementing regulations requires that the Commission do so.

The Continued Storage Rule and GEIS are important to the commercial nuclear energy industry because the regulation and environmental analysis support licensing of new nuclear

¹ See Petition to Supplement Reactor-Specific Environmental Impact Statements to Incorporate by Reference the Generic Environment Impact Statement for Continued Spent Fuel Storage (Jan. 28, 2014) (Petition).

² 10 C.F.R. § 51.23(b).

³ Final Rule, Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238, 56,239 (Sept. 19, 2014) (Continued Storage Rule); see also NUREG-2157, Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel, Vol. 1, at 1-6 (Sept. 2014) (GEIS).

projects, as well as license renewals. During the two-year rulemaking effort to develop and issue the Rule and GEIS, final decisions on many licensing actions were suspended and some were substantially delayed.⁴ The Commission has resumed issuing reactor licenses now that it has issued the final Rule and GEIS. It should continue with predictable and timely reviews and licensing decisions. Applicants should not suffer additional delays based upon petitioners' incorrect interpretation of the requirements for supplemental EISs. Accordingly, the Commission should deny the petitions.

II. STATEMENT OF THE CASE

Several states and environmental groups challenged NRC's 2010 update to the Continued Storage Rule (then known as the Waste Confidence or Temporary Storage Rule). In 2012, the D.C. Circuit in *New York v. NRC* vacated and remanded elements of the 2010 update to the agency for further consideration under NEPA.⁵ In response to the court's ruling, the Commission determined it would not issue licenses dependent upon the Rule until it addressed the remand.⁶ The Commission also decided to hold in abeyance a number of new contentions alleging that EISs (and other environmental analyses) omitted analysis of continued storage of spent nuclear fuel beyond a reactor's licensed life for operation and before ultimate disposal.⁷

To address the court's ruling, the Commission directed the NRC Staff to develop a GEIS to support an updated rule. The NRC encouraged and received wide public participation in this

⁴ See SECY-12-0132, Implementation of Commission Memorandum and Order CLI-12-16 Regarding Waste Confidence Decision and Rule, Enclosure (Oct. 3, 2012) (ML12276A038).

⁵ *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012).

⁶ *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 NRC 63, 67 (2012).

⁷ *Id.* at 68-69.

rulemaking. In September 2014, the NRC issued the final Rule and GEIS.⁸ The GEIS comprehensively assesses the environmental impacts of continued storage of spent nuclear fuel for all sites. The Rule, in turn, codifies the environmental impacts reflected in the GEIS and establishes that these determinations are “deemed incorporated” into site-specific EISs.⁹

In addressing the abeyance of the earlier proposed continued storage contentions, the Commission explained the NRC had considered conducting site-specific reviews to address the impacts of continued storage, but concluded these impacts will not vary significantly across sites and thus can be analyzed generically.¹⁰ The Commission further stated that “[b]ecause these generic impact determinations have been the subject of extensive public participation in the rulemaking process, they are excluded from litigation in individual proceedings.”¹¹ As a result, the Commission lifted the suspension on all final licensing decisions and dismissed (or directed the appropriate licensing boards to dismiss) the earlier proposed continued storage contentions.¹²

In September 2014, petitioners (and others) filed petitions to suspend final licensing decisions and associated proposed contentions in seventeen reactor licensing proceedings.¹³ According to petitioners, the Rule and GEIS failed to include Atomic Energy Act (AEA) safety findings on spent fuel disposal and therefore the NRC cannot issue new or renewed reactor licenses. Petitioners claim these filings are “place-holders” to ensure “NRC does not escape

⁸ Continued Storage Rule, 79 Fed. Reg. at 56,238; Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel NUREG-2157, 79 Fed. Reg. 56,263 (Sept. 19, 2014).

⁹ 10 C.F.R. § 51.23(a)-(b).

¹⁰ *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-14-8, 80 NRC ___, slip op. at 9 (Aug. 26, 2014).

¹¹ *Id.*

¹² *Id.*

¹³ Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Issuance of Waste Confidence Safety Findings (Sept. 29, 2014).

judicial review of its decision to eliminate Waste Confidence findings from its regulations by appearing to relegate those findings to individual reactor licensing proceedings without necessarily making the findings in those proceedings.”¹⁴ This issue is fully briefed and pending before the Commission.¹⁵

Also, in October 2014, petitioners (and others) challenged the Continued Storage Rule and GEIS in the D.C. Circuit.¹⁶ Those challenging the Rule seek to litigate: (1) NRC’s generic finding that severe accident impacts are small; (2) NRC’s generic finding that spent fuel pool leaks will likely have only a small environmental impact; (3) whether the GEIS is consistent with the federal government’s trust responsibility; (4) NRC’s examination of substantive alternatives; (5) NRC’s consideration of potential mitigation measures; (6) NEPA issues regarding institutional controls and cost-benefit analysis; and (7) AEA issues.¹⁷ The court is considering briefing formats and schedules proposed by the parties.

Now, more than four months after the Continued Storage Rule and GEIS were issued, petitioners have filed petitions in eight reactor licensing proceedings asking the Commission to order the NRC Staff to prepare site-specific supplemental EISs that reference the Continued Storage Rule and GEIS.

¹⁴ Environmental Organizations’ Opposition to NRC’s Motion to Defer Briefing Pending Agency Action at 2-3, *New York v. NRC*, No. 14-1210 (D.C. Cir. Jan. 20, 2015) (ML15027A478).

¹⁵ See *DTE Elec. Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-14-9, 80 NRC ___, slip op. at 3 (Oct. 7, 2014).

¹⁶ *New York v. NRC*, No. 14-1210 (D.C. Cir., filed Oct. 27, 2014) (ML14363A099); *Prairie Island Indian Community v. NRC*, No. 14-1212 (D.C. Cir., filed Oct. 27, 2014) (ML14316A625); *Beyond Nuclear v. NRC*, No. 14-1216 (D.C. Cir., filed Oct. 29, 2014) (ML14317A782); *Natural Res. Def. Council v NRC*, No. 14-1217 (D.C. Cir., filed Oct. 29, 2014) (ML14317A784). The court has consolidated these four cases. See *New York v. NRC*, No. 14-1210 (D.C. Cir., Oct. 31, 2014) (ML14317A789) (order consolidating cases).

¹⁷ Petitioners’ Briefing Proposal at 5-8, *New York v. NRC*, No. 14-1210 (D.C. Cir. Jan. 20, 2015) (ML15027A476).

III. DISCUSSION

A. The Petitions Are Procedurally Improper and Unjustifiably Late

As an initial matter, the petition does not comport with any specific pleading form or process recognized by the NRC Rules of Practice. Because similar unauthorized petitions have been filed frequently in recent years,¹⁸ NEI urges the Commission to take this opportunity to provide clear direction discouraging such requests absent compelling circumstances that cannot be addressed through means sanctioned by NRC regulations (*e.g.*, proposed new contentions).

In exercising its inherent supervisory authority over agency proceedings, the Commission has treated similar petitions as general motions brought under 10 C.F.R. § 2.323.¹⁹ Petitioners also cite this provision as authority for their request.²⁰ Under section 2.323, “[a]ll motions must be made no later than ten (10) days after the occurrence or circumstance from which the motion arises.”²¹ Yet the petitions arise from the Continued Storage Rule issued on September 19, 2014, and site-specific EISs that predate the Rule.²² Consequently, a motion could have been filed

¹⁸ See, *e.g.*, *Fermi*, CLI-14-9, slip op. at 2; *DTE Elec. Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-14-7, 80 NRC ___, slip op. at 1 (July 17, 2014); *Union Elec. Co.* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC 141, 145-46 (2011).

¹⁹ See, *e.g.*, *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 476 (2008); *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation), CLI-02-23, 56 NRC 230, 237 (2002).

²⁰ Petition at 2, 11 (citing 10 C.F.R. § 2.323(b)).

²¹ 10 C.F.R. § 2.323(a)(2).

²² See Petition at 4-6. While not relied upon in the petitions, the NRC Staff also made its position that site-specific EISs do not need to be supplemented clear months ago. See Consideration of New Information Regarding the Continued Storage Rule for Fermi Nuclear Power Plant, Unit 3, Combined License Application Review (Nov. 20, 2014) (ML14318A477) (concluding that the Continued Storage GEIS does not warrant a supplement to the Fermi COL EIS); 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) (ML14281A237) (finding that the Continued Storage GEIS does not trigger the need for a supplement to the Limerick license renewal EIS).

months ago alleging the omission of information purportedly required by law.²³ Accordingly, the Commission should deny the petitions as untimely.

B. The Petitions Impermissibly Attack the Continued Storage Rule

Petitioners' central argument is that the Continued Storage GEIS has not been properly "incorporated" into site-specific EISs. Although they recognize the Continued Storage Rule establishes that GEIS determinations are "deemed incorporated" into site-specific EISs, petitioners brazenly assert "that statement, by itself, is insufficient to comply with NEPA or NRC's implementing regulations."²⁴ In disputing this provision's adequacy, petitioners engage in a collateral attack on the Continued Storage Rule.²⁵ The Commission does not permit attacks on NRC regulations in licensing proceedings, absent a proper request for a waiver.²⁶ Here, petitioners have not requested a waiver, much less satisfied the stringent requirements governing such requests.²⁷ Accordingly, the Commission should deny the petitions as an impermissible challenge to the Continued Storage Rule.

C. NEPA and NRC's Implementing Regulations Do Not Require Supplemental EISs

According to petitioners, NEPA requires that NRC prepare supplemental EISs addressing continued storage of spent fuel. However, in making this argument, petitioners ignore the

²³ See 10 C.F.R. § 2.309(f)(1)(vi) (allowing a petitioner to allege the omission of "information on a relevant matter as required by law"); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 382-83 (2002).

²⁴ Petition at 6.

²⁵ See, e.g., *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 315 (2012) (holding that any claim "calling for requirements in excess of those imposed by our regulations" must be rejected as an impermissible collateral attack on NRC regulations); *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 206 (2000) (rejecting an "attempt[] to impose . . . a requirement more stringent than the one imposed by the regulations").

²⁶ See 10 C.F.R. § 2.335(a), (b); see also *Calvert Cliffs*, CLI-14-8, slip op. at 9.

²⁷ See *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-05-24, 62 NRC 551, 559-60 (2005).

regulations governing the potential need for the NRC to supplement an EIS before it takes a proposed action. Specifically, pursuant to 10 C.F.R. §51.92(a), the NRC must supplement an EIS if there are (1) substantial changes in the proposed action that are relevant to environmental concerns, or (2) significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. In order to be significant, new information must present a “seriously different picture” of the environmental impact of the proposed project from what was previously considered.²⁸ Petitioners fail to acknowledge this standard, much less explain why it would trigger supplemental EISs in these circumstances. Having failed to make any such showing, there is no basis for the Commission to grant the petitions.

Petitioners appear to assume that NRC must prepare EIS supplements even if it concludes that new information contained in the GEIS does not meet the standards for supplementing an EIS. But NEPA does not require that the NRC generate an EIS supplement or any other NEPA-document as part of its evaluation *of whether information is significant* for purposes of supplementing an EIS.²⁹ Instead, NRC regulations only require a supplemental EIS to address significant new information relevant to the proposed action. To find otherwise would render the term “significant” meaningless by reading it out of the phrase “new and significant.”³⁰ Such an

²⁸ *Hydro Res., Inc.* (2929 Coors Road, Suite 101, Albuquerque, N.M. 87120), CLI-99-22, 50 NRC 3, 14 (1999) (citing *Sierra Club v. Froehlke*, 816 F.2d 205, 210 (5th Cir. 1987)).

²⁹ *See Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 379 (1989) (upholding an agency’s decision not to supplement an EIS based on the agency’s supplemental information report); *Hodges v. Abraham*, 300 F.3d 432, 446 (4th Cir. 2002) (holding that an agency is entitled to conduct a preliminary inquiry to determine whether changed circumstances are significant); *Idaho Sporting Cong. Inc. v. Alexander*, 222 F.3d 562, 566 (9th Cir. 2000) (finding that an agency may use “non-NEPA environmental evaluation procedures” to determine whether supplementation of an EIS is necessary).

³⁰ *See Callaway*, CLI-11-5, 74 NRC at 167 (explaining that to warrant a supplemental EIS, “information must be both ‘new’ and ‘significant,’ and it must bear on the proposed action or its impacts”); *see also Buchanan v. Nicholson*, 451 F.3d 1331, 1336 (Fed. Cir. 2006) (finding an agency interpretation unreasonable because it would “read out” and render “meaningless” a regulatory provision).

interpretation would overburden NRC’s licensing process because new (but not significant) information continually emerges while an application sits before the agency.³¹

If petitioners believe this (or another) standard obligates NRC to prepare supplemental EISs, they are obligated to present their claim to the agency in a manner that meets all NRC regulatory requirements, including those relating to timeliness. Regardless of where new information originates, NRC rules “place the initial burden of raising issues based on such new information on petitioners.”³² The “trigger” for timely raising such issues is when the new information becomes available.³³ Here, petitioners impermissibly deferred filing their environmental concerns even though they could have raised this issue shortly after the NRC issued the Continued Storage Rule.³⁴

Petitioners argue that by not preparing site-specific supplemental EISs NRC violates another regulation, 10 C.F.R. Part 51, Appendix A, § 1(b), which requires “that ‘material’ incorporated by reference into an FEIS ‘shall be cited in the statement and its content briefly described.’”³⁵ However, this regulation is inapplicable here. Appendix A, section 1(b) states: “The techniques of tiering and incorporation by reference described respectively in 40 CFR

³¹ See *Marsh*, 490 U.S. at 373 (explaining that NEPA does not require that an agency “supplement an EIS every time new information comes to light after the EIS is finalized” because to require otherwise “would render agency decisionmaking intractable”).

³² *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-12-13, 75 NRC 681, 686 (2012) (footnotes and citations omitted).

³³ *Id.*

³⁴ See *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC 419, 428-29 (2003) (“But there would be no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements every time they ‘realize[d] . . . that maybe there was something after all to a challenge it either originally opted not to make or which simply did not occur to it at the outset.”) (citation omitted); *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), CLI-83-19, 17 NRC 1041, 1048-50 (1983) (holding that petitioners may not defer filing environmental concerns because they hope the NRC Staff may ultimately address the issue).

³⁵ Petition at 8 (quoting 10 C.F.R. Part 51, App. A, n.1).

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.” Sections 1502.20 and 1508.28 encourage tiering “to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review.”³⁶ In turn, section 1502.21 indicates that 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.”

Although these regulations provide examples where these techniques are appropriate, they do not purport to prohibit or even address the situation here, where NRC prepared the GEIS through an open and public rulemaking. Through notice-and-comment rulemaking, NRC issued regulations to resolve certain generic issues and incorporate the GEIS into EISs. As a result, in the present circumstances the GEIS supplements already prepared site-specific EISs to form a complete environmental record.³⁷ The provisions cited by petitioners simply do not prohibit what the NRC has done here. Accordingly, NRC need not prepare supplemental EISs incorporating by reference or summarizing the GEIS.³⁸

³⁶ 40 C.F.R. § 1502.20; *see also* 40 C.F.R. § 1508.28.

³⁷ Continued Storage Rule, 79 Fed. Reg. at 56,243 (“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.”).

³⁸ Not repeating information already contained in the GEIS in site-specific supplemental EISs does nothing to change NRC’s ultimate NEPA findings. Thus, the petitions should also be denied in accordance with the Commission’s instruction that the purpose of the adjudicatory process is not to edit inconsequential aspects of an EIS. *McGuire*, CLI-03-17, 58 NRC at 431; *see also* 40 C.F.R. § 1500.3 (explaining that any “any trivial violation of these [CEQ] regulations not give rise to any independent cause of action”); *Exelon Generating Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 811 (2005) (“There may, of course, be mistakes in the [EIS], but in an NRC adjudication, it is Intervenors’ burden to show their significance and materiality. Our boards do not sit to flyspeck environmental documents or to add details or nuances.”) (internal quotes omitted).

According to petitioners, *Pacific Rivers Council v. U.S. Forest Service* supports their claim because it shows “tools for shortening an EIS may not be used in a way that diminishes the accuracy or completeness of the EIS” and “[m]aterial 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.’”³⁹ However, *Pacific Rivers* was vacated as moot,⁴⁰ and, in any event, provides little help for petitioners’ argument. The court there determined an agency EIS failed to discuss logging impacts on individual fish species.⁴¹ The agency attempted to “save” the EIS by claiming it had incorporated two biological assessments discussing these impacts. Those assessments, however, were not “described and analyzed in the text” of the EIS, contained “no analysis . . . of the manner or degree to which the alternatives may have affected these fish,” and “applied to only one group of fish species.”⁴²

Unlike the agency’s EIS in *Pacific Rivers*, the Continued Storage GEIS extensively considered the environmental effects of continued storage of spent fuel, was prepared through an open NEPA process with extensive public participation, and was incorporated by regulation into site-specific EISs after a notice-and-comment rulemaking. As a result, the public and decision-makers have both easy access to the GEIS and official notice that NRC incorporated it into site-

³⁹ Petition at 7-8 (quoting *Pac. Rivers Council v. U.S. Forest Serv.*, 689 F.3d 1012 (9th Cir. 2012), *vacated as moot*, 133 S. Ct. 2843 (2013)).

⁴⁰ *U.S. Forest Serv. v. Pac. Rivers Council*, 133 S. Ct. 2843 (2013); *see also Pac. Rivers Council v. U.S. Forest Serv.*, 724 F.3d 1146, 1147 (9th Cir. 2013).

⁴¹ *Pac. Rivers*, 689 F.3d at 1029-30.

⁴² *Id.* at 1031-32.

specific EISs.⁴³ Petitioners also fail to offer any substantive basis for requiring supplementation or otherwise challenging the adequacy of site-specific EISs.

Moreover, contrary to petitioners' suggestion, there is no evidence the Continued Storage Rule's implementation has or will mislead the public or decision-makers about NRC's analysis of the continued storage of spent fuel.⁴⁴ In addition to the official notice in the *Federal Register* and the Code of Federal Regulations, the Continued Storage Rule and GEIS's issuance were widely publicized on NRC's website (where they remain readily accessible) as well as by news media.⁴⁵ And judging by the challenges to the Continued Storage Rule and GEIS before both the agency and the court, states and environmental groups cannot be said to lack knowledge regarding NRC's intent to rely on the GEIS as part of its environmental analysis. Accordingly, there is no indication the Continued Storage Rule impedes agency and public review of any issue in any proceeding.

D. Supplemental EISs Are Unnecessary for Public Participation in NRC Proceedings

Petitioners assert the NRC must prepare site-specific supplemental EISs referencing the GEIS to allow them to file "placeholder" contentions challenging NRC's reliance on the

⁴³ See 44 U.S.C. § 1507 (establishing publication in the *Federal Register* as official notice of a regulation's existence, contents, and legal effect).

⁴⁴ Petition at 8 n.3 (noting the NRC does not have "discretion to issue an incomplete or misleading FEIS for individual reactors"); see also *id.* at 9 (indicating the public and state and local officials "are given no hint that the NRC relies on the Continued Spent Fuel Storage GEIS for any part of that FEIS's environmental analysis," are "deprived of any information regarding the NRC's current analysis of the matter," and "are entitled to review the agency's analysis").

⁴⁵ See, e.g., NRC News Release No. 14-055, NRC Approves Final Rule on Spent Fuel Storage and Ends Suspension of Final Licensing Actions for Nuclear Plants and Renewals (Aug. 26, 2014), available at <http://www.nrc.gov/reading-rm/doc-collections/news/2014/14-055.pdf>; Dave Flessner, *NRC Approves Nuclear Waste Storage to Allow TVA to Proceed with Watts Bar*, Chattanooga Times Free Press, Aug. 27, 2014, available at <http://www.timesfreepress.com/news/business/aroundregion/story/2014/aug/27/nrc-approves-nuclear-waste-storage-to-allow-tva-to/265594/>.

Continued Storage Rule.⁴⁶ They claim these contentions are necessary to ensure that if the D.C. Circuit were to invalidate the Continued Storage Rule or GEIS, the NRC also would reverse any licensing decision dependent on the Rule and GEIS.⁴⁷ According to petitioners, NRC regulations prohibit such “contentions until the Continued Storage GEIS is actually incorporated into the site-specific EISs.”⁴⁸

As an initial matter, NRC regulations do not allow “placeholder” contentions.⁴⁹ Such filings are inconsistent with NRC’s “longstanding interest in sound case management and regulatory finality and would be unfair to the other parties.”⁵⁰ Rather than allowing such contentions, NRC regulations require petitioners to file contentions of omission if they believe a NEPA document omits legally required information.⁵¹ To be sure, hearing rights are not implicated here because no contention may challenge NRC regulations—precisely what petitioners indicate they wish to do with their placeholder contentions.⁵² But assuming for argument’s sake that petitioners could identify a proper issue for a contention, they would have needed to timely file it soon after the new information triggering the need for a supplemental EIS

⁴⁶ Petition at 10.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *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).

⁵⁰ *Exelon Generation Co.* (Byron Nuclear Station, Units 1 & 2; Braidwood Nuclear Station, Units 1 & 2), CLI-14-6, 79 NRC ___, slip op. at 5 (May 2, 2014).

⁵¹ *See* 10 C.F.R. § 2.309(f)(1)(vi) (allowing a petitioner to allege the omission of “information on a relevant matter as required by law”); *McGuire*, CLI-02-28, 56 NRC at 382-83.

⁵² 10 C.F.R. § 2.335(a), (b); *see also Calvert Cliffs*, CLI-14-8, slip op. at 9.

became available.⁵³ Here, petitioners impermissibly deferred filing a contention even though they could have raised this issue shortly after NRC promulgated the Continued Storage Rule.⁵⁴

Furthermore, granting the petitions and deviating from the terms of the Continued Storage Rule would undermine NRC's public participation process. The NRC issued the Continued Storage Rule after providing multiple opportunities for public involvement in a variety of formats over the course of the rulemaking and receiving extensive public comments. After considering these comments, the Commission issued a final rule, the stated purpose of which was "to preserve the efficiency of the NRC's licensing process."⁵⁵ Petitioners' proposal ignores the Rule's plain language incorporating the GEIS into site-specific EISs, and would defeat the Rule's purpose and undermine NRC's extensive notice-and-comment rulemaking process used to shape the final Rule.⁵⁶ Accordingly, the NRC need not prepare supplemental EISs to ensure appropriate public participation in its proceedings.

IV. CONCLUSION

The petitions are procedurally improper, untimely, and amount to impermissible challenges to the recently issued Continued Storage Rule. Moreover, petitioners' flawed reading of the NEPA, NRC's implementing regulations, NRC precedent, and federal case law fails to

⁵³ See *Diablo Canyon*, CLI-12-13, 75 NRC at 686.

⁵⁴ See *Catawba*, CLI-83-19, 17 NRC at 1048-50. As petitioners have acknowledged, they filed placeholder contentions to address their AEA concerns in September 2014. See Environmental Organizations' Opposition to NRC's Motion to Defer Briefing Pending Agency Action at 2-3, *New York v. NRC*, No. 14-1210 (D.C. Cir. Jan. 20, 2015) (ML15027A478).

⁵⁵ Continued Storage Rule, 79 Fed. Reg. at 56,239; see also GEIS at 1-6.

⁵⁶ This is particularly true here, where there is no indication it would be equitable for the court to reverse a licensing decision dependent on the Continued Storage Rule even if the court were to take issue with the Rule or GEIS. See *Minnesota v. NRC*, 602 F.2d 412, 418 (D.C. Cir. 1979) (declining to vacate license amendments while the NRC addressed waste confidence issues based on the court's remand); *Potomac Alliance v. NRC*, 682 F.2d 1030, 1038-39 (D.C. Cir. 1982) (same).

justify ordering the NRC Staff to prepare supplemental EISs or allowing “placeholder” contentions. Accordingly, the Commission should deny the petitions.

Respectfully submitted,

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ENERGY INSTITUTE, INC.

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

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

DTE ELECTRIC CO.	)	52-033-COL
(Fermi Nuclear Power Plant, Unit 3))	
)	
DUKE ENERGY CAROLINAS, LLC	)	52-018-COL
(William States Lee III Nuclear Station, Units 1 and 2)	)	52-019-COL
)	
LUMINANT GENERATION CO. LLC	)	52-034-COL
(Comanche Peak Nuclear Power Plant, Units 3 and 4)	)	52-035-COL
)	
NUCLEAR INNOVATION NORTH AMERICA LLC	)	52-012-COL
(South Texas Project Units 3 and 4)	)	52-013-COL
)	
PROGRESS ENERGY FLORIDA, INC.	)	52-029-COL
(Levy County Nuclear Power Plant, Units 1 and 2)	)	52-030-COL
)	
STP NUCLEAR OPERATING CO.	)	50-498-LR
(South Texas Project, Units 1 and 2)	)	50-499-LR
)	
TENNESSEE VALLEY AUTHORITY	)	50-391-OL
(Watts Bar Nuclear Plant, Unit 2))	
)	
VIRGINIA ELECTRIC AND POWER CO.	)	52-017-COL
d/b/a DOMINION VIRGINIA POWER and)	
OLD DOMINION ELECTRIC COOPERATIVE)	
(North Anna Power Station, Unit 3))	

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that I electronically served via the Electronic Information Exchange (the NRC's E-Filing system) copies of the "Nuclear Energy Institute, Inc.'s Unopposed Motion for Leave to File *Amicus Curiae* Brief," and "*Amicus Curiae* Brief of the Nuclear Energy Institute, Inc. in Response to Petitions to Supplement Site-Specific Environmental Impact Statements to Reference the Continued Storage Generic Environmental Impact Statement" on this 12th day of February, 2015.

Respectfully submitted,

Signed (electronically) by Jonathan M. Rund

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this 12th day of February, 2015