

April 24, 2015

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
BEFORE THE SECRETARY OF THE COMMISSION

In the Matter of )  
Luminant Generation Co., L.L.C. ) Docket Nos. 52-034-COL,  
(Comanche Peak Nuclear Power Plant, ) 52-035-COL  
Units 3 and 4 )

**SEED COALITION’S HEARING REQUEST  
AND PETITION TO INTERVENE IN COMBINED LICENSE  
PROCEEDING FOR COMANCHE PEAK UNITS 3 AND 4 NUCLEAR POWER PLANT**

**I. INTRODUCTION**

Pursuant to 10 C.F.R. §§ 2.309(c), 2.309(f)(1), and 2.309(f)(2), SEED Coalition requests a hearing and seeks leave to intervene in the Nuclear Regulatory Commission’s (“NRC’s”) combined licensing (“COL”) proceeding for the Comanche Peak Units 3 and 4 nuclear power plant. This Hearing Request/Petition to Intervene is supported by the attached SEED Coalition’s Motion to Reopen the Record of Combined License Proceeding for Comanche Peak Units 3 and 4 Nuclear Power Plant (Apr.23, 2015).

SEED Coalition seeks admission of a single “place-holder” contention challenging the NRC’s reliance, in proposing to license Comanche Peak Units 3 and 4, on the Continued Storage of Spent Nuclear Fuel Rule (79 Fed. Reg. 56,238 (Sept. 19, 2014) (“Continued Spent Fuel Storage Rule”)) and the Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel (NUREG-2157, September 2014) (“Continued Spent Fuel Storage GEIS”).<sup>1</sup>

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<sup>1</sup> SEED Coalition notes that similar place-holder contentions have been filed in other NRC licensing cases, including license renewal proceeding for Callaway Unit 1 and the Fermi Unit 3 COL proceeding. *See* Missouri Coalition for the Environment’s Hearing Request and Petition to Intervene in License Renewal Proceeding for Callaway Nuclear Power Plant (Dec. 8, 2014); Beyond Nuclear’s Hearing Request and Petition to Intervene in Combined License Proceeding for Fermi Unit 3 Nuclear Power Plant (Feb. 12, 2015).

While SEED Coalition seeks admission of its contention, it does not seek to litigate the substantive content in an adjudicatory hearing. Instead, SEED Coalition has already raised its concerns about the Continued Spent Fuel Storage Rule and the Continued Spent Fuel Storage GEIS in comments on draft versions of those documents, and the NRC has already either rejected or disregarded SEED Coalition's comments in the final versions of the Rule and GEIS. SEED Coalition also has appealed the final versions to the U.S. Court of Appeals for the District of Columbia Circuit. *See Beyond Nuclear v. NRC*, Docket No. 14-1216 (filed Oct. 29, 2014).<sup>2</sup>

The sole purpose of this contention is to lodge a formal challenge to the NRC's complete and unqualified reliance, in the individual licensing proceeding for Comanche Peak Units 3 and 4, on the legally deficient Continued Spent Fuel Storage Rule and Continued Spent Fuel Storage GEIS. SEED Coalition submits its contention with the reasonable expectation that it will be denied, because the subject matter of the contention is generic. SEED Coalition respectfully submits that nevertheless, the filing of a contention is the only procedural means offered by Commission regulations for ensuring that any court decision resulting from SEED Coalition's appeal of the generic Continued Spent Fuel Storage Rule and GEIS will also be applied to the individual Comanche Peak Units 3 and 4 licensing proceeding, which relies on the Continued Spent Fuel Storage Rule and GEIS. Upon denial of SEED Coalition's contention, SEED Coalition intends to appeal the decision to the U.S. Court of Appeals and request the Court to hold the appeal in abeyance pending its ruling in *New York II*.<sup>3</sup>

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<sup>2</sup> *Beyond Nuclear v. NRC* was consolidated with four other cases and is now captioned *New York et al. v. NRC*, Docket Nos. 14-1210, 14-1212, 14-1216, and 14-1217 (Consolidated) (filed October 31, 2014) ("*New York II*").

<sup>3</sup> In this context, SEED Coalition notes that its contention is not accompanied by a petition for a

## II. DEMONSTRATION OF STANDING

SEED Coalition is a project of Texas Fund for Energy and Environmental Education, Inc., a statewide nonprofit organization with 5,000 members working for clean air and clean energy in Texas. The organization advocates for sustainable energy, including energy efficiency, renewable energy, and conservation.

SEED Coalition seeks admission of its contention in order to protect its members' interest in a clean and healthy environment, including protection from the health and environmental hazards posed by generation of spent fuel at the proposed Comanche Peak Units 3 and 4 nuclear reactors. The organization has standing to intervene through members who live, work, and/or own property within 50 miles of the proposed Comanche Peak Units 3 and 4 reactors, and their interests may be affected by the results of the proceeding. *Virginia Electric and Power Co.* (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979). Their health, safety, property value, and means of livelihood could be adversely affected if the NRC permits Comanche Peak Units 3 and 4 to operate in a manner that is unsafe or harmful to the environment. SEED Coalition has attached a declaration from Representative Lon Burnam who has authorized SEED Coalition to bring this legal action on his behalf.

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waiver of 10 C.F.R. §§ 51.71(d), 51.95(c)(2), or any of the other regulations on which the Commission relies to bar members of the public from litigating generic NEPA issues in individual licensing proceedings. No purpose would be served by such a waiver, because SEED Coalition does not seek an adjudicatory hearing on the NRC's generic environmental findings. Instead, SEED Coalition's only purpose in raising its contention is to ensure that any decision by the U.S. Court of Appeals regarding the validity of the Continued Spent Fuel Storage Rule and GEIS will also be applied to this proceeding, in which the NRC relies on them.

### III. FACTUAL AND PROCEDURAL BACKGROUND

For several decades, the NRC relied on its “Waste Confidence” decision and Temporary Storage Rule to address, in reactor licensing and re-licensing proceedings, safety and environmental issues associated with spent fuel storage and disposal. In 2010, the NRC published updates to the Waste Confidence decision (the “Waste Confidence Update”) and Temporary Storage Rule, which were challenged by several state governments, an Indian tribe, and environmental organizations. Waste Confidence Decision Update, 75 Fed. Reg. 81,037 (Dec. 23, 2010) and Temporary Storage Rule, 75 Fed. Reg. 81,032 (Dec. 23, 2010). In *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012) (“*New York I*”), the U.S. Court of Appeals vacated the Waste Confidence Update and Temporary Storage Rule, and remanded them to the NRC for further proceedings.

In 2011, the NRC issued the Final Environmental Impact Statement for Combined Licenses (COLs) for Comanche Peak Units 3 and 4 at 6-12 – 6-13 (NUREG-1943, May 2011) (ML11131A001)(Comanche Peak 3-4 FEIS”). The Comanche Peak 3-4 FEIS cross-referenced the 2010 Waste Confidence Decision for findings regarding the safety and environmental impacts of storing and disposing of spent fuel. *Id.* at 6-14 – 6-16.

On July 9, 2012, following on the Court’s decision, SEED Coalition submitted a contention in this proceeding, asserting that in the absence of a valid GEIS for spent fuel storage and disposal, the environmental impacts and alternatives must be analyzed in the individual licensing proceeding. Intervenors’ Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Proposed Comanche Peak Units 3 and 4 Nuclear Power Plant. SEED Coalition also petitioned the NRC to suspend the

Comanche Peak Units 3 and 4 licensing proceeding pending the agency's compliance with the Court's remand. At the request of SEED Coalition and other petitioners, the NRC subsequently suspended licensing and re-licensing decisions for all reactors, including Comanche Peak Units 3 and 4. *Calvert Cliffs 3 Nuclear Power Project, LLC et al.*, CLI-12-16, 76 NRC 63 (2012) ("CLI-12-16").

Then, on September 13, 2013, in response to the Court's remand in *New York I*, the NRC published a proposed rule entitled Waste Confidence – Continued Storage of Spent Nuclear Fuel, 78 Fed. Reg. 56,776 (Sept. 13, 2013) ("Proposed Waste Confidence Rule"). The NRC also published a Draft Waste Confidence GEIS (NUREG-2157, noticed at 78 Fed. Reg. 56,621 (Sept. 13, 2013)).

On December 20, 2013, SEED Coalition joined thirty-two other environmental organizations in submitting Comments by Environmental Organizations on Draft Waste Confidence Generic Environmental Impact Statement and Proposed Waste Confidence Rule and Petition to Revise and Integrate All Safety and Environmental Regulations Related to Spent Fuel Storage and Disposal (ADAMS Accession No. ML14030A152, corrected on Jan. 7, 2014 in ML14024A297) ("SEED Coalition et al. Comments"). The SEED Coalition et al. Comments were supported by expert declarations by Dr. Arjun Makhijani, David Lochbaum, Dr. Gordon Thompson, and Mark Cooper (ADAMS Accession No. ML14030A152). The comments and supporting declarations made detailed and comprehensive criticisms of the Proposed Waste Confidence Rule and Draft Waste Confidence GEIS, charging that they were inadequate to satisfy NEPA or the Atomic Energy Act on both legal and technical grounds. Other organizations, as well as state and local governments, also filed comments critical of the

Proposed Rule and Draft GEIS.

Despite receiving significant criticisms of the proposed Waste Confidence Rule and Draft Waste Confidence GEIS, in September 2014, the NRC published the Final Continued Spent Fuel Storage Rule and Final Continued Spent Fuel Storage GEIS, without changing its environmental analysis in any significant respect. The Final Continued Spent Fuel Storage Rule also omitted “Waste Confidence” safety findings required by the Atomic Energy Act. Upon issuance of the Rule and GEIS, the Commission lifted the suspension of licensing and re-licensing for Comanche Peak Units 3 and 4 and other reactors. *Calvert Cliffs 3 Nuclear Power Project, LLC et al.*, CLI-12-08, 80 NRC 71 (2014).

In October 2014, SEED Coalition joined seven other environmental organizations in seeking judicial review of the Rule and GEIS by the U.S. Court of Appeals for the District of Columbia Circuit under NEPA, the Atomic Energy Act, and the Administrative Procedure Act, *inter alia*. *Beyond Nuclear et al. v. NRC*, No. 14-1216 (filed Oct. 29, 2014). The case was consolidated with similar appeals by the States of New York, Connecticut, Massachusetts, and Vermont; the Prairie Island Indian Community; and Natural Resources Defense Council. *See New York II* and note 2 above. The parties are now awaiting a briefing schedule.

After the NRC issued the Continued Spent Fuel Storage Rule and GEIS, SEED Coalition reasonably anticipated that the NRC Staff would comply with NEPA and the agency’s own implementing regulations by incorporating the Continued Spent Fuel Storage GEIS by reference into the grossly outdated Comanche Peak Units 3 and 4 FEIS. When three months had passed after the effective date of the Rule and the NRC Staff still had not supplemented the Comanche Peak Units 3 and 4 FEIS (or any other FEIS issued prior to the Continued Spent Fuel Storage

GEIS), SEED Coalition joined four other organizations in petitioning the NRC Commissioners to order the correction of the Staff's legal error. 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 to Supplement"). The Petitioners argued that NEPA and implementing regulations of NRC and the Council on Environmental Quality ("CEQ") require the NRC to supplement the Comanche Peak Units 3 and 4 FEIS and other EISs to incorporate the Continued Spent Fuel Storage GEIS by reference. The Petition to Supplement is pending before the Commission.

#### **IV. CONTENTION**

##### **A. Statement of Contention**

While the text of the Comanche Peak Units 3 and 4 FEIS is grossly outdated with respect to its discussion of spent fuel storage impacts, 10 C.F.R. § 51.23(b) provides that the Continued Spent Fuel Storage GEIS is incorporated by reference into the Comanche Peak Units 3 and 4 FEIS.<sup>4</sup> For all of the reasons stated in SEED Coalition et al.'s Comments on the Draft Waste Confidence GEIS, however, the Continued Spent Fuel Storage Rule and GEIS fail to provide the NRC with a lawful basis under NEPA for issuing a COL for Comanche Peak Units 3 and 4. As discussed in SEED Coalition et al.'s comments on the Rule and GEIS, they suffer from the following failures:

- In blatant violation of NEPA and the Court's decision in *New York I*, the Continued Spent Fuel Storage GEIS fails to examine the probability and consequences of failure to site a

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<sup>4</sup> 10 C.F.R. § 51.23(b) states that the Continued Spent Fuel Storage GEIS is deemed incorporated into EISs prepared under 10 C.F.R. § 51.95 (which governs preparation of draft and final supplemental EISs for reactor licensing and license renewal).

repository. Instead of examining the risk of failing to site a repository, the GEIS rationalizes the risk away, by arbitrarily assuming that spent fuel will be protected by “institutional controls” for an infinite period of time at reactor sites. This assumption is not only absurd and inconsistent with the Nuclear Waste Policy Act (“NWPA”), but it also defeats the Court’s purpose of forcing NRC to reckon with the environmental consequences of its failure to site a repository.

- The GEIS fails to acknowledge that the Continued Spent Fuel Storage Rule is a licensing action, and therefore it distorts the statement of purpose and need for the rule as relating to administrative rather than environmental concerns. As a result, the GEIS also mischaracterizes the alternatives that must be considered. Instead of evaluating alternatives related to storage and disposal of spent fuel, the GEIS examines alternatives related to the administrative question of how to prepare an EIS. The result is a farcical cost-benefit analysis that utterly fails to address alternatives for avoiding or mitigating the environmental impacts of storing spent fuel or siting a repository.
- The GEIS’ analysis of the environmental impacts of extended spent fuel storage ignores the fact that NRC knows very little about the behavior of spent fuel in long-term or indefinite storage conditions, especially the potentially significant effects of long-term dry cask storage on high burnup fuel integrity. In violation of NEPA, the NRC makes no attempt to quantify these uncertainties.
- The GEIS fails to fully consider the environmental impacts of spent fuel pool leaks and fires. In violation of NEPA, the GEIS relies upon incomplete data, adopts a flawed concept of risk and ignores a range of causes for accidents.
- In violation of NEPA, the GEIS makes no attempt to show how the environmental impacts associated with the Continued Spent Fuel Storage Rule will be quantified and incorporated into cost-benefit analyses for nuclear reactors. Although spent fuel disposal and long-term storage costs are high enough to tip the balance of a cost-benefit analysis for reactor licensing away from licensing, nowhere does the NRC explain how it will take these costs into account in reactor licensing decisions.
- In violation of NEPA, the GEIS fails to support the limited conclusions in the Continued Spent Fuel Storage Rule and GEIS regarding the technical feasibility of spent fuel disposal.
- The NRC has splintered the analysis of environmental impacts associated with storage and disposal of spent fuel into an array of safety findings and environmental analyses. While the issues covered by these separate findings and analyses overlap and involve



cumulative impacts, the NRC refuses to integrate them. The NRC also refuses to correct inconsistencies between them.<sup>5</sup>

**B. Statement of Basis for the Contention**

The basis for SEED Coalition’s contention is provided in the SEED Coalition et al. Comments and attachments (including the declarations of Dr. Arjun Makhijani, Dr. Gordon Thompson, David Lochbaum, and Mark Cooper).

**C. Demonstration that the Contention is Within the Scope of the Proceeding**

The contention is within the scope of the proceeding because it challenges the adequacy of the NRC’s NEPA review for the licensing of Comanche Peak Units 3 and 4.

**D. Demonstration that the Contention is Material to the Findings the NRC Must Make to License This Reactor**

The contention is material to the findings that the NRC must make in order to license this reactor because it asserts that the environmental findings in the Continued Spent Fuel Storage Rule and the Continued Spent Fuel Storage GEIS are not supported and are legally deficient.

**E. Concise Statement of the Facts or Expert Opinion Supporting the Contention, Along with Appropriate Citations to Supporting Scientific or Factual Materials**

The statements of fact or expert opinion supporting the contention are set forth in the SEED Coalition et al. Comments and attachments (including the declarations of Dr. Arjun

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<sup>5</sup> As discussed above at pages 6-7, the NRC Staff has not yet updated the Comanche Peak Units 3 and 4 FEIS to incorporate the Continued Spent Fuel Storage GEIS by reference, as required by NEPA, 10 C.F.R. Part 51, Appendix A and other authorities. *See also* Petition to Supplement at 7-9. In the absence of an accurate FEIS, SEED Coalition is not able to challenge the Comanche Peak Units 3 and 4 FEIS with the accuracy and specificity required by 10 C.F.R. §§ 2.309(f)(1)(vi) and (f)(2). *Id.* at 10-11. Nevertheless, in order to ensure that the contention is filed before the NRC licenses Comanche Peak Units 3 and 4, SEED Coalition submits it now, based on the best available information.

Makhijani, Dr. Gordon Thompson, David Lochbaum, and Mark Cooper).

**F. A Genuine Dispute Exists with the Applicant on a Material Issue of Law or Fact**

This contention raises a genuine dispute with both the applicant and the NRC regarding whether the NRC has satisfied NEPA for the purpose of issuing the COL for Comanche Peak Units 3 and 4.

**V. THE CONTENTION IS TIMELY PURSUANT TO 10 C.F.R. §§ 2.309(c) and 2.309(f)(2)**

NRC regulations 10 C.F.R. § 2.309(c) and § 2.309(f)(2) call for a showing that:

(i) The information upon which the amended or new contention is based was not previously available;

(ii) The information upon which the amended or new contention is based is materially different than information previously available; and

(iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

This Hearing Request/Petition to Intervene is timely because it does not depend at all on past information. Instead, it is a “place-holder” that depends on an event that will occur in the future: the U.S. Court of Appeals’ decision in *New York II*. SEED Coalition’s contention seeks the denial (or revocation) of a COL for Comanche Peak Units 3 and 4 in the event that the Court of Appeals reverses the Continued Spent Fuel Storage Rule and/or GEIS.

**VI. CONSULTATION CERTIFICATION PURSUANT TO 10 C.F.R. § 2.323(b)**

Undersigned attorney Robert Eye certifies that on April 21, 2015, he contacted counsel for the applicant and the NRC Staff in an attempt to obtain their consent to this Hearing Request/Petition to Intervene. Counsel for both parties stated that they would oppose it.

## VII. CONCLUSION

For the reasons stated, SEED Coalition respectfully requests that its contention be admitted.

Respectfully submitted,

*Signed (electronically) by:*

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April 24, 2015

### **CERTIFICATE OF SERVICE**

I hereby certify that on April 23, 2015, a copy of the above and foregoing Request for Hearing and Petition to Intervene was served by the Electronic Information Exchange.

*Signed (electronically) by:*

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