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Attachments: Comment from James Mallon on behalf of PSEG Power received via mail.pdf

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Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
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ATTN: Rulemakings and Adjudications Staff

Subject: **Docket ID No. NRC-2012-0246, RIN 3150-AJ20
Comments on the Proposed Rule for "Waste Confidence—Continued
Storage of Spent Nuclear Fuel," 78 Fed. Reg. 56,776, and the Draft
Waste Confidence Generic Environmental Impact Statement,
NUREG-2157**

On September 13, 2013, the U.S. Nuclear Regulatory Commission (NRC) published a proposed rule in the *Federal Register* (78 Fed. Reg. 56,776) regarding "Waste Confidence-Continued Storage of Spent Nuclear Fuel" ("Proposed Rule"). The Proposed Rule revises the NRC's generic determination on the environmental impacts of the continued storage of spent nuclear fuel beyond a reactor's licensed life for operation and prior to ultimate disposal. The NRC also prepared a Draft Generic Environmental Impact Statement (DGEIS) to support the Proposed Rule. See NUREG-2157, Waste Confidence Generic Environmental Impact Statement, Draft Report for Comment (Sept. 2013). The NRC requested comments on both the Proposed Rule (78 Fed. Reg. at 56,776) and the DGEIS (NUREG-2157 at ii).

On behalf of PSEG Power, LLC (PSEG), I respectfully submit these comments on the Proposed Rule and the DGEIS. In summary, the rulemaking documents for the waste confidence rulemaking should include an affirmative statement that waste confidence issues do not apply to Early Site Permit (ESP) applications, and the DGEIS should be revised accordingly. Because ESPs do not authorize their holders to generate or store spent nuclear fuel, the National Environmental Policy Act (NEPA) analysis for ESP applications does not need to consider the environmental impacts of continued storage of spent nuclear fuel beyond a reactor's licensed life for operation and prior to ultimate disposal.

Background

On May 25, 2010, PSEG submitted its application to the NRC for an ESP for the PSEG Site in Salem County, New Jersey. The ESP would approve the PSEG Site for a period of 20 years for a possible future nuclear power facility. The ESP would not authorize PSEG to construct and operate a nuclear power facility at the site, and would not result in generation or storage of any spent nuclear fuel. PSEG would need to submit a separate combined license (COL) application requesting permission to construct and operate the facility. The PSEG ESP application is the only ESP application pending before the NRC at this time.

During the NRC's ongoing review of this ESP application, the U.S. Court of Appeals for the District of Columbia Circuit issued a June 8, 2012 decision, *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012), vacating and remanding the 2010 update to the NRC's Waste Confidence Decision and Temporary Storage Rule (10 CFR § 51.23), as contrary to NEPA.

The NRC subsequently published the Proposed Rule and the DGEIS in September 2013 to address the Court decision. The Proposed Rule would revise and rename the "Temporary Storage Rule" at 10 CFR § 51.23 and would utilize the DGEIS in place of the former "Waste Confidence Decision" to support Section 51.23. As proposed, Section 51.23(a) would state (78 Fed. Reg. at 56,804):

(a) The Commission has developed a generic environmental impact statement (NUREG-2157) analyzing the environmental impacts of storage of spent nuclear fuel beyond the licensed life for operation of a reactor. The Commission has concluded the following:

- (1) The analysis in NUREG-2157 generically addresses the environmental impacts of storage of spent nuclear fuel beyond the licensed life for operation of a reactor; and
- (2) The analysis in NUREG-2157 supports the Commission's determinations that it is feasible to:
 - (i) Safely store spent nuclear fuel following the licensed life for operation of a reactor and
 - (ii) have a mined geologic repository within 60 years following the licensed life for operation of a reactor.

Based on these conclusions in Section 51.23(a), the NEPA analyses for specified future reactor and spent fuel storage facility licensing actions would not need to consider the environmental impacts of continued storage on a site-specific basis.

The Proposed Rule and ESP Applications

The Proposed Rule itself does not specifically mention ESP applications in any manner. Nonetheless, the language of the Proposed Rule and its Statement of Considerations (SOC) support the conclusion that the Proposed Rule, and waste confidence issues more generally, do not apply to ESP applications. For example, the SOC addresses the question of whom does the Proposed Rule affect by stating (78 Fed. Reg. at 56,780):

This proposed rule would affect any nuclear power reactor applicant and licensee undergoing issuance or renewal of an operating license for a nuclear power reactor under 10 CFR parts 50 or 54, "Requirements for renewal of operating licenses for nuclear power plants"; issuance of a combined license for a nuclear power reactor under 10 CFR part 52, "Licenses, certifications, and approvals for nuclear power plants"; or some amendments of a license under 10 CFR parts 50 or 52. This proposed rule would also affect the issuance of an initial, amended, or renewed license for storage of spent nuclear fuel at an ISFSI under 10 CFR part 72, "Licensing requirements for the independent storage of spent nuclear fuel, high-level radioactive waste, and reactor-related greater than Class C waste." The proposed rule could also affect participants in any proceeding addressing these licensing actions.

Similarly, the proposed 10 CFR § 51.23 (Environmental impacts of storage of spent nuclear fuel beyond the licensed life for operation of a reactor) states in part in paragraph (b) (78 Fed. Reg. at 56,804):

[N]o discussion of environmental impacts of spent nuclear fuel storage in reactor facility storage pool or an independent spent fuel storage installations (ISFSI) for the period following the term of the reactor operating license or amendment, reactor combined license or amendment, or ISFSI license, renewal, or amendment for which application is made, is required in any environmental report, environmental impact statement, environmental assessment, or other analysis prepared in connection with the issuance or amendment of an operating license for a nuclear power reactor under parts 50 and 54 of this chapter, or issuance or amendment of a combined license for a nuclear power reactor under parts 52 and 54 of this chapter, or the issuance of a license for storage of spent nuclear fuel at an ISFSI, or any amendment thereto.

These statements confirm that the waste confidence issues apply to applications for operating licenses, COLs, and ISFSIs. There is no mention of ESP applications.

The DGEIS and ESP Applications

Notwithstanding the above statements that support a conclusion that the waste confidence issues do not apply to ESP applications, the DGEIS raises some confusion. For example, Section 7.1 of the DGEIS addresses assumptions for the cost-benefit analysis for the proposed action. Section 7.1.1 addresses new reactor applications, including the PSEG ESP application, because it is the only pending ESP application. That section states: "In general, COL and ESP application reviews take longer and require more staff effort to complete than other NRC reviews that rely on the Waste Confidence rule." This statement could be interpreted to mean that the NRC believes that the Proposed Rule applies to ESP applications.

Furthermore, Appendix H of the DGEIS provides the estimated costs of alternatives used in the cost portion of the costs and benefits analysis in Chapter 7 of the DGEIS. Table H-1 provides estimated site-specific costs for new reactor reviews. Footnote (d) to this table bins the Bell Bend project with the PSEG ESP and states that they are "treated as new reviews because the NRC is not likely to issue a draft EIS by the end of fiscal year 2014; the NRC assumes that the environmental impacts of continued storage will be addressed within a normal review schedule for those projects." This statement also could be interpreted to mean that the NRC concludes that the waste confidence issues apply to the PSEG ESP application.

These statements in the DGEIS raise confusion about whether the NRC believes the waste confidence issues apply to ESP applications. Given this confusion, PSEG submits the following comments.

PSEG Comments

Comment No. 1 – The rulemaking documents for the waste confidence rulemaking should include an affirmative statement that waste confidence issues do not apply to ESP applications.

PSEG's position that the waste confidence issues do not apply to ESP applications is supported by a number of different justifications:

- The Waste Confidence Decision and the Temporary Storage Rule at 10 CFR § 51.23 that are at issue in the D.C. Circuit decision do not mention ESP applications, but appropriately only refer to applications for operating licenses, COLs, and ISFSIs. As discussed above, the proposed 10 CFR § 51.23 and the SOC for the Proposed Rule also do not encompass ESP applications.
- This is consistent with 10 CFR § 51.75, which specifically requires a Draft Environmental Impact Statement (EIS) for COL applications to address spent fuel storage and 10 CFR § 51.23, but does not include a similar requirement for a Draft EIS for ESP applications.

- The 2007 Part 52 rulemaking added COL applications within the scope of 10 CFR § 51.23(b), but was silent on ESP applications. See Licenses, Certifications, and Approvals for Nuclear Power Plants, 72 Fed. Reg. 49,352, 49,429, 49,509-510 (Aug. 28, 2007). This is consistent with the 2010 Waste Confidence Decision and Temporary Storage Rule update rulemaking documents, which address COL applications, but not ESP applications. See Waste Confidence Decision Update, 75 Fed. Reg. 81,037, 81,039, 81,060, 81,062 n.25, 81,068 (Dec. 23, 2010); Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 75 Fed. Reg. 81,032, 81,033 (Dec. 23, 2010). As discussed above, the SOC for the Proposed Rule also does not address ESP applications.
- Because 10 CFR § 51.23 has never encompassed construction permits,¹ it also should not encompass ESPs, which are considered partial construction permits. See 10 CFR § 52.1 (definition of Early Site Permit).

For the above reasons, and the fact that an approved ESP does not allow the ESP holder to generate any spent nuclear fuel governed by the ESP, PSEG concludes that ESP applications are unaffected by the Commission's statement in CLI-12-16 that it "will not issue licenses dependent upon the Waste Confidence Decision or the Temporary Storage Rule until the court's remand is appropriately addressed," because, as a legal matter, these waste confidence issues do not apply to ESP applications. The rulemaking documents for the waste confidence rulemaking should make this clear in order to prevent any unnecessary confusion or resource expenditures during ESP application reviews.

This outcome also is consistent with the Waste Confidence Directorate's status teleconference on June 19, 2013. Specifically, during that teleconference, a Ms. Sarah Fields asked the NRC Staff "if the proposed rule and the GEIS will cover issues on early site permits, and how considerations for on-site storage will be addressed in an early site permit NEPA document, or any early site permit application." See Teleconference Transcript at 40 (June 19, 2013). Paul Michalak, NRC Branch Chief of the Environmental Impact Statement Branch, responded on behalf of the NRC Staff by stating (Transcript at 40-41):

The early site permit does not rely on Waste Confidence because you do not get a permit to store anything at that site with the early site permit.

¹ The original 10 CFR § 51.23(b) stated that no discussion of any environmental impact of spent fuel storage for the period following the term of the license "is required in any environmental report, environmental impact statement, environmental assessment or other analysis prepared in connection with the issuance or amendment of an operating license for a nuclear reactor or in connection with the issuance of an initial license for storage of spent fuel at an ISFSI, or any amendment thereto." Requirements for Licensee Actions Regarding the Disposition of Spent Fuel Upon Expiration of Reactor Operating Licenses, 49 Fed. Reg. 34,688, 34,694 (Aug. 31, 1984).

That comes in the second half, in that COL, Combined Operating License. That second component of that is where the applicant would get permission then to build a reactor and store the spent fuel after the reactor was operating. So, it would be the second part of that, Sarah. The early site permit does not rely on Waste Confidence, the proposed rule 51.23. . . .

[ESP applicants] haven't actually asked us for permission to store anything there, and we're addressing the impacts of actual storage. So, it's really the second part of that process where they come to us and they say we want to build a reactor at their site, and we want to store fuel here. That's when they point at this rule.

PSEG's Comment No. 1 is fully consistent with the NRC Staff's statements.

For these reasons, PSEG requests that the NRC Staff include an affirmative statement in the rulemaking documents for the waste confidence rulemaking that waste confidence issues do not apply to ESP applications. PSEG proposes the following statement, or its equivalent: "The issues encompassed by 10 CFR § 51.23 and NUREG-2157 do not apply to ESP applications. Because ESPs do not authorize their holders to generate or store spent nuclear fuel, the NEPA analysis for ESP applications does not need to consider the environmental impacts of continued storage of spent nuclear fuel beyond a reactor's licensed life for operation and prior to ultimate disposal."

Comment No. 2 – The DGEIS should be revised to remove any implications that waste confidence issues apply to ESP applications and also should include an affirmative statement that waste confidence issues do not apply to ESP applications.

As discussed above, the DGEIS includes a few statements that could be interpreted to incorrectly imply that waste confidence issues apply to ESP applications. The DGEIS should be revised to prevent any unnecessary confusion or resource expenditures due to the confusion during ESP application reviews. To accomplish this, PSEG requests that the NRC revise the DGEIS as follows:

- Remove any discussion of ESPs or ESP applications from Section 7.1 of the DGEIS, and instead discuss new reactor applications affected by waste confidence issues, including COL or operating license applications.
 - Revise any discussion of "new reactors" or similar phrases to clarify that they only apply to new reactors affected by waste confidence issues.
 - On page 7-3, lines 8-9, delete "and one early site permit (ESP) application."

- On page 7-3, line 10, delete “and ESP.”
 - On page 7-3, line 16, delete “and ESP.”
 - On page 7-3, line 18, delete “and ESP.”
 - On page 7-5, line 8, delete “or ESP.”
- Add a statement in Section 7.1 to clarify that the waste confidence issues do not apply to ESP applications. PSEG proposes the following statement, or its equivalent:
 - “The issues encompassed by 10 CFR § 51.23 and NUREG-2157 do not apply to ESP applications. Because ESPs do not authorize their holders to generate or store spent nuclear fuel, the NEPA analysis for ESP applications does not need to consider the environmental impacts of continued storage of spent nuclear fuel beyond a reactor’s licensed life for operation and prior to ultimate disposal.”
- Remove any discussion of ESPs or ESP applications from Table H-1 of the DGEIS, and instead discuss only new reactor applications affected by waste confidence issues, including COL or operating license applications.
 - Revise any discussion of “new reactors” or similar phrases to clarify that they only apply to new reactors affected by waste confidence issues.
 - Remove any discussion of the PSEG ESP from the last sentence of Footnote (d). PSEG proposes the following revised sentence, or its equivalent: “Bell Bend is treated as a new review because the NRC is not likely to issue a draft EIS by the end of fiscal year 2014; the NRC assumes that the environmental impacts of continued storage will be addressed within a normal review schedule for that project.”
 - Revise Table H-1 to the extent that it assumes a site-specific review of waste confidence issues for the PSEG ESP application. If the NRC intended Table H-1 to be based on a future potential site-specific review of a COL application that references a future PSEG ESP, then that should be clarified.
- Revise the discussion of the cost-benefit analysis in Chapter 7 or elsewhere in the DGEIS to the extent it is otherwise affected by the above changes.

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PSEG appreciates the opportunity to provide the above comments on the Proposed Rule and the DGEIS. If any additional information is needed for the issues raised in this letter, please contact David Robillard, PSEG Nuclear Development Licensing Engineer, at (856) 339-7914.

Sincerely,

A handwritten signature in cursive script, appearing to read "James Mallon".

James Mallon
Early Site Permit Manager
Nuclear Development
PSEG Power, LLC