

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE STATE OF NEW YORK,	)	
THE STATE OF VERMONT, and	)	
THE STATE OF CONNECTICUT,	)	
	)	
Petitioners,	)	
	)	
against	)	
	)	
UNITED STATES NUCLEAR	)	Docket No. 11-1045
REGULATORY COMMISSION, and	)	(consolidated with Nos. 11-1051,
UNITED STATES OF AMERICA,	)	11-1056, and 11-1057)
	)	
	)	
Respondents.	)	
	)	

**MOTION FOR LEAVE TO INTERVENE OF THE STATE OF NEW JERSEY**

Pursuant to Fed. R. App. P.15(d) and D.C. Circuit Rule 15(b), the State of New Jersey (“New Jersey”) hereby moves for leave to intervene as party petitioner in the petition for judicial review filed by the States of New York, Vermont, and Connecticut (“Petitioners”) on February 14, 2011 concerning the United States Nuclear Regulatory Commission’s (“NRC”) Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation rule (“Temporary Storage Rule”) and affiliated Waste Confidence Decision Update (Waste Confidence Rule”). See 75 Fed. Reg. 81,032 and 81,037 (December 23, 2010). New Jersey has a direct and substantial interest in the outcome of this rule challenge. In addition, the Petitioners may not adequately represent the interests of New Jersey. Finally, New Jersey’s motion is timely filed pursuant to Fed. R. App. P. 15(d).

**Background**

In 1990, the NRC promulgated its initial Waste Confidence rule, finding that spent fuel

from nuclear power plants could be stored safely and without significant environmental impacts for at least 30 years beyond the licensed life for operation. See 55 Fed. Reg. 38,474 (September 18, 1990). Spent nuclear fuel is defined at 42 U.S.C. § 10101 as “fuel that has been withdrawn from a nuclear reactor following irradiation, the constituent elements of which have not been separated by reprocessing.” The NRC confirmed its 1990 findings in 1999, see 64 Fed. Reg. 68,005, and issued the proposed Waste Confidence Rule on October 9, 2008 at 73 Fed. Reg. 59,551. NRC’s Temporary Storage Rule, codified at 10 C.F.R. § 51.23(a), revises the 1990 rulemaking and concludes that spent nuclear fuel from a nuclear reactor can be stored safely and without significant environmental impacts for at least 60 years beyond the expiration of an operating license in a spent fuel storage basin either onsite or offsite.

On February 14, 2011, the States of New York, Vermont, and Connecticut filed a petition for review of the Temporary Storage Rule and the Waste Confidence Rule under the above captioned Docket Number. Environmental groups--the Natural Resources Defense Council, Inc., Blue Ridge Environmental Defense League, Inc., Riverkeeper, Inc., and Southern Alliance for Clean Energy, Inc.--also filed petitions for review of the Temporary Storage Rule and the Waste Confidence Rule. Prairie Island Community is also a petitioner. The above captioned matter has been consolidated with Docket Nos. 11-1051, 11-1056, and 11-1057.

**Standard for Intervention Under Fed. R. App. P. 15(d)**

In ruling upon intervention applications, Appellate Courts have looked to the standard for intervention applicable in District Courts pursuant to Fed. R. Civ. P. 24(a)(2). See Sierra Club v. EPA, 358 F.3d 516, 517-18 (7<sup>th</sup> Cir. 2004); see also Automobile Workers v. Scofield, 382 U.S. 205, 209-10 n. 10 (1965). Fed. R. Civ. P. 24(a)(2) provides that intervention is proper for anyone

who "claims an interest relating to the property or transaction which is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest"(emphasis added). See also Building and Construction Trades Dept., AFL-CIO v. Reich, 40 F.3d 1275, 1282 (D.C. Cir. 1994).

For the following reasons, New Jersey respectfully requests the Court to allow for intervention:

### **New Jersey Has a Direct and Substantial Interest In This Rule Challenge**

Courts have granted intervention to parties that have demonstrated a direct and substantial interest in the outcome of the action. See, e.g., Yakima Valley Cablevision, Inc. v. FCC, 794 F.2d 737, 744-45 (D.C. Cir. 1986)(granting intervention because movants were "directly affected by application" of agency policy); New Mexico Dep't of Human Services v. HCFA, 4 F.3d 882, 884, n. 2 (10<sup>th</sup> Cir. 1993)(allowing medicaid beneficiaries to intervene since "*their* benefits hang in the balance")(emphasis in original); Bales v. NLRB, 914 F.2d 92, 94 (6<sup>th</sup> Cir. 1990) (intervention granted to a party with a "substantial interest in the outcome of the petition").

New Jersey has a direct and substantial interest in the outcome of the Temporary Storage Rule and Waste Confidence Rule challenge. New Jersey has four operating nuclear power reactors that are affected by the NRC's rules: Oyster Creek in Forked River, New Jersey, Hope Creek (Unit One) in Hancocks Bridge, New Jersey, and Salem Nuclear Generating Station (Units 1 and 2), also in Hancocks Bridge, New Jersey. See Declaration of Patrick Mulligan, attached hereto. The 60 year time period applies once a license has expired or is terminated.

According to NRC's "High-Value Datasets" set forth in the Temporary Storage Rule, there are 14 reactor operating licenses that will expire between 2012 and 2020 and an additional 36 licenses that will expire between 2021 and 2030. 75 Fed. Reg. 81,036. Of the New Jersey power plants, at least Oyster Creek will be subject to termination of its license or will cease operations during this time frame (thereby triggering the 60 year time period it would be allowed to store spent fuel). A recent settlement agreement requires Oyster Creek to cease generation prior to January 1, 2020. See Declaration of Patrick Mulligan, attached hereto.

As the state sovereign, New Jersey is concerned with the health of its citizens and the environment and has responsibilities to protect the public health. See, e.g., Department of Health v. Owens-Corning Fiberglass Corp., 100 N.J. Super. 366, 381 (App. Div. 1968)(“The safeguarding of the public health has long been considered an essential government function of the police power of the State”)(citing Borough of West Caldwell v. Borough of Caldwell, 138 A.2d 402, 413 (1958)). Here, although it doubled the acceptable storage time, the NRC failed to conduct a complete Environmental Impact Statement pursuant to the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4332(1)(C), and instead performed an environmental assessment that found no significant impact from its rules. Based on the lack of a detailed Environmental Impact Statement as required by NEPA, there are no assurances that the citizens and environment of New Jersey will not be harmed by leaks from the long-term storage of spent fuel at a nuclear power plant in New Jersey. Accordingly, the outcome of this rule challenge directly and substantially affects New Jersey’s interests.

### **New Jersey’s Interests May Not Be Adequately Represented by the Petitioners**

This Court has held that an intervenor “need only show that the representation of

his interest ‘may be’ inadequate, not that representation will in fact be inadequate.” Dimond v. District of Columbia, 792 F.2d 179, 192 (D.C. Cir. 1986)(quoting Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10 (1972)(“The requirement of the Rule is satisfied if the applicant shows that representation of his interest ‘may be’ inadequate; and the burden of making that showing should be treated as minimal”).

New Jersey is home to four nuclear power plants. Each nuclear power plant in the nation presents unique public health and safety concerns based on varying sizes of the reactors, the integrity of the storage basins, and the locations of the power plants. In addition, the permit life varies among the power plants and thus, too, the potential storage time of spent fuel. As a state sovereign, New Jersey can only address interests of the State. New Jersey’s challenge will therefore be specifically tailored to address the protection of the health and safety of its citizens and its environment. Accordingly, its interests may not be adequately represented by the Petitioners.

### **Conclusion**

New Jersey has a direct and substantial interest in the outcome of the challenge to the Temporary Storage Rule and the Waste Confidence Rule. In addition, the Petitioners in this action may not adequately represent New Jersey’s interests. New Jersey’s motion is also timely filed. Accordingly, pursuant to Fed .R. App. P. 15(d) and D.C. Circuit Rule 15(b), proposed intervenor New Jersey respectfully requests that its motion for leave to intervene in this action be granted.

Dated: March 15, 2011

Respectfully submitted,

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