

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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STATE OF NEW YORK, STATE OF )  
VERMONT, STATE OF )  
CONNECTICUT, )

Petitioners, )

v. )

UNITED STATES NUCLEAR )  
REGULATORY COMMISSION )  
and the )  
UNITED STATES OF AMERICA, )

Respondents. )

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No. 11- 1045

**MOTION OF NUCLEAR ENERGY INSTITUTE, INC.  
FOR LEAVE TO INTERVENE IN SUPPORT OF RESPONDENTS**

The Nuclear Energy Institute, Inc. (“NEI”) hereby moves this court for leave to intervene on its own motion and as of right in the above-captioned case pursuant to Rule 15(d) of the Federal Rules of Appellate Procedure, Circuit Rule 15(b), and the provisions of 28 U.S.C. § 2348 and 42 U.S.C. § 2239(b). NEI seeks intervention in support of the U.S. Nuclear Regulatory Commission (“NRC”) and offers the following grounds for the requested action.

1. By Petition dated February 14, 2011, the States of New York, Vermont, and Connecticut initiated the above-captioned proceeding seeking review of the NRC’s Final Rule on the Consideration of Environmental Impacts of

Temporary Storage of Spent Fuel After Cessation of Reactor Operation (“Temporary Storage Rule”),<sup>1</sup> and the related Waste Confidence Decision Update.<sup>2</sup>

2. The NRC’s Waste Confidence Decision was originally adopted in response to a decision by the U.S. Court of Appeals for the District of Columbia Circuit. In *State of Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1978), the Court ruled that, in order to satisfy the requirements of the National Environmental Policy Act (“NEPA”), the NRC must address — in the context of considering nuclear power plant and independent spent fuel storage installation (ISFSI) licenses and amendments — whether reasonable assurance exists that an offsite disposal solution for high level nuclear waste will be available by the expiration dates of the plants’ operating licenses and, if not, whether there is reasonable assurance that spent fuel can be stored safely at the reactor sites beyond those dates and until a disposal site is available. The Court also ruled that the NRC “could properly consider the complex issue of nuclear waste disposal in a ‘generic’ proceeding such as rulemaking, and then apply its determinations in subsequent individual adjudicatory proceedings.” 602 F.2d at 416-17.

3. The Temporary Storage Rule and Waste Confidence Decision subject to the current challenge are based on five findings, two of which were updated in

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<sup>1</sup> 75 Fed. Reg. 80132 (Dec. 23, 2010).

<sup>2</sup> 75 Fed. Reg. 80137 (Dec. 23, 2010).

the agency proceeding below. The Waste Confidence Decision Update specifically revised Finding 2, determining that there is reasonable assurance that sufficient mined geologic capacity will be available when necessary for the disposal of commercially generated high-level radioactive waste and spent nuclear fuel; and Finding 4, determining that there is reasonable assurance that, if necessary, commercially generated spent nuclear fuel can be safely stored and without significant environmental impacts for at least 60 years beyond the licensed life for operation. The final Temporary Storage Rule revised 10 CFR § 51.23(a) to conform to the revisions to Findings 2 and 4.

4. For the following reasons NEI has a clear interest in the instant matter. NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including the regulatory program of the NRC. As such, NEI and its members have an interest in generic operational, technical, and environmental issues such as those addressed in the Temporary Storage Rule and parallel Waste Confidence Decision Update.

5. NEI's membership includes all companies currently licensed to operate the 104 commercial nuclear power plants in operation in the United States. NEI's membership also includes companies previously licensed to operate nuclear

power plants, and who now are licensed only to possess spent, or used, nuclear fuel at the sites of shut down reactors.<sup>3</sup>

6. Used nuclear fuel from nuclear power plants operated by NEI members is to be disposed of by the United States Government pursuant to the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. §§ 10101, *et seq.* (“NWPA”). This Government obligation is embodied in the Standard Contract for the Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste (“Standard Contract”)<sup>4</sup> that nuclear companies were required to enter into with the Department of Energy.

7. NEI members pay approximately \$750 million per year in fees into the Nuclear Waste Fund (“the Fund”) established under the NWPA, to cover all costs associated with used nuclear fuel disposal, including costs of repository design, licensing, construction, and operation. Since its inception in 1983, NEI members have paid or are committed to pay a total of more than \$30 billion into the Fund.<sup>5</sup>

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<sup>3</sup> See attached Declaration of Rodney McCullum in Support of the Motion of the Nuclear Energy Institute, Inc. for Leave to Intervene in Support of Respondents, ¶ 3 (“McCullum Declaration”).

<sup>4</sup> See 10 CFR Part 961.

<sup>5</sup> See McCullum Declaration, ¶ 4.

8. Until the Government acts to meet its obligation to take title to and dispose of the used nuclear fuel, NEI's members who are reactor licensees and former licensees must, in accordance with the NWPA, safely manage used nuclear fuel by maintaining it in a spent fuel pool on the nuclear plant site and/or at a licensee-controlled ISFSI. NEI's members are, under the NWPA, also obligated to provide increased onsite storage capacity as needed to support continuing plant operations.<sup>6</sup>

9. NEI was a party to the NRC rulemaking proceedings leading to adoption of the Waste Confidence Decision Update and the Temporary Storage Rule revising 10 CFR 51.23(a). NEI's participation included the submission of formal written comments in response to the NRC's rulemaking notice.<sup>7</sup>

10. The NRC's Waste Confidence Decision Update and the Temporary Storage Rule will be applied by the NRC in various pending and future reactor licensing proceedings, including proceedings in connection with (a) licenses and license amendments for expansion of spent fuel storage capacity at reactor sites, (b) license renewal proceedings for extension of the operating lifetimes of existing nuclear power plants, and (c) proceedings on combined operating license ("COL")

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<sup>6</sup> See McCullum Declaration, ¶ 5.

<sup>7</sup> See McCullum Declaration, ¶¶ 6-7.

and construction permit applications for proposed new reactors. Implementation of the Waste Confidence Decision Update and Temporary Storage Rule, together with the other regulations contained in 10 CFR Part 51, provides the process by which the NRC will meet its legal obligations in these licensing matters to comply with of the NEPA, 42 U.S.C. §§ 4321 *et. seq.*<sup>8</sup>

11. Without the Waste Confidence Decision Update and the associated generic determination contained in revised 10 CFR § 51.23(a), license applicants and the NRC would be required to consider the environmental impacts of temporary storage of used fuel for a period beyond cessation of the license in each individual environmental review document and NRC reactor licensing proceeding, including in connection with applications for spent fuel storage licenses, for license renewal, and for COLs.<sup>9</sup>

12. The use of a rulemaking to reach a generic determination of no significant environmental impact from temporary storage of used nuclear fuel after cessation of reactor operation is efficient, provides regulatory certainty for nuclear applicants and licensees, and is a transparent means of government decision making. NEI's members would be harmed by inefficient and unnecessary site-

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<sup>8</sup> See McCullum Declaration, ¶ 8.

<sup>9</sup> See McCullum Declaration, ¶¶ 8-10.

specific proceedings, by virtue of the attendant increased costs and delayed regulatory approvals in connection with numerous proposed projects.<sup>10</sup>

13. Invalidation of the Waste Confidence Decision Update and the Temporary Storage Rule at issue here could affect the efficiency of new plant licensing, as well as the relicensing of operating plants, both of which could impede the ability of licensees to generate electricity through safe nuclear power plants. Nuclear plants currently account for twenty percent of this nation's electricity.<sup>11</sup>

14. WHEREFORE, NEI requests that its motion to intervene in the instant case be granted on the grounds and for the reasons stated above.

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<sup>10</sup> *See id.*

<sup>11</sup> *See id.*

Respectfully submitted,

/s/ signed electronically by

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COUNSEL FOR THE  
NUCLEAR ENERGY INSTITUTE

\* Counsel of Record

Dated: March 8, 2011



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**DECLARATION OF RODNEY McCULLUM IN SUPPORT OF  
THE MOTION OF THE NUCLEAR ENERGY INSTITUTE, INC.  
FOR LEAVE TO INTERVENE IN SUPPORT OF RESPONDENTS**

1. My name is Rodney McCullum. I am Senior Director, Used Fuel Programs, at the Nuclear Energy Institute, Inc. ("NEI"). I hold a Bachelor of Science degree in Nuclear Engineering (1980, University of Cincinnati); and a Master of Business Administration degree (2000, Lewis University). In my current position, I lead, manage, and direct NEI's efforts to develop and implement

technical and regulatory programs to achieve the goals of the nuclear energy industry for safe and effective nuclear fuel management.

2. I have personal knowledge of the matters discussed in this Declaration.

3. NEI's members include all entities currently licensed to operate 104 commercial nuclear power units in the United States. NEI's members also include entities licensed to possess used fuel previously generated at reactors that have since permanently ceased operations.

4. NEI members pay approximately \$750 million per year in fees into the Nuclear Waste Fund ("the Fund") established under the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. §§ 10101 *et seq.* ("NWPA"), to cover all costs associated with used nuclear fuel disposal, including costs of repository design, licensing, construction, and operation. Since its inception in 1983, NEI members have paid or are committed to pay a total of more than \$30 billion into the Fund.

5. Until the Government acts to meet its obligation to take title to and dispose of the nuclear fuel, NEI's members, who are reactor licensees and former licensees must, in accordance with the NWPA, safely manage used nuclear fuel by maintaining it in a spent fuel pool on the nuclear plant site and/or at a licensee-controlled independent spent fuel storage installation (ISFSI). NEI's members are,

under the NWPA, also obligated to provide increased onsite storage capacity as needed to support plant operations.

6. I was involved in the development of the comments submitted February 5, 2009, by NEI, on behalf of NEI's members from the commercial nuclear energy industry, in the rulemaking proceeding that led to the adoption of the Nuclear Regulatory Commission's ("NRC's") Final Rule ("NRC Rule"), entitled, *Temporary Storage of Spent Nuclear Fuel after Cessation of Reactor Operation*, codified at 10 C.F.R. 51.23(a), and in the agency's related proceeding on the *Waste Confidence Decision Update*.

7. NEI's comments provided technical and policy grounds in support of the agency's proposed revisions to two of the five findings in the prior Waste Confidence Decision. NEI's comment letter was submitted by Anthony Pietrangelo, then serving as NEI Vice President, Regulatory Affairs, and now serving as Senior Vice President and Chief Nuclear Officer.

8. Since 1984, licensing proceedings involving NEI's reactor licensee members have been subject to the NRC's Waste Confidence Decision through the application of 10 CFR § 51.23, as that rule has been revised from time to time. The Waste Confidence Decision and the findings in 10 § CFR 51.23(a) have relieved applicants, licensees, and the NRC itself, from the obligation to prepare a site-specific discussion of any environmental impact of spent fuel storage in


reactor facility storage pools or an independent spent fuel storage installation (ISFSI) for the period following the term of the reactor operating license or amendment, reactor combined license or amendment, or initial ISFSI license or amendment, in any environmental documentation or other analysis prepared in connection with the NRC's initial issuance or amendment of an operating license or a combined operating license for a nuclear power reactor, the NRC's issuance of a renewed operating license or renewed combined operating license, or the NRC's issuance of a license for storage of spent fuel at an ISFSI, or any amendment thereto.

9. Invalidation of the NRC's Waste Confidence Decision Update and the conforming revisions to 10 CFR § 51.23(a) could result in the absence of a generic determination of environmental impacts of extended spent fuel storage. This situation could exist for many years. Such a situation could result in delay in licensing, construction, and availability of commercial nuclear reactors, based on the need to review and litigate in individual adjudications the issues currently addressed in the five Waste Confidence Decision findings and in 10 CFR § 51.23, which would have a direct affect on NEI and its members.

10. The lack of a high level waste repository has already necessitated the storage of used nuclear fuel at nuclear power plants for periods far longer than originally intended by the NWPAA, and resulted in a substantial operational burden

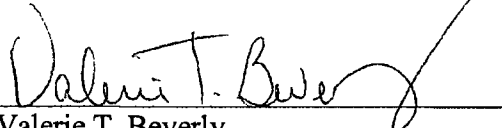
on, and the expenditure of hundreds of millions of dollars by, power plant owners and operators. The inability to efficiently license additional onsite storage capacity would further increase the burden placed on nuclear plant owners and operators resulting from the need to store ever increasing amounts of used nuclear fuel. In addition, the lack of a generic determination would further complicate NRC license renewal for existing nuclear plants to the detriment of NEI and its members.

I declare under penalty of perjury that the foregoing is true and correct.

  
\_\_\_\_\_  
Rodney J. McCullum

District of Columbia ) ss:

Subscribed and sworn to before me this 8<sup>th</sup> day of March, 2011.

  
\_\_\_\_\_  
Valerie T. Beverly

VALERIE T. BEVERLY  
Notary Public District of Columbia  
My Commission Expires 5/14/2012

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**NUCLEAR ENERGY INSTITUTE, INC.  
CORPORATE DISCLOSURE STATEMENT**

The Nuclear Energy Institute, Inc. (“NEI”), a not-for-profit 501(c)(6) corporation, is a trade association representing the nuclear energy industry. NEI’s objective is to ensure the development of policies that promote the beneficial uses of nuclear energy and technologies in the United States and around the world. NEI does not have any parent companies, and no publicly-held company has a 10 percent or greater ownership interest in NEI.

Respectfully submitted,

/s/ signed electronically by \_\_\_\_\_

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served copies of the foregoing “Motion of Nuclear Energy Institute, Inc. for Leave to Intervene in Support of Respondents” and “Nuclear Energy Institute, Inc. Corporate Disclosure Statement” upon those listed on the attached service list by Electronic Case Filing (“ECF”), or, for any party not registered for ECF, by U.S. Mail, first class, postage prepaid.



Respectfully submitted,

/s/ signed electronically by \_\_\_\_\_

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