

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

**In the Matter of
South Texas Project Nuclear Operating Co.
Renewal Application for the South Texas Project
Units 1 and 2**

Docket Nos. 50-498-LR, 50-499-LR

July 9, 2012

**PETITION FOR INTERVENTION TO FILE A NEW CONTENTION CONCERNING
TEMPORARY STORAGE AND ULTIMATE DISPOSAL OF NUCLEAR WASTE AT
STP UNITS 1 & 2**

Pursuant to the Federal Register notice published on January 13, 2011, at 76 Fed. Reg. 2426 and 10 C.F.R. 2.309 SEED Coalition and Susan Dancer hereby move to intervene and for leave to file a new contention in the above-captioned matter.¹

DESCRIPTION OF PETITIONER

SEED Coalition is a statewide non-profit organization working for clean air and clean energy in Texas. Karen Hadden is the executive director of the Seed Coalition. The SEED Coalition office is located at 1303 San Antonio, #100, Austin, Texas 78701. SEED Coalition advocates for safe energy alternatives and opposes the use of nuclear power to generate electricity including the relicensing of South Texas Project (STP) Units 1 & 2. SEED Coalition has members who reside within 50 miles of the STP 1 & 2 including Susan Dancer who lives in Blessing, Texas, approximately 8 miles from STP 1 & 2. Ms. Dancer wishes to be represented by SEED Coalition in this matter. (See Declaration of Susan Dancer, attached)

¹ SEED Coalition has previously moved to intervene in this matter, See *Petition for Leave to Intervene*, Accession No. ML110740848. Intervenor's motion was subsequently denied on August 26, 2011, See *Memorandum and Order*, Accession No. ML11238A160.

STANDING

Pursuant to 10 CFR 2.309, a request for hearing by these petitioners must:

Set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the result of the proceeding, including the reasons why the petitioner should be permitted to intervene with particular reference to the factors set forth in 10 CFR 2.309(d)(1), and the specific aspect or aspects of the subject matter of the proceeding as to which the petitioner can and wishes to intervene. *In the Matter Pacific Gas & Electric Co.*, (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413,426 (2002).

According to the Atomic Safety and Licensing Board (ASLB) standing requirements are described as follows:

In determining whether a petitioner has sufficient interest to intervene in a proceeding, the Commission has traditionally applied judicial concepts of standing. See *Metropolitan Edison Co.*, (Three Mile Island Nuclear Station, unit 1), CLI-83-25, 18 NRC 327, 332 (1983)(citing *Portland General Electric Co.*(Pebble Springs Nuclear Plant, Units 1 and 2), CLI- 76-27, 4 NRC 610(1976). Contemporaneous judicial standard for standing require a petitioner to demonstrate that (1) it has suffered or will suffer any distinct and palpable harm that constitutes injury-in-fact within the zone of interests arguably protected by the governing statutes (e.g. the Atomic Energy Act of 1954 (AEA), the National Environmental Policy Act of 1969 (NEPA); (2) the injury can be fairly traced to the challenged action; and (3) the injury is likely to be redressed by a favorable decision. See *Carolina Power and Light Co.*, (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 NRC 25, 29 (1999). An organization that wishes to intervene in a proceeding may do so either in its own right by demonstrating harm to its organizational interests, or any representational capacity by demonstrating harm to its members. See *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC to 61, 271 (1998). To intervene in a representational capacity, an organization must show not only that at least one of its members would fulfill the standing requirements, but also that he or she has authorized the organization to represent his or her interests. See *Private Fuel 3 Storage, LLC* (Independent Fuel Storage Installation), LBP-98-7, 47 NRC 152, 168, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998). *Diablo Canyon*, *supra*, 56 NRC at 426. See Also, *Southern Nuclear Operating Co.*

(Vogtle Electric Generating Plant), 52-011-ESP, Board Memorandum and Order (March 12, 2007)(Ruling on Standing and Contentions) at 5-6.

The Petitioner herein has standing to participate in this proceeding as demonstrated by the declaration attached hereto. The individual Petitioner has authorized their affiliated organizations named herein to represent their interests in this proceeding. *See: Diablo Canyon*, 56 NRC at 426.

The attached declaration establishes that the individual Petitioner resides within 50 miles of STP Units 1 and 2. Accordingly, the individual Petitioner has presumptive standing because of her proximity to STP Units 1 & 2. *Diablo Canyon, supra*, 56 NRC at 426-27, citing *Florida Power & Light Co.*, (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 146, affirmed, CLI-01-17, 54 NRC 3 (2001) (petitioners who reside within 50 miles of a proposed nuclear power plant have presumptive standing in nuclear reactor construction permit and operating license cases due to an “obvious potential for off-site consequences”). Further, the declaration establishes that she would suffer a distinct and palpable harm to constitute injury-in-fact within the zone of interests that are to be protected by the Atomic Energy Act, 42 USC 2011, et seq. (AEA) and the injury can be fairly traced to the challenged action and the injury is likely to be redressed by a favorable decision. The Petitioner’s objectives in this matter are to protect public health and safety, and the environment by opposing the relicensing and continued operation of STP Units 1 & 2 beyond the expiration of its current operating licenses, midnight on August 20, 2027 and December 15, 2028, respectively, unless the applicant can establish that it meets the requirements of the AEA, 42 U.S.C. 2133(b)(d), that require the public's health, safety and property will not be jeopardized by the Applicant's continued operation of a nuclear plant beyond the initial licensed operating term.

CONTENTION

I. INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.309(f)(1) and 2.309(f)(2), the SEED Coalition (“Intervenor”) seeks leave to file a new contention which challenges the failure of the Environmental Report for STP Units 1 & 2 power plant operating license renewal to address the environmental impacts of spent fuel pool leakage and fires as well as the environmental impacts that may occur if a spent fuel repository does not become available. The contention is based on the United States Court of Appeals for the District of Columbia Circuit’s recent decision in *State of New York v. NRC*, No. 11-1045 (June 8, 2012), which invalidated the Nuclear Regulatory Commission’s (“NRC”) Waste Confidence Decision Update (75 Fed. Reg. 81,037 (Dec. 23, 2010)) (“WCD”) and the NRC’s final rule regarding Consideration of Environmental Impacts of Spent Fuel After Cessation of Reactor Operation (75 Fed. Reg. 81,032 (Dec. 23, 2010)) (“Temporary Storage Rule” or “TSR”). *State of New York* vacated the generic findings in 10 C.F.R. § 51.23(a) regarding the safety and environmental impacts of spent fuel storage. As a result, the NRC no longer has any legal basis for Section 51.23(b), which relies on those findings to exempt both the agency staff and license applicants from addressing long-term spent fuel storage impacts in individual licensing proceedings.

Intervenor recognizes that because the mandate has not yet issued in *State of New York*, this contention may be premature. Nevertheless, Intervenor is submitting the contention within 30 days of becoming aware of the court’s ruling, in light of Commission precedents judging the timeliness of motions and contentions according to when petitioners became aware of a decision’s potential effect on their interests. *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 386 (2002). If

the Atomic Safety and Licensing Board determines that this contention is premature, Intervenor requests that consideration of the contention be held in abeyance pending issuance of the mandate.

II. FACTUAL BACKGROUND

In 1984, the NRC issued its first WCD, making findings regarding the safety of spent fuel disposal and the safety and environmental impacts of spent fuel storage. Over the several decades that have passed since then, the NRC has updated the WCD. The latest update was issued in December 2010. On June 8, 2012, the U.S. Court of Appeals for the D.C. Circuit took review of the NRC's 2010 WCD Update and TSR and vacated those rules in their entirety. In the course of reviewing the WCD Update, the court found that the WCD is a "major federal action" under the National Environmental Policy Act ("NEPA"), therefore requiring either a finding of no significant impact ("FONSI") or an environmental impact statement ("EIS"). *Id.*, slip op. at 8. The court also found it was "eminently clear that the WCD will be used to enable licensing decisions based on its findings" because the WCD "renders uncontestable general conclusions about the environmental effect of plant licensure that will apply in every licensing decision." *Id.*, slip op. at 9 (citing 10 C.F.R. § 51.23(b)).

With respect to the WCD's conclusions regarding spent fuel disposal, the court observed that the NRC has "no long-term plan other than hoping for a geologic repository" and that spent reactor fuel "will seemingly be stored on site at nuclear plants on a permanent basis" if the government "continues to fail in its quest" to site a permanent repository. *Id.*, slip op. at 13. Thus, the court concluded that the WCD "must be vacated" with respect to its conclusion in Finding 2 that a suitable spent fuel repository will be available "when necessary." *Id.*, slip op. at

11. In order to comply with NEPA, the court found that the NRC must “examine the environmental effects of failing to establish a repository.” *Id.*, slip op. at 12.

With respect to the TSR’s conclusions regarding the environmental impacts of temporary storage of spent reactor fuel at reactor sites, the court concluded that the NRC’s environmental assessment (“EA”) and FONSI issued as part of the TSR “are not supported by substantial evidence on the record” in two respects. First, the NRC had reached a conclusion that the environmental impacts of spent fuel pool leaks will be insignificant, based on an evaluation of past leakage. The court concluded that the past incidence of leaks was not an adequate predictor of leakage thirty years hence, and therefore ordered the NRC to examine the risks of spent fuel pool leaks “in a forward-looking fashion.” *Id.*, slip op. at 14. In addition, the court found that the NRC’s analysis of the environmental impacts of pool fires was deficient because it examined only the probability of spent fuel pool fires and not their consequences. *Id.*, slip op. at 18-19. “Depending on the weighing of the probability and the consequences,” the court observed, “an EIS may or may not be required.” *Id.*, slip op. at 19.

In remanding the WCD Update and the TSR to the NRC, the court purposely did not express an opinion regarding whether an EIS would be required or an EA would be sufficient. Instead, it left that determination up to the discretion of the NRC. *Id.*, slip op. at 12, 20.

III. CONTENTION

A. Statement of the Contention

The Environmental Report for STP Units 1 & 2 does not satisfy NEPA because it does not include a discussion of the environmental impacts of spent fuel storage after cessation of operation, including the impacts of spent fuel pool leakage, spent fuel pool fires, and failing to establish a spent fuel repository, as required by the U.S. Court of Appeals in *State of New York v.*

NRC, No. 11-1045 (June 8, 2012). Therefore, unless and until the NRC conducts such an analysis, no license may be issued.

**B. The Contention Satisfies the NRC's Admissibility Requirements in
10 C.F.R. § 2.309(f)(1)**

1. Brief Summary of the Basis for the Contention

The contention is based on the United States Court of Appeals for the District of Columbia Circuit's decision in *State of New York v. NRC*, which invalidated the NRC's generic findings in 10 C.F.R. § 51.23(a) regarding the safety and environmental impacts of spent fuel storage after cessation of reactor operation with respect to spent fuel pool leakage, pool fires, and the environmental impacts of failing to establish a repository. As a result, the NRC no longer has any legal basis for Section 51.23(b), which relies on those findings to exempt both the agency staff and license applicants from addressing spent fuel storage impacts in individual licensing proceedings. To the extent that Environmental Report for STP Units 1 & 2 addresses spent fuel storage impacts, it does not address the concerns raised by the Court in *State of New York*. Therefore, before the license of STP Units 1 & 2 can be renewed, those impacts must be addressed.

Intervenor does not currently take a position on the question of whether the environmental impacts of post-operational spent fuel storage should be discussed in an individual EIS or environmental assessment for this facility or a generic EIS or environmental assessment. That question must be decided by the NRC in the first instance. *Baltimore Gas and Electric Co. v. NRDC*, 462 U.S. 87 (1983). Intervenor reserves the right to challenge the adequacy of any generic analysis the NRC may prepare in the future to address the site-specific environmental conditions at STP Units 1 & 2. The current circumstances, however, are such that the NRC has

no valid environmental analysis, either generic or site-specific, on which to base the issuance of a license for this facility.

2. The Contention is Within the Scope of the Proceeding

The contention is within the scope of this licensing proceeding because it seeks to ensure that the NRC complies with the NEPA before renewing the operating license for STP Units 1 & 2. There is no doubt that the environmental impacts of spent fuel storage must be addressed in all NRC reactor licensing decisions. *State of New York*, slip op. at 8 (holding that the WCD is a “predicate” to every licensing decision); *Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979).

3. The Issues Raised Are Material to the Findings that the NRC Must Make to Support the Action that is Involved in this Proceeding

The issues raised in this contention are material to the findings the NRC must make to support the action that is involved in this proceeding, in that the NRC must render findings pursuant to NEPA covering all potentially significant environmental impacts. *See* discussion above in subsection (2). As such, in the absence of 10 C.F.R. § 51.23(a), it is clear that this contention addresses a material omission in the NRC staff’s environmental review pursuant to NEPA.

4. Concise Statement of Facts of Expert Opinion Support the Contention

This contention is based primarily on law rather than facts. Intervenor has adequately supported their contention by citing *State of New York* and discussing its legal effect on this proceeding. Intervenor also relies on the undisputed fact that the NRC has taken no steps to cure the deficiencies in the basis for 10 C.F.R. § 51.23(a) that the Court identified in *State of New York*.

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

The Intervenor has a genuine dispute with the applicant regarding the legal adequacy of the environmental analysis on which the applicant relies in seeking a license renewal in this proceeding. Unless or until the NRC cures the deficiencies identified in *State of New York* or the applicant withdraws its application, this dispute will remain alive.

IV. THE CONTENTION IS TIMELY PURSUANT TO 10 C.F.R. § 2.309(f)(2).

The contention meets the timeliness requirements of 10 C.F.R. § 2.309(f)(2), which 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.

Id.

Intervenor satisfies all three prongs of this test. First, the information on which the contention is based -- *i.e.*, the invalidity of 10 C.F.R. § 51.23(b) and the findings on which it is based -- is new and materially different from previously available information. Prior to June 8, 2012, 10 C.F.R. § 51.23 was presumptively valid. Subsequent to the issuance of *State of New York* by the U.S. Court of Appeals, the NRC no longer has a lawful basis for relying on that regulation to exempt itself or license applicants from considering the environmental impacts of post-operational spent fuel storage in the environmental analyses for individual reactor license applications. By the same token, the generic analyses in the WCD and the TSR, on which the NRC relied for all of its reactor licensing decisions, are no longer sufficient to support the issuance of a license. Therefore the NRC lacks an adequate legal or factual basis to renew the license for STP Units 1 & 2.

Finally, the contention is timely because it has been submitted within 30 days of June 8, 2012, the date the U.S. Court of Appeals issued *State of New York*.

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

Intervenor certifies that on July 6, 2012, we contacted counsel for the applicant and the NRC staff in an attempt to obtain their consent to this Motion. Counsel for the applicant advised that the new contention would be opposed. Counsel for the NRC staff advised that it does not have enough information to take a take a position on the admissibility of the proposed contention.

VI. CONCLUSION

For the reasons stated, Intervenor respectfully requests that the Atomic Safety and Licensing Board grant leave to file their contention.

Respectfully submitted this 9th day of July, 2012.

Signed (electronically) by Robert V. Eye

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CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2012 a copy of "Petition for Intervention to File a New Contention" was served by the Electronic Information Exchange on the following recipients:

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