UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NEW YORK, *et al.*	)	
	)	
Petitioners	)	
	)	
v.	)	
	)	Case Nos. 14-1210,
UNITED STATES NUCLEAR REGULATORY	)	14-1212, 14-1216,
COMMISSION, and	)	14-1217
UNITED STATES OF AMERICA	)	
	)	(consolidated)
Respondents	)	

MOTION OF NORTHERN STATES POWER COMPANY
FOR LEAVE TO INTERVENE IN SUPPORT OF RESPONDENTS

Northern States Power Company, a Minnesota corporation, d/b/a Xcel Energy ("NSPM") moves this Court, pursuant to 42 U.S.C. § 2348, Rule 15(d) of the Federal Rules of Appellate Procedure, and D.C. Circuit Local Rule 15(d), for intervention as of right in the above captioned cases as a respondent in support of the Nuclear Regulatory Commission ("NRC").[1]

NSPM is the operator and holder of NRC operating license Nos. DPR-42 and DPR-60 for the Prairie Island Nuclear Generating Plant, Units 1 & 2 ("PINGP") and the NRC materials license No. SNM-2506 for the Prairie Island Independent Spent Fuel Storage Installation ("PI ISFSI") located on the PINGP site. The PI ISFSI stores used nuclear fuel generated by PINGP. Until the Department of

[1] The above-captioned cases were consolidated by order of the Court dated October 31, 2014.

Energy meets its obligation under the Nuclear Waste Policy Act to dispose of this used fuel, NSPM must safely store it at the ISFSI. The PINGP and PI ISFSI are located adjacent to the reservation of the Prairie Island Indian Community (the "Community"), the petitioner in Case No. 14-1212.

NSPM's PI ISFSI is the subject of a license renewal proceeding before the NRC, in which the Community has intervened as an adverse party. The Community has raised claims before the NRC and against NSPM that substantially overlap the claims that it raises in this Court, and the claims before the NRC currently remain pending. As a result, the relief sought by the Community's Petition, if granted, would significantly and uniquely impact NSPM's operation of its facilities, potentially resulting in the denial or conditioning of the license renewal application. Thus, NSPM has a direct interest in this proceeding.

In further support of its motion, NSPM states the following:

1. On October 20, 2011, NSPM applied to the NRC to renew the PI ISFSI license for an additional 40 years. The license expired on October 31, 2013 but remains in effect under the NRC's "timely renewal" regulation, which provides that the existing license remains in effect as long as the licensee filed an application for renewal not less than two years prior to the license expiration. 10 C.F.R. § 72.42(c). The NRC provided an opportunity for hearing on NSPM's application. 77 Fed. Reg. 37, 937 (June 25, 2012). The

Community petitioned to intervene, and in support of its petition, the Community offered a number of contentions challenging NSPM's application. The Community was admitted as a participant in the Prairie Island ISFSI proceeding. *Northern States Power Co.* (Prairie Island Nuclear Generating Plant Independent Spent Fuel Storage Installation), LBP-12-24, 76 N.R.C. 503 (2012).

2. Just prior to the NRC's notice of opportunity for hearing, this Court in *New York v. NRC,* 681 F.3d 471 (D.C. Cir. 2012) vacated in part the NRC's Temporary Storage Rule, 10 C.F.R. § 51.23, and Waste Confidence Decision. In response to the Court's ruling in *New York*, the NRC determined that it would not issue licenses dependent upon the Temporary Storage Rule pending completion of the remand proceeding. *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 N.R.C. 63, 67 (2012). The NRC also determined that any contentions relating to the Rule would be held in abeyance pending further order. *Id.* at 69. Shortly after the NRC's *Calvert Cliffs 3* decision, the Community filed its petition to intervene in the PI ISFSI licensing proceeding. Among the contentions in the Community's petition was "Contention 1," challenging NSPM's application because it relied on the Temporary Storage Rule and the Waste Confidence Decision. As a result, the order admitting the

Community as a party in the license renewal proceeding held the Community's Contention 1 in abeyance.[2]

3. To address the Court's ruling in *New York*, the NRC commenced a rulemaking proceeding to update the Temporary Storage Rule and developed a Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel ("GEIS" or "Continued Storage GEIS") to support the updated rule. The GEIS generically addressed the environmental impacts of continued storage of used nuclear fuel. The final Continued Storage Rule, adopted September 19, 2014, updated 10 C.F.R. § 51.23 to state that the Commission has generically determined that the environmental impacts of continued storage of spent nuclear fuel beyond the licensed life of a reactor are those identified in its Continued Storage GEIS. Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56238 (Sept. 19, 2014) ("Continued Storage Rule"). The Continued Storage Rule also directs how these impacts are to be addressed in individual license proceedings. 10 C.F.R. § 51.23(b). At the same time, the NRC adopted the Continued Storage GEIS, 79 Fed. Reg. 56,263.

[2] LBP-12-24, 76 N.R.C. at 7. Portions of some of the Community's other contentions were also related to the Temporary Storage Rule and Waste Confidence Decision and were likewise held in abeyance.

4. Following the issuance of the Continued Storage Rule and GEIS, the NRC lifted the stay on licensing proceedings and ordered that continued storage contentions held in abeyance be dismissed. *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-14-08, 80 N.R.C. ___, slip op. at 10 (Aug. 26, 2014). As a result, the Community's Contention 1 and related portions of other of its contentions were dismissed.

5. On October 20, 2014, the Community filed, in the Prairie Island ISFSI license renewal proceeding, the Motion contained in Attachment 1 hereto seeking to admit a "New Contention 1" challenging the NRC's Continued Storage Rule and GEIS. The Community asserted that the NRC's Continued Storage Rule and GEIS fail to satisfy the NRC's "federal trust responsibility" to assess and mitigate the potential impacts on the Community. Attachment 1 at 2. The Community claimed that as a result it had a genuine dispute with NSPM regarding whether the NRC should renew the license for the Prairie Island ISFSI. *Id*. at 12. NSPM and the NRC Staff filed separate Answers opposing the Community's motion.

6. On October 27, 2014, the Community filed in this Court Case No. 14-1212, pursuant to Fed. R. App. P. 15, 42 U.S.C. § 2239, 28 U.S.C. §§ 2341-23-44; and 5 U.S.C. § 551 *et seq*., purporting to challenge the NRC's Continued

Rule and GEIS. The petitioners in Cases Nos. 14-1210, 14-1216, and 14-1217 also challenge the Continued Storage Rule and GEIS.

7. The Community, in the ongoing NRC license renewal proceeding for NSPM's PI ISFSI, has sought to challenge the Continued Storage Rule and the GEIS, as applied to the PI ISFSI. The Community's NRC filings on this issue are attached to this motion as Attachments 1 and 2. As those filings demonstrate, the Community's claims before this Court substantially overlap the claims that the Community has raised before the NRC. NSPM and the Community, in other words, are adverse with respect to the issues raised in this appeal, in a currently pending administrative proceeding.

8. The Community issued a press release (Attachment 3 to hereto) at the time it filed its Petition before this Court in which it stated that "[t]he NRC has sidestepped its obligation to our Tribe to do a full and complete analysis of the risks of permanent onsite storage of nuclear waste 600 yards from our nearest residences." The press release quotes the Tribal Council President as stating that "[t]emporary on-site nuclear waste was first approved on Prairie Island in 1994," and "[f]or more than two decades the Prairie Island Indian Community has been waiting for the federal government to uphold its promise and remove on-site nuclear waste that sits just 600 yards from our backyards." He further adds that "[t]he number of so-called temporary dry

cask containers at Prairie Island currently totals 36, with a total of 98 casks needed if the nuclear plant operates to the end of its current license in 2034." Thus, it is clear that the Community's primary interests in this case focus on the PI ISFSI, which is located 600 yards from a member of the Community.

9. As the owner, operator and licensee of the PINGP and the PI ISFSI facilities, NSPM will be directly impacted by this Court's review of the NRC's Continued Storage Rule and GEIS. If the Community's request for relief were to be granted and if the NRC were to modify or rescind its Continued Storage Rule and GEIS or otherwise grant relief to the Community, NSPM's rights with respect to the license renewal of the PI ISFSI could be substantially adversely affected. NSPM therefore has a unique, direct, and substantial interest in this proceeding.

10. In general, the Courts of Appeals have evaluated intervention requests consistent with the standards of Fed. R. Civ. P. 24(a)(2). *See, e.g., Building & Constr. Trades Dep't v. Reich,* 40 F.3d 1275, 1282 (D.C. Cir. 1994); *Sierra Club v. EPA*, 358 F.3d 516, 517-18 (7th Cir. 2004). Fed. R. Civ. P. 24(a)(2) permits intervention when the movant "claims an interest relating to the property or transaction that is the subject of the 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."

11. This Court has in the past routinely granted intervention and party status to affected NRC licensees or applicants in lawsuits brought against the NRC regarding agency rulemakings. *See*, *e.g.*, Order, *New York v. NRC*, No. 11-1045 (D.C. Cir. May 9, 2011) (granting a nuclear utility's motion for leave to intervene as a party in a direct challenge to the Temporary Storage Rule and Waste Confidence Decision).

12. Pursuant to Fed. R. App. P. 15, NSPM should be deemed to be a party to this proceeding. The Community has identified NSPM's facility as the focus of its challenge to the NRC's rules. NSPM owns and operates the facility that is the subject of this action, and therefore, has a direct and substantial interest in the outcome of this proceeding. The disposition of this action may, as a practical matter, impair or impede NSPM's ability to protect its interests. NSPM is the only party fully capable of asserting and protecting the unique interests that it has in the subject matter of this proceeding.

WHEREFORE, for the foregoing reasons, NSPM respectfully requests that this Court grant NSPM leave to intervene in the above-captioned proceeding, with the full rights attendant thereto.

Respectfully submitted,

/s/ signed electronically by

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Dated: November 25, 2014

October 20, 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
Northern States Power Company	)	Docket No. 72-10-ISFSI-2
	)	ASLBP No. 12-922-ISFSI-MLRBD01
(Prairie Island Nuclear Generating Plant, Independent Spent Fuel Storage)	)	

PRAIRIE ISLAND INDIAN COMMUNITY'S MOTION FOR LEAVE TO FILE A NEW CONTENTION AFTER ISSUANCE OF THE NRC'S CONTINUED STORAGE OF SPENT FUEL FINAL RULE

I. Introduction

The Prairie Island Indian Community in the State of Minnesota (PIIC) hereby moves the Atomic Safety and Licensing Board (ASLB or Board) for leave to file a new contention based on the Nuclear Regulatory Commission's recently-issued Final Rule on the Continued Storage of Spent Nuclear Fuel (Continued Storage Rule).[1] The PIIC timely files this motion under 10 C.F.R. Section 2.309(c)(1) and the Board's Amended Initial Scheduling Order of February 1, 2013.[2] To the extent the Board determines that the contention would require a waiver to challenge the Continued Storage Rule, the PIIC also requests such a waiver.

On September 19, 2014, the NRC published in the *Federal Register* a notice of its final Continued Storage Rule.[3] The Continued Storage Rule is effective October 20, 2014.[4] The NRC prepared a final generic environmental impact statement (GEIS) that provides a regulatory basis

[1] *See* Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238-56,263, NRC-2012-0246 (September 19, 2014).
[2] *See* Amended Initial Scheduling Order (February 1, 2013).
[3] *See* 79 Fed. Reg. 56,238 (September 19, 2014).
[4] *Id.*

for the Continued Storage Rule.[5] The NRC revised 10 CFR § 51.23(a) to codify the environmental impact determinations of the GEIS (NUREG–2157).[6] The Continued Storage Rule also clarifies that the generic determination will define anticipated impacts of continued storage in individual licensing proceedings,[7] and will apply to license renewal for an independent spent fuel storage installation (ISFSI).[8] The Commission also lifted the suspension on final licensing decisions related to spent fuel generation and storage "in view of the issuance of a revised rule codifying the NRC's generic determinations regarding the environmental impacts of continued storage of spent nuclear fuel beyond a reactor's licensed operating life."[9] In this proceeding, the Board recently issued an Order implementing the Commission's directive.[10]

II. Proposed New Contention Based on Continued Storage Rule and GEIS.

New Contention 1: The Continued Storage Rule and GEIS Fail to Satisfy the NRC's Federal Trust Responsibility to Assess and Mitigate the Potential Impacts on the PIIC, Its People, and Its Land.

A. Statement of Basis for the Contention

The "trust responsibility" that the federal government owes to Indian tribes imposes both substantive and procedural duties on the federal government. This doctrine has its origin in *Cherokee Nation v. Georgia,* where Chief Justice John Marshall described Indian tribes as being

[5] *See* Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel, NUREG-2157, 79 Fed .Reg. 56,263-56,264 (September 19, 2014), available on the NRC's ADAMS at ML14196A105 (Vol. 1) and ML14196A107 (Vol. 2).
[6] *See* 79 Fed. Reg. at 56249 and 56260. Revised § 51.23(a) states: "The Commission has generically determined that the environmental impacts of continued storage of spent nuclear fuel beyond the licensed life for operation of a reactor are those impacts identified in NUREG–2157, 'Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel.'"
[7] The Commission notes that the rule and GEIS satisfy NRC's NEPA obligations with regard to the continued storage of spent fuel for initial, renewed and amended licenses for, among other things, ISFSIs. *Id.* n.8.
[8] *See* 79 Fed. Reg. at 56249 and 56260. Revised § 51.23(b) states in pertinent part: "The environmental reports described in §§ 51.50, 51.53, and 51.51 are not required to discuss the environmental impacts of spent nuclear fuel storage in a reactor facility storage pool or an ISFSI for the period following the term of the reactor operating license, reactor combined license, or ISFSI license."
[9] CLI-14-08, slip op. at 3.
[10] Memorandum and Order dated October 2, 2014.

"in a state of pupilage," with "[t]heir relation to the United States resembl[ing] that of a ward to his guardian."[11] The trust responsibility is a common law doctrine, although Congress has supplemented the doctrine from time-to-time via legislation. It imposes certain substantive duties on the federal government, including the duty to provide services to tribal members (e.g., health care, education), the duty to protect tribal sovereignty, and the duty to protect tribal resources.[12] The trust responsibility also includes a procedural component – the duty to consult with Indian tribes – which is necessary to effectuate these substantive components.[13]

When it comes to tribal resources, the trust responsibility is at its apex. The Supreme Court has noted that the conduct of federal officials must "be judged by the most exacting fiduciary standards."[14] General principles of trust law are frequently incorporated by courts into the federal trust responsibility. Consequently, just as private trust law is about serving the best interests of the beneficiary, "[a]t the core of the Indian trust doctrine is the federal government's duty to serve the 'best interests' of the tribe and its members."[15] Through the trust responsibility, the federal government has a general mandate to ensure the preservation of a usable land base for future generations of tribal members.[16] Thus, the federal government is obligated to protect Indian trust lands from alienation, confiscation, environmental degradation, or the risk of environmental degradation.[17]

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[11] 30 U.S. 1, 17 (1831).
[12] Reid Peyton Chamber, Judicial Enforcement of the Federal Trust Responsibility to Indians, 27 Stan. L. Rev. 1213 (1975).
[13] Gabriel S. Galanda, "The Federal Indian Consultation Right: A Frontline Defense Against Tribal Sovereignty Incursion, Federal Lawyer (Fall 2010).
[14] *Seminole Nation v. United States,* 316 U.S. 286, 297 (1942).
[15] Mary Christina Wood, "Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources," 1995 Utah L. Rev. 109, 112 (1995).
[16] 1995 Utah L. Rev. at 138.
[17] *Lane v. Pueblo of Santa Rosa,* 249 U.S. 110 (1919) (enjoining the Secretary of the Interior from disposing of tribal lands under general public land laws because it would be a violation of the trust responsibility); *Cramer v. United* States, 261 U.S. 219 (1923) (placing heavy emphasis on the

It has been argued that as long as the federal agency complies with its statutory duties, it fulfills its trust responsibilities. While there are some federal decisions that make this claim, other federal decisions have left open the question of whether the United States is required to take special consideration of tribal interests when complying with applicable statutes and regulations.[18] PIIC believes that the trust responsibility must mean more than solely complying with existing statutes and regulations. Compliance of this type is no different than what is owed to the general public. In order for the trust responsibility to have any vitality, Federal agencies must exercise a higher responsibility when taking action that may affect a tribe. This is especially true when the issues concern lands held in trust by the United States for a tribe and the tribal cultural and historic resources and a tribe's ancestral homeland. The federal agency, here the NRC, must make every reasonable effort to ensure that these resources are protected in order to fulfill its fiduciary duty to the Tribe.

The PIIC does not believe that the NRC has fulfilled the trust responsibility in its analysis and conclusions in the Continued Storage Rule and GEIS in two respects. First, the Continued Storage Rule and GEIS fail to assess the impacts of a reasonably foreseeable event and its potentially catastrophic impacts on the Community, its homeland and its people. The facts are not complicated, nor are they unknown. In her comments on the vote, Chairman Macfarlane

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trust responsibility while voiding a federal land patent that had conveyed lands occupied by Indians to a railroad nearly 20 years earlier); *Pyramid Lake Paiute Tribe v. Morton,* 354 F.Supp. 252, 256 (D.D.C. 1972) (holding that the trust responsibility required enjoining diversions of water by a federal reclamation project which reduced the level of Pyramid Lake on a downstream Indian reservation and otherwise impaired the lake's fishery). *See also Fort Mojave Indian Tribe v. United States,* 23 Cl. Ct. 417, 426 (1991)(where the trust relationship exists, the trustee "has a duty to protect the trust property against damage or destruction. He is obligated to the beneficiary to do all acts necessary for the preservation of the trust res which would be performed by a reasonably prudent man employing his own like property for purposes similar to those of the trust").

[18] See *e.g., Gros Ventre Tribe v. United States,* 469 F.3d 801 (9th Cir. 2006) (claiming that the trust responsibility "does not impose a duty on the government to take action beyond complying with generally applicable statutes and regulations," while still stating that the Court was "leaving open the questions of whether the United States is required to take special consideration of tribal interests when complying with applicable statutes and regulations").

urged a staff to undertake a "complete analysis" including the reasonably foreseeable event of failed barriers:

> …a thorough and complete analysis would have refined and expanded the assumptions made in the DOE analysis and analyzed the impact of radionuclides on the local environment that would occur if the barriers maintained by institutional controls failed.[19]

The Chairman further noted that a complete analysis would not be particularly complicated to undertake:

> I disagree in part with the staff's views about the difficulty of quantitatively measuring impact, and believe it is relatively straightforward to calculate bounding impacts of indefinite storage…We should only put forward what we can know with some certainty: if the casks containing the spent fuel and the fuel cladding were to failed, we can still calculate the concentrations of radionuclides at a given time. We can then qualitatively argue, underpinned by this factual analysis, that the impacts on the environment, surrounding soils, air, surface and ground waters would be LARGE.[20]

Simply put, the Chairman maintained the position "that the staff should fully evaluate the potential range of environmental impacts for indefinite, no-repository storage under two scenarios – keeping and losing institutional controls."[21]

The Community concurs and submits that the failure to undertake a complete analysis of a reasonably foreseeable event is inconsistent with the hard look required by NEPA. The Commission's failure or refusal to undertake a complete analysis renders the GEIS inconsistent with its statutory obligation under NEPA and thus a violation of the trust obligation. The failure to conduct a complete analysis of a reasonably foreseeable event also violates the trust responsibility because of the certain impact on the trust res – the Community's trust lands, the environment, soils, air and water. Whether the Commission is obligated to assess a worst-case

[19] Chairman's Comments at 4.
[20] *Id.*
[21] The Chairman further notes "I do not fully approve the final GEIS without a formal analysis of indefinite storage to fully address a loss of institutional controls as one scenario."

scenario is of no moment. It is required to assess reasonably foreseeable events, and with respect to trust lands, events that may damage or destroy the trust res.[22]

Second, fundamental to safety determinations are institutional controls including funds for replacement ISFSI and the development and operation of DTS. The analysis fails in two important respects: failure to analyze a loss of controls and failure to analyze the cost of these controls and the cost impact on long-term viability. The failure to analyze loss of controls is discussed above and is a significant shortcoming in the GEIS. As to the second, the Chairman notes that safety and security of spent fuel are inextricably linked with sufficient financial resources. While immediate financial needs may be met – or they may not – by the spent fuel management funding requirement, "the question remains as to how to assure funding over the long term and indefinite storage scenarios."[23]

The GEIS does not address the costs associated with permanent on-site storage and the financial projections ist offers for immediate term cost assessments are based on outdated, unrealistic data. First, the NRC assumes, without a realistic assessment of the future costs, that spent nuclear fuel will be reloaded into new casks every 100 years. The NRC's $1.66 million per cask replacement cost estimate[24] is completely unrealistic. Among other things, the GEIS purports to base its per cask cost estimate on a 2012 EPRI Technical Report. The EPRI cost

[22] *Fort Mojave Indian Tribe v. United States,* 23 Cl. Ct. 417, 426 (1991)(where the trust relationship exists, the trustee "has a duty to protect the trust property against damage or destruction. He is obligated to the beneficiary to do all acts necessary for the preservation of the trust res which would be performed by a reasonably prudent man employing his own like property for purposes similar to those of the trust").

[23] Chairman's Comment at 5.

[24] *See* GEIS Section 2.1.2.2 at 2-17 (discussing EPRI's formula for estimating the cost to design, license, and construct a dry cask storage facility) and Section 2.2.2.2 at page 2-35 (discussing the NRC's $1.66M per cask replacement cost estimate). In addition, the NRC relies on the Bureau of Labor Statistics (BLS) Consumer Price Index (CPI) inflation calculator method to adjust older cost estimates to 2014 dollars. *See* GEIS Section 2.1 at 2-2 n.3. As set forth more fully below, by relying on the BLS CPI to adjust cost *estimates* from past years to 2014 dollars rather than the actual costs that were experienced, the NRC's cost estimates are

estimate is based on the cost estimates used by Xcel Energy d/b/a Northern States Power Co. in its 2005 Application for a Certificate of Need for Dry Cask Storage at the Monticello Nuclear Generating Plant and a 2007 Spent Fuel Plan Submittal by Entergy for Pilgrim Nuclear Power Station. EPRI used Xcel's $720,000 per storage unit *cost estimate* ($2005) with Entergy's $415,000 per storage system *cost estimate* ($2006), inflated the cost estimates to 2012 dollars and then averaged the two estimates to calculate an estimated amortized upfront cost of approximately $650,000 per storage system (Constant $2012). In its November 2013 filing with the Minnesota PUC, however, Xcel said that it's actual installed per cask cost at Monticello was approximately $3.69 million ($36.9 / 10 canisters), while it's per cask cost at Prairie Island was estimated to be $5.96 million.

On June 8, 2012, the United States Court of Appeals for the District of Columbia Circuit invalidated the NRC's Waste Confidence Decision and its final rule, "Consideration of Environmental Impacts of Spent Fuel After Cessation of Reactor Operation.[25] The Court of Appeals held that the NRC "can and must assess the potential environmental effects of [] a failure [to secure permanent storage]."[26] The Court held:

> Overall, we cannot defer to the Commission's conclusions regarding temporary storage because the Commission did not conduct a sufficient analysis of the environmental risks. In so holding, we do not require, as petitioners would prefer, that the Commission examine each site individually. However, *a generic analysis must be forward looking and have enough breadth to support the Commission's conclusions*. Furthermore, as NEPA requires, the Commission must conduct a true EA regarding the extension of temporary storage. *Such an analysis must, unless it finds the probability of a given risk to be effectively zero, account for the consequences of each risk*.[27]

PIIC believes that the NRC's generic analysis in its Continued Storage Rule and GEIS falls short of the D.C. Circuit's remand directive because is not sufficiently forward looking and

[25] *See New York v. NRC*, 681 F.3d 471, 473 (D.C. Cir. 2012).
[26] 681 F.3d at 479.
[27] 681 F.3d at 483 (emphasis added).

does not have enough breadth to support the NRC's generic conclusions that spent nuclear fuel can be safely stored indefinitely onsite at the PI ISFSI. The NRC has merely replaced one hope – that a geologic repository would available when necessary – with two more – that ISFSIs will be rebuilt and spent fuel will be reloaded into new casks every 100 years using a DTS and that institutional controls will exist to ensure that this is done.[28] And just as the NRC's presumption of the existence of a permanent geologic repository could not be used to avoid an analysis of the environmental risks and consequences of each risk should spent fuel be stored on site indefinitely,[29] the NRC cannot merely presume that ISFSIs will be rebuilt and spent fuel will be reloaded into new casks every 100 years to avoid an analysis of the consequences of cask failure if stored on site indefinitely. The Circuit Court said the NRC "can and must assess the potential environmental effects" of permanent on site storage.[30] The NRC must include an accounting for the risk that the ISFSI is not rebuilt and the spent fuel is not reloaded into new casks every 100 years. Unless and until the NRC does so, any site-specific EA that concludes with a finding of no significant impact based in reliance upon the flawed generic findings, is invalid.

The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq.*, requires federal agencies such as the NRC to examine and report on the environmental consequences of their actions.[31] "Under NEPA, each federal agency must prepare an Environmental Impact Statement (EIS) before taking a 'major Federal action [] significantly

[28] *See* Chairman's Comments at 3-4.
[29] 681 F.3d at 479 ("If the government continues to fail in its quest to establish [a geologic repository], then [spent nuclear fuel] will seemingly be stored on site at nuclear plants on a permanent basis. The Commission can and must assess the potential environmental effects of such a failure.").
[30] *Id.*
[31] *Id.* at 475.

affecting the quality of the human environment.'"[32] An agency can avoid preparing an EIS, however, if it conducts and Environmental Assessment (EA) and makes a Finding of No Significant Impact (FONSI).[33] "No EIS is required if the agency conducts an EA and issues a FONSI sufficiently explaining why the proposed action will not have a significant impact."[34]

The Circuit Court in *New York* explained that the "considerable deference" given to an agency's decision regarding whether to prepare an EIS depends on the agency's adherence to four factors:

> Though we give considerable deference to an agency's decision regarding whether to prepare an EIS, the agency must 1) "accurately identif[y] the relevant environmental concern," 2) take a "hard look at the problem in preparing its EA," 3) make a "convincing case for its finding of no significant impact," and 4) show that even if a significant impact will occur, "changes or safeguards in the project sufficiently reduce the impact to a minimum." *Taxpayers of Michigan Against Casinos v. Norton*, 433 F.3d 852, 861 (D.C. Cir. 2006) (internal quotation omitted). An agency's decision not to prepare an EIS must be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Public Citizen*, 541 U.S. at 763 (quoting 5 U.S.C. § 706(2)(A)).[35]

The Circuit Court struck down the NRC's Waste Confidence Decision because it was based on an unsuitable FONSI that "did not examine the environmental effects of failing to establish a repository."[36]

An EA FONSI based on the Continued Storage Rule and GEIS would suffer the same defect. As discussed above, NEPA requires that the NRC must "accurately identif[y] the relevant environmental concern." In this case, that concern is eventual cask failure during long-term or indefinite storage periods. However, rather than "show that even if a significant impact

[32] *Id.* at 476 (quoting 42 U.S.C. § 4332(2)(C)). The Circuit Court adds that the Council on Environmental Quality (CEQ) has defined major federal actions to include actions with "[i]ndirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." *Id.* (quotation and citation omitted).
[33] *Id.* (citations omitted).
[34] 681 F.3d at 477 (citing *Dep't of Transp. V. Public Citizen*, 541 U.S. 752, 757-58 (2004)).
[35] 681 F.3d at 477.
[36] *Id.* at 478.

will occur, 'changes or safeguards in the project sufficiently reduce the impact to a minimum,'" the NRC instead *assumes* safeguards that do not currently exist, are not required by any law or regulation, and for which no accurate cost or funding mechanism is identified. Under these circumstances, a FONSI would be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[37]

The PIIC's assessment of the Circuit Court's mandate tracks NRC Chairman Allison Macfarlane's comments on the Continued Storage Rule and GEIS. "The court's remand," according to Chairman Macfarlane, "was based on the federal government's failure thus far to implement the primary institutional control of permanent isolation. On this basis alone it is reasonable to question whether political and societal willingness to maintain obvious institutional controls will continue forever."[38] "Objectively, there are significant uncertainties such as (1) the lack of experience in repeatedly repackaging spent fuel into new storage devices over time, (2) the lack of a guarantee that responsible parties would pay for the costs of repackaging over time, and (3) unforeseen events in our natural environment and society. These all pose challenges to the assumption that indefinite institutional controls is the only scenario to consider in the resource impact assessments of the GEIS."[39]

As Chairman Macfarlane stated, "a thorough and complete analysis would have refined and expanded the assumptions made in the DOE analysis and analyzed the impact of

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[37] 681 F.3d at 477-78; *accord Pit River Tribe v. U.S. Forest Service*, 469 F.3d 768, 788 (9th Cir. 2006) (holding that agencies' NEPA and NHPA violations constituted violations of the agencies' "minimum fiduciary duty to the Pit River Tribe").
[38] *See* Chairman's Comments at 3-4.
[39] *Id.* at 4. These significant uncertainties are especially acute at the PI ISFSI where its per cask cost has increased from $812,500 in 1994 to $5.96 million per cask cost in 2013, a 734 percent cost increase in just 20 years.

radionuclides on the local environment that would occur if the barriers maintained by institutional controls failed."[40]

> We should only put forward what we can know with some certainty: if the casks containing the spent fuel and the fuel cladding were to fail, we can still calculate the concentrations of radionuclides at a given time. We can then qualitatively argue, underpinned by this factual analysis, that the impacts on the environment, surrounding soils, air, surface and ground waters would be LARGE.[41]

The NRC cannot meet the D.C. Circuit Court's remand mandate unless and until it analyzes the impact of radionuclides in the local environment that would occur if the ISFSI and casks are not replaced every 100 years, or if the barriers maintained by institutional controls failed by some other means. Likewise, a Final EA that makes a finding of no significant impact based on the generic findings in the Continued Storage Rule and GEIS, would also be fatally defective.

B. Demonstration that the Contention is Within the Scope of the Proceeding.

The contention is within the scope of the proceedings because it challenges the omission of the required NEPA analysis and of findings required by the Atomic Energy Act (AEA) for re-licensing the PI ISFSI.[42] The AEA specifically requires that the NRC make a finding that the proposed license renewal "will be accord with the common defense and security and will provide adequate protection to the health and safety of the public."[43]

C. Demonstration that the Contention is Material to the Findings the NRC Must Make to Re-License the PI ISFSI.

---

[40] Chairman's Comments at 4 (noting that "[a]n underlying assumption of the impacts in the GEIS is that as long as the spent fuel remains sealed and isolated in a dry storage cask, there will be no significant exposures to the natural environment and humans that surround the dry cask").
[41] Chairman's Comments at 4 (emphasis in original).
[42] *See* Atomic Energy Act Section 182, 42 U.S.C. § 2232; *accord* Union *of Concerned Scientists v. NRC*, 824 F.2d 108 (D.C. Cir. 1987).
[43] 42 U.S.C. § 2232(a).

This contention is material to the findings that the NRC must make in order to relicense the PI ISFSI because it asserts environmental impact analysis required by NEPA and safety findings required by the AEA that have not been made.

D. Concise Statement of the Facts Supporting the Contention.

This contention is a legal, not factual, argument. Factual assertions regarding the hazards posed by spent fuel that is not contained from the environment are well-established and not in dispute.[44]

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

This contention raises a genuine dispute with the applicant, NSPM, regarding whether the NRC should renew the license for the PI ISFSI for up to 40 years. Unless and until the NRC cures the deficiencies caused by the failure to perform the required NEPA analysis and include AEA-required safety findings, this dispute will remain alive.

F. The Contention is Timely Pursuant to 10 C.F.R. §§ 2.309(c) and 2.309(f)(2).

The PIIC has timely moved to add this contention to this proceeding. PIIC has met the timeliness requirements of 10 C.F.R. § 2.309(c) and § 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.

[44] Spent nuclear fuel "poses a dangerous, long-term health and environmental risk. It will remain dangerous 'for time spans seemingly beyond human comprehension.'" *New York*, 681 F.3d at 474 (quoting Blue Ribbon Commission on America's Nuclear Future, *Report to the Secretary of Energy* at 10-11 (2012). *See also* 40 C.F.R. § 197 (EPA citing risks of radioactive material at times after 10,000 years and up to 1 million years after disposal).

First, the information on which the contention is based – i.e., the issuance of the Continued Storage Rule – was not publicly available until September 19, 2014. Second, the information in the Continued Storage Rule is materially different than previously available information because the Continued Storage Rule does not include the safety findings that were included in all the prior versions of the Waste Confidence Decision and on which the NRC previously relied for licensing of reactors. *See New York v. NRC,* 681 F.2d 471, 476-77 (D.C. Cir. 2012).

Third, the Contention is timely because it has been submitted within 30 days of September 19, 2014, the date the NRC issued the Continued Storage Rule and GEIS.[45]

III. Request for Waiver

The grant of a waiver, is a procedural waiver that allows a petitioner to base a contention on circumstances outside the scope of the particular rule that is being challenged. The PIIC challenges 10 C.F.R. § 51.23(b). The criteria for granting a waiver include:

(i) the rule's strict application would not serve the purposes for which it was adopted;
(ii) special circumstance exist that were not considered, either explicitly or by necessary implication, in the rulemaking proceeding leading to the use of the rule sought to be waived;
(iii) those circumstances are unique to the facility rather than common to a large class of facilities; and
(iv) waiver of the regulation is necessary to reach a significant safety problem.[46]

PIIC meets all four of the criteria.[47] The overarching concern raised by the PIIC is the trust obligation owed it by the NRC. The long-term risks associated with the indefinite onsite storage of spent nuclear fuel, as reflected in the Chairman's Comments, support this waiver request. In

[45] *See* Amended Initial Scheduling Order, Para. D.2; 10 C.F.R. § 2.306 (stating that if the last day of time period falls on a weekend, the period runs until the end of the next business day).
[46] *See Exelon Generation Company*, LLC (Limerick Generating Station, Units 1 and 2), 76 N.R.C. 377, CLI-13-07 (October 31, 2013).
[47] *See* Declaration of Philip R. Mahowald dated October 20, 2014.

addition, the PIIC is merely requesting waiver of a PROCEDURAL rule in order for the NRC to fulfill its trust responsibilities to the PIIC. This presents a legitimately unique fact situation. The PIIC's immediate proximity to the PI ISFSI warrants a harder NEPA review that the Continued Storage Rule and GEIS would allow. The requested waiver will address an issue of great significant – the NRC's fulfillment of its trust responsibilities to the PIIC.

II. CONCLUSION

For the foregoing reasons, the PIIC's motion for leave to file a new and amended contention should be granted and its new contention should be admitted.

Respectfully submitted,

Signed (electronically) by Philip R. Mahowald

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October 20, 2014

October 20, 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
Northern States Power Company	)	
	)	
(Prairie Island Nuclear Generating Plant, Independent Spent Fuel Storage)	)	Docket No. 72-10-ISFSI-2 ASLBP No. 12-922-ISFSI-MLRBD01

CERTIFICATE OF SERVICE

I hereby certify that copies of **Prairie Island Indian Community's Motion for Leave to File A New Contention,** dated October 20, 2014, was provided to the Electronic Information Exchange for service on the individuals listed below this 20th day of October, 2014.

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October 20, 2014

Attachment 1

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of

Northern States Power Company (Prairie Island Nuclear Generating Plant, Plant, Independent Spent Fuel Storage)	Docket No. 72-10-ISFSI-2 ASLBP No. 12-922-ISFSI-MLRBD01

DECLARATION OF PHILIP R. MAHOWALD

1. My name is Philip R. Mahowald. I am General Counsel for the Prairie Island Indian Community in the State of Minnesota.

2. Approximately 250 enrolled Community Members reside on or near the Reservation.

3. Attached to this Declaration as Exhibit A is an aerial photo which shows the portions of the Prairie Island Indian Community Reservation within a one-half (1/2) and one-mile (1 mi.) radius of the Prairie Island Independent Spent Fuel Storage Installation.

4. 10 CFR 2.335 provides for a challenge to a regulation by way of a petition requesting a "waiver" or exception to the regulation on the sole ground of "special circumstances", i.e., because of special circumstances with respect to the subject matter of the proceeding, application of the regulation would not serve the purposes for which the regulation was adopted. PIIC is petitioning for a waiver of 10 CFR Section 51.23(a) based on the decision of the United States Court of Appeals for the District of Columbia Circuit in *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012). The Circuit Court of Appeals for the District of Columbia struck down the revised Waste Confidence Decision and revised Temporary Storage Rule, concluding that the NRC did not conduct a sufficient analysis of the environmental risks,[1] failed to evaluate the probability and consequences of failing to establish a permanent common repository, and

[1] *New York*, 681 F.3d at 483.

appeared to have no plan other than "hoping for a geologic repository" despite what the Court described as "societal and political barriers to selecting a site."[2]

5. Based on this decision, PIIC believes that the necessary safety and environmental review for an ISFSI license renewal would be artificially truncated by application of the Continued Storage Rule and its Generic Environmental Impact Statement. Furthermore, there is no hope on the horizon for the siting, licensing, construction, and operation of either an interim centralized storage facility for spent fuel or a repository to dispose of the fuel. Although the Blue Ribbon Commission has made a number of recommendations relative to the development of storage and disposal facilities, there has been no action by the responsible government agencies or the Congress to move forward with implementing the BRC recommendations. Furthermore, even if a storage or disposal facility was on the horizon, the DOE has no reasoned scheme on how priorities will be set for moving spent fuel from operating reactors like PINGP.

6. For all of these reasons, PIIC petitions the Commission to allow the safety and environmental review of the NSPM license renewal application to fully consider the requisite time frame in which deficiencies in the storage of spent fuel may be revealed.

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

Executed this 20th day of October, 2014, at Welch, Minnesota.

Signed (electronically) by Philip R. Mahowald

_____

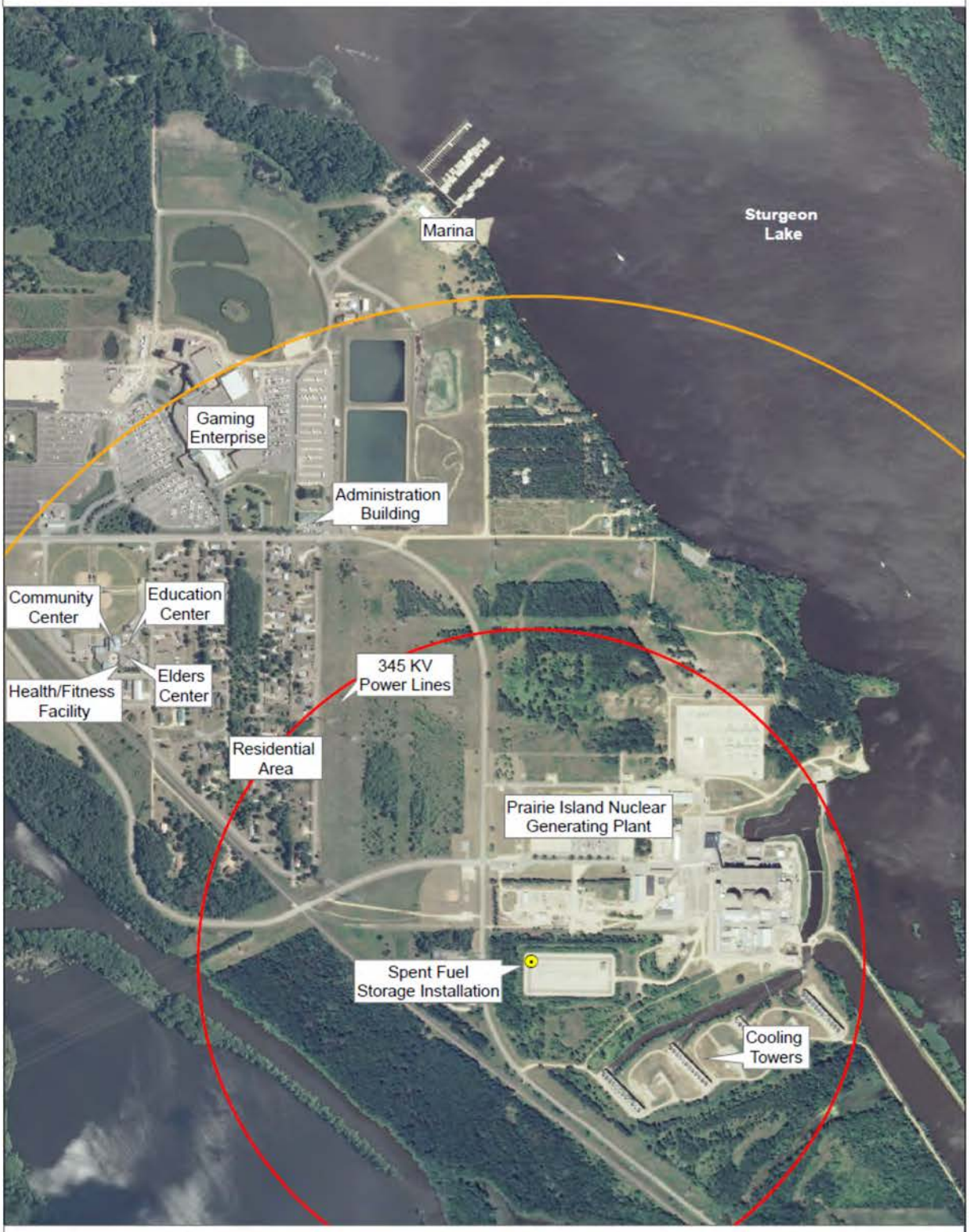
Philip R. Mahowald

Prairie Island Indian Community
State of Minnesota
County of Goodhue

[2] *Id.* at 478-79.

Prairie Island Indian Community

Independent Spent Fuel Storage Installation with 1/2 Mile and 1 Mile proximities.



Legend

- Independent Spent Fuel Storage
- 1 Mile
- 1/2 Mile

0 0.25 0.5 Miles

N W E S

November 24, 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of Northern States Power Company (Prairie Island Nuclear Generating Plant, Independent Spent Fuel Storage)	)))))	Docket No. 72-10-ISFSI-2 ASLBP No. 12-922-ISFSI-MLRBD01

PRAIRIE ISLAND INDIAN COMMUNITY'S REPLY IN SUPPORT OF MOTION FOR LEAVE TO ADMIT NEW CONTENTION AFTER ISSUANCE OF THE NRC'S CONTINUED STORAGE OF SPENT FUEL FINAL RULE

The Prairie Island Indian Community (PIIC) has moved the Atomic Safety and Licensing Board for leave to file a new contention based on the Nuclear Regulatory Commission's recently-issued Final Rule on the Continued Storage of Spent Nuclear Fuel (Continued Storage Rule).[1] The PIIC respectfully replies to the respective responses of the NRC Staff[2] and Northern States Power Company, a Minnesota corporation (NSPM).[3]

I. INTRODUCTION

The PIIC respects the fact that the Continued Storage Rule has ushered in a new regulatory paradigm, and that NSPM as applicant/licensee and the NRC as regulator must adjust from a regulatory framework established for short-term, temporary onsite storage to one of long-term, indefinite onsite storage. The PIIC's contention is simply that a gap exists in the new regulatory framework when it comes to the recognition and consideration of the NRC's trust

[1] *See* Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238-56,263, NRC-2012-0246 (September 19, 2014).
[2] NRC Staff's Answer to Prairie Island Indian Community's Motion for Leave to File a New Contention After Issuance of the NRC's Continued Storage of Spent Fuel Final Rule (Nov. 14, 2014) (NRC Answer).
[3] Northern States Power Company's Answer Opposing Prairie Island Indian Community's Motion for Leave to File New Contention After Issuance of the NRC's Continued Storage of Spent Fuel Final Rule (Nov. 14, 2014) (NSPM Answer).

responsibilities to the PIIC as a federally-recognized Indian Tribe. This is a quintessential site-specific consideration that cannot be addressed generically. In the discrete context of the NRC's obligations under the National Environmental Policy Act, the NRC's trust responsibility to the PIIC cannot be fulfilled by a NEPA review that effectively disregards (or scopes out) adequate consideration of the impact that indefinite spent nuclear fuel storage one-half mile from the PIIC's core reservation area may have on the viability of the Prairie Island Reservation homeland for generations to come. In order to fulfill its trust responsibility to the PIIC the NRC must ensure that adequate funding exists to fulfill the Continued Storage Rule's assumptions and must conduct a site-specific environmental impact analysis of potential impacts should the assumptions in the Continued Storage Rule and GEIS not be fulfilled.

II. DISCUSSION

A. PIIC's Waiver Request

Both NSPM and the Staff dispute the validity of the PIIC request for a waiver of 10 C.F.R § 51.23(b). The waiver criteria in 10 C.F.R. § 2.335(b) were recently addressed by the Commission in *Exelon Generation Company, LLC* (Limerick Generating Station, Units 1 and 2), CLI-13-07 (October 31, 2013). As set forth in that case, the criteria for granting a waiver are:

(i) the rule's strict application would not serve the purposes for which it was adopted;

(ii) special circumstance exist that were not considered, either explicitly or by necessary implication, in the rulemaking proceeding leading to the use of the rule sought to be waived;

(iii) those circumstances are unique to the facility rather than common to a large class of facilities; and

(iv) waiver of the regulation is necessary to reach a significant safety problem.[4]

[4] *Limerick*, CLI-13-07 at 9 (citing *Dominium Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559-60 (2005)).

In *Limerick*, the Commission found that a waiver could also include a significant *environmental* issue, as well as a safety issue.[5] The grant of a waiver is a procedural device that allows a party to a proceeding to base a contention on circumstances outside the scope of the particular rule that is being challenged, in this case 10 C.F.R. § 51.23(b). In addition to meeting the four criteria, the Commission noted that a petitioner seeking a waiver must show that there is something extraordinary about the subject matter of the proceeding such that the rule should not apply. There is something extraordinary involved in this license renewal application: the immediate adjacency of a dry cask storage facility that could pose a long-term threat to the interests and viability of a federally-recognized Indian Tribe and its reservation homeland.[6]

The threat to the very viability of a federally-recognized Indian Tribe and its reservation homeland was not considered in the rulemaking proceeding on Section 51.23(b). The immediate adjacency of the PIIC reservation to the PI ISFSI is a unique case and not common to a large class of facilities. The waiver of 10 C.F.R. § 51.23(b) is necessary to evaluate the potential environmental and safety impacts on the PIIC resulting from the loss of institutional controls if funds are not available to implement the critical safety facilities for long-term storage identified in the Continued Storage Rule and GEIS. The PIIC is asking for procedural relief in this waiver request. There is considerable precedent for federal agencies to provide additional process and procedural protection for federally-recognized Indian Tribes, including the Commission's

[5] *Limerick*, CLI-13-07 at 11.

[6] For example, federal agencies are subject to the provisions of the various executive memoranda first initiated by President Clinton, and affirmed by subsequent Presidents. *See* Memorandum, *Government-to-Government Relations With Native American Tribal Governments*, 59 Fed. Reg. 22951 (April 29, 1994). This memorandum requires that federal agencies "assess the impact" of their action on tribal trust resources and "assure that tribal government rights and concerns are considered." As a general matter, courts have emphasized that special attention to procedural fairness is required because of the "overriding duty of our federal government to deal fairly with Indians wherever located" and have used the existence of a generalized trust responsibility to impose obligations of procedural fairness on the United States in making decisions affecting Indian Tribes. *See Morton v. Ruiz*, 415 U.S. 199, 236 (1974).

directive to the NRC staff in a Staff Requirements Memorandum in connection with Uranium Recovery:

> The staff should develop and implement an internal protocol for interactions with Native American Tribal Governments that allows for custom tailored approaches that will address both NRC and Tribal interests on a case-by-case basis. The staff should assess what policies other federal agencies have for interactions with Native American Tribal Governments and report those findings, which could determine the efficacy of an NRC policy statement, to the Commission.[7]

Certainly the significant issues raised in PIIC's contention warrant a "custom tailored approach," i.e., the grant of a waiver from a generic finding. The trust responsibility of the federal government provides a legitimate basis for the grant of procedural relief from the Commission's generic rule in 10 C.F.R. § 51.23(b).

B. The Federal Trust Responsibility

Neither the Staff nor NSPM contest that the federal government owes a trust responsibility of measured by the highest fiduciary standard,[8] that this duty obligates the federal government to protect and serve the best interests of tribes and their members,[9] and that obligation includes the protection of Indian trust lands from alienation, confiscation, environmental degradation, or the risk of environmental degradation.[10] Instead, each attempts to reduce the trust responsibility to a mere platitude, and argues that the responsibility does not obligate the federal government from control of exceedingly dangerous uses of adjoining land owners. Both arguments are without merit and are contrary to law and policy.

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[7] SRM-M081211 (ADAMS Accession No. ML090080206, January 2009).
[8] PIIC Motion for Leave to File a New Contention After Issuance of the NRC's Continued Storage of Spent Fuel Final Rule, at 3 n. 14.
[9] *Id*., n. 15.
[10] *Id*., n. 17 (citing *Lane v. Pueblo of Santa Rosa,* 249 U.S. 110 (1919); *Cramer v. United* States, 261 U.S. 219 (1923); *Pyramid Lake Paiute Tribe v. Morton,* 354 F.Supp. 252, 256 (D.D.C. 1972); *Fort Mojave Indian Tribe v. United States,* 23 Cl. Ct. 417, 426 (1991).

Relying on dicta in *Skokomish Tribe of Indians v. FERC*, 121 F.3d 1303 (9th Cir. 1997), Staff contends that the NRC's trust responsibility is fulfilled by mere compliance with applicable statutes and that it imposes no greater obligation than that owed to the general public.[11] This suggestion attempts to turn the trust obligation on its head. But the *Skokomish* dicta did not mark a sea change in the trust responsibility doctrine in the Ninth Circuit. Rather, the Ninth Circuit has determined that "although the Secretary also has duties to all United States citizens, '[t]he Secretary's conflicting responsibilities and federal actions taken in the 'national interest' . . . do not relieve him of his trust obligations.'"[12]

The trust doctrine is *a priori* to agency authority as defined in any federal statute and, as such, it limits the discretion the agency may otherwise have pursuant to a broad congressional delegation in an enabling statute. In other words, the trust doctrine demands that the NRC administer the AEA and its NEPA obligations so as to minimize the adverse impacts on the PIIC. The trust responsibility thereby shapes the agency obligation under its authorizing statute, rather than the exact opposite, as suggested by the Staff. The federal courts have interpreted the trust responsibility to require duties beyond the plain language of the enabling statute and even where the statute is silent on the issue,[13] and have determined that the trust reasonability may be breached even if the federal government's conduct may not be "arbitrary and capricious."[14]

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[11] NRC Staff Answer at 3 n. 14.
[12] *See Northern Cheyenne Tribe v. Lujan*, 804 F. Supp. 1281, 1285 (D. Mont. 1991) (*citing* Memorandum Opinion, at 29 (May 28, 1985), *issued by Northern Cheyenne Tribe v. Hodel*, 851 F.2d 1152 (9th Cir. 1988)); *see also Navajo Tribe of Indians v. United States*, 364 F.2d 320, 323-24 (Ct. Cl. 1966).
[13] *See Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094, 1098-1101 (8th Cir. 1989)(Trust responsibility imposed duty on BIA and IHS under the Snyder Act and the Resource Conservation and Recovery Act to clean up waste located on Indian lands even though neither statute explicitly referenced the trust responsibility or the obligation); *White v. Califano*, 581 F.2d 697, 698 (8th Cir. 1978)(Where state lacked authority to provide critical health care services to tribal member, trust relationship imposed duty on federal government to provide such services even where the statute was silent on the issue).
[14] *Jicarilla Apache Nation v. United States*, 100 Fed. Cl. 726, 740 n. 18 (2011)(government's conduct in executing its trust duties are not subject to traditional arbitrary and capricious review); *Jicarilla Apache*

Judge Seymour summarized the issue in the famous dissent-that-became-the-majority opinion in *Jicarilla Apache Tribe v. Supron Energy Corp.*:

> [T]he most significant error the majority makes is its employment of administrative law analysis without considering what role, if any, the Secretary's fiduciary duty should play in a court's examination of his administrative action. . . . [T]he Secretary's actions in a situation such as this are constrained by principles of Indian trust obligations as well as by standards of administrative law.[15]

These cases demonstrate that the federal trust responsibility informs the responsibilities of executive agency action and requires more than mere minimal compliance where, like here, trust assets are implicated. The suggestion that the trust responsibility imposes no duty on the federal government that it does not already owe to the general public is simply contrary to over two and a half centuries of law and policy of this Country.

NSPM, in turn, attempts to sweep away the trust responsibility with three broad and unsupported statements. First, NSPM suggests that PIIC "provides no legal support" for its position that the trust responsibility requires the NRC to take a thorough hard look at reasonably foreseeable catastrophic events that would decimate the Community's lands and people.[16] This statement, of course, ignores the cases cited throughout PIIC's Motion Memorandum, and especially at pages 2-4, which, significantly, NSPM does not discuss or attempt to distinguish.

Second, NSPM, citing the *Gros Ventre* case, boldly states "nor does the trust obligation dictate that third party land (such as the NSPM ISFSI) be regulated in the best interest of Indian tribes."[17] This contention, simply put, is untrue and is inconsistent with innumerable cases that provide precisely the opposite. In fact, federal courts have specifically recognized a tribe's right

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Tribe v. Supron Energy Corp, 782 F.2d 855 (10th Cir. 1986), *reconsideration en banc* adopting dissenting opinion of Judge Seymour, 728 F.2d 1555, 1566 (10th Cir. 1984).

[15] *Jicarilla Apache Tribe,* 782 F.2d 855, *reconsideration en banc* adopting dissenting opinion of Judge Seymour, 728 F.2d 1555, 1566 (10th Cir. 1984).

[16] NSPM Answer at 5.

[17] NSPM Memo at 6.

to regulate third-party off-reservation conduct that impacts its rights[18] and relied on the trust responsibility to control third party off-reservation conduct that adversely impacts, or has the potential to adversely impact, tribal interests.[19]

For example, in *Pyramid Lake Paiute Tribe of Indians v. Morton*,[20] the court vacated regulations that diverted water to off-reservation irrigation districts from rivers that provided water to the Tribe's reservation. The Court determined that the Secretary was obligated to formulate a regulation that would preserve water for the Tribe and that was required because of the fundamental importance of water to the life of the reservation and the "moral obligation of the highest responsibility and trust" that the United States acting through its executive agencies has assumed.[21]

Another apt example is *Northern Cheyenne Tribe v. Hodel*.[22] There, the court considered Interior's offer to lease 2.24 billion tons of federal coal in the Powder River region of Montana and Wyoming for mining. Like here, the land involved bordered the Tribe's reservation. The leases were challenged by the Tribe because, *inter alia*, the impact of the mining on the Tribe's homeland and its people. In its order for remand, the court directed that –

> The district court should now promptly hold an evidentiary hearing to determine these [comparative] costs [to the parties] and then decide whether or not an injunction is appropriate. If the district court should determine that the threatened harm to the environment, including the cultural, social and economic cost to the Tribe, would be irreparable and that the balance of equities favors the Tribe, all mining shall be stayed until the Secretary completes his new review.[23]

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[18] *See Montana v. United States*, 450 U.S. 544, 1254 and 1258 (1982).
[19] *See Hodel*, 851 F.2d at 1158; *Confederated Salish and Kootenai Tribes of Flathead Reservation, Montana v. Namen*, 665 F.2d 951, 964-65 (9th Cir. 1982); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 256-59 (D.D.C. 1972).
[20] 354 F.Supp. 252 (D.D.C. 1972).
[21] *Pyramid Lake Paiute Tribe*, 354 F.Supp. at 256.
[22] 851 F.2d 1152 (9th Cir. 1988).
[23] 851 F.2d at 1158.

As in *Northern Cheyenne Tribe*, the PIIC submits that the reasonably foreseeable, and readily measurable potential impacts from the storage of high level spent nuclear fuel be evaluated. As the Court there concluded, the reach of the trust responsibility – to assess the potential for irreparable harm to the cultural, social and economic lives of the PIIC – focuses not on the location of the conduct as NSPM suggests, but on the impact of that conduct on the trust corpus. NSPM's contention to the contrary is simply unfounded.

Third, NSPM contends that PIIC is urging the NRC to violate its regulations by employing a more rigorous review than may be required absent the potential impact on tribal trust resources.[24] That suggestion is unworthy of any substantive response.

NSPM and NRC Staff assertions that the trust responsibility means that the PIIC is only entitled to the simple compliance with regulations applicable to the general public defy basic tenets of federal Indian law and legal interpretation. The NSPM and NRC Staff interpretation would render the trust responsibility meaningless. It's as if the trust responsibility was only meant to elevate Tribal status to that of the general public, rather than providing special consideration to sovereign nations, above and beyond what is provided to the general public.

Rather than asking for a non-compliance with regulations, PIIC is asking that NRC recognize its special trust responsibility in this unique case and: 1) take action to assure that the NRC's assumptions underlying the Continued Storage Rule – replacing the casks, ISFSI and dry transfer system (DTS) every 100 years – will be funded so that the statutory duty to provide reasonable assurance of adequate protection of the public health and safety and promote the common defense and security will be met for the PIIC; and 2) consider the unique impacts on the PIIC and its reservation homeland in the reasonably foreseeable scenario that institutional

[24] NSPM Answer at 5 and 6.

controls may not exist or that adequate funding will not be available to reload the casks and rebuild the ISFSI every 100 years. The special trust responsibility to the PIIC dictates that the NRC's generic assumptions be assured in this site-specific proceeding due to the PIIC's reservation homeland adjacent to the continued storage facility, and that the NRC also conduct a site-specific environmental impact analysis of potential impacts should the assumptions in the Continued Storage Rule and GEIS not be fulfilled. The requested waiver would allow this analysis to occur.

C. PIIC's Contention.

In addition to the waiver criteria, NSPM also argues that the PIIC's new contention did not meet the NRC's contention admissibility standards because the PIIC's claim that the loss of institutional controls is a foreseeable event that is not evaluated is "unsupported by facts," the PIIC's assertion that there remains a question regarding how to assure funding over the long term and indefinite scenarios is "unsupported by law," and the PIIC's assertion that the NRC has omitted findings required by the Atomic Energy Act is "unsupported by facts or law." Each of these is discussed below.

1. Reasonable Foreseeability

NSPM asserts that the PIIC's claim that the reasonably foreseeable event of failed barriers maintained by institutional controls was not assessed is wrong because PIIC does not factually support the "reasonably foreseeable" claim and failed barriers were qualitatively assessed in any event. In response, PIIC would emphasize that the NRC assumed that eventually casks and ISFSIs would have to be replaced, and that a DTS would need to be constructed. These are foreseeable events to deal with the potential for "failed barriers." These are "maintenance or remedial actions" that NRC believes will be necessary for "monitoring, and

controlling or remediating releases." At the very least, NRC must take action, such as explicitly requiring the creation of the requisite funding for institutional controls, that will assure that NRC assumptions will come to fruition in this specific licensing case.

NSPM asserts that the finding of "LARGE" impacts from the permanent failure of institutional controls renders PIIC's argument that the GEIS analysis must be "more complete" immaterial and would not make a difference in the outcome of the proceeding. This ignores the very real possibility that a more refined analysis would identify mitigating mechanisms – central to a NEPA analysis – that may result from the PIIC request for a comprehensive analysis. In addition, the special trust responsibility to the PIIC and the unique circumstances of this case, i.e., the PIIC, rather than general public, will be most directly affected by the "LARGE" impacts that would result from the failure of institutional controls, demand that the NRC assure that its general assumptions about longer term continued storage safety (replacement casks, ISFSI and DTS) will be adequately funded. Imposing conditions to make this assured funding happen would make a difference to the outcome of this proceeding.

2. Funding

NSPM argues that there are existing regulations, contractual arrangements and state provisions that will address the funding issue and that it cannot be assumed that NSPM and appropriate government agencies will not adhere to these requirements and arrangements. The costs of maintenance, monitoring and controlling or remediating releases with replacement casks, a new ISFSI, and DTS are potentially very large (i.e. $584 million to replace 98 casks at $5.96 million per cask in 2013 dollars), and there is no state or federal statutory mandate, regulatory requirement, or license condition that requires the collection of these enormous amounts of money. These costs were not originally anticipated or included in the existing

regulatory provisions, and further assurance that such costs will be covered should be provided *now* by actions and conditions requiring the beginning of fund accumulation. In addition, a more comprehensive site-specific analysis of the costs of the new casks, ISFSI and DTS should be conducted, with projections to the time period of long-term storage, given the enormous discrepancy between the per cask cost at the PI ISFSI and those assumed by the NRC in the Continued Storage Rule GEIS.

3. The Atomic Energy Act

NSPM asserts that the PIIC's claim that NRC has omitted findings required by the AEA is unsupported, and specifically argues that the PIIC provides no legal support for its assertion that the requested safety determinations are required by the common defense and security or public health and safety requirements of the AEA. In response, the PIIC would note that the special nuclear material (SNM) in reactor fuel, including spent fuel licensed to be stored on the reactor site, is licensed pursuant AEA Section 53, which provides that the Commission shall establish, by rule, minimum criteria for the issuance of specific or general licenses for the distribution of SNM depending on the degree of importance to the common defense and security or to the health and safety of the public. The Commission has promulgated such regulations for SNM licensing in 10 C.F.R. Part 70. 10 C.F.R. § 70.31 provides, among other things, that no license for SNM may be issued if the Commission finds that such issuance would be inimical to the common defense and security or would constitute unreasonable risk to the health and safety of the public. ISFSIs are licensed under 10 C.F.R. Part 72. 10 C.F.R. § 72.40(a)(5) requires that the Commission find that the applicant's proposed operating procedures to protect health and minimize danger to life or property are adequate. Section 72.40(a)(13) requires reasonable assurance that the activities authorized by the license can be conducted without endangering the

health and safety of the public. Section 72.40(a)(14) provides the NRC cannot issue the license if the Commission believes that issuance would be inimical to the common defense and security or to the health and safety of the public. Physical protection of stored spent fuel is addressed in part in 10 C.F.R. § 73.51(b)(1) which directs each licensee to establish and maintain a physical protection system with the objective of providing high assurance that activities involving spent nuclear fuel do not constitute an unreasonable risk to public health and safety.

The NRC staff also argued that the AEA does not require the NRC to make a safety finding on ultimate disposal of spent fuel in individual licensing actions. However, the PIIC is not asking for a safety finding on ultimate disposal. Rather, the PIIC is asking for an appropriate finding (or a condition to support a finding) that longer term storage *on this site* will be safe and that the funding needed to support that finding and the activities necessary for safety as assumed in the GEIS – replacement casks, new ISFSI, and construction and operation of a DTS – will in fact be available, as well as a site-specific impact analysis on the PIIC and its reservation homeland should those assumptions never be fulfilled.

4. Other NSPM and NRC Staff Arguments

NSPM asserts that, to the extent that PIIC is challenging NSPM's financial qualifications and its ability to fund spent fuel management, PIIC is untimely. Our response to this assertion is that the new information reflecting on the ability to fund spent fuel management is the NRC's assumption in the Continued Storage Rule and supporting GEIS, that safe storage in the longer term will require expensive periodic replacement of casks, the ISFSI and a DTS. This information only became available when the Commission officially published the Continued Storage Rule and supporting GEIS.

The NRC Staff also asserts that PIIC fails to raise a genuine dispute with the license application. In response, PIIC notes that our contention raises a genuine issue on the viability of compliance with the GEIS assumptions (replacing casks and ISFSI every 100 years, and construction and operation of a DTS) absent some assured mechanism to fund such activities.

III. CONCLUSION

For the foregoing reasons, the PIIC's motion for leave to file a new and amended contention should be granted and its new contention should be admitted.

Respectfully submitted,

Signed (electronically) by Philip R. Mahowald

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November 24, 2014

November 24, 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
Northern States Power Company	)	
	)	Docket No. 72-10-ISFSI-2
(Prairie Island Nuclear Generating Plant, Independent Spent Fuel Storage)	)	ASLBP No. 12-922-ISFSI-MLRBD01

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Prairie Island Indian Community's Reply in Support of Motion for Leave to File a New Contention After Issuance of the NRC's Continued Storage of Spent Fuel Final Rule** was provided to the Electronic Information Exchange for service on participants in the above-captioned proceeding, this 24th day of November, 2014.

Signed (electronically) by Philip R. Mahowald

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November 24, 2014

FOR IMMEDIATE RELEASE

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PRAIRIE ISLAND INDIAN COMMUNITY CHALLENGES NUCLEAR REGULATORY COMMISSION'S "CONTINUED STORAGE" RULE

Rule increases likelihood that more than 1.5 million pounds of nuclear waste will be stranded on Prairie Island indefinitely

Welch, Minn., Oct. 27, 2014 – The Prairie Island Indian Community today filed an appeal challenging the Nuclear Regulatory Commission's (NRC) final rule on the Continued Storage of Spent Nuclear Fuel with the United States Court of Appeals for the District of Columbia Circuit. The Continued Storage Rule and the Generic Environmental Impact Statement were recently approved by the NRC and became effective as of Oct. 20, 2014.

The states of New York, Connecticut and Vermont filed a separate appeal earlier today. In 2012, a coalition of the Prairie Island Indian Community, the states, and environmental groups won a landmark decision that vacated the NRC's Waste Confidence Decision and Temporary Storage Rule. In its decision, the Court of Appeals for the District of Columbia Circuit held that spent nuclear fuel "poses a dangerous, long-term health and environmental risk," and that the NRC "can and must assess the potential environmental effects" of permanent onsite storage.

"The NRC has sidestepped its obligation to our Tribe to do a full and complete analysis of the risks of permanent onsite storage of nuclear waste 600 yards from our nearest residences," said Tribal Council President Ronald Johnson. "It leaves communities like Prairie Island at considerable risk, exposing us to the vulnerabilities of aging facilities, human error and natural disasters for generations to come."

"We had hoped that the NRC's revised rule and environmental impact analysis would remedy the deficiencies identified by the Court of Appeals and reflect an honest, realistic assessment of how indefinite onsite storage might affect future generations," said Tribal Council President Johnson. "Unfortunately the NRC's Continued Storage Rule simply provides regulatory cover for the federal government's ongoing breach of its statutory obligation under the Nuclear Waste Policy Act of 1982 (NWPA) to remove spent nuclear waste to a geologic repository."

"We are proud to join the states of New York, Connecticut and Vermont in challenging the Continued Storage Rule," said Tribal Council President Johnson. "We still hope that the State of Minnesota will follow the lead of its sister states and re-engage in the fight to ensure that the

NRC meets its obligations under federal law to assess the public health, safety and environmental risks of indefinite onsite storage."

Temporary on-site nuclear storage was first approved on Prairie Island in 1994, with the guarantee that the federal government would be required to develop a permanent repository within two decades. "For more than two decades the Prairie Island Indian Community has been waiting for the federal government to uphold its promise and remove on-site nuclear waste that sits just 600 yards from our backyards," Johnson said. "No other community sits as close to a nuclear site and its waste storage." The number of so-called temporary dry cask storage containers at Prairie Island currently totals 36, with a total of 98 casks needed if the nuclear plant operates to the end of its current license in 2034.

About the Prairie Island Indian Community
The Prairie Island Indian Community, a federally recognized Indian Nation, is located in southeastern Minnesota along the banks of the Mississippi River, approximately 30 miles from the Twin Cities of Minneapolis and St. Paul. Twin nuclear reactors and 36 large steel nuclear waste storage casks sit just 600 yards from Prairie Island tribal homes. A total of 98 casks could be stranded on Prairie Island indefinitely unless the federal government fulfills its promise to build a permanent storage facility. The only evacuation route off the Prairie Island is frequently blocked by passing trains. The Tribe has been pushing for the removal of the nuclear waste since 1994 when Xcel Energy was first allowed to store the waste near its reservation. On the web: www.prairieisland.org.

The Prairie Island Indian Community joined the states of New York, Connecticut, Vermont and New Jersey and other public interest groups in the successful challenge to the 2010 amendment to the NRC's Waste Confidence Decision and Temporary Storage Rule. *See New York et al. v. Nuclear Regulatory Commission*, 681 F.3d 471 (D.C. Cir. 2012). In its decision vacating the Waste Confidence Decision and Temporary Storage Rule, the United States Court of Appeals for the District of Columbia Circuit directed the NRC to consider the possibility that a geologic repository for permanent disposal of spent nuclear fuel might never be built.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NEW YORK, *et al.*	)	
	)	
Petitioners	)	
	)	
v.	)	
	)	Case Nos. 14-1210,
UNITED STATES NUCLEAR REGULATORY	)	14-1212, 14-1216,
COMMISSION, and	)	14-1217
UNITED STATES OF AMERICA	)	
	)	(consolidated)
Respondents	)	

CORPORATE DISCLOSURE STATEMENT FOR
NORTHERN STATES POWER COMPANY

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Northern States Power Company ("NSPM") submits this Corporate Disclosure Statement.

NSPM, a Minnesota Corporation, is a direct, wholly owned utility subsidiary of Xcel Energy Inc. No other publicly held company has 10 percent or more equity interest in NSPM. NSPM owns and operates the Prairie Island Nuclear Generating Plant, Units 1 and 2, and the Prairie Island Independent Storage Facility, near Red Wing, Minnesota.

Respectfully submitted,

/s/ signed electronically by

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Dated: November 25, 2014

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NEW YORK, *et al.*	)	
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	)	Case Nos. 14-1210,
UNITED STATES NUCLEAR REGULATORY	)	14-1212, 14-1216,
COMMISSION, and	)	14-1217
UNITED STATES OF AMERICA	)	
	)	(consolidated)
Respondents	)	

CERTIFICATE OF SERVICE

I hereby certify that on this day, copies of "Motion of Northern States Power Company for Leave to Intervene in Support of Respondents" and "Corporate Disclosure Statement for Northern States Power Company" in the captioned proceeding have been served 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 paid.

Respectfully submitted

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