

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Michael M. Gibson, Chairman  
Dr. Gary S. Arnold  
Nicholas G. Trikouros

In the Matter of

NORTHERN STATES POWER CO.

(Prairie Island Nuclear Generating Plant,  
Independent Spent Fuel Storage Installation)

Docket No. 72-10-ISFSI-2

ASLBP No. 12-922-01-ISFSI-MLR-BD01

December 23, 2014

ORDER

(Denying Motion to File a New Contention Concerning the  
Continued Storage of Spent Nuclear Fuel)

The Prairie Island Indian Community (PIIC) has moved to admit a new contention “based on the Nuclear Regulatory Commission’s [(NRC’s)] recently-issued Final Rule on the Continued Storage of Spent Nuclear Fuel (Continued Storage Rule).”<sup>1</sup> PIIC contends that the NRC owes a “trust responsibility” to Indian Tribes that requires the NRC to go beyond “solely complying with existing statutes and regulations,” by ensuring its actions are in the best interests of PIIC and its members.<sup>2</sup> According to PIIC, the NRC failed to meet this trust responsibility when it issued the

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<sup>1</sup> 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 at 1 (Oct. 20, 2014) [hereinafter Motion to Admit CSR Contention].

<sup>2</sup> Id. at 3–4. According to PIIC, under the federal government’s trust responsibility, “the federal government is obligated to protect Indian trust lands from alienation, confiscation, environmental degradation, or the risk of environmental degradation.” Id. at 3.

Continued Storage Rule.<sup>3</sup> PIIC's contention challenges aspects of the Continued Storage Rule, and therefore PIIC asks for a waiver of the rule pursuant to 10 C.F.R. § 2.335(b) (2014).<sup>4</sup>

The applicant, Northern States Power Company (Northern States), and the NRC Staff each oppose the admission of PIIC's proffered contention. Both of these parties argue that PIIC's contention is beyond the scope of these proceedings because it challenges a Commission rule.<sup>5</sup> They also argue that a waiver of the Continued Storage Rule is inappropriate in this circumstance because PIIC cannot demonstrate the presence of "special circumstances" for a waiver, which are required under 10 C.F.R. § 2.335(b).<sup>6</sup> Intervenors filed their reply on November 24, 2014.<sup>7</sup>

In this Order, we conclude that PIIC has failed to demonstrate the special circumstances required to support a waiver of the Continued Storage Rule, and therefore we deny PIIC's motion to admit the new contention.

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<sup>3</sup> Id. at 4–5.

<sup>4</sup> Id. at 13.

<sup>5</sup> See Northern States Power Company's Answer Opposing 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 at 2–3 (Nov. 14, 2014) [hereinafter Northern States' Answer]; 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 Nuclear Fuel Rule at 3, 7 (Nov. 14, 2014) [hereinafter NRC Staff Answer].

<sup>6</sup> Northern States' Answer at 14–15; NRC Staff Answer at 6.

<sup>7</sup> See 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 (Nov. 24, 2014) [hereinafter Intervenor's Reply].

I. Procedural Background

This proceeding arises from Northern States' application for a forty-year extension of its license to operate the Prairie Island Independent Spent Fuel Storage Installation (ISFSI).<sup>8</sup> On August 24, 2012, PIIC timely filed a petition to intervene challenging Northern States' license renewal application.<sup>9</sup> PIIC's petition raised seven contentions, including several Waste Confidence<sup>10</sup>-based contentions, which are discussed below.<sup>11</sup> Shortly after the NRC's publication of its Draft Environmental Assessment and Draft Finding of No Significant Impact,<sup>12</sup> PIIC timely moved to admit three amended contentions based on the Draft Environmental Assessment,<sup>13</sup> some of which also covered Waste Confidence issues.<sup>14</sup> The Board's April 30,

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<sup>8</sup> See Letter from Mark A. Schimmel, Site Vice President, Prairie Island Nuclear Generating Plant, Northern States Power Company – Minnesota, to Director, Division of Spent Fuel Storage and Transportation, Office of Nuclear Material Safety and Safeguards, NRC, Prairie Island [ISFSI] License Renewal Application (Oct. 20, 2011) (ADAMS Accession No. ML11304A068).

<sup>9</sup> See [PIIC's] Request for Hearing and Petition to Intervene in License Renewal Proceeding for the Prairie Island [ISFSI] (Aug. 24, 2012) (ADAMS Accession No. ML12237B193) [hereinafter Petition to Intervene].

<sup>10</sup> The term "Waste Confidence" refers generally to the NRC's rulings on the "degree of assurance" that spent nuclear fuel and related radioactive waste from nuclear power plants can be safely stored and disposed of "past the expiration of existing facility licenses." See Waste Confidence Decision Update, 75 Fed. Reg. 81,037, 81,038 (Dec. 23, 2010).

<sup>11</sup> See generally Petition to Intervene at 24–60.

<sup>12</sup> See 78 Fed. Reg. 69,460 (Nov. 19, 2013); Draft Environmental Assessment for the Proposed Renewal of U.S. Nuclear Regulatory Commission License No. SNM–2506 for Prairie Island [ISFSI] (Nov. 7, 2013) (ADAMS Accession No. ML13205A120) [hereinafter Draft Environmental Assessment].

<sup>13</sup> See [PIIC] Motion to Admit New and Amended Contentions after Issuance of NRC's Draft Environmental Assessment (Dec. 12, 2013) (ADAMS Accession No. ML13347A274) [hereinafter Motion to Admit Amended Contentions].

<sup>14</sup> Id. at 2, 4.

2014 order reviews the early procedural history of this case,<sup>15</sup> and so it will not be repeated here.

A. Contentions Currently Admitted

This contention is not the only matter pending before this Board. In fact, four admitted contentions are pending in this case: (1) part of amended Contention 2 (The Draft Environmental Assessment Does Not Adequately Address Cumulative Impacts on Related Projects on the PIIC, Its Members and Its Land),<sup>16</sup> (2) part of renewed and amended Contention 3 (The Draft Environmental Assessment Fails to Satisfy the NRC's Federal Trust Responsibility to Assess and Mitigate the Potential Impacts on the PIIC, Its People, and Its Land),<sup>17</sup> (3) part of Contention 4 (Northern States' Environmental Report Does Not Adequately Assess the Impacts of the [Prairie Island] ISFSI on the Adjacent Minority Population),<sup>18</sup> and (4) all of Contention 6 (Northern States' License Renewal Application Is Deficient Because It Did Not Adequately Address the Potential Degradation of High Burnup Fuel Due to Aging During Storage, Subsequent Handling, and Transportation. 10 C.F.R. § 72.122 Requires Confinement Barriers and Systems to Protect Degradation of Fuel and to Not Pose Operational Safety Problems).<sup>19</sup>

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<sup>15</sup> See LBP-14-06, 79 NRC \_\_\_, \_\_\_ (slip op. at 2–4) (2014).

<sup>16</sup> See id. at \_\_\_ (slip op. at 11–28). The admissible portion of Contention 2 relates to PIIC's argument that the Draft Environmental Assessment "fails to adequately address [t]he potential impacts of the reasonably foreseeable expansion of the [Prairie Island] ISFSI on cultural and historic resources." Motion to Admit Amended Contentions at 4.

<sup>17</sup> LBP-14-06, 79 NRC at \_\_\_ (slip op. at 7, 29). The admissible portion of Contention 3 relates to PIIC's allegation that the Draft Environmental Assessment (1) inadequately analyzes the cumulative impacts of a possible expansion of the ISFSI on cultural and historic resources, and (2) wrongly concludes that such an allegedly deficient analysis can discharge the NRC's trust responsibility. Id. at \_\_\_ (slip op. at 29).

<sup>18</sup> The admissible portions of Contention 4 concern two alleged disparate impacts on PIIC as a minority population: (1) the disturbance of historic and archaeological resources, and (2) skyshine radiation. See LBP-12-24, 76 NRC 503, 520–23 (2012).

<sup>19</sup> See id. at 526–28.

## B. The Continued Storage Rule & PIIC's Waste Confidence Contentions

Because PIIC's proposed contention challenges NRC rules relating to management of spent nuclear fuel, we provide below a brief historical summary those rules. The Commission issued its first generic determination on the safety and environmental impacts of the storage and disposal of spent nuclear fuel in its August 31, 1984 Waste Confidence Decision.<sup>20</sup> At that time, the Commission expressed reasonable assurance that safe disposal of spent nuclear fuel and radioactive waste is technically feasible, and "that one or more mined geologic repositories for commercial high-level radioactive waste and spent fuel will be available by the years 2007–2009."<sup>21</sup> The same day, the Commission issued a final rule, codified at 10 C.F.R. § 51.23, known as the Temporary Storage Rule.<sup>22</sup> The Temporary Storage Rule<sup>23</sup> "expressed the Commission's reasonable assurance that a repository was likely to be available by 2007–2009."<sup>24</sup> As a result of this determination, the Commission's rule<sup>25</sup> instructed that "the agency did not need to assess the site-specific impacts of continuing to store the spent fuel in either an onsite or offsite storage facility in new reactor licensing EISs [Environmental Impact Statements] or EAs [Environmental Assessments] beyond the expiration dates of reactor licenses."<sup>26</sup>

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<sup>20</sup> See generally Waste Confidence Decision, 49 Fed. Reg. 34,658 (Aug. 31, 1984).

<sup>21</sup> Id. at 34,658.

<sup>22</sup> See Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238, 56,240 (Sept. 19, 2014); Requirements for Licensee Actions Regarding the Disposition of Spent Fuel Upon Expiration of Reactor Operating Licenses, 49 Fed. Reg. 34, 688 (Aug. 31, 1984).

<sup>23</sup> 10 C.F.R. § 51.23(a).

<sup>24</sup> 79 Fed. Reg. at 56,240.

<sup>25</sup> 10 C.F.R. § 51.23(b).

<sup>26</sup> 79 Fed. Reg. at 56,240. The Commission amended the Waste Confidence Decision and Temporary Storage Rule in 1990, extending the expected date of development of a spent fuel repository to 2025. See Waste Confidence Decision Review, 55 Fed. Reg. 38,474, 38,477 (Sept. 18, 1990).

In 2010, the Commission updated its Waste Confidence Decision and Temporary Storage Rule,<sup>27</sup> eschewing a specific date for the development of a spent fuel repository and instead concluding that such a repository “will be available . . . when necessary.”<sup>28</sup> However, on June 8, 2012, in New York v. NRC, 681 F.3d 471 (D.C. Cir. 2012), the United States Court of Appeals for the District of Columbia Circuit invalidated the NRC’s Waste Confidence Decision Update and the Temporary Storage Rule, noting that “[a]t this time, there is not even a prospective site for a repository, let alone progress toward the actual construction of one.”<sup>29</sup>

New York v. NRC precipitated a series of contentions on Waste Confidence matters before Atomic Safety and Licensing Boards in multiple licensing proceedings. Likewise, PIIC, in its August 24, 2012 Petition to Intervene and December 12, 2013 Motion to Admit Amended Contentions, raised a number of contentions concerning Waste Confidence matters:<sup>30</sup> amended Contention 1 (The Draft Environmental Assessment Improperly Minimizes Waste Storage Impacts),<sup>31</sup> part of amended Contention 2,<sup>32</sup> and part of Contention 4.<sup>33</sup> While PIIC

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<sup>27</sup> See Waste Confidence Decision Update, 75 Fed. Reg. 81,037; Consideration of Environmental Impacts of Temporary Storage of Spent Fuel after Cessation of Reactor Operation, 75 Fed. Reg. 81,032 (Dec. 23, 2010).

<sup>28</sup> 75 Fed. Reg. at 81,038.

<sup>29</sup> See New York v. NRC, 681 F.3d at 473–74.

<sup>30</sup> See Petition to Intervene at 24–60; Motion to Admit Amended Contentions at 2, 4.

<sup>31</sup> Motion to Admit Amended Contentions at 2. Amended Contention 1 alleged that the Draft Environmental Assessment must consider the impacts of long-term storage at the Prairie Island ISFSI. See LBP-14-06, 79 NRC at \_\_\_ (slip op. at 6–7).

<sup>32</sup> Motion to Admit Amended Contentions at 3. Amended Contention 2 alleged in part that the Draft Environmental Assessment did not adequately address cumulative impacts resulting from (1) long-term waste storage; and (2) the potential inability to transport high burn-up fuel offsite. See LBP-14-06, 79 NRC at \_\_\_ (slip op. at 7–10).

<sup>33</sup> Petition to Intervene at 42. Contention 4 alleged in part that Northern States’ Environmental Report did not assess the disparate impact on adjacent minority populations of long-term waste storage. See LBP-12-24, 76 NRC at 520–21.

acknowledged that the Commission, in CLI-12-16,<sup>34</sup> had instructed Licensing Boards to hold in abeyance any contentions on Waste Confidence matters until after the Commission's issuance of a new GEIS, PIIC nevertheless asked for a waiver of the Temporary Storage Rule to allow it to proceed with its contentions.<sup>35</sup> Pursuant to the Commission's order in CLI-12-16,<sup>36</sup> this Board held in abeyance PIIC's contentions that implicated Waste Confidence issues—which, of necessity, included PIIC's waiver petition.<sup>37</sup>

On August 26, 2014, the Commission issued CLI-14-08,<sup>38</sup> adopting (1) a generic environmental impact statement to identify and analyze the environmental impacts of continued storage of spent nuclear fuel (the Continued Storage GEIS);<sup>39</sup> and (2) associated revisions to the Temporary Storage Rule in 10 C.F.R. § 51.23 (now referred to as the Continued Storage Rule).<sup>40</sup> In CLI-14-08, the Commission noted that “the impacts of continued storage will not vary significantly across sites [and] can be analyzed generically.”<sup>41</sup> In the same order, the Commission further (i) lifted the suspension on final licensing decisions that it had imposed in CLI-12-16,<sup>42</sup> (ii) declined to accept for litigation the Waste Confidence-based contentions held in

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<sup>34</sup> Calvert Cliffs 3 Nuclear Project, LLC & Unistar Nuclear Operating Servs., LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), et al., CLI-12-16, 76 NRC 63, 68–69 (2012).

<sup>35</sup> Petition to Intervene at 56–58, 68.

<sup>36</sup> LBP-14-06, 79 NRC at \_\_ (slip op. at 2); LBP-12-24, 76 NRC at 511, 530.

<sup>37</sup> LBP-12-24, 76 NRC at 507 n.6.

<sup>38</sup> Calvert Cliffs 3 Nuclear Project, LLC & Unistar Nuclear Operating Servs., LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), et al., CLI-14-08, 80 NRC \_\_, \_\_ (2014).

<sup>39</sup> See Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,263 (Sept. 19, 2014). The full text of the Continued Storage GEIS is contained in NUREG-2157 (Sept. 2014) (ADAMS Accession Nos. ML14196A105, ML14196A107).

<sup>40</sup> See Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238.

<sup>41</sup> Calvert Cliffs, CLI-14-08, 80 NRC at \_\_ (slip op. at 9).

<sup>42</sup> Id. at \_\_ (slip op. at 3).

abeyance, and (iii) “direct[ed] the Atomic Safety and Licensing Boards to reject the contentions pending before them.”<sup>43</sup> On October 2, 2014, consistent with the Commission’s instruction in CLI-14-08, this Board dismissed all the contentions in this proceeding, or portions thereof, touching on Waste Confidence issues.<sup>44</sup> On October 20, 2014, a little over two weeks afterwards, PIIC submitted its motion to admit the instant contention concerning the newly promulgated Continued Storage Rule.

II. Description of the Instant Contention

PIIC’s contention states:

**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.**<sup>[45]</sup>

In support of its contention, PIIC asserts that “[t]he ‘trust responsibility’ that the federal government owes to Indian tribes imposes both substantive and procedural duties on the federal government,” such as “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,” as well as a duty to consult with Indian Tribes.<sup>46</sup> According to PIIC, the government’s “trust

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<sup>43</sup> Id. at \_\_\_ (slip op. at 10).

<sup>44</sup> Order (Dismissing Waste Confidence-Based Contentions in Accordance with CLI-14-08) at 5 (Oct. 2, 2014).

<sup>45</sup> The Board notes that the instant contention is similar to PIIC’s amended Contention 3, which the Board admitted in part. See LBP-14-06, 79 NRC at \_\_\_ (slip op. at 7, 29). Contention 3 states:

The Draft Environmental Assessment Fails to Satisfy the NRC’s Federal Trust Responsibility to Assess and Mitigate the Potential Impacts on the PIIC, Its People, and Its Land.

Although both the instant contention and Contention 3 raise trust responsibility claims, Contention 3 challenges the site-specific Draft Environmental Assessment, while the instant contention challenges the NRC’s Continued Storage Rule and GEIS.

<sup>46</sup> Motion to Admit CSR Contention at 2–3.



responsibility is at its apex” when it comes to managing tribal resources and preventing confiscation or environmental degradation of those resources.<sup>47</sup>

PIIC contends that the NRC failed to give the Tribe the unique, special consideration it is due when the NRC promulgated the Continued Storage Rule and GEIS, and as a consequence, the NRC failed to meet its trust responsibility to the Tribe.<sup>48</sup> PIIC provides two specific instances in which the NRC failed to meet its trust responsibility. First, PIIC argues the government never evaluated “the reasonably foreseeable event” of a failure of the institutional controls at a site storing spent nuclear fuel, which in turn would threaten PIIC’s trust lands.<sup>49</sup> PIIC also maintains that the Continued Storage Rule and GEIS do not realistically address the costs associated with construction and replacement of ISFSI spent fuel casks.<sup>50</sup>

Northern States responds that, under the Continued Storage Rule, “[l]icensees do not need to consider these impacts in their environmental reports,” and thus, “[n]o additional analysis of the impacts of continued storage is required” beyond what is mentioned in NUREG-2157.<sup>51</sup> The NRC Staff likewise asserts that “PIIC’s new contention is plainly a challenge to the Continued Storage Rule and supporting GEIS.”<sup>52</sup> Accordingly, both the NRC Staff and Northern States maintain that PIIC’s contention challenges a Commission rule and so, under 10 C.F.R. §

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<sup>47</sup> Id. (citing Seminole Nation v. United States, 316 U.S. 286, 297 (1942)).

<sup>48</sup> See id.

<sup>49</sup> See id. at 5–6.

<sup>50</sup> See id. at 6–7.

<sup>51</sup> Northern States’ Answer at 2–3 (quoting 79 Fed. Reg. at 56,243).

<sup>52</sup> NRC Staff Answer at 4.

2.309(f)(1)(iii) (2014), PIIC's contention is beyond the scope of the instant proceeding.<sup>53</sup>

Northern States and the NRC Staff also reject PIIC's interpretation of the trust responsibility.<sup>54</sup>

### III. Ruling on the Instant Contention

#### A. PIIC's Contention Is a Collateral Attack on the Continued Storage Rule

The primary question before this Board is whether the instant contention is beyond the permissible scope of the current proceeding because it challenges a Commission rule, and thus we need not reach the merits of the parties' trust responsibility arguments. The Continued Storage Rule 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 [the Continued Storage GEIS]."<sup>55</sup> According to the Commission, the Continued Storage GEIS "satisfies the NRC's [National Environmental Policy Act (NEPA)] obligations with respect to continued storage" of spent nuclear fuel in licensing decisions.<sup>56</sup>

Clearly, the Commission's Continued Storage Rule and GEIS preclude any discussion of the environmental impacts of storage of spent nuclear fuel in individual licensing proceedings: "NUREG-2157 provides the determinations of the environmental impacts of continued storage to be used in site-specific environmental reviews. No additional analysis of the impacts of

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<sup>53</sup> Northern States' Answer at 3; NRC Staff Answer at 7.

<sup>54</sup> Northern States' Answer at 5; NRC Staff Answer at 3. Northern States and the NRC Staff also contend that the instant contention fails to raise a genuine dispute with the application, because PIIC's alleged concerns with the Continued Storage GEIS were either addressed within the document itself, or were separately addressed by the Commission. See Northern States' Answer at 7-11; NRC Staff Answer at 8-10. As the Board denies PIIC's motion on other grounds, we need not reach this argument.

<sup>55</sup> 79 Fed. Reg. at 56,260.

<sup>56</sup> Id. at 46,243; see also NUREG-2157 § ES.4.

continued storage is required.”<sup>57</sup> Therefore, in alleging that the Continued Storage Rule and GEIS fail to address the trust responsibility the NRC owes PIIC, the instant contention represents a collateral attack on the Continued Storage Rule and GEIS. Indeed, PIIC concedes that it “challenges 10 C.F.R. § 51.23(b).”<sup>58</sup>

#### B. Requirements for Contentions Challenging an NRC Rule

Federal law allows administrative agencies to address “issues of general applicability” through rulemaking instead of individual adjudications, and ““the choice made between proceeding by general rule or by individual, ad hoc, litigation is one that lies primarily within the informed discretion of the administrative agency.””<sup>59</sup> In this vein, when the Commission has opted to address an issue through regulation, it has uniformly prohibited litigation of that same issue in a site-specific adjudicatory proceeding: “Contentions that are the subject of general rulemaking by the Commission may not be litigated in individual license proceedings.”<sup>60</sup> According to 10 C.F.R. § 2.335(a), “no rule or regulation of the Commission, or any provision thereof . . . is subject to attack” in an adjudicatory proceeding unless a waiver is granted by the Commission.<sup>61</sup>

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<sup>57</sup> See 79 Fed. Reg. at 56,243; see also *id.* at 56,260 (Pursuant to the updated 10 C.F.R. § 51.23(b), license applicants “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.”).

<sup>58</sup> Motion to Admit CSR Contention at 13.

<sup>59</sup> Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 84 (1974) (quoting NLRB v. Bell Aerospace Co., 416 U.S. 267, 293 (1974) (quoting SEC v. Chenery Corp., 332 U.S. 194, 203 (1947))).

<sup>60</sup> Calvert Cliffs, CLI-14-08, 80 NRC at \_\_\_ (slip op. at 9 n.27) (citing Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999) (citing in turn Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-813, 22 NRC 59, 86 (1985); Douglas Point, ALAB-218, 8 AEC at 85; Private Fuel Storage, LLC (ISFSI), LBP-98-7, 47 NRC 142, 179 (1998))).

<sup>61</sup> 10 C.F.R. § 2.335(a).

A party can petition for a waiver of a specific NRC regulation.<sup>62</sup> Waiver requests are handled in a two-step process. A Licensing Board initially determines, based on the record, whether a “prima facie showing” has been made by the petitioner, at which point the Licensing Board “shall . . . certify the matter directly to the Commission” for a final determination.<sup>63</sup> A prima facie showing is not a final determination on the merits, and instead “merely requires the presentation of enough information to allow the Board to infer (absent disproof) that special circumstances exist.”<sup>64</sup> The Commission then makes the final decision whether or not to grant the waiver request.<sup>65</sup>

Under 10 C.F.R. § 2.335(b), “[t]he sole ground for petition of waiver or exception is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted.”<sup>66</sup> In Seabrook, the Commission clarified that “[s]pecial circumstances are present only if the petition properly pleads one or more facts, not common to a large class of applicants or facilities, that were not considered either explicitly or

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<sup>62</sup> Id. § 2.335(b).

<sup>63</sup> Id. § 2.335(d).

<sup>64</sup> Pac. Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-10-15, 72 NRC 257, 279–80 (2010) (citing Black’s Law Dictionary 1310 (9th ed. 2009)), aff’d in part & rev’d in part, CLI-11-11, 74 NRC 427 (2011); see also Tenn. Valley Auth. (Watts Bar, Unit 2), 71 NRC 656, 662 n.9 (2010) (“Although the term prima facie is not defined in the Commission’s regulations, we interpret it to mean a substantial showing. That is, the affidavits supporting the petition must present each element of the case for waiver in a persuasive manner with adequate supporting facts.”); Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 and 2), ALAB-895, 28 NRC 7, 22 (1988) (“We have found that a prima facie showing within the meaning of 10 C.F.R. § 2.758(d) is one that is ‘legally sufficient to establish a fact or case unless disproved.’” (quoting Pac. Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-653, 16 NRC 55, 72 (1981) (“Prima facie evidence must be legally sufficient to establish a fact or case unless disproved.”))).

<sup>65</sup> 10 C.F.R. § 2.335(d); Diablo Canyon, LBP-10-15, 72 NRC at 279.

<sup>66</sup> 10 C.F.R. § 2.335(b).

by necessary implication in the proceeding leading to the rule sought to be waived.”<sup>67</sup> The Commission also stated in Seabrook that a waiver should not be granted unless the petition relates to a significant safety problem: “It would not be consistent with the Commission’s statutorily mandated responsibilities to spend time and resources on matters that are of no substantive regulatory significance.”<sup>68</sup>

Subsequent to Seabrook, the Commission’s Millstone<sup>69</sup> decision set forth a four-part test for granting a waiver under 10 C.F.R. § 2.335(b):

- (i) the rule’s strict application “would not serve the purposes for which [it] was adopted”;
- (ii) the movant has alleged “special circumstances” that were “not considered, either explicitly or by necessary implication, in the rulemaking proceeding leading to 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) a waiver of the regulation is necessary to reach a “significant safety [or environmental<sup>70</sup>] problem.”<sup>71</sup>

“For a waiver request to be granted, all four factors must be met.”<sup>72</sup>

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<sup>67</sup> Pub. Serv. Co. of N.H., et. al. (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 597 (1988), reconsid. denied, CLI-89-3, 29 NRC 234, CLI-89-7, 29 NRC 395 (1989).

<sup>68</sup> Id.

<sup>69</sup> Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551 (2005).

<sup>70</sup> Although the waiver issue in Millstone involved a significant safety concern, subsequent case law makes clear Millstone applies equally to significant environmental concerns (which is what PIIC seeks here with its waiver request). See Exelon Generation Co. (Limerick Generating Station, Units 1 and 2), CLI-13-07, 78 NRC 199, 209 (2013) (“We clarify now that the fourth Millstone factor also may apply to a significant environmental issue.”), petition for review docketed, No. 14-1225 (D.C. Cir. filed Nov. 4, 2014); Diablo Canyon, LBP-10-15, 72 NRC at 305 n.56 (“Because the rules in question, as well as the contention itself, address compliance with NEPA and not safety issues under the [Atomic Energy Act] . . . the waiver is needed to address a significant environmental issue instead of a significant safety issue.”).

<sup>71</sup> Millstone, CLI-05-24, 62 NRC at 559–60 (footnotes omitted) (quoting Seabrook, CLI-88-10, 28 NRC at 597); see also Limerick, CLI-13-07, 78 NRC at 205 (“In interpreting section 2.335, we identified four factors—often referred to as the ‘Millstone factors’—that waiver petitioners must satisfy.”).

### C. PIIC's Waiver Request

PIIC requests a waiver of the Continued Storage Rule, specifically, of 10 C.F.R. § 51.23(b), as updated by 79 Fed. Reg. 56,260.<sup>73</sup> PIIC contends that a waiver is warranted in order for this Board to “address an issue of great significan[ce] – the NRC’s fulfillment of its trust responsibilities to the PIIC.”<sup>74</sup> PIIC argues that it “is merely requesting waiver of a PROCEDURAL rule in order for the NRC to fulfill its trust responsibilities to the PIIC.”<sup>75</sup> PIIC also emphasizes that its unique location near to the ISFSI is relevant for the waiver: “This presents a legitimately unique fact situation. The PIIC’s immediate proximity to the [Prairie Island] ISFSI warrants a harder NEPA review tha[n] the Continued Storage Rule and GEIS would allow.”<sup>76</sup>

The accompanying declaration by PIIC’s counsel, Philip R. Mahowald, however, presents a different argument. In his declaration, Mr. Mahowald states that PIIC is “petitioning for a waiver of 10 CFR Section 51.23(a),” instead of § 51.23(b), “based on the decision of the United States Court of Appeals for the District of Columbia Circuit in New York v. NRC.”<sup>77</sup>

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<sup>72</sup> Millstone, CLI-05-24, 62 NRC at 560. There has been some discussion as to whether the Millstone factors entail more than 10 C.F.R. § 2.335(b)’s sole requirement for “special circumstances.” See, e.g., Exelon Generation Co. (Limerick Generating Station, Units 1 and 2), LBP-13-1, 77 NRC 57, 64 (2013) (“It is clear to us that the Millstone test establishes an appreciably higher burden for would-be waiver seekers than does 10 C.F.R. § 2.335(b).”), aff’d on other grounds, CLI-13-07, 78 NRC 199; Diablo Canyon, LBP-10-15, 72 NRC at 279 (noting the difference between the tests established in the regulation versus the case law). The Commission’s view, however, is that “[a]ll four of the Millstone requirements derive from the language and purpose of section 2.335(b),” and that all must be met in order for a waiver to be granted. Limerick, CLI-13-07, 78 NRC at 205 n.19.

<sup>73</sup> Motion to Admit CSR Contention at 14.

<sup>74</sup> Id. at 13.

<sup>75</sup> Id. at 14 (capitalization in original).

<sup>76</sup> Id.

<sup>77</sup> Declaration of Philip R. Mahowald ¶ 4 (Oct. 20, 2014).

Relying on New York v. NRC, Mr. Mahowald argues 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.”<sup>78</sup> Mr. Mahowald claims that “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,” much less any plan to move the fuel to a repository once selected.<sup>79</sup>

Both Northern States and the NRC Staff oppose PIIC’s waiver request. Northern States asserts that PIIC does not meet the first Millstone waiver requirement because “the Government fulfills its trust duties by executing federal law, not by waiving federal law.”<sup>80</sup> Regarding the second Millstone factor, Northern States argues that PIIC’s concerns were considered and rejected by the Commission as a whole, and that “PIIC’s proximity to the [Prairie Island] ISFSI is explicitly recognized in the GEIS.”<sup>81</sup> Northern States also takes issue with PIIC’s claim that it is in a unique position in accordance with the third Millstone factor: “Even ‘proximity to a nuclear

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<sup>78</sup> Id. ¶ 5.

<sup>79</sup> Id. A petition for a waiver must be accompanied by an affidavit stating “with particularity the special circumstances alleged to justify the waiver or exception requested.” 10 C.F.R. § 2.335(b) (emphasis added). Mr. Mahowald’s declaration, however, does not appear to meet this requirement. First, although PIIC in its motion petitions for a waiver of 10 C.F.R. § 51.23(b), the declaration accompanying the motion states that “PIIC is petitioning for a waiver of 10 CFR Section 51.23(a).” Compare Motion to Admit CSR Contention at 13 with Declaration of Philip R. Mahowald ¶ 4 (Oct. 20, 2014). Furthermore, the disparate arguments in support of the waiver request made in Mr. Mahowald’s declaration, centering on the District of Columbia Circuit’s decision in New York v. NRC, are unrelated to the trust responsibility arguments made by PIIC in its motion and reply. Notably, Mr. Mahowald’s October 20, 2014 declaration appears identical in many respects to his prior, August 24, 2012 declaration supporting PIIC’s attempt to seek a waiver of 10 C.F.R. § 51.23(a). Compare Declaration of Philip R. Mahowald ¶¶ 6–7 (Aug. 24, 2012) with Declaration of Philip R. Mahowald ¶¶ 4–6 (Oct. 20, 2014) and Petition to Intervene at 58–60 (all using similar language).

<sup>80</sup> Northern States’ Answer at 14 (citing United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2324–25 (2011)).

<sup>81</sup> Id. at 14–15.

power facility' or ISFSI is 'hardly unique.'"<sup>82</sup> Regarding the fourth Millstone factor, Northern States claims PIIC's concerns regarding the loss of institutional controls and radiation barriers have been addressed in the GEIS, and thus "there is no significant safety issue to be addressed."<sup>83</sup>

The NRC Staff responds more generally that "PIIC's request does not explain why the effects of the Continued Storage Rule are unique to the Prairie Island ISFSI as opposed to other ISFSI sites, nor does it discuss whether the NRC's licensing action in this case would implicate a significant safety problem."<sup>84</sup> The NRC Staff also insists it is improper for PIIC to rely solely on the trust responsibility and adjacency to the site in support of its waiver argument: "These points do not amount to a sufficient justification to litigate the Continued Storage Rule and GEIS in this individual licensing proceeding."<sup>85</sup>

In its reply, PIIC reemphasizes that the risks to the Tribe from the Prairie Island ISFSI are significant: "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."<sup>86</sup> PIIC urges that "the significant issues raised in PIIC's contention warrant a 'custom tailored approach,' i.e., the grant of a waiver from a generic finding."<sup>87</sup>

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<sup>82</sup> Id. at 15 (quoting Millstone, CLI-05-24, 62 NRC at 562).

<sup>83</sup> Id.

<sup>84</sup> NRC Staff Answer at 6.

<sup>85</sup> Id.

<sup>86</sup> Intervenor's Reply at 3.

<sup>87</sup> Id. at 4 (citation omitted).



D. PIIC Fails to Plead the Requisite Special Circumstances for a Waiver of the Continued Storage Rule

The Commission has repeatedly expressed its preference that generic issues regarding the management of high-level waste be addressed through rulemaking and not through individual adjudications.<sup>88</sup> The Commission maintains that storage and disposal of high-level waste “is a national problem of essentially the same degree of complexity and uncertainty for every renewal application and it would not be useful to have a repetitive reconsideration of the matter.”<sup>89</sup> In a recent decision, the Commission noted that “the court of appeals endorsed a generic approach.”<sup>90</sup> As a result, the Commission’s approval of the Continued Storage Rule and GEIS mandates that contentions discussing the long-term storage of spent nuclear fuel are not to be heard by individual Licensing Boards.<sup>91</sup> As expected, when a series of new challenges to the Continued Storage Rule were lodged in several different license proceedings, the Commission again quickly acted to exercise its “inherent supervisory authority over agency adjudications to review the petition and motions ourselves” in a joint proceeding.<sup>92</sup>

To whatever extent it might be permissible for PIIC to bring a contention concerning continued storage of high-level waste before this Board, PIIC has not pled the requisite special

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<sup>88</sup> See Oconee, CLI-99-11, 49 NRC at 345 (“The Commission sensibly has chosen to address high-level waste disposal generically rather than unnecessarily to revisit the same waste disposal questions, license-by-license, when reviewing individual applications.”).

<sup>89</sup> Id. (quoting 61 Fed. Reg. 66,537, 66,538 (Dec. 11, 1996)).

<sup>90</sup> Calvert Cliffs, CLI-14-08, 80 NRC at \_\_\_ (slip op. at 9 n.25) (citing New York v. NRC, 681 F.3d at 480 (“[W]e see no reason that a comprehensive general analysis would be insufficient to examine on-site risks that are essentially common to all plants.”)).

<sup>91</sup> Id. at \_\_\_ (slip op. at 9, 12) (“Because these generic impact determinations have been the subject of extensive public participation in the rulemaking process, they are excluded from litigation in individual proceedings.”).

<sup>92</sup> See DTE Electric Co. (Fermi Nuclear Power Plant, Unit 3), et al., CLI-14-09, 80 NRC \_\_\_ (slip op.) (Oct. 7, 2014).

circumstances under Millstone to allow this Board to certify a waiver of the Continued Storage Rule to the Commission.

Looking to the first Millstone factor, it is apparent that the purpose of 10 C.F.R § 51.23, as updated by 79 Fed. Reg. 56,240, is to restrict repetitive litigation at the Licensing Board level on the continued storage and disposal of spent nuclear fuel. As Northern States notes,<sup>93</sup> the first line of the Continued Storage Rulemaking Federal Register notice states:

The purpose of this final rule (rule) is to preserve the efficiency of the NRC's licensing process by adopting into the NRC's regulations the Commission's generic determinations of the environmental impacts of the continued storage of spent nuclear fuel (spent fuel) beyond the licensed life for operations of a reactor (continued storage).<sup>[94]</sup>

The rule explains that "repetitive site-specific licensing proceedings" on waste storage issues add unnecessary cost to the licensing process.<sup>95</sup>

Turning to the second Millstone factor, PIIC has not demonstrated that its "trust responsibility" concern was neglected by the NRC when writing the Continued Storage Rule and GEIS. During the rulemaking process, the NRC "held a government-to-government meeting with the Prairie Island Indian Community in June 2013," affording PIIC an opportunity to express its concerns.<sup>96</sup> In addition, PIIC provided "both oral and written comments" during the Continued Storage Rulemaking.<sup>97</sup> In at least one of those written comments, PIIC discussed in detail its views about the NRC's trust responsibility with respect to the Prairie Island ISFSI.<sup>98</sup>

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<sup>93</sup> Northern States' Answer at 14.

<sup>94</sup> 79 Fed. Reg. at 56,239 (emphasis added).

<sup>95</sup> Id. at 56,259.

<sup>96</sup> NUREG-2157 § ES.9; see also id. app. C.1 (discussing communications with Indian Tribes).

<sup>97</sup> Id. app. C.1.

<sup>98</sup> See Comments Submitted by the Attorneys General of the States of New York, Vermont, Connecticut, and the Commonwealth of Massachusetts, the Vermont Department of Public

This indicates that the NRC “by necessary implication” considered PIIC’s trust responsibility concerns during its rulemaking.<sup>99</sup>

Apart from PIIC’s own communications with the NRC, the agency also considered trust responsibility comments raised by other tribes with regards to the Continued Storage Rule. In particular, a comment lodged by the Santa Ynez Band of Chumash Indians was addressed directly in the Continued Storage GEIS:

D.2.29.9 – COMMENT: A commenter provided historical background information for the Santa Ynez Band of the Chumash Indians, located 120 km (75 mi) south of the Diablo Canyon Power Plant in Avila, California. The commenter also referenced the NHPA [National Historic Preservation Act], EOs [Executive Orders] 13007 (61 FR 26771) and 13175 (65 FR 67249), the Federal government’s Tribal Trust Responsibility, United Nations Declaration on the Rights of Indigenous Peoples, and the Advisory Council on Historic Preservation regulations at 36 CFR Part 800, which require consultation with Tribes prior to proceeding with Federal undertakings.

RESPONSE: The NRC appreciates the comments provided by the Santa Ynez Band of Chumash Indians describing the Federal requirements for government-to-government consultation. The NRC recognizes that the Federal government owes a general trust responsibility to Federally recognized Indian Tribes. The NRC also recognizes that there are specific government-to-government consultation responsibilities regarding interactions with Federally recognized Tribal governments due to their status as dependent sovereign nations. As such, the NRC offered Federally recognized Tribes the opportunity for government-to-government consultation consistent with the principles in Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments” issued November 9, 2000 (65 FR 67249) during the scoping and draft [Continued Storage] GEIS comment periods.

As discussed in the GEIS, the rulemaking does not authorize the initial or continued operation of any nuclear power plant, nor does it authorize storage of spent fuel. Because the rulemaking does not identify specific sites for NRC licensing actions, this proceeding cannot facilitate an NHPA Section 106 or Executive Order 13007 (61 FR 26771) review. The NRC will comply with NHPA

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Service, and the Prairie Island Indian Community on the Nuclear Regulatory Commission’s Draft Waste Confidence Generic Environmental Impact Statement and Proposed Rule at 4–5, 117–20 (Dec. 20, 2013) (ADAMS Accession No. ML13365A345) (commenting that “[t]he federal government’s role as trustee imposes” a “higher responsibility” on the NRC when considering the storage of spent nuclear fuel near tribal lands and resources).

<sup>99</sup> Millstone, CLI-05-24, 62 NRC at 560 (quotation omitted).

Section 106 requirements and other appropriate laws and orders when an applicant submits a request for a site-specific license (e.g., new reactor licensing, reactor license renewal, away-from-reactor ISFSIs, specifically licensed at-reactor ISFSIs, and DTSS [dry transfer system]). No revisions were made to the GEIS or [Continued Storage] Rule as a result of these comments.<sup>[100]</sup>

The text of the Continued Storage GEIS belies PIIC's claim that the NRC failed "either explicitly or by necessary implication" to consider the trust responsibility it owes to Indian Tribes when it issued the Continued Storage Rule.<sup>101</sup>

Separate and apart from the Continued Storage GEIS, it appears that the Commission has grappled for some time with the trust responsibility it owes Indian Tribes—and to PIIC in particular. In fact, the Commission's recently issued Proposed Tribal Policy Statement states that it owes a trust responsibility to Indian Tribes: "As an independent agency of the Federal government, the NRC shares the unique trust relationship with, and responsibility to, Indian Tribes."<sup>102</sup> In its Draft Tribal Protocol Manual, the NRC Staff also asserts that the NRC owes a trust responsibility to Indian Tribes, and discusses specifically how that responsibility has impacted its relationship with PIIC during the Prairie Island ISFSI license renewal.<sup>103</sup> While we

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<sup>100</sup> NUREG-2157 app. D.2.29.9 (emphasis added).

<sup>101</sup> Millstone, CLI-05-24, 62 NRC at 560 (quotation omitted).

<sup>102</sup> NRC Proposed Tribal Policy Statement, 79 Fed. Reg. 71,136, 71,140 (Dec. 1, 2014); see also Policy Issue Notation Vote, Tribal Consultation Policy Statement and Protocol, SECY-14-0006, at 5–6, Enclosure 1 at 17 (Jan. 10, 2014), available at <http://www.nrc.gov/reading-rm/doc-collections/commission/secys/2014/2014-0006scy.pdf> (The NRC Staff discusses the development of the Proposed Tribal Policy Statement, and recommends to the Commission that it adopt the following policy statement: "The NRC recognizes the Federal trust relationship and will seek to uphold its trust relationship with Indian Tribes."). The Commission has stated that it intends to fulfill its trust responsibility on a case-by-case basis. 79 Fed. Reg. at 71,137.

<sup>103</sup> See Draft Tribal Protocol Manual, Revision 1, NUREG-2173, § 1.D (Dec. 2014) (ADAMS Accession No. ML14274A014) [hereinafter Draft Manual] According to the Draft Manual, on October 3, 2012, as part of its case-by-case approach to working with Indian Tribes, the NRC signed a memorandum of understanding with PIIC "establishing a cooperating agency relationship between the NRC and the PIIC in preparing an Environmental Assessment for the license renewal of [the Prairie Island ISFSI]." Id. § 1.F.

make no ruling at this time as to the substance of the NRC's trust responsibility due Indian Tribes or PIIC,<sup>104</sup> the record shows that the Commission considered its trust responsibility owed Indian Tribes when promulgating the Continued Storage Rule and GEIS.

Regarding the third Millstone factor, PIIC has not explained sufficiently how its trust responsibility concern is unique to the Prairie Island ISFSI. While it is possible to demonstrate that a trust responsibility concern is unique to a particular facility, PIIC merely asserts that its adjacency to the Prairie Island ISFSI by itself "presents a legitimately unique fact situation."<sup>105</sup> PIIC, however, does not explain why its adjacency to the facility creates a fundamentally different situation from those facing other tribes, which were addressed by the NRC in the Continued Storage GEIS.<sup>106</sup> For example, the Continued Storage GEIS explains that the NRC in the past examined the environmental consequences of a private fuel storage facility slated to be located on or near the Skull Valley Band of Goshute Indians in Utah.<sup>107</sup> In the GEIS, the

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<sup>104</sup> The Commission states in its Proposed Tribal Policy Statement that it "implements its responsibilities through assuring that Tribal members receive the same protections under regulations that are available to other persons." 79 Fed. Reg. at 71,137. The Draft Manual similarly states that "the NRC exercises its fiduciary duty in the context of its authorizing statutes, including the Atomic Energy Act (AEA), and implements any fiduciary responsibility by ensuring that Tribal members receive the same protections under implementing regulations that are available to other persons." Draft Manual § 1.D (citing a decision of the United States Court of Appeals for the Ninth Circuit in Skokomish v. FERC, 121 F.3d 1303 (9th Cir.1997)). However, these documents do not represent the final view of the Commission. Moreover, the Proposed Tribal Policy Statement "is intended only to improve the internal management of the Commission, and is not intended to, and does not, grant, expand, create, or diminish any rights, benefits, or trust responsibilities, substantive or procedural, enforceable at law or in equity in any cause of action by any party against the United States, the Commission, or any person." 79 Fed. Reg. at 71,140 n.2. Similarly, the Draft Manual is "a reference tool" designed to help the NRC Staff "develop and maintain government-to-government relationships with Tribal governments." Draft Manual at 1.

<sup>105</sup> Motion to Admit CSR Contention at 14.

<sup>106</sup> See also Millstone, CLI-05-24, 62 NRC at 562 (noting that proximity to a nuclear power station does not by itself create a "unique" situation warranting a waiver of the Commission's rules).

<sup>107</sup> NUREG-2157 §§ ES.16.2, 2.1.3. The facility, however, was never constructed. Id. § 2.1.3.

Commission also concluded that Native Americans “as a group, experience common conditions with regard to environmental exposure or environmental effects” from storage of spent nuclear fuel.<sup>108</sup> And lastly, PIIC has made no showing that the effects of storing spent fuel at the Prairie Island ISFSI presents impacts unique from those already considered in the GEIS with respect to storing spent fuel at any ISFSI.<sup>109</sup> While the issue PIIC presents is a significant environmental matter (and hence meets that Millstone factor), PIIC has otherwise failed to make a prima facie showing on the first three Millstone factors, and so this Board cannot certify PIIC’s waiver request to the Commission.

We note that PIIC has raised a few other arguments, none of which sway the Board. First, although PIIC claims that it is requesting a waiver of a “PROCEDURAL rule” only,<sup>110</sup> we view the Continued Storage Rule to be much more than simply a procedural rule. Second, Mr. Mahowald’s references to New York v. NRC, and his claim that the establishment of a future repository is remote and speculative,<sup>111</sup> are addressed directly by the Continued Storage Rule and GEIS. Indeed, the Continued Storage Rule and GEIS were issued in response to New York v. NRC.<sup>112</sup> The Continued Storage GEIS analyzes in detail both short-term and long-term environmental impacts of spent fuel storage, even were a repository to be delayed indefinitely.<sup>113</sup> Finally, insofar as PIIC argues that the NRC failed to meet its general statutory

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<sup>108</sup> Id. § 3.3.

<sup>109</sup> The Board does not mean to suggest in any way that it would be impossible for a trust responsibility argument to be “unique,” but only that PIIC has failed to demonstrate that this situation is unique.

<sup>110</sup> Motion to Admit CSR Contention at 13–14 (capitalization in original); Intervenor’s Reply at 3.

<sup>111</sup> Declaration of Philip R. Mahowald ¶¶ 4, 5 (Oct. 20, 2014).

<sup>112</sup> 79 Fed. Reg. at 56,242.

<sup>113</sup> See NUREG-2157 § 4. In addition, as noted by Northern States, the Continued Storage GEIS did address the alleged deficiencies Intervenor raised in its motion. Northern States’

obligations under NEPA when it promulgated the Continued Storage Rule and GEIS,<sup>114</sup> such arguments are similarly rejected as a collateral attack on the Commission's regulations, unsupported by any showing of "special circumstances" warranting a waiver under Millstone.<sup>115</sup>

The Board understands that PIIC views the potential indefinite storage of spent nuclear fuel adjacent to its lands to be a significant concern for the Tribe.<sup>116</sup> However, as noted above, the significance of an issue does not by itself support a waiver of the NRC's rules under Millstone. All four Millstone factors must be met—and PIIC has not done so. PIIC is certainly free to bring a trust responsibility claim before this Board with respect to site-specific issues, such as to challenge portions of an Environmental Assessment.

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Answer at 5–7. The GEIS addressed what would happen if there were a permanent loss of institutional controls and the spent fuel casks ruptured, and determined that there would likely be "catastrophic consequences." NUREG-2157 app. B.3.4. Nonetheless, the Commission determined that the maintenance of institutional controls is a "reasonable" assumption. Id. The GEIS also discusses the cost for construction and replacement of ISFSIs. See id. §§ 2.1.2.2, 2.1.3, 2.2.1.

<sup>114</sup> See, e.g., Motion to Admit CSR Contention at 5 (PIIC claims that "the failure to undertake a complete analysis of a reasonably foreseeable event is inconsistent with the hard look required by NEPA.").

<sup>115</sup> See 10 C.F.R. § 2.335(a), (b); Ocone, CLI-99-11, 49 NRC at 345.

<sup>116</sup> See Motion to Admit CSR Contention at 14; Intervenor's Reply at 4.

IV. Conclusion

For the reasons stated above, we deny PIIC's motion for leave to file a new contention regarding the Continued Storage Rule and GEIS. A petition for interlocutory review of this Order may be filed within twenty-five (25) days of service of this Order in accordance with 10 C.F.R. § 2.341(f)(2) (2014). Any party supporting or opposing the petition may file an answer pursuant to 10 C.F.R. § 2.341(b)(3).

It is so ORDERED.

THE ATOMIC SAFETY  
AND LICENSING BOARD  
*/RA/*

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Michael M. Gibson, Chair  
ADMINISTRATIVE JUDGE  
*/RA/*

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Dr. Gary S. Arnold  
ADMINISTRATIVE JUDGE  
*/RA/*

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Nicholas G. Trikouros  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
December 23, 2014



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **ORDER (Denying Motion to File a New Contention Concerning the Continued Storage of Spent Nuclear Fuel) (LBP-14-16)** have been served upon the following persons by Electronic Information Exchange.

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Prairie Island Nuclear Generating Plant, Independent Spent Fuel Storage Installation,  
Docket No. 72-10-ISFSI

**ORDER (Denying Motion to File a New Contention Concerning the Continued Storage of Spent Nuclear Fuel) (LBP-14-16)**

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[Original signed by Brian Newell ]  
Office of the Secretary of the Commission

Dated at Rockville, Maryland  
this 23<sup>rd</sup> day of December, 2014