

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

D.C. Cir. No. 14-1210 (consolidated with D.C. Cir. Nos.
14-1212, 14-1216, 14-1217)

STATE OF NEW YORK, *et al.*,
Petitioners,

v.

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

COMMONWEALTH OF MASSACHUSETTS, *et al.*,
Intervenors.

Petition for Review of Final Administrative Action of the United States Nuclear
Regulatory Commission

PETITION FOR REHEARING EN BANC

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July 18, 2016

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PETITION FOR REHEARING EN BANC

I. INTRODUCTION

Pursuant to Fed. R. App. P. 35 and D.C. Cir. Rule 35, Petitioners Beyond Nuclear, et al.¹ seek rehearing *en banc* of their petition for review of the U.S. Nuclear Regulatory Commission's ("NRC's") Continued Spent Fuel Storage Rule ("Continued Storage Rule") and Generic Environmental Impact Statement ("GEIS"). A three-judge panel of this Court (the "Panel") denied the petition on June 3, 2016 in *State of New York v. NRC*, No. 14-1210 (Consolidated) ("Panel Decision").

The Panel Decision conflicts with two decisions cited by the Panel relating to the timing of the National Environmental Policy Act's ("NEPA's") requirement for a complete environmental impact statement to support a major federal action: *State of New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012) (hereinafter "*New York I*") (the predecessor to this case) and *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588 (D.C. Cir. 2015) (hereinafter "*Jewell*") (relied on in the Panel Decision, slip

¹ Petitioners are the same petitioners as in No. 14-12016, *Beyond Nuclear, et al. v. NRC* (consolidated with Nos. 14-1210, 14-1212, and 14-1217 in *State of New York v. NRC*): Beyond Nuclear, Blue Ridge Environmental Defense League, Missouri Coalition for the Environment, New England Coalition, Nuclear Information and Resource Service, Riverkeeper, San Luis Obispo Mothers for Peace, Southern Alliance for Clean Energy, and Sustainable Energy and Economic Development Coalition. Natural Resources Defense Council, which joined Petitioners in the briefing leading to the Panel Decision, has not join Petitioners in this petition for rehearing *en banc*.

op. at 11). The Panel Decision conflicts with *New York I* by holding that the GEIS was adequate to satisfy NEPA, even though it was incomplete, lacking any consideration of whether to implement alternatives to avoid or mitigate the environmental impacts of spent fuel storage. Slip op. at 8, 10. The Panel Decision further conflicts with *New York I* by holding that the Continued Storage Rule and GEIS made no “irreversible and irretrievable commitment of resources” that would require the preparation of a complete environmental impact statement (“EIS”) (*id.* at 11-12), when in fact the GEIS made the preclusive safety findings for all reactor licenses that were held to require an EIS in *New York I*. And by failing to recognize that NRC’s reiteration of waste confidence safety findings had preclusively enabled licensing of *all* reactors, the Panel erroneously approved the GEIS’ cumulative impact analysis, which disregards any impacts of continued spent fuel storage other than the impacts of a single hypothetical nuclear plant. NRC Br. 23, J.A.291.

The Panel Decision conflicts with *Jewell* by holding that NRC may wait until the time of reactor licensing to cure the defects in the GEIS’ environmental analysis (*id.* at 11), without also holding that review of the GEIS itself was rendered premature by this conclusion under *Jewell*.

As a result of the Panel’s conflicting interpretations of *New York* and *Jewell*, the Panel Decision creates a new and erroneous rule of law: that this Circuit will

accept, as fully compliant with NEPA, an EIS whose analysis of alternatives bears no relationship to the environmental impacts it evaluates, as long as some part of that EIS will be used in a future environmental review. By approving the adequacy of such an incoherent EIS, the Panel undermined the value of an EIS as a decisionmaking tool. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

Therefore the Court should take review to ensure that its disposition of this case is consistent with *New York I* and *Jewell*, and to secure and maintain the uniformity of the Court's decisions.²

II. BACKGROUND

A. *New York I* and the Case on Remand from *New York I*

1. Waste Confidence Decision

In *New York I*, the Court granted petitioners' challenge to NRC's 2010 Update to the NRC's Waste Confidence Decision ("WCD"). Consistent with its legal obligation under the Atomic Energy Act to ensure protection of public health and safety in its licensing decisions, *see, e.g.*, 42 U.S.C. § 2133(d), NRC had stated for decades that it "would not continue to license reactors if [it] 'did not have reasonable confidence that . . . [spent fuel] can and will in due course be disposed of safely.'" *Detroit Edison Co.*, 81 N.R.C. 221, 235 (2015) (quoting 42 Fed. Reg.

² This Petition for Rehearing does not contest the portion of the Panel Decision that addresses the claims made by the States and Prairie Island Indian Community.

34,391, 34,393 (July 5, 1977)). *See also* 81 N.R.C. at 238-39; *Natural Res. Def. Council v. NRC*, 582 F.2d 166, 169 (2d Cir. 1978). Therefore, between 1984 and 2010, NRC had issued and periodically updated the WCD, making safety findings regarding the technical feasibility, availability, and timeliness of safe spent fuel disposal in a repository and the safety of spent fuel storage in the meantime. 681 F.3d at 474-75. It codified these safety findings in 10 C.F.R. § 51.23(a).

2. *New York I*

In *New York I*, the Court vacated NRC's 2010 WCD Update, holding that the NRC had failed to comply with NEPA. 681 F.3d at 476-77. The Court rejected NRC's argument that NEPA was inapplicable because the WCD was not a "major federal action." 681 F.3d at 476. NRC argued that because the WCD "does not authorize the licensing of any nuclear reactor or storage facility, and because a site-specific EIS will be conducted for each facility at the time it seeks licensure," it need not prepare an EIS in connection with issuing the WCD. *Id.* To the contrary, the Court found that under "controlling precedent," the WCD could not be treated as "separate from the individual licensing decisions it enables." *Id.* The Court further held that issuance of the WCD required NEPA compliance because it had "a preclusive effect in all future licensing decisions – it is a pre-determined 'stage' of each licensing decision." *Id.* The Court observed that "[i]t is not only reasonably foreseeable but eminently clear that the WCD will be used to enable licensing

decisions based on its findings.” *Id.* at 477. Therefore the Court vacated the WCD and ordered that it must be supported by an EIS or environmental assessment (“EA”). *Id.* at 477, 483.

3. Continued Storage Rule and GEIS

In 2014, NRC issued the Continued Storage Rule and GEIS. The Continued Storage Rule no longer contained the safety findings of the WCD regarding NRC’s confidence that spent fuel could be safely stored and disposed of. Instead, the Rule adopted the environmental impact findings of the GEIS and incorporated them into all licensing and re-licensing decisions. 10 C.F.R. § 51.23, J.A. 59.

As NRC subsequently clarified, however, it had not dropped its Waste Confidence safety findings, nor did it stop relying on them as prerequisites to reactor licensing. Instead, NRC had incorporated those same findings into an appendix to the GEIS. *Detroit Edison*, 81 N.R.C. at 235; Pet. Br. 6-7; Pet. Reply Br. 2-3; J.A.769-770. Based on the safety findings now incorporated in the GEIS, NRC continued to assert – as it had in the WCD – that “it is safe to proceed with reactor licensing because it is ultimately possible to dispose of spent nuclear fuel safely.” *Detroit Edison*, 81 N.R.C. at 239.

While the Court had held in *New York I* that the WCD constituted a major federal action because it enabled licensing, the GEIS did not characterize the proposed action addressed by the GEIS’ environmental analysis as bearing any

relationship to licensing or the storage of spent fuel. Instead, it characterized the proposed action as “the adoption of a revised rule – 10 CFR 51.23 – that codifies the analysis of the environmental impacts of continued storage of spent fuel.” Pet. Br. 9, J.A.338-40. Nor did the GEIS’ alternatives analysis address any alternatives to avoid or mitigate the environmental impacts of spent fuel storage, including mitigation measures or discontinuation of licensing. Instead, the GEIS compared the environmental effects (including costs and benefits) of writing a single generic EIS, writing many reactor-specific EISs, or writing a policy statement. Pet. Br. 9, J.A.694-712. The only part of the GEIS that related to spent fuel storage was the impact analysis. Pet. Br. 10-11. While the impact analysis discussed some measures that would mitigate the effects of spent fuel storage, the GEIS did not consider those measures as part of its alternatives analysis. J.A.1010. And despite the fact that the GEIS made binding safety and environmental determinations for all reactor licensing and re-licensing decisions, the GEIS’ impact analysis was restricted to continued spent fuel storage at a single hypothetical nuclear power plant. JA291.

Petitioners appealed the Continued Storage Rule and GEIS, contending in part that NRC had violated NEPA by failing to consider alternatives that would avoid or mitigate the environmental impacts of storing spent fuel, including the

alternative of ceasing the production of spent fuel by not licensing reactors. Pet. Br. 18-20.

B. Panel Decision

In *New York II*, the Panel denied Petitioners' petition for review. In addressing Petitioners' claim that NRC had violated NEPA by failing to consider alternatives that would avoid or mitigate the environmental impacts of continued storage of spent nuclear fuel, the Panel made two internally contradictory findings.

On the one hand, the Panel concluded that *New York I* "compel[led]" it to rule that the Continued Storage Rule was a "major federal action" and that the completeness and adequacy of the GEIS were subject to review in this proceeding. Slip op. at 8. On the other hand, the Panel declared that under *Jewell*, a review of the completeness of NRC's environmental impact analysis for spent fuel storage must be postponed until the time of reactor licensing. *Id.* at 11.

The Panel then went on to rule, paradoxically, that the GEIS satisfied NEPA's requirements for an EIS (*id.* at 9-10), even though its alternatives analysis bore no relationship to the environmental impacts at issue. *Id.* at 10 ("The NRC did consider alternatives for the only action it took in the Rule – i.e., incorporating the GEIS into future licensing proceedings."). Relying on *Jewell*, the Panel concluded that consideration of alternatives related to the environmental impacts of spent fuel could be postponed until the time of reactor licensing. *Id.* at 11-12.

ARGUMENT

III. THE PANEL DECISION CONFLICTS WITH *NEW YORK I* AND *JEWELL*.

The Panel's erroneous decision that a facially inadequate EIS can be judged complete and adequate now because its deficient alternatives analysis might be cured in the future stems from the Panel's internally inconsistent interpretations of *New York I* and *Jewell* with respect to the question of what is the appropriate timing for the Court's review of the adequacy of the NRC's Continued Spent Fuel Storage GEIS. The Panel Decision cannot be reconciled with either *New York I* or *Jewell*. Therefore, in order to ensure the uniformity of its decisions, the Court should take review.

A. Standard for the Timing of NEPA Obligations

As the Panel Decision correctly recognized, an agency's NEPA obligations are triggered when the agency takes a "major federal action" to which it has also made "an irreversible and irretrievable commitment of resources." Slip op. at 11 (quoting *Jewell*, 779 F.3d at 599-600).³ At that time, the agency must conduct a complete NEPA review that includes consideration of both the impacts of the

³ Numerous other D.C. Circuit precedents have also followed this rule. *See, e.g., Sierra Club v. Peterson*, 717 F.2d 1409, 1414 (D.C. Cir. 1983); *Public Citizen v. NRC*, 940 F.2d 679, 684 (D.C. Cir. 1991); *Wyoming Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 49 (D.C. Cir. 1999); *Ctr. for Biological Diversity v. U.S. Dept. of Interior*, 563 F.3d 466, 480 (D.C. Cir. 2009).

proposed action and the alternatives to the proposed action. *New York I*, 681 F.3d at 477.⁴

B. The Panel Decision Conflicts with *New York I*.

The Panel Decision conflicts with *New York I* in two respects. First, it contradicts *New York I* by accepting, as a complete and adequate EIS, a GEIS whose discussion of alternatives amounted to a comparison of how much paper is consumed by preparing a generic EIS, many separate site-specific EISs, or a policy statement. Pet. Br. 9, J.A.694-712. The GEIS made no attempt to explain how this array of administrative alternatives would “sufficiently reduce” the potentially significant radiological environmental impacts of spent fuel storage. 681 F.3d at 477. To accept as complete an EIS with such a deep chasm between the alternatives analysis and the impact analysis is utterly inconsistent with *New York I* and NEPA itself.

Second, the Panel Decision contradicts *New York I* by holding that the Rule is not an irreversible and irretrievable commitment of resources requiring the preparation of a complete EIS. As discussed above in Section II.A, the Continued Storage GEIS incorporates and perpetuates the very same Waste Confidence safety

⁴The “heart” of an EIS is the requirement that an agency must “‘rigorously explore and objectively evaluate’ the projected environmental impacts of all ‘reasonable alternatives’ for completing the proposed action.” *City of Alexandria, Va. v. Slater*, 198 F.3d 862, 866 (D.C. Cir. 1999) (quoting 40 C.F.R. § 1502.14); *see also* 10 C.F.R. pt. 51, subpt.A, app. A, para. (5).

findings found by the Court in *New York I* to constitute a part of the licensing decision requiring preparation of an EIS. These safety findings clear the way for reactor licensing by precluding any future challenges to the safety of spent fuel disposal or related activities. *Detroit Edison*, 81 N.R.C. at 242 (denying petitions to challenge, in individual reactor licensing proceedings, the GEIS' determinations of confidence that spent fuel can be safely disposed of). Just as the Waste Confidence safety findings in the WCD preclusively removed any obstacles to the issuance of reactor licenses based on the safety of spent fuel disposal, so they had the same effect in the proceeding for issuance of the Rule and GEIS. Therefore the Panel's failure to require a complete GEIS that addresses both the impacts of and alternatives to spent fuel storage conflicts with *New York I*.

C. The Conflict with *New York I* is Compounded by the Panel's Approval of the Cumulative Impacts Analysis.

In addition to being inconsistent with *New York I* (as discussed in Section III.B above), the Panel's erroneous determinations that (1) the Rule and GEIS are not part of NRC licensing decisions, and (2) the NRC made no irreversible and irretrievable commitment of resources, also undermine the validity of the Panel's determination that the GEIS' cumulative impacts analysis was adequate. In holding that a cumulative impact analysis of spent fuel impacts generated by more than one reactor was not required, the Panel found that "there are no concurrently pending proposals before the NRC because the NRC is not licensing any reactors." Slip op.

at 16 (citing *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 514 (D.C. Cir. 2010)). But the Panel failed to consider that the Waste Confidence safety findings made by NRC in the GEIS constituted a part of *all* nuclear reactor licensing and re-licensing decisions that can never be revisited. *Detroit Edison*, 81 N.R.C. at 242. Accordingly, the Panel was incorrect in declaring that the only decisions affected by the GEIS were decisions in “future licensing proceedings.” Slip op. at 16.⁵ Having chosen to make a generic safety determination that was applicable and preclusive in all reactor licensing decisions, the NRC was obligated to evaluate environmental impacts of that determination for all reactors to which it could apply. *New York I*, 681 F.3d at 476-77. To be consistent with *New York I*, the

⁵The Panel also failed to consider the fact that the NRC had suspended all pending reactor licensing and re-licensing decisions at the time of the Court's decision in *New York I*, and that all of these cases were still pending when the NRC issued the Rule and GEIS in 2014. *See* Pet. Br. 7. Environmental Petitioners challenged NRC's reliance on the Continued Storage Rule and GEIS in twenty-three of those proceedings. *Calvert Cliffs 3 Nuclear Project, LLC, et al.*, 80 N.R.C. 71 (2014). Any of those individual reactor licensing decisions that became ripe for review while this petition for review was pending were appealed to this Court and have been held in abeyance pending the outcome of this case. As demonstrated in Petitioners' Certificate as to Parties, Rulings, and Related Cases (included in Petitioners' Opening Brief), Petitioners had filed eight such appeals by the time Petitioners filed their petition for review of the Continued Storage Rule and GEIS. Two more decisions were appealed during the pendency of this petition for review. The Court has held all of these petitions for review in abeyance. *See* Order dated May 22, 2015 in No. 15-1114; Order dated August 7, 2015 in No. 15-1258 (Consolidated); Order dated October 15, 2015 in No. 15-1173; Order dated May 18, 2016 in No. 16-1108.

Panel should have ordered NRC to conduct a cumulative impact analysis for the Waste Confidence safety findings as they applied to all reactor licensing decisions.

D. The Panel Decision Conflicts with *Jewell*.

The Panel Decision also conflicts with *Jewell* by holding that NRC may wait until the time of reactor licensing to “ensure that it has fully complied with NEPA,” and yet proceeding with a review of the merits of the GEIS. Slip op. at 11. Having ruled that NRC’s NEPA obligation would not mature until the time of reactor licensing, the Panel was required by *Jewell* to rule that the GEIS is unripe and unreviewable until the time of reactor licensing. 779 F.3d at 599-600.

The Court should take review in order to secure and maintain uniformity of these decisions.

IV. CONCLUSION

For the foregoing reasons, the Court should grant rehearing *en banc* of Petitioners' petition for review.

Respectfully submitted,

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July 18, 2016

PETITIONERS' RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Cir. Rule 16.1, Petitioners Beyond Nuclear, Blue Ridge Environmental Defense League, Missouri Coalition for the Environment, New England Coalition, Nuclear Information and Resource Service, Riverkeeper, San Luis Obispo Mothers for Peace, Southern Alliance for Clean Energy, and Sustainable Energy and Economic Development Coalition state that they are nonprofit corporations whose general nature and purpose is environmental advocacy. Petitioners have no parent companies, no publicly-traded company has a 10% or greater ownership interest in any of them, and none of them is traded for profit.

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to D.C. Circuit Rules 15(c)(3) and 28(a)(1), counsel for Petitioners Beyond Nuclear, Blue Ridge Environmental Defense League, Missouri Coalition for the Environment, New England Coalition, Nuclear Information and Resource Service, Riverkeeper, San Luis Obispo Mothers for Peace, Southern Alliance for Clean Energy, and Sustainable Energy and Economic Development Coalition certify as follows:

1. Parties, Intervenors and *Amici Curiae*.

The parties submitting this petition for rehearing *en banc* are Petitioners Beyond Nuclear, Blue Ridge Environmental Defense League, Missouri Coalition for the Environment, New England Coalition, Nuclear Information and Resource Service, Riverkeeper, San Luis Obispo Mothers for Peace, Southern Alliance for Clean Energy, and Sustainable Energy and Economic Development Coalition on behalf of their members; and respondents United States Nuclear Regulatory Commission (“NRC”) and the United States of America. Additional Petitioners are Natural Resources Defense Council, the State of Connecticut, the State of New York, the State of Vermont, and the Prairie Island Indian Community.

The State of Massachusetts intervened on behalf of the Petitioners. The Nuclear Energy Institute, Entergy Nuclear Operations, Inc., and Northern States

Power Co. intervened on behalf of Respondents. The Sierra Club participated as an *amicus curiae*.

2. Rulings Under Review.

In their petition for review, Petitioners sought review of the following NRC final Rule and final Generic Environmental Impact Statement, as set forth below.

a. *Final Rule for Continued Storage of Spent Nuclear Fuel*, 79 Fed. Reg. 56238 (September 19, 2014).

b. *Final Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel*, 79 Fed. Reg. 56263 (September 19, 2014).

Petitioners now seek *en banc* review of the Panel Decision issued June 3, 2016.

3. Related Cases.

This proceeding consists of four consolidated cases. The lead case is *State of New York, et al. v. United States Nuclear Regulatory Commission and the United States of America*, D.C. Cir. No. 14-1210. The three cases that were consolidated in the aforementioned action are *Prairie Island Indian Community v. United States Nuclear Regulatory Commission and the United States of America*, D.C. Cir. No. 14-1212; *Beyond Nuclear et al. v. United States Nuclear Regulatory Commission and the United States of America*, D.C. Cir. No. 14-1216; and *Natural*

Resources Defense Council v. United States Nuclear Regulatory Commission and the United States of America, D.C. Cir. No. 14-1217.

The following other cases are related to the instant case:

- *Missouri Coalition for the Environment v. United States Nuclear Regulatory Commission and the United States of America*, D.C. Cir. No. 15-1114 (filed Apr. 23, 2015);
- *Beyond Nuclear vs. United States Nuclear Regulatory Commission and the United States of America*, D.C. Cir. No. 15-1173 (filed June 19, 2015);
- *Blue Ridge Environmental Defense League v. United States Nuclear Regulatory Commission and the United States of America*, No. 15-1258 (filed Aug. 6, 2015) (consolidated by Order dated August 7, 2015 with *Blue Ridge Environmental Defense League v. United States Nuclear Regulatory Commission and the United States of America*, No. 15-1259 (filed Aug. 6, 2015); *Blue Ridge Environmental Defense League v. United States Nuclear Regulatory Commission and the United States of America*, No. 15-1260 (filed Aug. 6, 2015); *Nuclear Information and Resource Service v. United States Nuclear Regulatory Commission and the United States of America* (No. 15-1261) (filed Aug. 6, 2015); *Sustainable Energy and Economic Development Coalition v. United States Nuclear Regulatory Commission and the United States of America* (No. 15-1262) (filed Aug. 6, 2016);

Beyond Nuclear v. United States Nuclear Regulatory Commission and the United States of America, D.C. Cir. No. 15-1263 (filed Aug. 6, 2015); and *Southern Alliance for Clean Energy*, No. 15-1427 (filed Nov. 20, 2015)); and

- *Sustainable Energy and Economic Development Coalition v. United States Nuclear Regulatory Commission and the United States of America* (No. 16-1108) (filed Apr. 11, 2016).

All of the above-listed cases appeal individual reactor licensing decisions on the ground that they rely on the Rule and GEIS appealed in this proceeding. This Court held all of the cases in abeyance pending its decision in this case. Petitioners in each of these cases have also asked the Court to hold them in abeyance pending the disposition of their petition for rehearing *en banc*.

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July 18, 2016

**UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,)	14-1210, 14-1212,
)	14-1216, and 14-1217)
Respondents.)	
_____)	

CERTIFICATE OF SERVICE

I, Diane Curran, certify that on July 18, 2016, I served the foregoing Petition for Rehearing En Banc (including an appendix with Corporate Disclosure Statement, and Certificate as to Parties, Rulings, and Related Cases) on the following by posting it on the Court’s Electronic Case Filing system:

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