

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS; GREG
ABBOTT, GOVERNOR OF THE
STATE OF TEXAS; and TEXAS
COMMISSION ON
ENVIRONMENTAL QUALITY

Petitioners,

v.

UNITED STATES NUCLEAR
REGULATORY COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

Case No. **21-60743**

**UNOPPOSED MOTION OF INTERIM STORAGE
PARTNERS, LLC FOR LEAVE TO INTERVENE**

Brad Fagg
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
202-739-3000
brad.fagg@morganlewis.com

Counsel for Interim Storage Partners, LLC

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Petitioners

- State of Texas; Greg Abbott, Governor of the State of Texas; and Texas Commission on Environmental Quality

- Counsel for Petitioners:

Michael R. Abrams
Assistant Attorney General
Office of the Attorney General
Solicitor General Division
P.O. Box 12548 (MC-059)
Austin, TX 78711-2548
Direct: 512-963-6407
Email: Michael.Abrams@oag.texas.gov

Respondents

- U.S. Nuclear Regulatory Commission
 - Counsel for U.S. Nuclear Regulatory Commission:

Andrew Paul Averbach, Esq., Solicitor
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop 15 D21

11555 Rockville Pike
Rockville, MD 20852-2738
Direct: 301-415-1956
Email: andrew.averbach@nrc.gov
Fax: 301-415-3200

- United States of America
 - Counsel for United States of America:

Justin Heminger
U.S. Department of Justice
Environment & Natural Resources Division-Appellate
Section
P.O. Box 7415
Ben Franklin Station
Washington, DC 20044-7415
Direct: 202-514-5442
Email: justin.heminger@usdoj.gov

Proposed Intervenor-Respondent

- Interim Storage Partners, LLC

Interim Storage Partners, LLC is a limited liability company organized and existing under the laws of the State of Delaware with principal offices in Andrews, Texas. The sole purpose of Interim Storage Partners, LLC is to license, design, construct and operate the Consolidated Interim Storage Facility at the Waste Control Specialists site in Andrews County, Texas. Interim Storage Partners, LLC is jointly owned by Orano CIS, LLC (51%) and Waste Control Specialists, LLC (49%). No other publicly held company has 10 percent or more equity interest in Interim Storage Partners, LLC.

Orano CIS, LLC is owned 100% by Orano USA, LLC. Orano CIS, LLC and Orano USA, LLC are both limited liability companies formed in the State of Delaware. Orano USA, LLC is 100% owned by Orano SA, a French entity. Orano SA is ultimately majority (70%) owned and

controlled by the French State, through two French government entities. Two Japanese entities (Mitsubishi and Japan Nuclear Fuel) each own a 5% (non-voting) interest in Orano SA. The remaining 20% interest (non-voting) in Orano SA is held in two (non-voting) trusts, in connection with financing arrangements.

Waste Control Specialists, LLC is wholly-owned by Fermi Holdings, Inc., an investment affiliate of J.F. Lehman & Co. The full ownership chain includes several other privately held J.F. Lehman & Co. investment affiliates, with no individual shareholders owning more than 25% of any of the entities.

- o Counsel for Interim Storage Partners, LLC:

Brad Fagg
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Direct: 202-739-3000
Email: brad.fagg@morganlewis.com

/s/ Brad Fagg
Brad Fagg

Dated: October 15, 2021

Introduction

Pursuant to FED. R. APP. P. 15(d) and FIFTH CIR. R. 15.5, Interim Storage Partners, LLC (“ISP”) respectfully files this Motion to Intervene as a party-respondent in the above-captioned matter. Respondent U.S. Nuclear Regulatory Commission (“NRC”), by its counsel Andrew P. Averbach, has indicated that the NRC does not oppose ISP’s intervention. Respondent United States of America, by its counsel Justin Heminger, has indicated that the United States of America (collectively with the NRC, the “Federal Respondents”) does not oppose ISP’s intervention. The State of Texas; Greg Abbott, Governor of the State of Texas; and Texas Commission on Environmental Quality (collectively, “Petitioners”), by counsel Michael R. Abrams, have indicated that the Petitioners do not oppose ISP’s intervention.

In support of the motion, ISP states as follows:

Background

1. The NRC was created to regulate the activities addressed in the Atomic Energy Act of 1954 (“AEA”) and “to ensure the safe use of radioactive materials for beneficial civilian purposes while protecting people and the environment.” NRC, About NRC (Feb. 8, 2021),

<https://www.nrc.gov/about-nrc.html>. In this role, the NRC issues, amends, and oversees licenses for nuclear materials.

2. By letters dated June 8, 2018, and July 19, 2018, ISP applied to the NRC (the “Application”) for a specific license (“License”) to construct and operate a Consolidated Interim Storage Facility to store spent nuclear fuel and other radiological waste (the “Facility”). The Facility would be located adjacent to an existing radiological waste facility in Andrews County, Texas.

3. On August 29, 2018, the NRC published a notice in the Federal Register providing the public, pursuant to the NRC’s Rules of Practice and Procedure at 10 C.F.R. § 2.309, an opportunity to (1) request a formal evidentiary hearing to challenge the Application, and (2) petition for leave to intervene in the proceeding. See 83 Fed. Reg. 44,070 (Aug. 29, 2018).

4. Between September 2018 and November 2018, multiple parties (“Administrative Challengers”)—but not the Petitioners—submitted to the NRC various filings, including hearing requests and petitions to intervene in the administrative proceeding, purporting to challenge the Application (“Initial Filings”).

5. In November 2018, the Secretary of the Commission referred the Initial Filings to the NRC's Atomic Safety and Licensing Board Panel ("Panel") for consideration under the NRC's Rules of Practice and Procedure at 10 C.F.R. § 2.309.

6. The Panel is a separate component of the NRC, independent from the Commission and the NRC Staff, and is composed of administrative judges who are lawyers, engineers, and scientists. See Atomic Safety and Licensing Board Panel (Feb. 25, 2021), <https://www.nrc.gov/about-nrc/organization/aslbpfundesc.html>.

7. On November 16, 2018, the Panel's Chief Administrative Judge established a three-judge Atomic Safety and Licensing Board ("Board") to consider the Filings.

8. The NRC's Rules of Practice and Procedure at 10 C.F.R. § 2.309(c) also permit hearing requests, intervention petitions, and motions for leave to file new or amended contentions to be filed after the deadline specified in 83 Fed. Reg. 44,070 (Aug. 29, 2018) upon the timely submission of a filing based on materially different information that was not previously available.

9. Pursuant to 10 C.F.R. § 2.309(c), certain of the Administrative Challengers submitted various filings purporting to challenge the Application based on allegedly new information that was not available when the Initial Filings were due (“Subsequent Filings”).

10. Following multiple rounds of briefing and oral argument, the Board issued, between 2019 and 2021, a series of orders ultimately denying or dismissing all challenges filed by the Administrative Challengers. See *Interim Storage Partners, LLC (WCS Consolidated Interim Storage Facility)*, LBP-19-7, 90 N.R.C. 31, 118 (2019); LBP-19-9, 90 N.R.C. 181 (2019); LBP-19-11, 90 N.R.C. 358 (2019); LBP-21-2, 93 N.R.C. __ (slip op.) (Jan. 29, 2021).

11. Pursuant to the NRC’s Rules of Practice and Procedure, between 2019 and 2021, each of the Administrative Challengers appealed to the Commission certain aspects of the Board’s orders referenced in para. 10.

12. In a series of orders between 2020 and 2021, the Commission affirmed each of the Board’s orders because the Administrative Challengers failed to demonstrate any error of law or abuse of discretion in any of the Board’s orders referenced in para. 10. See

Interim Storage Partners, LLC (WCS Consolidated Interim Storage Facility), CLI-20-13, 92 N.R.C. __ (Dec. 4, 2020) (slip op.); CLI-20-14, 92 N.R.C. __ (Dec. 17, 2020) (slip op.); CLI-20-15, 92 N.R.C. __ (Dec. 17, 2020) (slip op.); CLI-21-9, 93 N.R.C. __ (June 22, 2021) (slip op.).

13. Between March 2021 and August 2021, each of the Administrative Challengers petitioned the U.S. Court of Appeals for the District of Columbia Circuit for review of certain orders issued in the NRC administrative proceeding. See D.C. Cir. Case Nos. 21-1048, 21-1055, 21-1056, 21-1179 (all cases consolidated under lead Case No. 21-1048). Those cases remain pending.

14. On September 13, 2021, the NRC determined, based on its review of the Application, that: there is reasonable assurance that the activities that would be authorized by the License can be conducted without endangering the health and safety of the public; there is reasonable assurance that those activities will be conducted in compliance with the applicable regulations of 10 C.F.R. Part 72; and the issuance of the License will not be inimical to the common defense and security. Accordingly, the NRC issued Materials License No. SNM-2515

to ISP, pursuant to 10 C.F.R. Part 72, on September 13, 2021. See Pet., Attachs. A-G.

15. On September 23, 2021, Petitioners petitioned this Court under “42 U.S.C. § 2239(b) and Rule 15(a) of the Federal Rules of Appellate Procedure” for review of a Federal Register notice published by the NRC on September 17, 2021, which Petitioners characterize as an “order.” Pet. at 1. More specifically, Petitioners ask the court to review: Interim Storage Partners, LLC; WCS Consolidated Interim Storage Facility; Issuance of Materials License and Record of Decision, 86 Fed. Reg. 51,926 (Sept. 17, 2021).”

Grounds for Intervention

16. Rule 15(d) states that a motion to intervene “must be filed within 30 days after the petition for review is filed and must contain a concise statement of the interest of the moving party and the grounds for intervention.” Fed. R. App. P. 15(d). Since Rule 15(d) “provides no standard for resolving intervention questions,” this Court has identified two considerations: “first, the statutory design of the act and second, the policies underlying intervention in the trial courts pursuant to Fed. R.

Civ. P. 24.” *State of Tex. v. U.S. Dep’t of Energy*, 754 F.2d 550, 551 (5th Cir. 1985) (internal citation omitted).

17. Federal Rule of Civil Procedure 24(a)(2) states that, on timely motion, the Court must permit anyone to intervene who “claims an interest relating to the property or transaction that is the subject 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.” The inquiry under Rule 24(a)(2) “is a flexible one, which focuses on the particular facts and circumstances surrounding each application” and “intervention of right must be measured by a practical rather than technical yardstick.” *Entergy Gulf States La., L.L.C. v. E.P.A.*, 817 F.3d 198, 203 (5th Cir. 2016) (citing *Edwards v. City of Hous.*, 78 F.3d 983, 999 (5th Cir. 1996)). The rule “is to be liberally construed,” with “doubts resolved in favor of the proposed intervenor.” *Id.* (citing *In re Lease Oil Antitrust Litig.*, 570 F.3d 244, 248 (5th Cir. 2009)).

18. Accordingly, a proposed intervenor as of right must satisfy four requirements:

(1) the application for intervention must be timely;

- (2) the applicant must have an interest relating to the property or transaction which is the subject of the action;
- (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest; and
- (4) the applicant's interest must be inadequately represented by the existing parties.

Texas, 754 F.2d at 552; see also *Haspel & Davis Milling & Planting Co. v. Bd. of Levee Comm'rs of the Orleans Levee Dist.*, 493 F.3d 570, 578 (5th Cir. 2007). As discussed below, ISP meets all four requirements.

The Motion Is Timely

19. This motion is timely because it has been filed within "30 days after the petition for review [was] filed," as required by Fed. R. App. P. 15(d), and because it has been filed "promptly after the petition for review of the agency proceeding is filed, but not later than 14 days prior to the due date of the brief of the party supported by the intervenor," as required by FIFTH CIR. R. 15.5.

ISP Has A Significant Interest In The License That Is The Subject Of The Petition

20. ISP is the entity that holds the NRC License—as required by the Atomic Energy Act of 1954, as amended—to construct and operate the subject Facility, consistent with ISP’s business objectives. ISP has substantial interests in whether this court vacates the License, as requested by Petitioners.

Disposition Of The Petition May As A Practical Matter Impair Or Impede ISP’s Ability to Protect That Interest

21. Petitioners request this Court to “hold unlawful and set aside the order issuing Materials License No. SNM-2515 and vacate the License.” Pet. at 2. If this Court were to grant the relief Petitioners seek, it would, as a practical matter, adversely affect the benefits that ISP expects to realize from the issuance of the License to construct and operate the Facility.

The Federal Respondents May Be Unable To Represent ISP’s Unique Interests Adequately

22. A prospective intervenor’s burden of showing inadequate representation is not onerous, as it need only show that representation of its interest may be inadequate, not that representation will in fact be inadequate. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 539

(1972); *Supreme Beef Processors, Inc. v. U.S. Dep't of Agric.*, 275 F.3d 432, 437 (5th Cir. 2001).

23. ISP is aligned with the Federal Respondents insofar as: the NRC's independent Board issued a series of orders ultimately denying the Initial Filings and the Subsequent Filings submitted by the Administrative Challengers; the NRC Commissioners issued a series of orders affirming the Board's orders; and the NRC issued the requested License. ISP, however, may well have a unique perspective to offer beyond that of the NRC insofar as it the holder of the NRC License and the owner and operator of the subject Facility once constructed. ISP may have different interests from the Federal Respondents in this litigation, beyond the shared interest of preserving the NRC regulatory framework and decision-making process, particularly with respect to whether the License is vacated, as requested by the Petitioners. As a result, the Federal Respondents may not adequately represent ISP's interests.

24. To ensure that ISP's participation as an intervenor is helpful to the Court, ISP will endeavor to coordinate with the Federal Respondents to avoid duplicative briefing and to ensure that ISP

focuses on arguments and/or background facts that the Federal Respondents may not address.

WHEREFORE, ISP respectfully requests that the Court grant ISP leave to intervene as a party-respondent.

Dated: October 15, 2021

Respectfully submitted,

By /s/ Brad Fagg
Brad Fagg (Counsel of Record)
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 739-5191
brad.fagg@morganlewis.com

Attorneys for Interim Storage Partners, LLC

CERTIFICATE OF COMPLIANCE

1. This Motion complies with the length limit of FED. R. APP. P. 27(d)(2)(A) and FIFTH CIR. R. 27.4 because it contains 1,851 words, except for the items excluded from the word count pursuant to FED. R. APP. P. 32(f), as determined by the word-count function on Microsoft Word 2013.

2. As required by FED. R. APP. P. 27(d)(1)(E), this Motion complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and FIFTH CIR. R. 32.1, and the type-style requirements of FED. R. APP. P. 32(a)(6), because it has been prepared in proportionally spaced typeface using Microsoft Word 2013 Century Schoolbook 14-point font.

3. I hereby certify that, in accordance with FIFTH CIR. R. 27.4, I contacted all other parties regarding this motion. Counsel for the Petitioners and the Federal Respondents do not oppose ISP's intervention.

/s/ Brad Fagg
Brad Fagg

Dated: October 15, 2021

CERTIFICATE OF SERVICE

I, Brad Fagg, a member of the Bar of this Court, hereby certify that on October 15, 2021, I electronically filed the foregoing "UNOPPOSED MOTION OF INTERIM STORAGE PARTNERS, LLC, FOR LEAVE TO INTERVENE" with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate ECF system.

/s/ Brad Fagg
Brad Fagg

Dated: October 15, 2021