

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

SIERRA CLUB, et al.,)	
Petitioners,)	
)	
v.)	No. 21-1229
)	
UNITED STATES NUCLEAR)	
REGULATORY COMMISSION and)	
the UNITED STATES OF AMERICA,)	
Respondents.)	

**FEDERAL RESPONDENTS’ MOTION TO CONSOLIDATE PETITION
WITH PREVIOUSLY CONSOLIDATED PETITIONS**

The United States Nuclear Regulatory Commission (“NRC”) and the United States (collectively, “Federal Respondents”) move to consolidate this Petition for Review, No. 21-1229, with seven other already-consolidated petitions currently pending before this Court under the lead case *Don’t Waste Michigan v. NRC*, No. 21-1048. These petitions all relate to proceedings before the NRC that ultimately resulted in issuance of a single license to Intervenor Interim Storage Partners, L.L.C. (“ISP”). And the Court has issued a briefing schedule and format that governs the other seven petitions for review. Based on the Court’s orders and the related nature of these matters, Federal Respondents believe that the Court’s intention is to efficiently hear and resolve all related petitions for review in a single consolidated proceeding. Although the present Petition for Review may appear on its face to challenge agency actions that are different from those at issue in the

other petitions, the Petition actually challenges two agency documents that *support* the license. Thus, the Petition should be consolidated with the other seven.

Petitioners in No. 21-1229 (which are also Petitioners in four of the consolidated petitions) have stated that they do not consent to this motion. Thus, Federal Respondents respectfully request that the Court consolidate this Petition with the other seven. In support, Federal Respondents state as follows:

1. This Petition for Review relates to the issuance by the NRC of a license to ISP to construct and operate a spent fuel storage facility in Andrews County, Texas. Petitioners have already collectively filed *four* petitions for review in this Court, which the Court has consolidated with three others, related to the NRC's orders in adjudicatory proceedings and issuance of the ISP license. And the Court has issued an order, based upon a motion to govern submitted jointly by all the parties involved in the consolidated cases, providing a briefing format for the issues pertaining to the license to be litigated under a comprehensive and unified framework. Petitioners here nonetheless take the position that they should be afforded a separate, additional bite at the petition-for-review apple, even though their newest Petition, like the others they (and others) filed, raise claims under the National Environmental Policy Act ("NEPA") and relate to the same license.

2. In 2018, ISP submitted its license application to the NRC. The Petitioners in this case—(1) Sierra Club; and (2) Don't Waste Michigan and

several co-Petitioners (referred to collectively as “Don’t Waste Michigan” here)—separately sought to intervene in the proceedings before the agency. The NRC denied their requests to intervene, finding their contentions before the agency to be inadmissible, and both Sierra Club and Don’t Waste Michigan filed petitions for review of the Commission’s decisions in this Court in February 2021. *Don’t Waste Michigan v. NRC*, No. 21-1048; *Beyond Nuclear v. NRC*, No. 21-1056. On its own motion, the Court consolidated these petitions. Later, the Federal Respondents filed a consent motion to further consolidate the related petition for review in *Sierra Club v. NRC*, No. 21-1055, and to hold all three petitions in abeyance until the agency reached a final decision on the pending license application. The Court granted that motion, consolidating the three petitions under the first-filed petition, *Don’t Waste Michigan*, No. 21-1048, and placing the petitions in abeyance. In August 2021, the Court consolidated a fourth petition for review, *Fasken Land & Minerals, Ltd. v. NRC*, No. 21-1179. *Don’t Waste Michigan v. NRC*, Order, Document #1911723 (Aug. 26, 2021).

3. The NRC issued the license on September 13, 2021. That same day, the NRC published a Record of Decision (“ROD”) that supports the NRC’s decision to issue the license. *See* 86 Fed. Reg. 51926 (Sept. 17, 2021) (“The NRC staff has published a record of decision (ROD) that supports the NRC’s decision to

approve ISP's license application for the [Andrews County facility] and to issue the license.").

4. In accordance with this Court's instructions, the parties to the four consolidated cases conferred and submitted a joint motion to govern future proceedings on October 12, 2021 (Document #1917672). Among other things, the motion proposed a briefing format for the consolidated cases, including a word count, and it proposed a schedule for the parties' preliminary filings. Petitioners also requested a deadline of December 1, 2021, to amend their petitions for review so as to include additional challenges not only to the NRC's adjudicatory decisions that denied their motions to intervene, but also to the license itself. Three of the four petitioners, including Sierra Club and Don't Waste Michigan, filed amended petitions for review in this Court raising such a challenge. *See* Document #192099 (Sierra Club amended petition for review challenging license); Document #1921507 (Don't Waste Michigan's amended petition).¹

¹ The fourth petitioner, Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners (collectively, "Fasken"), filed a separate petition challenging the ISP license in the United States Court of Appeals for the Fifth Circuit, which consolidated the case with a previously filed petition challenging the license, *Texas v. NRC* (5th Cir. No. 21-60743). Federal Respondents filed a motion to dismiss Texas's petition for lack of subject-matter jurisdiction (which the court has "carried with the case," i.e., decided to consider along with the merits), and Federal Respondents have also moved the Fifth Circuit to dismiss, or in the alternative, transfer Fasken's related petition to this Court. Fasken opposes that relief, but it has not yet filed a response. In addition to the proceedings before this Court and the Fifth Circuit, the State of New Mexico has filed a petition challenging the

5. On November 10, 2021, the Court issued an order adopting (other than the word count proposed by petitioners) the parties' proposal in their joint motion to govern. However, the Court directed the parties to address in their briefs whether amendment, as opposed to a new petition for review, was the appropriate vehicle through which to include a challenge to the license itself (and whether the court has jurisdiction to review such a challenge). Document #1021742.

6. In response to the Court's November 10 order, the three petitioners who had amended their petitions voluntarily withdrew their amendments and filed new separate petitions for review. Each of these petitions included challenges to the license itself, including arguments arising under the National Environmental Policy Act ("NEPA"). *See* Document Nos. 1922417 (Don't Waste Michigan petition for review challenging "the issuance by the NRC of a license to build and operate the ISP [facility] via a Record of Decision"), 1922379 (Sierra Club petition for review); *see also* Document #1922345 (Beyond Nuclear petition for review). By order dated November 17, 2021, the Court, on its own motion, consolidated these petitions with the cases previously consolidated with Case No. 21-1048 and deemed the deadlines established in its November 10, 2021, order to be applicable to each of the seven consolidated petitions for review. Document #1922896.

license in the United States Court of Appeals for the Tenth Circuit. *New Mexico v. NRC*, No. 21-9593 (10th Cir.), which Federal Respondents likewise intend to move to dismiss for lack of subject-matter jurisdiction.

7. In addition to filing their own petitions for review, Sierra Club and Don't Waste Michigan also filed an additional joint Petition for Review, which is the subject of this case, No. 21-1229. Like the initial petitions and the newer petitions filed by Sierra Club and Don't Waste Michigan (as well as the petitions of other parties in the consolidated cases), this Petition challenges the agency's compliance with NEPA in issuing the ISP license. But the Petition does so not by challenging the license, but by purporting to separately challenge the NRC's July 2021 Environmental Impact Statement (EIS) under NEPA and the agency's Record of Decision documenting its compliance with NEPA. These agency documents are not separate final agency actions but were prepared to document the NRC's compliance with NEPA to support the license. *See* 86 Fed. Reg. at 51,926. "In a licensing proceeding, it is the order granting or denying the license that is ordinarily the final order." *City of Benton v. NRC*, 136 F.3d 824, 825 (D.C. Cir. 1998). So here. Among the consolidated petitions, Petitioners have filed two petitions for review challenging the license. To the extent that those petitions are jurisdictionally proper (*see* Paragraph 9 below), Petitioners may use them as a vehicle to challenge the NRC's NEPA compliance, as documented in EIS and ROD. But Petitioners cannot separately challenge the NRC's NEPA compliance when issuing the license apart from challenging the license itself.

8. Moreover, even if the EIS and ROD were separately challengeable final orders under the Hobbs Act (and they are *not*), this Petition should still be consolidated with the other seven petitions because, at bottom, they all relate to the same license. Indeed, there is no reason why this Petition for Review should not be briefed under, and subject to the same deadlines as those set forth in, the Court's November 10 order. This conclusion is particularly apparent given that the No. 21-1229 petition was filed by the same parties who had already filed *four* petitions for review concerning the ISP license that had been consolidated, and that No. 21-1229, like the other petitions brought by Sierra Club, Don't Waste Michigan, and Fasken, raises NEPA compliance issues.

9. Simply stated, Petitioners have filed already filed four petitions for review in this Court relating to the ISP license, and their fifth one should be consolidated with the prior four. To be clear, Federal Respondents' position is that the Court only has jurisdiction over the first two petitions, which directly (and properly, from a jurisdictional perspective) challenge the Commission's decision denying them admission in the proceeding. *See Alaska v. FERC*, 980 F.2d 761, 763 (D.C. Cir. 1992) ("Having failed to achieve the status of a party to the litigation, the putative intervenor could not later seek review of the final judgment on the merits."). But that is an issue that this Court should address at the merits stage, as its November 10 order expressly contemplates. Meanwhile, there is no

sound reason not to include Petitioners' *third* challenge related to the ISP license (and fifth petition overall), which likewise raises the agency's compliance with NEPA, as part of the same consolidated briefing that is already scheduled to begin next month. Putting the cases on different tracks, even though they raise the same, or substantially similar issues, results in unnecessarily duplicative work for all parties involved, including the Court; creates the risk of inconsistent judgments; and encourages an end-run around the case management prerogatives of the Court, which were set in accordance with petitioners' own proposals and agreed to by the parties.

For the foregoing reasons, Federal Respondents respectfully request that the Court consolidate this Petition for Review with the petitions previously consolidated with *Don't Waste Michigan v. NRC*, No. 21-1048.

Respectfully submitted,

/s/ Justin D. Heminger

TODD KIM

Assistant Attorney General

JUSTIN D. HEMINGER

Attorney

Environment and Natural Resources

Division

U.S. Department of Justice

Post Office Box 7415

Washington, D.C. 20044

justin.heminger@usdoj.gov

(202) 514-5442

/s/ Andrew P. Averbach

ANDREW P. AVERBACH

Solicitor

Office of the General Counsel

U.S. Nuclear Regulatory Commission

11555 Rockville Pike

Rockville, MD 20852

andrew.averbach@nrc.gov

(301) 415-1956

December 3, 2021

**CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 27(D)**

I certify that this filing complies with the requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this filing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 1,799 words, excluding the parts of the of the filing exempted under Fed. R. App. P. 32(f), according to the count of Microsoft Word.

/s/ Andrew P. Averbach

Andrew P. Averbach

Counsel for Respondent

U.S. Nuclear Regulatory Commission