

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SIERRA CLUB, et al.,

Petitioners,

v.

UNITED STATES NUCLEAR
REGULATORY COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

Case No. **21-1229**

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

Pursuant to Federal Rule of Appellate Procedure 15(d) and D.C. Circuit Rule 15(b), Interim Storage Partners, LLC (“ISP”) respectfully moves for leave 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 (together with the NRC, the “Federal Respondents”), by its counsel Justin Heminger, has indicated that the United States of America does not oppose ISP’s intervention. Petitioners Don’t Waste Michigan, Citizens’

Environmental Coalition, Citizens for Alternatives to Chemical Contamination, Nuclear Energy Information Service, Public Citizen, Inc., San Luis Obispo Mothers for Peace, Sustainable Energy and Economic Development Coalition ("SEED") (collectively "DWM Petitioners"), and Petitioner Sierra Club (with DWM Petitioners, collectively "Petitioners"), by counsel Terry J. Lodge, have indicated that that the Petitioners do not oppose ISP's intervention.

This is a protective motion. On December 3, 2021, the Federal Respondents filed a motion to consolidate this Case, No. 21-1229, with seven other already-consolidated petitions currently pending before this court, Case Nos. 21-1048 (lead), 21-1055, 21-1056, 21-1179, 21-1227, 21-1230, and 21-1231). ECF No. 1925216. ISP has already been granted intervenor status in those consolidated cases, and supports the relief requested by the Federal Respondents in their December 3, 2021 motion. Nevertheless, in an excess of caution and to the extent that this case remains unconsolidated as-of the deadline for ISP to move to intervene under Fed. R. App. Proc. 15(d), ISP respectfully requests that it be granted intervenor status in this Case No. 21-1229 as well.

In support of the motion, ISP states as follows:

Background

1. The U.S. Nuclear Regulatory Commission (“NRC”), an independent agency of the United States of America (together with the NRC, the “Federal Respondents”), 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, Petitioners and other parties (collectively “Administrative Challengers”) 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/aslbpfuncdesc.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 this court for review of certain orders issued in the NRC administrative proceeding. See Case Nos. 21-1048, 21-1055, 21-1056, and 21-1179. This court consolidated all four cases under lead Case No. 21-1048.

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. The NRC also published a corresponding public notice on September 17, 2021. See 86 Fed. Reg. 51,926 (“Issuance Notice”).

15. On October 8, 2021, this court granted ISP’s motion for leave to intervene in the pending proceedings under lead Case No. 21-1048. See ECF No. 1917338.

16. On November 4, 2021, and November 8, 2020, respectively, Sierra Club and the DWM Petitioners filed with this court “Amended Petition[s] for Review,” ECF Nos. 1920999 and 1921507, in Case Nos. 21-1055 and 21-1048, purporting to expand their respective original

challenges to also include the NRC's "issuance" of the license to ISP and corresponding Issuance Notice, as described in para. 14.

17. On November 12, 2021, Sierra Club and the DWM Petitioners also filed with this court new "Petition[s] for Review," ECF Nos. 1922379 and 1922417, Case Nos. 21-1227 and 21-1231. On November 17, 2021, this court consolidated both of those new cases under lead Case No. 21-1048. See ECF No. 1922896.

18. On November 12, 2021, Sierra Club and the DWM Petitioners filed with this court yet another "Petition for Judicial Review," ECF No. 1922494, in the instant Case No. 21-1229. This court has not yet consolidated Case No. 21-1229 with the other cases pending before the court related to the NRC's ISP licensing proceeding (Case Nos. 21-1048 (lead), 21-1055, 21-1056, 21-1179, 21-1227, 21-1230, and 21-1231).

19. On December 3, 2021, the Federal Respondents filed a motion to consolidate Case No. 21-1229 with the seven other already-consolidated petitions currently pending before this court. ECF No. 1925216.

20. ISP anticipates that the motion will be granted for the reasons stated by the Federal Respondents in their motion to consolidate and

because the previously-consolidated petitions and the petition in Case No. 21-1229 all relate to the same proceedings before the NRC that ultimately resulted in issuance of a single license to ISP. However, to the extent this Case No. 21-1229 continues to exist as a separate matter, ISP protectively files this separate motion to intervene.

Grounds for Intervention

21. This Court has routinely permitted intervention by NRC licensees and license applicants in cases where petitioners seek to challenge license applications approved by or pending before the NRC. See, e.g., *Commonwealth of Massachusetts v. U.S. Nuclear Regulatory Comm'n*, No. 19-1198, Order Granting Mot. to Intervene, ECF No. 1814533 (D.C. Cir. 2019); *Safe Energy Coalition of Mich. v. U.S. Nuclear Regulatory Comm'n*, 866 F.2d 1473 (D.C. Cir. 1989); see also *In re: Friends of the Earth, et al.*, No. 16-1189, Order Granting Mot. to Intervene, ECF No. 1620139 (D.C. Cir. 2016). ISP respectfully requests that it be allowed to intervene here.

22. 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). To satisfy this rule, a prospective intervenor must “simply . . . file a motion setting forth its interest and the grounds on which intervention is sought.” *Synovus Fin. Corp. v. Bd. of Governors of Fed. Reserve Sys.*, 952 F.2d 426, 433 (D.C. Cir. 1991). Since Rule 15(d) “provides no standard for resolving intervention questions,” appellate courts have 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); see also *Sierra Club, Inc. v. E.P.A.*, 358 F.3d 516, 517-18 (7th Cir. 2004).

23. Under Federal Rule of Civil Procedure 24, this Court has held that “qualification for intervention as of right depends on the following four factors: (1) the timeliness of the motion; (2) whether the applicant ‘claims an interest relating to the property or transaction which is the subject of the action’; (3) whether ‘the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest’; and (4) whether ‘the applicant’s interest is adequately represented by existing parties.’” *Fund*

For Animals, Inc. v. Norton, 322 F.3d 728, 731 (D.C. Cir. 2003) (quoting Fed. R. Civ. P. 24(a)(2)); see also Roeder v. Islamic Republic of Iran, 333 F.3d 228, 233-34 (D.C. Cir. 2003). ISP satisfies these requirements, as explained below.

The Motion Is Timely

24. This motion is timely because it has been filed within “30 days after the petition for review [was] filed.” Fed. R. App. P. 15(d); see also Ala. Power Co. v. I.C.C., 852 F.2d 1361, 1367 (D.C. Cir. 1988).

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

25. ISP is the entity that holds the NRC license to construct and operate the subject facility, consistent with ISP’s business objectives. ISP has substantial interests in whether this court reverses the NRC’s decision to issue the license, as requested by Petitioners.

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

26. Petitioners seek a review of NRC documents relating to the agency’s decision to issue the License. If this Court were to overturn or forestall these actions or find the NRC’s processes improper, ISP’s License may be affected.

27. As discussed above, 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 as a result of the License to construct and operate the facility.

The Federal Agency Respondent May Be Unable To Represent ISP's Unique Interests Adequately

28. 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." *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)).

29. 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 is the holder of the NRC License and the owner and operator of the subject Facility. 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 NRC's decision to issue the License is reversed, as requested by the Petitioners. As a result, the Federal Respondents may not adequately represent ISP's interests.

30. To ensure that ISP's participation as an intervenor is helpful to the Court, ISP will endeavor to coordinate with the NRC to avoid duplicative briefing and to ensure that ISP focuses on arguments and/or background facts that the NRC may not address.

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

Respectfully submitted,

By /s/ Brad Fagg
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Dated: December 8, 2021

**ADDENDUM—CERTIFICATE OF PARTIES AND
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appeal Procedure 26.1 and D.C. Circuit Rule 26.1, Interim Storage Partners, LLC represents as follows:

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.

In addition, pursuant to Circuit Rules 27(a)(4) and 28(a)(1)(A), the undersigned counsel certifies that no parties appeared before a district court; and all parties, intervenors, or amici in this Court (Case No. 21-1055) are as follows:

- Parties: Sierra Club, Don't Waste Michigan, Citizens' Environmental Coalition, Citizens for Alternatives to Chemical Contamination, Nuclear Energy Information Service, Public Citizen, Inc., San Luis Obispo Mothers for Peace, Sustainable Energy and Economic Development Coalition (Petitioners); U.S. Nuclear Regulatory Commission and the United States of America (Respondents);

- Intervenors (Motion Pending): Interim Storage Partners, LLC; and
- Amici: None.

/s/ Brad Fagg
Brad Fagg

Dated: December 8, 2021

CERTIFICATE OF SERVICE

I, Brad Fagg, a member of the Bar of this Court, hereby certify that on December 8, 2021, I electronically filed the foregoing "UNOPPOSED MOTION OF INTERIM STORAGE PARTNERS, LLC, FOR LEAVE TO INTERVENE" and the Addendum thereto, "CERTIFICATE OF PARTIES AND CORPORATE DISCLOSURE STATEMENT" with the Clerk of the Court for the United States Court of Appeals for the D.C. 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: December 8, 2021