

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF NEW MEXICO, ex rel.
HECTOR H. BALDERAS,
Attorney General, and the NEW
MEXICO ENVIRONMENT
DEPARTMENT,

Petitioners,

v.

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

Respondents.

Case No. **21-9593**

NOTICE OF INTERVENTION
BY INTERIM STORAGE PARTNERS, LLC

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Introduction

Pursuant to FED. R. APP. P. 15(d) and TENTH CIR. R. 15.4(A), Interim Storage Partners, LLC (“ISP”) respectfully files this Notice of Intervention as a party-respondent in the above-captioned matter. ISP was a party to the agency proceeding of which the Petitioners seek review.

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, 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 No. 21-1048 (consolidated). Those petitions remain pending, and briefing on the merits is underway.

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.

15. On November 12, 2021, Petitioners petitioned this Court under "42 U.S.C. §§ 2239(b), 4370m-6, 10139(a)(1)(D) and (a)(2), 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 1-2. 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).

Requirements for Intervention

16. TENTH CIR. R. 15.4(A) states that “a party to an agency proceeding may intervene in a review of that proceeding by filing a notice of intervention in the court,” and specifies that “[t]he notice must state whether the party wishes to intervene as a petitioner in opposition to the agency order or as a respondent in support of the order.”

17. FED. R. APP. P. 15(d) states that a notice of intervention “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.”

ISP Was a Party to the NRC Proceeding

18. As noted in paras. 2 through 14, *supra*, ISP was a party to the agency proceeding of which Petitioners purport to seek review.

ISP Wishes to Intervene as a Respondent

19. As noted in the Introduction, *supra*, ISP is intervening as a party-respondent in the above-captioned matter.

This Notification Is Timely

20. The Petition for Review was filed on November 12, 2021. This Notification 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).

ISP’s Interest and Grounds for Intervention

21. 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.

22. Petitioners request this Court to “set aside and vacate the NRC’s record of decision and issuance of Materials License No. SNM-2515.” Pet. at 3. 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.

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 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 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 files this Notice of Intervention as a party-respondent in the above-captioned matter.

Dated: December 8, 2021 Respectfully submitted,

By /s/ Brad Fagg

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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 "NOTICE OF INTERVENTION BY INTERIM STORAGE PARTNERS, LLC" with the Clerk of the Court for the United States Court of Appeals for the Tenth 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

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Dated: December 8, 2021