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11-1045(L) & 11-1057(CON)
11-1051(CON), 11-1056(CON)

United States Court of Appeals for the District of Columbia Circuit

STATE OF NEW YORK; STATE OF VERMONT; STATE OF CONNECTICUT,

Petitioners,

v.

NUCLEAR REGULATORY COMMISSION; UNITED STATES OF AMERICA,

Respondents,

STATE OF NEW JERSEY,

Intervenor for Petitioner,

NUCLEAR ENERGY INSTITUTE, INC.; ENTERGY NUCLEAR OPERATIONS INC.,

Intervenors for Respondent.

(*caption for 11-1057 listed on inside front cover*)

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

FINAL REPLY BRIEF FOR STATES OF NEW YORK, VERMONT, CONNECTICUT, AND NEW JERSEY, AND THE PRAIRIE ISLAND INDIAN COMMUNITY

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for State of New York
120 Broadway
New York, New York 10271
(212) 416-8096

BARBARA D. UNDERWOOD
Solicitor General
CECELIA C. CHANG
Deputy Solicitor General
BRIAN A. SUTHERLAND
Assistant Solicitor General of Counsel

(*counsel listing continued on signature pages*)

LEMUEL M. SROLOVIC
Bureau Chief
Environmental Protection Bureau
MONICA WAGNER
Deputy Bureau Chief
JOHN J. SIPOS
JANICE A. DEAN
Assistant Attorneys General

Dated: February 7, 2012

(*caption for No. 11-1057*)

PRAIRIE ISLAND INDIAN COMMUNITY,

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GLOSSARY OF ABBREVIATIONS

EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
NEPA	National Environmental Policy Act
NRC	Nuclear Regulatory Commission

SUMMARY OF ARGUMENT

There are over one hundred nuclear power reactors in the United States. For over half a century, since nuclear power plants were first licensed, the federal government has assured the public that radioactive spent fuel generated by the plants would be moved off site and stored in a safe facility away from individual reactor sites and population centers. In 2010, NRC abandoned any effort to establish a target date for achieving that goal. Instead, NRC amended its "temporary-storage" rule to provide that hazardous spent fuel (already stored at individual reactor sites for decades longer than originally intended) could continue to be stored at reactor sites for an additional *sixty years* after the reactor's operating license expires with no significant environmental impacts.

As petitioners established in their opening brief, NRC's generic finding of no significant environmental impact—applicable to every nuclear plant across the nation—violates NEPA. NRC's failure to prepare a full environmental impact statement (EIS), analyzing alternatives to the continued on-site storage of spent fuel for sixty years after licensed operation and identifying mitigation measures to

minimize the environmental impact of such storage, cannot be reconciled with the agency's own assessment of environmental risks. NRC has proposed to analyze the risk of leaks during a plant's license renewal period in a site-specific EIS and is in the process of preparing a full EIS for the longer term—after the first sixty years of storage covered by the temporary-storage rule. NRC gives no explanation (and there is none) for treating the storage of spent fuel *during* licensed operation and in the longer term *after* licensed operation differently from storage during the intervening sixty-year period *immediately following* a reactor's shutdown.

Moreover, NRC's generic finding of no significant environmental impact is unsupported by the record. Spent-fuel storage pools at many nuclear plants have already leaked radioactive water, contaminating groundwater beyond EPA-approved levels. In addition, NRC does not deny that a spent-fuel-pool fire would have catastrophic environmental consequences. Accordingly, NRC could not reasonably make a determination that, if sustained, eliminates the need to analyze the impacts of both future leaks and fires in a full EIS.

Finally, NRC does not dispute that it failed to consider the entire range of environmental harms covered by NEPA, including the cultural, economic, and historic harms to parties like petitioner Prairie Island Indian Community, on whose ancestral homeland (and immediately adjacent to its current reservation) is located a nuclear power plant. The amended temporary-storage rule may be vacated on this basis alone and remanded to the NRC for further consideration.

ARGUMENT

NRC'S GENERIC NATIONWIDE FINDING OF NO SIGNIFICANT IMPACT FOR SIXTY ADDITIONAL YEARS OF ON-SITE SPENT-FUEL STORAGE IS ARBITRARY AND UNREASONABLE

A. NRC Fails to Justify the Creation of a Sixty-Year Window During Which Spent-Fuel Storage Has No Significant Impacts on the Environment.

As explained in petitioners' opening brief (States Br. at 26-33), NRC has failed to justify its generic environmental analysis of the risk of sixty additional years of spent-fuel storage at nuclear reactor sites across the nation after those reactors cease operation. NRC's generic analysis is inconsistent with the agency's own concurrent actions and

proposals, which confirm that on-site spent-fuel storage has significant impacts on the environment.

1. The amended temporary-storage rule is inconsistent with NRC's proposal to require analysis of the risk of leaks during the period of a reactor's operation in the site-specific EIS prepared before a reactor is relicensed.

First, as petitioners pointed out, NRC has proposed that spent-fuel leakage risks arising during the period of a reactor's operation be assessed in the site-specific EIS required for license renewal proceedings for individual plants—confirming the agency's recognition that such risks are environmentally significant and site-specific. States Br. at 14, 28, 35; NRC Br. at 27. NRC offers no justification for ignoring the same site-specific considerations—and resorting to generic analysis—with regard to spent-fuel storage after the plant's license expires.[1]

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[1] NRC contends that petitioners have failed to preserve this argument. *See* NRC Br. at 27 & n.70. But NRC's waiver claim applies—if at all—only to New York, not to the other petitioners. NRC published its EIS proposal for license renewals on July 31, 2009 (J.A. 186), *after* the notice-and-comment period for the challenged rule had closed.

(*continued on the next page*)

NRC makes a purely formalistic argument—noting that its "proposed site-specific consideration of leakage potential during [a plant's] *licensed* operation does not relate to the same *post-licensed* period" covered by the amended temporary-storage rule. NRC Br. at 28 (emphasis in original). But the site-specific risks of spent-fuel storage do not change—let alone go away—simply because a nuclear plant ceases operation. If anything, the risks of leakage and other environmental harms are likely greatest as a plant nears the expiration of its license (and in the years immediately following). This is because an operating plant generates more and more spent fuel over time, increasing the amount of radioactive material stored in spent-fuel pools and in dry-cask storage on-site. Spent fuel recently placed in storage pools has not had an opportunity to decay, cool, and diminish in

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New York, and only New York, submitted supplemental comments after NRC issued its July 2009 proposal. Even if New York's supplemental comments waived the issue for New York, the other petitioners had no opportunity to raise NRC's subsequent EIS proposal during the notice-and-comment period, and they were not required to submit supplemental post-comment-period comments to preserve the issue for this Court's review. *See CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079 (D.C. Cir. 2009) (citing *Darby v. Cisneros*, 509 U.S. 137 (1993)).

radioactivity, and that material will remain in the spent-fuel pools after the reactor stops generating electricity.

NRC contends that site-specific analysis is appropriate only for the period of a plant's operational life because that analysis addresses the overall risk of leakage from the "entire plant" rather than the specific risk of leakage from spent-fuel storage pools (NRC Br. at 28), but that argument is unpersuasive for several reasons. NRC's argument implies that the risk of leaking radioactive waste into groundwater is greater from other parts of a nuclear power plant than from spent-fuel pools, transfer canals, and the pipes serving them. But when NRC proposed to require site-specific analysis for the period of a plant's operation, the data it provided did not support that conclusion. To the contrary, NRC has shown no reason why the safeguards it proposed for a license renewal period are not equally necessary during the post-operational period—namely, site-specific analysis of spent-fuel pool storage risks that would determine which types of leaks are most likely to occur and what mitigation measures are appropriate to reduce those risks.

NRC's substitution of generic for site-specific analysis based solely on whether a plant is operating or continues to have a valid operating license cannot be sustained under NEPA. NRC has previously determined that spent-fuel pools are found in "a wide variety of configurations" (J.A. 307), which create differences in leakage potential and impact. These differences in configuration and potential for adverse impacts do not go away merely because a reactor shuts down. Indeed, the principal assumption underlying the temporary-storage rule is that on-site spent-fuel storage pools and all of their associated equipment will continue to operate *without* structural change after a reactor ceases operation.

In addition to the acknowledged configuration differences, the factual record specifically bears out the site-specific nature of spent-fuel pool leaks. Storage pools at some nuclear plants have already leaked, contaminating groundwater at various facilities around the country. *See* States Br. 10-11. The incidence of actual leaks is not attributable only to generic, industry-wide factors. NRC admits as much, by explaining that it addressed past leaks through individual inspection and enforcement actions, not by broad industry-wide rules or regulatory

action. NRC Br. at 24-25. Here, NRC's own treatment of spent-fuel storage risks *during* a nuclear power plant's operational life contradicts and refutes its decision to ignore site-specific factors and dispense with a full EIS for the period after the plant's license expires.

2. The amended temporary-storage rule is inconsistent with NRC's decision to prepare a full EIS for long-term storage of spent fuel beyond the sixty-year period covered by the temporary-storage rule.

In addition to recognizing that an EIS containing site-specific analysis should be prepared to analyze impacts arising *during* a nuclear plant's period of operation, NRC has also recognized that a full EIS is appropriate to assess the environmental impact of longer-term spent-fuel storage *beyond* the sixty-year period authorized by the amended temporary-storage rule. *See* J.A. 251; States Br. at 13, 35. NRC's decision to carve out a sixty-year window in between EIS assessments makes no sense and is not plausibly supported by the record.

A central premise of NRC's planned long-range EIS is that storing spent fuel for prolonged periods of time may be dangerous and unsafe. Were this not true NRC would have no reason to conduct an "unprecedented long-term review" of the environmental impact of

storing spent fuel for a three-hundred year period. J.A. 251. NRC explained that a "longer-term" EIS was appropriate because an EIS would "provide additional information . . . on whether spent fuel can be safely stored" beyond the sixty-year period contemplated in the amended temporary-storage rule. *Id.*

But the agency's distinction between longer-term storage and storage of spent fuel for the first sixty years after a nuclear power plant ceases operation is not based on scientific data. The risks of spent-fuel storage—although substantial for many decades—actually *decline* rather than increase over time because the spent-fuel rods cool off and decay. *See, e.g.*, J.A. 661 (noting that expected time between exposure to air and ignition is shorter for fuel rods recently removed from a reactor). NRC does not claim, in any event, that the likelihood of environmental impact is somehow greater after the first sixty years covered by the amended temporary-storage rule.

NRC's invocation of discretionary authority (NRC Br. at 14), does not cure the fundamental conflict in its position. If an EIS is required to address "longer-term [spent-fuel] storage issues," as the agency itself acknowledges (J.A. 251), NRC provides no justification for defining the

long-term to *exclude* the six decades of storage after a nuclear plant ceases operation. And it does not claim that it has any specific data or factual basis to justify that exclusion.

3. NRC cannot justify a sixty-year window between planned environmental impact statements.

NRC's unprecedented sixty-year window between proposed EIS assessments cannot reasonably be sustained. Not only are there no unifying factors that would allow NRC to treat storage risks as identical and generic across all nuclear power plants nationwide (to the contrary, NRC admits that the storage pools are diversely constructed, that leaks have occurred for different reasons in different plants, and that site-specific factors are relevant in assessing leakage risks), there is also no scientific or data-driven reason for selecting *sixty years* as the appropriate period to carve out from EIS review. Because nuclear power plants received their initial operating licenses at varying times in the 1960s through 1980s, and may or may not seek license renewal, actual closure and license-expiration dates will vary widely across the country. Consequently, NRC's generic finding of no significant environmental impact from continued spent-fuel storage for sixty years

after license expiration does not even address a single point in time, but instead an unknown and unknowable period that could range over several decades.

Nor is the finding of no significant impact justified, as NRC suggests, by the absence of past harm and the low probability of a truly catastrophic accident. NRC Br. at 44-45. Even if the risk of a spent-fuel fire or leak is low, the risk is as likely to be realized *tomorrow* as sixty or one hundred years in the future. For this reason, a rational agency does not wait ninety-nine years to consider the impact of a "hundred-year flood," or find that such risk is insignificant during the next sixty years. And NRC offers no justification here for determining that the risk of environmental impacts, significant enough to warrant an EIS for long-term storage, can be ignored for an arbitrary sixty-year window after a nuclear plant's licensed operation ends.

NRC attempts to justify its sixty-year EIS carve-out by placing the burden on States and other affected parties to identify and raise site-specific environmental impacts in individual licensing proceedings or through a waiver application to the agency. NRC Br. at 40-41. But under NEPA, NRC is responsible for evaluating environmental impacts,

42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4; it cannot shift that burden to affected parties. *See Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n*, 449 F.2d 1109, 1116-18 (D.C. Cir. 1971) (invalidating rules providing that hearing board need not consider environmental factors unless "affirmatively raised by outside parties or staff members"). And NRC's burden-shifting proposal is necessarily ineffective for identifying all relevant environmental risks. Unlike NRC, the States and other affected parties do not have full access to nuclear reactor sites, nor do they have NRC's ability to request data from plant operators. States Br. at 31-32. As the primary federal regulator, NRC cannot shed its NEPA responsibilities by asking affected parties to compile site-specific data and independently evaluate environmental risks and impacts, obligations that NEPA imposes on NRC alone.[2]

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[2] To be clear, petitioners do not argue that NRC must conduct an individualized plant-by-plant assessment of all 104 operating nuclear power plants in the United States before issuing a generic rule. But NEPA requires the agency to consider site-specific factors to the extent necessary to reach a valid generic determination of environmental impacts of storing spent fuel in on-site pools. NRC has not done so here.

B. NRC's Finding of No Significant Environmental Impact is Unsupported by the Record.

Even if it were appropriate for NRC to carve out a sixty-year window and rely solely on generic analysis in revising its temporary-storage rule, its finding of no significant environmental impact is unreasonable and unsupported by the record in light of the substantial risk and potential environmental impact of a spent-fuel storage pool leak or fire. States Br. at 33-40.

1. The risk of spent-fuel-pool leaks, which have already occurred, warrants a full EIS.

The risk of a spent-fuel-pool leak is not a theoretical environmental concern. Many spent-fuel pools have *already leaked* radioactive water. States Br. at 10-11 (reviewing record of prior leaks). In its brief, NRC fails to acknowledge—let alone offer cogent grounds for ignoring—its prior finding that such leaks either "did or potentially could, impact ground-water resources" by contaminating groundwater beyond EPA-approved levels. J.A. 738; *see also* J.A. 739 (finding that Tritium concentration in samples taken from contaminated groundwater at Watts Bar facility exceeded EPA limit).

EPA's finding with respect to preexisting, known leaks is sufficient by itself to warrant a full EIS. Although NRC relies on a task force report analyzing some of the prior leaks (NRC Br. at 24-25), the task force focused only on the narrow question of whether prior leaks had endangered the near-term health of persons in the surrounding area. But NEPA analysis is not restricted to near-term impacts on human health; instead, the agency must consider broader effects on the "natural and physical environment" as a whole, independent from direct harms to human health. 40 C.F.R. § 1508.14; *see also Calvert Cliffs' Coordinating Comm.*, 449 F.2d at 1122 (noting that "[t]he sweep of NEPA is extraordinarily broad, compelling consideration of *any and all* types of environmental impact," including nuclear power plants' effect on water quality (emphasis added)).

NRC itself has repeatedly acknowledged that concern over "public health" is not coextensive with long-term impact to the environment, the broader scope of NEPA's EIS analysis. *See, e.g.,* J.A. 281 (finding "reasonable assurance that storage in spent fuel pools provides adequate protection of public health and safety . . . *and* will not result in significant impacts on the environment" (emphasis added)); NRC Br.

24 (referencing "public health and safety *as well as the environment*" (emphasis added)). Yet NRC's finding of no significant impact for the revised temporary-storage rule relies primarily and improperly on a finding of no demonstrable harm to public health alone. *See* J.A. 282; *see also* J.A. 738.

NRC's assertion that leakage "has not and will not threaten groundwater supplies" is simply wrong. NRC Br. at 21. Groundwater has undisputedly been contaminated by release of radionuclides during prior spent-fuel-pool leaks. And in rejecting an EIS, NRC does not deny the possibility of future leaks; it merely asserts in sweeping fashion that "future leaks, if any, likewise will not be significant." NRC Br. at 27. But the record does not permit NRC to draw that determinative conclusion. Reliance on past leaks (assuming all past leaks were detected) cannot provide adequate assurance, as NRC claims, that future leaks involving a higher volume of water or a different location

with different environmental attributes will not have a greater impact on the environment as a whole than NRC has found past leaks to have.[3]

Moreover, even if public health were the sole appropriate focus, the record does not support the conclusion that future leaks, possibly involving more water or different proximity to drinking-water supplies, will not impact human health. The task force report on which NRC relies confirms that public exposure to radiation from a spent-fuel-pool leak depends on multiple site-specific variables, *see* J.A. 768, variables that NRC declined to consider in the rulemaking at issue here.

2. NRC failed to assess the catastrophic impact of a spent-fuel-pool fire.

Similarly, NRC unreasonably discounted the risk of a potential spent-fuel-pool fire in finding no significant environment impact related to its revision of the temporary-storage rule. States Br. at 38-39. NRC

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[3] While genuine mitigation measures may be considered under NEPA, NRC effectively concedes that its recommendations for preventing plant leaks fail to qualify as true mitigation measures. *See* NRC Br. at 26. NRC has not required *any* nuclear plant to adopt its recommendations or identified a future date by which it will do so. Thus, this is not a case where "an agency or involved third party" has "agree[d] to employ certain mitigation measures," making an EIS unnecessary. *Spiller v. White*, 352 F.3d 235, 241 (5th Cir. 2003).

does not contest that a propagating zirconium fire would be an environmental disaster, equivalent in impact to a nuclear meltdown. Although the NRC has determined that risk of a fire is very low (NRC Br. at 43), NEPA requires agencies to consider and evaluate impacts which have catastrophic consequences, even if their probability is low. *Cf.* 40 C.F.R. § 1502.22(b)(4). For this reason, NRC does not—and could not—decline to conduct an EIS to assess the risk and environmental impact of a potential nuclear-reactor meltdown. *See* J.A. 681. Likewise, because the risk of a catastrophic spent-fuel-pool fire is not entirely "remote and speculative," NRC should have examined the impact of potential fires in a full EIS. States Br. at 38-39.

3. NRC failed to analyze the full range of environmental impacts covered by NEPA.

Finally, NRC does not dispute that it failed to consider other environmental impacts covered by NEPA in issuing its finding of no significant environmental impact, including the historic, cultural, and economic harms caused by prolonged on-site storage of spent fuel. States Br. at 40. NRC contends that petitioners failed to raise their "non-health impact" challenges during the rulemaking. NRC Br. at 45.

But in its comments, petitioner Prairie Island Indian Community (the "Tribe") described its unique relationship to the Prairie Island nuclear plant, the Tribe's small size, and its members' proximity to spent-fuel storage facilities in sufficient detail to alert the NRC that the Tribe is highly vulnerable to adverse non-health impacts covered by NEPA. J.A. 1035-37, 1040.

Likewise, the state petitioners' comments indicated that the presence of nuclear power plants in each State and their accompanying spent-fuel storage pools have a significant impact on property values. J.A. 1190-91. Contrary to NRC's assertion (NRC Br. at 45 n.118), New York's expert, Dr. Stephen Sheppard, considered the economic impact on nearby property values of the Indian Point plant, which has spent-fuel pools, for the post-license period. *See* Stephen Sheppard, Potential Impacts of Indian Point Relicensing with Delayed Site Reclamation (Feb. 26, 2009) (J.A. 1174-78). And he did not assume "indefinite storage," as NRC suggests, but instead assumed that spent fuel would be stored on-site for sixty to seventy years after the conclusion of plant operations, the *same period* covered by the amended temporary-storage rule. *Id.* Other than non-preservation, which it incorrectly asserts,

NRC does not contend that it addressed these other NEPA factors. The amended temporary-storage rule may be vacated, and the matter remanded to the agency on this ground alone.

CONCLUSION

For the reasons stated above, the petition should be granted.

Dated: New York, NY
February 7, 2012

Respectfully submitted,

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York

By: */s/ Janice A. Dean*
Janice A. Dean
Assistant Attorney General
120 Broadway, 25th Floor
New York, NY 10271
(212) 416-8459

BARBARA D. UNDERWOOD
Solicitor General
CECELIA C. CHANG
Deputy Solicitor General
BRIAN A. SUTHERLAND
Assistant Solicitor General

LEMUEL M. SROLOVIC
Bureau Chief
Environmental Protection Bureau
MONICA WAGNER
Deputy Bureau Chief
JOHN J. SIPOS
JANICE A. DEAN
Assistant Attorneys General

of Counsel
(*counsel listing continues on next page*)

JEFFREY S. CHIESA
Attorney General of the State of New Jersey

By: */s/ Kevin P. Auerbacher*
Kevin P. Auerbacher
Assistant Attorney General
Ruth E. Musetto
Deputy Attorney General
R.J. Hughes Justice Complex
25 Market Street
P.O. Box 093
Trenton, New Jersey 08625
(609) 292-6945

WILLIAM H. SORRELL
Attorney General of the State of Vermont

By: */s/ Thea Schwartz*
Thea Schwartz
Assistant Attorney General
109 State Street
Montpelier, Vermont 05609
(802) 828-3186

GEORGE JEPSEN
Attorney General of the State of Connecticut

By: */s/ Robert Snook*
Robert Snook
Assistant Attorney General
55 Elm Street, P.O. Box 120
Hartford, Connecticut 06106
(860) 808-5020

JACOBSON, BUFFALO, MAGNUSON ANDERSON & HOGEN PC
Special Counsel to the Prairie Island Indian Community

By: */s/ Joseph F. Halloran*
Joseph F. Halloran
Kasey W. Kincaid
335 Atrium Office Building
1295 Bandana Boulevard
Saint Paul, Minnesota 55108

Philip R. Mahowald
5636 Sturgeon Lake Road
Welch, Minnesota 55089

General Counsel to the Prairie Island Indian Community

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, Janice A. Dean, an attorney in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 3,464 words and complies with the type-volume limitations of Rule 32(a)(7)(B).

/s/ Janice A. Dean
Janice A. Dean

CERTIFICATE OF SERVICE

I, Janice A. Dean, hereby certify that on February 7, 2012, I served the Final Reply Brief for States of New York, Vermont, Connecticut, and New Jersey, and The Prairie Island Indian Community via the CM/ECF system upon the following counsel of record:

John Emad Arbab, Esq.
(john.arbab@usdoj.gov)
U.S. Department of Justice
Environmental and Natural
Resources Division
P.O. Box 23795
Washington, D.C. 20026
for Respondent United States

John F. Cordes, Jr., Esq.
(john.cordes@nrc.gov)
Robert Michael Rader, Esq.
(robert.rader@nrc.gov)
11555 Rockville Pike
Rockville, Maryland 20852
for Respondent NRC

Geoffrey H. Fettus, Esq.
(gfettus@nrdc.org)
1152 15th Street, N.W., Suite 300
Washington, D.C. 20005
for Petitioner NRDC

Brad Fagg, Esq.
(bfagg@morganlewis.com)
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
for Intervenor Entergy Nuclear Operations Inc.,

Diane Curran, Esq.
(dcurran@harmoncurran.com)
Harmon, Curran, Spielberg &
Eisenberg, LLP
1726 M Street, N.W., Suite 600
Washington, D.C. 20036
for Petitioners Blue Ridge Environmental Defense League, Inc., Riverkeeper, Inc., and Southern Alliance for Clean Energy, Inc.

David A. Repka, Esq.
(drepka@winston.com)
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006
for Intervenor Nuclear Energy Institute, Inc.

/s/ Janice A. Dean
JANICE A. DEAN
February 7, 2012