

Energy Matters

[Radioactive Quandry: States Wonder What's Next for Spent Fuel](#)

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By Roger Witherspoon

The Nuclear Regulatory Commission faces a Thursday deadline to challenge a landmark, unanimous decision by a three-judge Appellate Court panel in June which ordered the agency to develop site specific assessments of the environmental impact of meltdowns in the bulging spent fuel pools before extending the licenses of some 30 nuclear power plants.

Immediately after receiving the June 8 decision the NRC asked the court for the time to petition the full 15-member US Court of Appeals for the DC Circuit to consider the case.

“There is a process for getting the entire 15-judge panel to look anew at the decision en banc, and you have to file right away to get this,” explained Vermont assistant attorney general Kyle Landis, who successfully argued his state’s case. “The government gets longer to file its motions than others do. “August 22 will either come or go without them filing anything, or they will file on or before that date. If they file for the en banc hearing, the whole case would be looked at again by the full panel.

“Everything filed at the DC circuit gets transmitted to the whole panel of judges and then they look at it and write a decision that could be 15-0 or split in any way. Here it was a

unanimous ruling and with En Banc you need just a simple majority of eight of the 15 judges. It's a pretty rare occurrence that a circuit court grants a rehearing en banc. The reason they have three-judge panels is they are much more efficient and they can go through a lot more cases than if they have the whole court hearing them.

“But the process is there and sometimes they succeed, and sometimes they don't.”

Whether or not the NRC decides to appeal, there is a growing question hanging over the case as to how much of the decision applies to the 71 power plants which have already received 20-year license extensions and have thousands of tons of highly radioactive spent fuel sitting in their pools of water, potentially for hundreds of years. The NRC's position is that it only applies to the 33 plants currently seeking license extensions, including the Indian Point plant on the Hudson River between West Point and New York City.

But if the NRC's interpretation is valid and the agency is allowed to narrowly construe the Court ruling, it would exempt New York's four Nine Mile Point 1&2; James A. Fitzpatrick, and Ginna nuclear plants; Vermont's Vermont Yankee; Connecticut's Millstone 2 & 3; and New Jersey's Salem 1&2 and Hope and Oyster Creek nuclear plants. According to the industry's Nuclear Energy Institute, spent fuel pools in New York hold 3,946 tons of irradiated fuel rods; New Jersey's hold 2,811 tons; Vermont's hold 683tons; and Connecticut's hold 2,260 tons. And each plant adds about 30 tons of high level radioactive waste every 18 months. (<http://bit.ly/PK8UOL>)



The Appellate Court decision vacated the 2010 incarnation of the NRC's “waste confidence rule,” which held that since there had never been a meltdown and conflagration in an American spent fuel pool – what is known as an exothermic fire – that there was no need to evaluate the possibility that there might be one in the future. As a result, civic groups and states were barred from challenging the safety of spent fuel pools during the relicensing process.

As a result of the ruling, the NRC will have to develop site specific environmental impact assessments of the potential damage to the region caused by an exothermic fire triggered by an accident, natural disaster such as an earthquake, or terrorism. The Appellate Court panel specifically stated the NRC cannot assume the government will eliminate the potential risk by developing a national repository for the spent fuel.

From a legal perspective, the applicability of the ruling to plants which already have 20-year extensions is complicated by the fact that while the Court vacated the 2010 Waste Confidence Rule – which incorporated and superseded several previous editions of that regulation – there was no specific ruling on previous versions of the regulation.



And none of the states specifically sought to include its other plants in the decision. The office of New York Attorney General Eric Schneiderman declined to discuss the implications for the state's other nuclear power plants and said in a statement that "While the actions on long-term, on-site storage of nuclear waste, as well as other many other actions taken by the Attorney General's Office, offer important benefits for nuclear power plant security nationwide, the Attorney General is currently focused on the pending Indian Point's relicensing proceeding, which is currently before the NRC right now."

Similarly, Connecticut Assistant Attorney General Robert Snook said only that "we will await and review the NRC's decision about its next steps before determining what if any further actions are appropriate."

New Jersey did not have a firm idea as to what should be done when it filed a friend of the court brief to join the suit filed by New York, Vermont, and Connecticut. The state still doesn't.

"At this point it's just wait and see how the court decision plays out," said Larry Ragonese, spokesman for the New Jersey Department of Environmental Protection. "We are waiting to see what their response is. Salem, Hope Creek, and Oyster Creek have all been relicensed. There is nothing for us to do until the NRC takes the next step in response to the court case."

New Jersey does not plan to ignore the implications for the four nuclear plants within its jurisdiction, he said. “The purpose was to force the government to come up with a plan as to what they want done with spent nuclear fuel. We want them to come up with a master plan, and based on that, we will respond and take whatever action we need to take.”

Attorneys for the Natural Resources Defense Council and the Southern Alliance for Clean Energy (SACE) agreed the decision would be a pyrrhic victory if the case only pertains to the pending license applications. But the issue of whether a decision to invalidate a regulation also covers previous versions of that rule is a complex legal matter which, for now, is not addressed.

“I don’t think it is pyrrhic,” said Geoffrey Fettus of the NRDC. “Our focus is on the environmental analysis that we hope the agency undertakes in the near future and that analysis applies across all the plants with its own site specific permutations.

“When and if the NRC goes forward with complying with the decision and does the environmental impact assessment that it was directed to do by the court they will have to look at nuclear waste, the environmental impact, and the strong possibility there may not be a repository for a period of time or ever. It is our belief that the current method of storage for many of the plants around the country, regardless of when or how they were licensed, of leaving them in densely packed pools will be done away with.

“Will it take years to win this fight? Yes. If a clear eyed environmental analysis is done, removing the spent fuel from pools into on site, hardened storage will be a significant environmental victory. We think that hopefully will be one of the most clear and positive results of doing this analysis.”



Similarly, Sara Darczak of SACE said “We are troubled by the fact that the NRC is saying that this decision pertains only to the existing, current licensing proceedings. We are involved in several of those as a public advocacy group. And when you look at the way high level radioactive waste has been dealt with nationally for years, the public was not allowed to bring up the questions that most of the public are concerned about. The NRC knows there is something wrong with nuclear waste, and those people were never allowed to talk about

that.

“We are doing legal research to find out possible next steps. But the policy in this nation is to build more reactors to generate more waste when we don’t know what to do with it.”