

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

STATE OF NEW MEXICO, *ex rel.*)
HECTOR BALDERAS, Attorney General,)

Plaintiff,)

v.)

UNITED STATES NUCLEAR)
REGULATORY COMMISSION and)
CHAIRMAN CRISTOPHER HANSON, in)
his official capacity as Chairman of the)
Commission,)

Federal Defendants.)
_____)

Case No. 1:21-CV-00284-MV-JFR

**FEDERAL DEFENDANTS' MOTION
TO DISMISS FIRST AMENDED
COMPLAINT; BRIEF IN SUPPORT**

Administrative Procedure Act Case, 5
U.S.C. §§ 701 *et seq.*

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MOTION

The United States Nuclear Regulatory Commission and Chairman Cristopher Hanson, in his official capacity (collectively, “Federal Defendants” or “NRC”), through undersigned counsel, respectfully move to dismiss this action for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). This Court lacks jurisdiction over New Mexico’s claims because the Atomic Energy Act and the Hobbs Act provide that the United States Courts of Appeals are the exclusive avenue for judicial review of all NRC final orders related to licensing. New Mexico, through counsel of record, has been consulted and opposes this Motion to Dismiss.

MEMORANDUM

The State of New Mexico¹ challenges the United States Nuclear Regulatory Commission’s authority to issue licenses to construct two consolidated interim facilities for the storage of high-level nuclear waste generated by NRC licensees. New Mexico asserts that the NRC cannot issue licenses for these facilities under the Atomic Energy Act, the Nuclear Waste

¹ New Mexico brings suit through Attorney General Hector H. Balderas, “acting on behalf of itself, and as *parens patriae*.” ECF No. 7 (“Am. Compl.”) ¶ 1; *see also id.* ¶ 216. To the extent that New Mexico asserts the interests of its citizens as *parens patriae*, New Mexico may not do so in an action against the United States. *State ex rel. Sullivan v. Lujan*, 969 F.2d 877, 883 (10th Cir. 1992) (“ . . . the State does not have standing as a *parens patriae* to bring an action on behalf of its citizens against the federal government because the federal government is presumed to represent the State’s citizens.”); *see also Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1178 (9th Cir. 2011) (“California, like all states, ‘does not have standing as *parens patriae* to bring an action against the Federal Government.’”) (*quoting Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 548 U.S. 592, 610 n.16 (1982)).

Policy Act, the National Environmental Policy Act, the Administrative Procedure Act, and the Tenth Amendment. *See generally* Am. Compl.

As courts in this circuit and others have uniformly held when confronted with similar challenges, New Mexico has brought its claims in the wrong court. This uniformity is no surprise given the plain language of the relevant statutory provisions concerning judicial review. Through the Atomic Energy Act, Congress designated an exclusive process through which each of New Mexico's arguments could have been raised. Atomic Energy Act of 1954, § 189(a)-(b) as amended, 42 U.S.C. § 2239(a)-(b). Under the process outlined in the Atomic Energy Act, a party may raise arguments contesting the "granting, suspending, revoking, or amending of any license" before the NRC at a hearing. 42 U.S.C. § 2239 (a)(1)(A). The NRC's final order in these proceedings will be subject to a direct appeal to the United States Court of Appeals under the Administrative Orders Review Act, commonly referred to as the "Hobbs Act." 42 U.S.C. § 2239(b); *see also* 28 U.S.C. § 2342(4). The Hobbs Act confers on the courts of appeals "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of the [NRC] made reviewable by section 2239 of title 42." 28 U.S.C. § 2342(4) (emphasis added).

Because New Mexico's assertions fall squarely within the Atomic Energy Act's and Hobbs Act's exclusive avenue for review, this Court lacks jurisdiction over New Mexico's Amended Complaint. While other entities challenging the issuance of licenses for the proposed facilities have pursued the review process before the NRC (and have raised many, if not all, of the same arguments that New Mexico raises in its Amended Complaint), New Mexico failed to exhaust its administrative remedies and bring these claims to the NRC's attention through the

agency's administrative appeal process. New Mexico's Amended Complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(1).

BACKGROUND

I. Statutory and Regulatory Framework

A. The Role of the NRC in Licensing Facilities.

The NRC is an independent regulatory commission created by Congress. *See* Energy Reorganization Act of 1974, 42 U.S.C. § 5841. In accordance with the Atomic Energy Act ("AEA"), 42 U.S.C. §§ 2011-2297h-13, the agency licenses and regulates civilian use of radioactive materials for use in the generation of nuclear power.

Along with regulating the construction and operation of nuclear power plants, the NRC licenses and regulates the storage of high-level nuclear waste and, in particular, spent nuclear fuel (i.e., fuel that is still radioactive but is no longer useful in the production of electricity) before its ultimate disposal. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 207 (1983); *see also Bullcreek v. NRC*, 359 F.3d 536, 538-39 (D.C. Cir. 1984) ("... it has long been recognized that the AEA confers on the NRC authority to license and regulate the storage and disposal of such fuel."). The NRC's regulations provide for the issuance of licenses for facilities, located either at the sites of nuclear power plants or at separate locations, for the storage of spent fuel. 10 C.F.R. Part 72. *See generally* NUREG-2157, Final Report, Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel, at G-1 to G-2 (Sept. 2014)² ("Generic Environmental Impact Statement") (explaining the

² The Generic Environmental Impact Statement is available at <https://www.nrc.gov/docs/ML1419/ML14196A105.pdf>

regulatory framework governing the issuance of licenses to operate both on-site and off-site spent fuel storage facilities).

The Nuclear Waste Policy Act of 1982 (“NWPA”) establishes the federal government’s policy to dispose of high-level radioactive waste in a deep geologic repository. *See* 42 U.S.C. §§ 10101-10270. Under the NWPA, Congress designated the Department of Energy (“DOE”) as the agency responsible for designing, constructing, operating, and decommissioning a repository, *id.* § 10134(b); the Environmental Protection Agency (“EPA”) as the agency responsible for developing radiation protection standards for the repository, *id.* § 10141(a); and the NRC as the agency responsible for developing regulations to implement EPA’s standards and for licensing and overseeing construction, operation, and closure of the repository, *id.* §§ 10134(c)-(d), 10141(b). Although DOE has applied to the NRC for the construction of a repository at Yucca Mountain, Nevada, the project remains stalled, and spent fuel is either stored at reactor sites or at stand-alone spent fuel storage facilities. *See generally* Generic Environmental Impact Statement, at B-1 to B-42.

B. Avenues for Participation in NRC’s Licensing Proceedings.

The AEA provides interested parties with an opportunity to intervene in NRC licensing proceedings and to object to the issuance of a license or an amendment proposed by a licensee. Specifically, Section 2239(a) provides that a party can object to the issuance of a license or a proposed amendment thereto and can request a hearing before the agency challenging the legal or factual basis for the agency’s licensing decision. *See* 42 U.S.C. § 2239(a)(1).

Hearings are governed by the NRC’s regulations. *See* 10 C.F.R. Part 2. To be “admitted” as a party to a licensing proceeding, an intervenor must establish standing and submit at least one “contention” setting forth an issue of law or fact to be controverted. *See* 10 C.F.R.

§§ 2.309(d), (f)(1). Even if a state or local government does not separately seek admission as a party, it is afforded by regulation a reasonable opportunity to participate in a hearing. *Id.*

§ 2.315(c).

If an intervenor does not obtain the relief it requests through the hearing process, the AEA provides that the party can seek judicial review of the agency's final order in the United States Court of Appeals for the circuit in which the proposed facility is located or in the United States Court of Appeals for the District of Columbia Circuit. 42 U.S.C. § 2239(b) (specifying that the courts of appeals must review the agency's decision in accordance with the Administrative Procedure Act and the Hobbs Act); *see also* 28 U.S.C. § 2342. Thus, a party seeking review of a final order issued by the NRC following a hearing must file a petition for review in the Court of Appeals within 60 days after entry of the final order being challenged. 28 U.S.C. § 2344.

II. Factual Background

A. Consolidated Interim Storage Facility Applications Filed by Holtec International and Interim Storage Partners.

In March 2017, Holtec International (“Holtec”) filed an application for a license under the AEA to construct and operate a consolidated interim storage facility (“CISF”) in Lea County and Eddy County, New Mexico. *See generally* Holtec International’s HI-STORE Consolidated Interim Storage Facility for Interim Storage of Spent Nuclear Fuel, 83 Fed. Reg. 32,919 (July 16, 2018). In July 2018, Interim Storage Partners (“ISP”) filed a license application³ to construct a similar CISF facility in Andrews County, Texas, near the border with New Mexico. *See*

³ The initial application for this facility was received in April 2016 from Waste Control Specialists, LLC (“WCS”). Following the creation of a joint venture between WCS and Orano CIS, LLC, the applicant for the CISF submitted a license application under its new name—ISP—on July 19, 2018.

generally Interim Storage Partners Waste Control Specialists Consolidated Interim Storage Facility, 83 Fed. Reg. 44,070 (Aug. 29, 2018), *corrected*, 83 Fed. Reg. 44,680 (Aug. 31, 2018). The NRC provided public notice of these license applications in the Federal Register and explicitly stated that interested parties had the opportunity to request a hearing and petition for leave to intervene in accordance with the AEA. *See id.* at 32,919 and 44,070; *see also* Am. Compl. ¶ 49.

In September 2018, two public interest groups lodged with the Commission “motions to dismiss” the Holtec and ISP applications on the ground that the NRC’s consideration of the applications would violate the NWPA. Ex. 1-2. These motions were based on the same argument New Mexico raises before this Court: that the proposed facilities would store fuel to which the DOE, as opposed to NRC power plant licensees, held title. *See generally id.* The Commission denied the motions, explaining that the agency’s rules do not provide for the filing of motions to dismiss licensing applications, but it referred the underlying legal arguments to the Commission’s Atomic Safety and Licensing Board (“Licensing Board”), which had been convened to adjudicate hearing requests that had already been filed. Ex. 3. One of the entities, Beyond Nuclear, appealed the decision to the U.S. Court of Appeals for the D.C. Circuit, which dismissed the petition because the Commission’s order did not constitute a final order reviewable under the Hobbs Act. Ex. 4. Additionally, the D.C. Circuit concluded that “because the administrative proceedings are ongoing, and petitioners acknowledge that those proceedings may resolve the dispute underlying this petition, the petition is not ripe for judicial review.” *Id.*

Meanwhile, the Licensing Board entertained the various contentions that had been filed by the two entities, as well as by several other intervenors (including, in the *Holtec* proceeding, requests to participate as local government bodies by the Cities of Carlsbad and Hobbs, New

Mexico; Lea County, New Mexico, and the Eddy-Lea Energy Alliance). This administrative process led to three decisions from the Licensing Board in the *Holtec* proceeding resolving various contentions and motions to submit amended contentions⁴ and seven separate appeals to the Commission.⁵ The *ISP* proceedings included four decisions from the Licensing Board⁶ and prompted seven separate appeals to the Commission.

In *Holtec*, the Commission issued three orders resolving the contentions,⁷ and these decisions are the subject of three consolidated petitions for review to the D.C. Circuit.⁸ In *ISP*, the Commission issued three orders resolving appeals from decisions from the Licensing Board,⁹ and three separate petitions for review have since been filed before (and consolidated by) the D.C. Circuit.¹⁰ The Commission is still resolving an appeal of the Licensing Board's denial of a

⁴ *Holtec International*, LBP-19-04 (Atomic Safety and Licensing Board Panel, May 7, 2019), *Holtec International*, LBP-20-06 (Atomic Safety and Licensing Board Panel, June 18, 2020), *Holtec International*, LBP-20-10 (Atomic Safety and Licensing Board Panel, September 3, 2020).

⁵ Decisions of the NRC's Licensing Board are available at <https://www.nrc.gov/reading-rm/doc-collections/aslbp/orders/>; decisions of the Commission are available at <https://www.nrc.gov/reading-rm/doc-collections/commission/orders/>.

⁶ *Interim Storage Partners LLC*, LBP-19-07 (Atomic Safety and Licensing Board Panel, August 23, 2019); *Interim Storage Partners LLC*, LBP-19-09 (Atomic Safety and Licensing Board Panel, November 18, 2019); *Interim Storage Partners LLC*, LBP-19-11 (Atomic Safety and Licensing Board Panel, December 13, 2019), *Interim Storage Partners LLC*, LBP-21-02 (Atomic Safety and Licensing Board Panel, January 29, 2021).

⁷ *Holtec International*, CLI-20-04 (Commission Order, April 23, 2020); *Holtec International*, CLI-21-04 (Commission Order February 18, 2021); *Holtec International*, CLI-21-07 (Commission Order April 28, 2021).

⁸ *Beyond Nuclear v. NRC*, D.C. Cir. No. 20-1187 (consolidated with *Don't Waste Michigan v. NRC*, D.C. Cir., No. 20-1225; *Sierra Club v. NRC*, D.C. Cir. No. 21-1104).

⁹ *Interim Storage Partners LLC*, CLI-20-13 (Commission Order, December 4, 2020); *Interim Storage Partners LLC*, CLI-20-14 (Commission Order, December 17, 2020); *Interim Storage Partners LLC*, CLI-20-15 (Commission Order, December 17, 2020).

¹⁰ *Don't Waste Michigan v. NRC*, D.C. Cir. No. 21-1048 (March 8, 2021); (consolidated with *Sierra Club v. NRC*, D.C. Cir. No. 21-1055; and *Beyond Nuclear v. NRC*, D.C. Cir. No. 21-1056).

motion for leave to file a new contention and reopen the record filed by one of the petitioners.¹¹ Proceedings before the D.C. Circuit in both the *Holtec* and *ISP* cases have been placed in abeyance pending the resolution of proceedings before the agency.

B. New Mexico's Amended Complaint

Although New Mexico declined to participate in the *Holtec* and *ISP* proceedings before the Commission and has not sought to intervene in the pending D.C. Circuit cases, New Mexico now seeks declaratory and injunctive relief in this Court. In effect, New Mexico alleges that (1) the NRC lacks legal authority under the AEA and NWSA to issue licenses for the proposed *Holtec* and *ISP* CISF facilities; (2) issuance of such licenses would contravene applicable statutes and regulations, including the AEA, NWSA, and National Environmental Policy Act (“NEPA”); and (3) licensing of the CISFs would place disproportionate burdens on New Mexico, as well as tribes and local governments. *See generally* Am. Compl. ¶¶ 202-220. A party seeking judicial review of the licensing proceeding, or the outcome of that proceeding, however, must do so in compliance with the AEA and the Hobbs Act by (1) participating in the administrative proceedings before the Commission, and (2) appealing the final order stemming from those administrative proceedings to the courts of appeals. Instead of complying with these requirements, New Mexico filed its Amended Complaint in this Court on May 17, 2021.¹²

STANDARD OF REVIEW

New Mexico's attempt to bring its claims in the wrong court is a jurisdictional defect subject to a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. Jurisdiction is a threshold issue that must be addressed before considering

¹¹ *Interim Storage Partners LLC*, LBP-21-02 (Atomic Safety and Licensing Board Panel, January 29, 2021).

¹² While the Amended Complaint was filed on May 17, 2021, New Mexico did not perfect service of any Complaint or Summons on the United States until May 20, 2021.

the merits of a case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–96 (1998). A lack of jurisdiction is presumed unless the party asserting jurisdiction establishes that it exists. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Thus, the plaintiff bears the burden of proof on a Rule 12(b)(1) motion to dismiss for lack of jurisdiction. *Id.*

A Rule 12(b)(1) jurisdictional attack may be facial or factual. *Holt v. United States*, 46 F.3d 1000, 1002-03 (10th Cir. 1995). A facial attack challenges the allegations in the complaint as insufficient on their face to invoke federal jurisdiction. *Id.* at 1002. A factual attack, in contrast, disputes the plausibility of the allegations, which would otherwise invoke federal jurisdiction. *Id.* at 1003. Here, Federal Defendants' motion to dismiss is a facial attack on subject matter jurisdiction under Rule 12(b)(1). If the Court determines that it does not have subject matter jurisdiction, it must dismiss the claim. Fed. R. Civ. P. 12(h)(3).

ARGUMENT

This Court lacks subject matter jurisdiction because the AEA and the Hobbs Act set forth the exclusive avenue for judicial review that New Mexico seeks to bypass. Under the AEA, Congress provided that challenges to the NRC's administrative actions as they pertain to licensing first must be brought before the Commission in an initial proceeding. 42 U.S.C. § 2239(a). Congress further specified that the courts of appeals are the sole and proper forum for the judicial review of a final order entered in any proceeding for the "granting, suspending, revoking, or amending of any license." *See* 42 U.S.C. § 2239(b)(1); *see also* 28 U.S.C. § 2342. By creating review of NRC decisions through the Hobbs Act, "Congress intended to provide for initial court of appeals review of *all* final orders in licensing proceedings." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 737 (1985) (emphasis added); *see also State of Michigan v. United States*, 994 F.2d 1197, 1204 (6th Cir. 1993) (concluding that the district court did not

have jurisdiction over Michigan's challenge to NRC regulations under the Hobbs Act, and that Michigan must first seek relief before the agency with review of any agency action in the court of appeals).

I. 42 U.S.C. § 2239(b) Vests Exclusive Jurisdiction with the Courts of Appeals to Review Final Orders Entered by the NRC.

Congress has vested the courts of appeals with exclusive jurisdiction to review final orders by the NRC. 42 U.S.C. § 2239(b); 28 U.S.C. § 2342. If New Mexico had participated in the administrative process and if the Commission had issued an order with respect to New Mexico's assertions, then this final order would fall under the AEA's and Hobbs Act's grant of exclusive jurisdiction.

Although "the normal default rule is that persons seeking review of agency action go first to district court," that default rule is superseded "when a direct-review statute specifically gives the court of appeals subject-matter jurisdiction to directly review agency action." *Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1332 (D.C. Cir. 2013) (citations omitted). Under Section 2239, Congress incorporated the Hobbs Act so that a party interested in an NRC order may seek review by filing a petition in a federal court of appeals. Congress further provided that the jurisdiction of the court of appeals would be "exclusive." 28 U.S.C. § 2342 Thus, Section 2239's direct-review provision removes an NRC order from the purview of the district court and places it within the exclusive jurisdiction of the courts of appeals.

For challenges to Commission proceedings and decisions, the Supreme Court in *Lorion* confirmed that "Congress intended to locate initial subject-matter jurisdiction in the courts of appeals." 470 U.S. at 746. The Court explained that this "result is in harmony with Congress' choice of Hobbs Act review for Commission licensing proceedings in § 2239(b) and is consistent with basic principles respecting the allocation of judicial review of agency action." *Id.*

The courts have uniformly followed *Lorion* in confirming that the courts of appeals have direct-review jurisdiction over the Commission's final orders. *See, e.g., Pub. Watchdogs v. S. California Edison Co.*, 984 F.3d 744, 756-58 (9th Cir. 2020) (affirming the district court's decision that it lacked jurisdiction because the Hobbs Act encompasses all final orders of the NRC related to licensing); *see also Gen. Atomics v. NRC*, 75 F.3d 536, 539 (9th Cir. 1996) (affirming the district court's conclusion that it was without jurisdiction under the Hobbs Act to entertain a lawsuit seeking to enjoin an NRC hearing over whether a parent company of licensee could be responsible for cleanup costs). Indeed, the court in *Skull Valley Band of Goshute Indians v. Leavitt*, 215 F. Supp. 2d 1232 (D. Utah 2002), *aff'd on other grounds*, 376 F.3d 1223 (10th Cir. 2004), applied this principle to claims that are functionally identical to the ones raised here.

In *Skull Valley*, a Native American tribe and an applicant for a license to construct a spent nuclear fuel storage facility alleged that a series of Utah statutes designed to stop the proposed facility from operating were preempted by the AEA. *Id.* at 1239-40. Utah counterclaimed, as New Mexico asserts here, that "NRC has no authority to license a private, for profit, off-site [spent nuclear fuel] storage facility," and that "an NRC license will necessarily violate . . . NEPA and therefore be invalid." *Id.* at 1252. The court dismissed the counterclaim for lack of jurisdiction because, under the Hobbs Act, "the proper forum for review of issues concerning the NRC's authority to license the proposed . . . facility or the propriety of such a license is the federal court of appeals." *Id.* (citing 28 U.S.C. § 2342 and *Env't Def. Fund v. NRC*, 902 F.2d 785, 786 (10th Cir. 1990)); *see also Env't Def. Fund*, 902 F.2d at 786-87 ("[P]etitions to compel final agency action which would only be reviewable in the United States Courts of Appeal are also within the exclusive jurisdiction of a United States Court of Appeals." (citations omitted)).

The *Skull Valley* court also noted that the Utah defendants had “challenged the lawfulness of the proposed facility in the NRC licensing process, and all parties have the right to appeal the NRC’s decision to the appropriate court of appeals.” *Id.*

Other courts have reached the same conclusion when addressing challenges to NRC actions that could have been raised through the agency’s hearing process. For instance, in *Citizens Awareness Network v. NRC*, 854 F. Supp. 16, 17 (D. Mass. 1994), an environmental group sought to enjoin efforts to decommission a nuclear power plant after it was denied a hearing request. The group alleged that the NRC approved a decommissioning plan without an adequate environmental impact statement, in violation of NEPA. *Id.* at 17-18. The court dismissed the case, ruling that the plaintiff’s claims were “in essence” a challenge to a final order in an NRC licensing proceeding and, therefore, were properly brought only under the Hobbs Act before the court of appeals. *Id.* at 17-18 (reasoning that plaintiff was “attempting to stick a NEPA label on a Hobbs Act claim”).

Similarly, in *City of West Chicago v. NRC*, 542 F. Supp. 13, 15 (N.D. Ill. 1982), the court dismissed a challenge to an NRC amendment to a demolition license under the Hobbs Act. The plaintiff alleged, in part, that the NRC’s amendment to a demolition license “was granted in violation of NRC regulations, the AEA, the due process clause of the Constitution, and [NEPA],” and thus sought “judicial review of the NRC’s license amendment on the grounds that it was improperly issued.” *Id.* at 14. The *West Chicago* court held that the demolition license amendment “was a final order in a licensing proceeding over which the court of appeals has exclusive jurisdiction to review.” *Id.* at 15. The court reasoned that the “specific grant of authority to the court of appeals supersede[d] the more general grants of federal question or mandamus jurisdiction upon which [the plaintiff] base[d its] case.” *Id.*; accord *Lorion*, 470 U.S.

at 745 (concluding in the context of a challenge to the NRC’s decision not to suspend a license that “[a]bsent a firm indication that Congress intended to locate initial APA review of agency action in the district courts, we will not presume that Congress intended to depart from the sound policy of placing initial APA review in the courts of appeals”).

The Hobbs Act requires the same outcome here. The exclusive avenue for New Mexico to raise its arguments is through the administrative process, with attendant opportunities for judicial review, that Congress mandated when it passed the AEA. Following publication of notice in the Federal Register of the Holtec and ISP license applications, New Mexico had an opportunity either to file a petition to intervene in the administrative proceedings or to proceed as an interested governmental body. Indeed, its claims are functionally the same as those of the entities who raised NWPA, AEA, and NEPA arguments before the agency and have now appealed the Commission’s resolution of them to the D.C. Circuit. Yet nowhere in its 50-page Amended Complaint does New Mexico explain why it is somehow appropriate for this Court—in direct contravention of the AEA, Hobbs Act, and precedent reflecting the exclusivity of the NRC’s hearing process—to assume jurisdiction over this matter. Nor can it. Its claims are a direct challenge to the legality of the agency’s issuance of a license for the proposed Holtec and ISP facilities, and New Mexico’s claims fall outside the scope of this Court’s jurisdiction.

New Mexico asserts that there is no appellate jurisdiction under Section 119 of NWPA because there has not been a final agency action or decision by the NRC. Am. Compl. ¶ 21 (citing 42 U.S.C. § 10139(a)(1)(A)). This assertion is a non-sequitur, and it does not resolve the jurisdictional infirmities of the Amended Complaint. There is no jurisdiction under the judicial review provisions of the NWPA because licensing of the facilities at issue is governed by the AEA, not the NWPA, which creates an entirely separate process, including a separate process for

judicial review of applications by DOE to construct and operate a facility for the permanent disposal of spent nuclear fuel in a repository. Here, New Mexico bypassed the exclusive avenue of review set forth in the AEA to contest the granting, suspending, revoking, or amending of license applications, submitted by private parties (not DOE), to be issued by the NRC pursuant to the AEA. New Mexico could have raised arguments before the NRC that issuing a license under the AEA would contravene the terms of the NWPA, as other parties did, but it failed to do so.

And even if the NWPA governed the license applications here, which it does not, this Court would still not have jurisdiction over this action. Similar to the Hobbs Act, under the NWPA, the “United States courts of appeals shall have original and exclusive jurisdiction over” (1) “any final decision or action of the Secretary, the President, or the Commission[;]” and (2) challenges to “the constitutionality of any decision made[] or actions taken.” 42 U.S.C. § 10139(a)(1), (c). That New Mexico agrees that there is no final agency action demonstrates that its allegations are not ripe for review. Am. Compl. ¶ 21; *see State of Tex. v. U.S. Dep’t of Energy*, 764 F.2d 278, 285 (5th Cir. 1985) (granting the motion to dismiss because the challenged activity under the NWPA “are neither ‘final’ nor ‘ripe’ for judicial review.”); *see also State of Nev. v. Watkins*, 939 F.2d 710, 716 (9th Cir. 1991). A lack of finality under the NWPA does not demonstrate, as New Mexico seems to suggest, that jurisdiction is somehow conferred, instead, upon the district court. When there is a final order or action taken, a petition challenging it must be brought before the United States courts of appeals. *Id.*

In short, courts have repeatedly and consistently rejected attempts like the one here to challenge NRC decisions through avenues other than the courts of appeal in accordance with the Hobbs Act. New Mexico’s complaint should be dismissed for lack of jurisdiction.

II. New Mexico Failed to Exhaust NRC's Statutory Remedies As Required by the AEA.

This Court also lacks jurisdiction because New Mexico failed to exhaust mandatory administrative remedies under the AEA, which mandates exhaustion of the NRC's administrative process before judicial review in the courts of appeals. *See* 42 U.S.C. § 2239(a), (b)(1); *see also Nader v. Ray*, 363 F. Supp. 946, 954 (D.D.C. 1973) (holding that the plaintiffs failed to invoke or exhaust any of the administrative remedies available to them before the Atomic Energy Commission, but even if they had, the district court lacked jurisdiction under the Hobbs Act). The doctrine of exhaustion of administrative remedies obligates a plaintiff to exhaust all available administrative remedies before pursuing a claim judicially. *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (“[A]s a general rule . . . courts should not topple over administrative decisions unless the administrative body not only has erred, but has erred against objection made at the time appropriate under its practice.”). Claims not first exhausted in the administrative process must be dismissed. *See, e.g., McKeen v. U.S. Forest Serv.*, 615 F.3d 1244, 1255 (10th Cir. 2010); *West v. Bergland*, 611 F.2d 710, 717 (8th Cir. 1979) (“A person cannot evade agency process simply by claiming the agency is operating [u]ltra vires.”).

“Where Congress specifically mandates, exhaustion is required.” *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992). For decisions of the NRC, Congress has specified that a party must contest the “granting, suspending, revoking, or amending of any license” before the NRC. 42 U.S.C. § 2239(a)(1)(A). When a statute requires exhaustion as a prerequisite to judicial review, it must be strictly enforced. *See Jarita Mesa Livestock Grazing Ass’n v. U.S. Forest Serv.*, 140 F. Supp. 3d 1123, 1163 (D.N.M. 2015) (noting that “even where a statute does not expressly require exhaustion, courts must draw guidance from congressional intent ‘in determining

whether application of the doctrine would be consistent with the statutory scheme.” (internal citation omitted)).

The obligation to exhaust administrative remedies is “not some arbitrary hurdle to make it difficult for [plaintiffs] to sue.” *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1237 (10th Cir. 2005). Rather, exhaustion “promotes the twin general goals of protecting administrative agency authority and promoting judicial efficiency” by:

- (1) implementing congressional intent to delegate authority to the agency by discouraging frequent and deliberate flouting of administrative procedures; (2) further protecting agency autonomy by allowing the agency in the first instance to apply its special expertise and correct its errors; (3) providing more efficient judicial review by permitting the parties to develop the facts of the case in the agency proceedings; and (4) promoting judicial economy by avoiding needless repetition of administrative and judicial factfinding and perhaps mooting the judicial controversy.

Forest Guardians v. U.S. Forest Serv., 641 F.3d 423, 431 n.6 (10th Cir. 2011) (citation omitted).

Robust enforcement of the administrative exhaustion requirement also “greatly minimizes the’ . . . concern that plaintiffs will ‘shirk their duty’ to raise claims before the agency, ‘only to present new evidence that undermines’ the agency’s decision.” *Id.* (citation omitted); *see also Forest Guardians v. U.S. Forest Serv.*, Civ. No. 05-0372-JB/DJS, 2006 WL 4109661, at *23 (D.N.M. Aug. 22, 2006) (“The exhaustion requirement requires the party opposing agency action inform the agency how the agency is not complying with the law.”) *aff’d*, 641 F.3d 423 (10th Cir. 2011).

New Mexico’s claims resemble the claims that were rejected in *Gage v. Atomic Energy Commission*, 479 F.2d 1214 (D.C. Cir. 1973). In *Gage*, the petitioners challenged the Atomic Energy Commission’s¹³ regulations, but they had not participated in the rule-making

¹³ The Atomic Energy Commission is the predecessor to the NRC.

proceedings. *Id.* at 1217. The court held that under the AEA, participation in the “appropriate and available administrative procedure” is the “statutorily prescribed prerequisite” for Hobbs Act jurisdiction. *Id.* The court determined that since the “petitioners were never parties to the rule-making proceedings, this court simply does not have jurisdiction over their claim.” *Id.* at 1218.

Similarly, here, New Mexico’s challenge is barred because it has not exhausted its administrative remedies related to Holtec’s and ISP’s applications for licenses to build and operate a consolidated interim storage facility. Like the petitioners in *Gage*, New Mexico had the opportunity to participate in the adjudicatory proceedings related to the Holtec and ISP license applications but failed to raise its concerns before the Commission. *Cf. id.* at 1217 (“Petitioners stood aside, uninvolved, despite the fact that they had actual knowledge of the proceedings and were urged by AEC staff members to join the fray.”). New Mexico’s refusal to exhaust or even engage with the administrative remedies as provided under the AEA is disqualifying, and the Court should dismiss this action as a result. *Id.* at 1217-18; *see also Pub. Watchdogs*, 984 F.3d at 763 (confirming that basic principles of administrative law, like exhaustion, support the decision to allow the NRC to first address a petition that raises concerns that are “within the NRC’s special competence[.]”—“to make a factual record to apply its expertise, and to correct its own errors so as to moot judicial controversies.”) (citing *Parisi v. Davidson*, 405 U.S. 34, 37 (1972)).

Even if New Mexico had brought its claims in the correct court, New Mexico’s failure to exhaust its administrative remedies strips this Court of the power to hear the case. Had New Mexico exhausted its administrative remedies, the NRC would have had the opportunity to address New Mexico’s claims in the first instance and build a record for judicial review.

CONCLUSION

New Mexico's attempt to side-step the exclusive avenue of review set forth in the AEA and Hobbs Act should be rejected. For the reasons stated above, New Mexico's Amended Complaint should be dismissed for lack of jurisdiction under Fed. R. Civ. P. 12(b)(1).

Respectfully submitted this 17th day of June, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on June 17th, 2021 I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System. Counsel of record currently identified on the Mailing Information list to receive e-mail notices for this case are served via Notices of Electronic Filing generated by CM/ECF.

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EXHIBIT 1

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

In the Matter of:)	
)	
Holtec International)	Docket No. 72-1051
)	
(HI-STORE Consolidated Interim Storage Facility)	
)	
In the Matter of:)	
)	
Interim Storage Partners)	Docket No. 72-1050
)	
(WCS Consolidated Interim Storage Facility))	
)	

**BEYOND NUCLEAR, INC.’S MOTION TO DISMISS LICENSING PROCEEDINGS
FOR HI-STORE CONSOLIDATED INTERIM STORAGE FACILITY
AND WCS CONSOLIDATED INTERIM STORAGE FACILITY
FOR VIOLATION OF THE NUCLEAR WASTE POLICY ACT**

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I. INTRODUCTION

Pursuant to the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. § 10101, *et seq.* (“NWP”) and the Administrative Procedure Act, 5 U.S.C. §§ 706(2)(A) and (C), Beyond Nuclear, Inc. (“Beyond Nuclear”) hereby requests that the U.S. Nuclear Regulatory Commission (“NRC” or “Commission”) dismiss the above-captioned applications by Holtec International (“Holtec”) and Interim Storage Partners, L.L.P. (“ISP”) to build and operate centralized interim spent fuel storage facilities (“CISF”) in New Mexico and Texas, respectively.¹ The proceedings must be dismissed because the central premise of both Holtec’s and ISP’s applications – that the U.S. Department of Energy (“DOE”) will be responsible for the spent fuel that is transported to and stored at the proposed interim facilities – violates the NWP. Under the NWP, the DOE is precluded from taking title to spent fuel unless and until a permanent repository has opened. 42 U.S.C. §§ 10222(a)(5)(A), 10143.

By even considering these unlawful applications, the NRC impermissibly allows Holtec and ISP to undermine longstanding Congressional policy, established in the NWP, that ownership of and liability for spent fuel should remain with private licensees until a federal repository becomes available for permanent disposal. By conducting these licensing proceedings, the NRC also unfairly subjects Beyond Nuclear and its members to the costly and unnecessary expenses of challenging the applications that cannot be lawfully approved.

Finally, the fact that NRC is entertaining these unlawful license applications gives them undeserved legitimacy in the eyes of the public, giving rise to general public anticipation that Holtec and ISP may be allowed to store thousands of tons of highly radioactive waste at the

¹ These applications were noticed at 83 Fed. Reg. 32,919 (July 16, 2018) (“Holtec Hearing Notice”) and 83 Fed. Reg. 44,070 (Aug. 29, 2018) (“ISP Hearing Notice”). Holtec’s proposed CISF is referred to as “Holtec CISF” and ISP’s proposed CISF is referred to as “WCS CISF.”

proposed CISFs for decades. Beyond Nuclear respectfully submits that this public perception will unnecessarily depress the property values of Beyond Nuclear members who reside and own property in the vicinity.

II. THE ISSUES RAISED BY THIS MOTION LIE OUTSIDE THE SCOPE OF THE PENDING LICENSING PROCEEDINGS AND THEREFORE SHOULD BE CONSIDERED IN A SEPARATE PROCEEDING

While Beyond Nuclear has submitted this Motion in the NRC's dockets for the Holtec and ISP license applications (Nos. 72-1050 and 72-1051, respectively), Beyond Nuclear does not seek consideration of the Motion in either of the licensing proceedings that has been noticed in the Federal Register. Holtec Hearing Notice, 83 Fed. Reg. 32,919; ISP Hearing Notice, 83 Fed. Reg. 44,070. The scope of those proceedings is limited to the question of whether the applications satisfy the Atomic Energy Act ("AEA"), the National Environmental Policy Act ("NEPA"), and NRC's regulations for implementation of those statutes. 10 C.F.R. §§ 72.40, 51.101. The question posed in this Motion, *i.e.*, whether consideration of Holtec's and ISP's license applications is permitted by the NWPA, a separate statute, can be answered without consideration of the AEA and NEPA. Therefore the Commission should establish a separate proceeding for consideration of this Motion.²

III. BEYOND NUCLEAR HAS STANDING TO BRING THIS MOTION

As set forth below, Beyond Nuclear has standing to bring this Motion as a representative of its members. *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 342 (1977).

² In an abundance of caution, Beyond Nuclear has submitted a hearing request and contentions in the Holtec licensing proceeding and anticipates submitting a hearing request and contentions in the ISP licensing proceeding. Beyond Nuclear's contentions assert the same NWPA claims as are asserted in this Motion. Beyond Nuclear's hearing requests will preserve these claims in the event that the Commission and/or a reviewing court holds that the licensing proceedings for consideration of the Holtec and ISP applications constitute the only venues in which the NRC will consider whether these applications violate the NWPA.

Beyond Nuclear is a nonprofit, nonpartisan membership organization that aims to educate and activate the public about the connections between nuclear power and nuclear weapons and the need to abolish both to protect public health and safety, prevent environmental harms, and safeguard our future. Beyond Nuclear advocates for an end to the production of nuclear waste and for securing the existing reactor waste in hardened on-site storage until it can be permanently disposed of in a safe, sound, and suitable underground repository. For almost ten years, Beyond Nuclear has worked toward its mission by regularly intervening in NRC licensing, relicensing, and other proceedings related to irradiated nuclear fuel matters. Based on the following, as well as the additional interests included in members' declarations, *see* Exhibits 01-08, Beyond Nuclear demonstrates that its members fulfill the standing requirements and have authorized Beyond Nuclear to represent their interests. Accordingly, Beyond Nuclear has standing to request NRC dismiss the Holtec and ISP applications.

A. Beyond Nuclear's Standing is Established through Radiological Injury

Beyond Nuclear's members are largely concerned with radiological injury. To establish standing, the injury alleged need not be large: even minor radiological exposures, within regulatory limits, resulting from a proposed license activity can be sufficient. *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 417 (2001), *reversed on other grounds*, CLI-02-24, 56 NRC 335 (2002). In *Yankee Atomic Elec. Co.*, for example, the Licensing Board found standing because the Board could not "rule out" the potential for "some, even if minor, public exposures" from the decommissioning process to members of the petitioner organizations who lived within ten miles of the site, recreated along waterways, and regularly used roads that potentially would be used to transport waste. (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 69-70, *aff'd*, CLI-96-7, 43 NRC 235, 246-48

(1996). *See also Armed Forces Radiobiology Research Inst. (Cobalt-60 Storage Facility)*, ALAB-682, 16 NRC 150, 154 (1982) (quoting *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 74 (1978)) (“[T]he emission of non-natural radiation into appellees’ environment would also seem a direct and present injury, given our generalized concern about exposure to radiation and the apprehension flowing from the uncertainty about the health and genetic consequences of even small emissions like those concededly emitted by nuclear power plants.”).

The NRC recognizes two legal frameworks for analyzing standing based on radiological injury: traditional standing and the proximity presumption. *U.S. Army Installation Command (Schofield Barracks, Oahu, Hawaii, & Pohakuloa Training Area, Island of Hawaii, Hawaii)*, LBP-10-4, 71 NRC 216, 228 (2010). Beyond Nuclear has standing pursuant to both frameworks.

B. Beyond Nuclear Has Standing Pursuant to Traditional Standing Doctrine

To establish standing through traditional means, the NRC applies judicial concepts of standing, *i.e.*, injury-in-fact, causation, and redressability. *Pac. Gas & Electric Co. (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation)* LBP-07-14, 56 NRC 413, 426 (2002).

Beyond Nuclear establishes standing through traditional means by virtue of the injuries to its members who live and travel on or along routes that Holtec and ISP plan to transport spent nuclear fuel. Members will be injured primarily from radiologic exposure received during normal transportation operations. *See WASH-1238, Environmental Survey of Transportation of Radioactive Materials To and From Nuclear Power Plants (Dec. 1972)* (NRC found that a person who spends three minutes at an average distance of three feet from loaded truck or car might receive a dose of as much of 1.3 mrem); *Environmental Report on the HI-STORE CIS*

FACILITY at 4-32 (Report No. HI-2167521) (Dec. 2017) (using dose rate of 10 mrem/hour at a distance of 6.5 feet for transportation radiation impact analysis) (hereinafter “Holtec Environmental Report”); WCS Environmental Report at 4-13 (using dose rate of 0.1 mSv per hour at 2 meters for transportation radiation impact analysis). For example, the Licensing Board in *Duke Cogema Stone & Webster* found that “unwanted doses of ionizing radiation” from shipments of nuclear fuel transported “over the same public highways the Petitioners’ members travel” established standing because “incident-free shipping of plutonium provides a dose of ionizing radiation, albeit small, to anyone next to the transport vehicle and a minor exposure to radiation, even one within regulatory limits, is sufficient to state an injury in fact.” LBP-01-35, 54 NRC at 417.

There is also a risk of radiologic injury to Beyond Nuclear’s members from an accident involving shipments of spent nuclear fuel being transported to the CISFs. *See e.g.*, Holtec Environmental Report at 4-34 (the application analyzes “a spectrum of accidents that ranged from high-probability accidents of low severity and consequences to severe accidents with radiological consequences”); WCS Environmental Report at 4-15 (noting that rail casks could release radioactivity in “exceptionally severe accidents.”). There is a higher likelihood of an accident involving spent nuclear fuel near the CISFs because the transportation infrastructure in those areas is already unsafe and impacted from the oil and gas boom. *See e.g.*, *New Mexico GOP Governor Hopeful: Toll Roads for Oil Traffic*, Associated Press, KTBS (Aug. 21, 2018), https://www.ktbs.com/news/business/new-mexico-gop-governor-hopeful-toll-roads-for-oil-traffic/article_e8f4a10a-2542-5a9a-b64e-d0e6448c7bc8.html.

Further, Beyond Nuclear’s members’ interest in and right to travel will also be injured because they will either not know which route is safest to avoid radiological injury or they will

be unable to avoid unsafe routes because of the limited highways in the area. *See Duke Cogema Stone & Webster*, LBP-01-35, 54 NRC at 415.

Holtec plans to transport spent nuclear fuel to the Holtec CISF on the Burlington Northern Santa Fe Carlsbad Subdivision railroad. Holtec Environmental Report at 2-4, 3-105, 4-30. This railroad travels through Roswell, New Mexico, south to Carlsbad, New Mexico, and then travels east toward the Holtec site, along which it parallels Highway 62/180 for 20 miles at a distance of 100 to 500 feet. Holtec may also transport the spent nuclear fuel the final 3.8 miles to the Holtec CISF by truck. Holtec Environmental Report at 4-33. Beyond Nuclear members who live or travel on roads that cross or parallel the Burlington Northern Santa Fe Carlsbad Subdivision railroad will be exposed to small doses of unwanted radiation during the normal transportation of spent nuclear fuel to the Holtec Facility and a higher likelihood of an accident involving spent nuclear fuel. Their interest in travel will be affected if they wish to avoid these injuries. Thus, Beyond Nuclear has standing to request dismissal of the Holtec application through members:

- Danny Berry who regularly travels on roads and highways around the Holtec CISF, including Highway 62/180 where it parallels the Burlington Northern Santa Fe Carlsbad Subdivision railroad. *See Exhibit 01.*
- Keli Hatley and Margo Smith, who regularly travel on Highway 62/180 where it parallels the Burlington Northern Santa Fe Carlsbad Subdivision railroad, regularly travel other roads in the area on which Holtec may transport spent nuclear fuel, and regularly travel on Laguna Road/Country Road 55 which will have to be moved to avoid the Holtec CISF. *See Exhibits 03 and 05.*
- Nick King, who lives within 450 yards of one Burlington Northern Santa Fe Carlsbad Subdivision railroad, 800 yards of a second Burlington Northern Santa Fe Carlsbad Subdivision railroad, and within one mile of a railyard at which the spent nuclear fuel shipments may stop for extended periods. *See Exhibit 04.*
- Gene Harbaugh, who lives within 250 yards of a Burlington Northern Santa Fe Carlsbad Subdivision railroad and within 500 yards of a railyard at which the spent nuclear fuel shipments may stop for extended periods. *See Exhibit 08.*

- Jimi Gadzia, who lives within 900 yards of the Burlington Northern Santa Fe Carlsbad Subdivision railroad and whose frequent travel in Roswell causes her to regularly travel along and over this railroad. *See* Exhibit 02.

ISP also plans to transport spent nuclear fuel to the WCS CISF by rail. ISP plans to use the Texas and New Mexico Railway between Monahan, Texas, and Eunice, New Mexico. WCS Environmental Report at 4-8. This railroad parallels Highway 18 within a few hundred feet for approximately 40 miles. Beyond Nuclear members who live or travel on roads that cross or parallel the Texas and New Mexico Railway will be exposed to small doses of unwanted radiation during the normal transportation of spent nuclear fuel to the WCS Facility and a higher likelihood of an accident involving spent nuclear fuel. Their interest in travel will be affected if they wish to avoid these injuries. Thus, Beyond Nuclear has standing to request dismissal of the ISP application through members:

- Rose Gardner and D.K. Boyd, who regularly travel on roads and highways around the WCS CISF, including Highway 18 where it parallels the Texas and New Mexico Railway. *See* Exhibits 06 and 07.

Beyond Nuclear also establishes standing through traditional means by virtue of adverse impacts to its members' property values. *See Kelley v. Selin*, 42 F.3d 1501, 1509–10 (6th Cir. 1995) (“Petitioners are clearly asserting a threatened injury. The injury can be fairly traced to respondents’ actions since petitioners allege that it is the storage of spent nuclear fuels in the VSC–24 cask that has the potential to interrupt enjoyment of their lakefront property and to diminish its value. Finally, a decision in their favor could redress the threatened harm.”); *see also Louisiana Energy Servs., L.P.* (Claiborne Enrichment Ctr.), CLI-98-3, 47 NRC 77, 108-109 (1998). Because of public perception and anticipation, individuals are hesitant to move close to a nuclear facility or the transportation route for spent nuclear fuel, which leads to depressed property values near these sites. Close proximity to nuclear facilities and transportation routes for

spent nuclear fuel may decrease property values as soon as a nuclear facility is licensed. Thus, Beyond Nuclear has standing to request dismissal of the Holtec application through members:

- Margo Smith and Keli Hatley, whose homes and property are located within one to seven miles from the Holtec CISF and each of their livelihoods is directly connected to the value of the Smith Ranch, which shares a fence line with the Holtec CISF. *See* Exhibits 05 and 03.
- Daniel Berry, whose home and property is located within 11 miles of the Holtec CISF and who owns ranchland located within three to 15 miles of the Holtec CISF. *See* Exhibit 01.
- Gene Harbaugh, whose home and property is located within 250 yards of a Burlington Northern Santa Fe Carlsbad Subdivision railroad and 500 yards of the railyard that Holtec will use to transport spent nuclear fuel to the Holtec CISF. *See* Exhibit 08.
- Nick King, whose home and property is located within 450 yards of one Burlington Northern Santa Fe Carlsbad Subdivision railroad, within 800 yards of a second Burlington Northern Santa Fe Carlsbad Subdivision railroad, and within one mile of a railyard that Holtec will use to transport spent nuclear fuel to the Holtec CISF. *See* Exhibit 04.
- Jimi Gadzia, whose home and property is located within 900 yards of the Burlington Northern Santa Fe Carlsbad Subdivision railroad that Holtec may use to transport spent nuclear fuel to the Holtec CISF. *See* Exhibit 02.

Beyond Nuclear also has standing to request dismissal of the ISP application through members:

- Rose Gardner, whose home and property are located within seven miles of the WCS CISF. *See* Exhibit 06.
- D.K. Boyd, whose property is four miles from the WCS CISF at the nearest point. *See* Exhibit 07.

C. Beyond Nuclear Has Standing Pursuant to the Proximity Presumption

NRC has also applied an alternative to establishing standing based on the proximity presumption. *Tennessee Valley Auth.* (Sequoyah Nuclear Plant, Units 1 & 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-14, 56 NRC 15, 3 (2002) (“This so-called proximity or geographical presumption ‘presumes a petitioner has standing to intervene without the need specifically to

plead injury, causation, and redressability...’ ”); *Armed Forces Radiobiology Research Inst.*, ALAB-682, 16 NRC at 154 (The “proximity to a large source of radioactive material establishes petitioner’s interest.”). Where the “nature of the proposed action and the significance of the radioactive source” create an “obvious potential for offsite consequences,” the NRC applies a presumption of standing to individuals residing, owning property, or having frequent and regular contacts within the radius of those potential offsite consequences. *Consumers Energy Co.* (Big Rock Point Indep. Spent Fuel Storage Installation), CLI-07-19, 65 NRC 423, 426 (2007) (quoting *Exelon Generation Co. LLC & PSEG Nuclear, LLC* (Peach Bottom Atomic Power Station, Units 2 & 3), CLI-05-26, 62 NRC 577, 580-581 (2005)); see also *Kelley v. Selin*, 42 F.3d 1501 (6th Cir. 1995).

The determination of the radius “beyond which . . . there is no longer an ‘obvious potential for offsite consequences’” is made on a case-by-case basis. *Exelon Generation Co. LLC & PSEG Nuclear, LLC*, CLI-05-26, 62 NRC at 580-81. Licensing Boards have found standing based on proximity to spent nuclear fuel ranging from 4,000 feet to 17 miles. *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142 (1997); *Pac. Gas & Elec. Co.*, LBP-02-23, 56 NRC at 428. The standard for assessing the potential for offsite consequences is whether the consequences are plausible, not whether consequences are probable or likely. *Cfc Logistics, Inc.*, LBP-03-20, 58 NRC 311, 320 (2003), citing *Ga. Inst. of Tech.* (Georgia Tech Research Reactor) CLI-95-12, 42 NRC 111 (1995) (Commission found standing based on a “plausible scenario, albeit a highly unlikely one, in which three independent redundant safety systems—all designed to function under normal circumstances—could simultaneously fail in a research reactor.”).

The potential for offsite consequences from both the Holtec CISF and WCS CISF is “obvious” due to the characteristics and quantity of spent nuclear fuel Holtec and ISP plan to consolidate at the CISFs. Spent fuel is and will remain highly radioactive and dangerous to humans for hundreds of thousands of years. *Nuclear Energy Institute v. EPA*, 373 F.3d 1251, 1257 (D.C. Cir. 2004). Holtec proposes to store an astronomical quantity of this extremely dangerous and long-lived radioactive waste -- up to 173,600 MTU, more than twice the total amount of commercially generated spent nuclear fuel existing in the entire United States today. *See infra*, Section V.A. For its part, ISP plans to store 40,000 MTU of spent nuclear fuel at the WCS CISF -- a quantity that is more than half of the spent nuclear fuel existing in the United States. WCS Environmental Report at 4-9. As discussed in the Blue Ribbon Commission’s Report (for more detail, *see infra* Section V.A.), the *only* acceptable means for separating this dangerous material from the environment for the long-term is disposal, not interim storage. Blue Ribbon Commission on America’s Nuclear Future, Report to the Secretary at xi (Jan. 2012) (ML120970375) (“BRC Report”) (“The conclusion that disposal is needed and that deep geologic disposal is the scientifically preferred approach has been reached by every expert panel that has looked at the issue and by every other country that is pursuing a nuclear waste management program.”). Further, Holtec and ISP each acknowledge at least one plausible scenario that would result in off-site consequences from storage of spent nuclear fuel at both CISFs. HI-STORE CIS Safety Analysis Report at 8-5 – 8-6 (Report No. HI-2167374) (Mar. 27, 2017) (safety analysis explains that a criticality accident is possible due to a flooded canister) (hereinafter “Holtec SAR”); WCS Safety Analysis Report at 12-2 (“Analyses are provided for a range of hypothetical accidents, including those with the potential to result in a total effective

dose equivalent of greater than 5 Rem outside the owner controlled area or the sum of the deep-dose equivalent specified in 10 CFR 72.106.”).

Thus, Beyond Nuclear has standing to request dismissal of the Holtec and ISP applications based on the proximity presumption, through members who own property nearby and have frequent and regular contacts within the radius of potential obvious offsite consequences from the Holtec CISO and the WCS CISO, including:

- Keli Hatley, who lives one mile from the Holtec CISO. *See* Exhibit 03. Ms. Hatley often spends time with family approximately two miles from the Holtec CISO and ranches her cattle up to the fence line of the Holtec CISO. *Id.* Ms. Hatley and her children drive most days over a section of the Laguna Road/Country Road 55 that currently travels across the Holtec site and will have to be moved if the CISO is built. *Id.*
- Margo Smith, who lives seven miles from the Holtec CISO. *See* Exhibit 05. Ms. Smith regularly spends time within approximately two miles of the Holtec CISO, ranching and visiting her two daughters’ homes. *Id.*
- Daniel Berry, who owns property within three to fifteen miles of the Holtec CISO. *See* Exhibit 01. Mr. Berry also lives and works on this land, and regularly drives on Highway 62/180 near the Holtec CISO. *Id.*
- Jimi Gadzia, who owns mineral rights within ten to 16 miles of the Holtec CISO. *See* Exhibit 02.
- Rose Gardner, whose home and work are located within seven miles of the WCS CISO. *See* Exhibit 06. Ms. Gardner also visits family who live approximately five miles from the WCS CISO. *Id.*
- D.K. Boyd, whose property is four miles from the WCS CISO at the nearest point. *See* Exhibit 07.

IV. STATUTORY FRAMEWORK

A. Nuclear Waste Policy Act

The NWPA is Congress’ “comprehensive scheme for the interim storage and permanent disposal of high-level radioactive waste generated by civilian nuclear power plants.” *Ind. Mich. Power Co. v. DOE*, 88 F.3d 1272, 1273 (D.C. Cir. 1996). The NWPA establishes distinct roles for the federal government and spent fuel generators with respect to the storage and disposal of

spent fuel. The “Federal Government has the responsibility to provide for the permanent disposal of ... spent nuclear fuel” but “the generators and owners of ... spent nuclear fuel have the primary responsibility to provide for, and the responsibility to pay the costs of, the interim storage of ... spent fuel until such ... spent fuel is accepted by the Secretary of Energy.” 42 U.S.C. § 10131. Thus, Section 111 of the NWPA specifically provides that the federal government will not take title to spent fuel until it has opened a repository. 42 U.S.C. § 10131(a)(5).

B. Administrative Procedure Act

The Administrative Procedure Act prohibits, and requires reviewing courts to hold unlawful and set aside, federal agency action that is “not in accordance with law,” or “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. §§ 706(2)(A), (C). These prohibitions have prevented other agencies from ignoring the mandates of the NWPA. For example, after the Yucca Mountain project was abandoned, the DOE determined it need not revise the annual fee nuclear power producers must pay pursuant to the NWPA to cover the costs of nuclear waste disposal. *Nat'l Ass'n of Regulatory Util. Comm'rs v. U.S. Dep't of Energy*, 736 F.3d 517, 519-520 (D.C. Cir. 2013). The D.C. Circuit struck that decision down as “contrary to law.” *Id.* In striking similarity with Holtec’s and ISP’s assumptions discussed in detail below, DOE premised its determination on an assumption that a temporary storage facility could be constructed *without* NRC first issuing a license for the construction of a permanent facility. *Id.* Of course, the NWPA requires that precondition. The Court thus held that while “it is one thing to anticipate minor statutory additions to fill gaps,” it is “quite another to proceed on the premise of a wholesale reversal of a statutory scheme. The latter is flatly unreasonable.” *Id.*

V. FACTUAL BACKGROUND

A. History of Spent Fuel Storage and Policy in the U.S.

While the NWPA calls for construction of a repository for disposal of spent fuel, no repository has been licensed or built to date. Therefore, a significant quantity of spent fuel has accumulated at reactor sites. The spent fuel is stored in water-filled fuel storage pools and dry storage casks. NUREG-2157, Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel at 2-11 (Sept. 2014) (“Continued Storage GEIS”). As of 2011, approximately 67,500 MT of spent fuel had accumulated at commercial nuclear power plants, with the inventory growing by about 2,000 MT per year. Continued Storage GEIS at 2 –11. This inventory of stored spent fuel is now greater than the Congressionally imposed limit on the capacity of the Yucca Mountain repository of 70,000 MT. 42 U.S.C. § 10134(d).

Despite the increasing quantity of spent fuel stored at reactor sites, the NRC has concluded that onsite spent fuel storage poses no significant environmental risks, even for an indefinite storage period. Continued Storage GEIS at xlvii – xlviii.³ Consistent with the GEIS, neither ISP nor Holtec has argued that spent fuel would pose less of a radiological risk if it were transported to an away-from reactor storage site.

Under Section 302 of the NWPA, 42 U.S.C. § 10222, reactor licensees were required to pay into a Nuclear Waste Fund for construction of a repository. When the repository failed to materialize, licensees began to recover contract damages for the purpose of covering the cost of continuing to store spent fuel at their reactor sites. *See, e.g., Maine Yankee Atomic Power Co. v. United States*, 225 F.3d 1336, 1341–42 (Fed. Cir. 2000); *see also Nat’l Ass’n of Regulatory Util.*

³ The only exceptions to the NRC’s finding of “small” environmental impacts related to the potentially “large” adverse impacts to historic and cultural resources, and “moderate” environmental impacts by related nonradioactive waste. *Id.*

Comm'rs, 736 F.3d at 520; *Ind. Michigan Power Co.*, 88 F.3d at 1276-77 (finding that DOE's obligation under Section 302(a)(5)(B) of the NWPA to start disposing of spent nuclear fuel by a set date was not limited by the lack of a repository that Section 302(a)(5)(A) required prior to DOE taking title; only the remedy the courts could provide for DOE's failure to start disposing was limited). Contract damage lawsuits under the NWPA are now commonplace, and the DOE pays damages on a cyclical basis to reactor licensees. *See, e.g., Nat'l Ass'n of Regulatory Util. Comm'rs*, 736 F.3d at 520.

In 1987, Congress amended the NWPA by directing DOE to narrow the focus of its search for a repository site to a single location, Yucca Mountain in Nevada. But after two decades passed without significant progress, the DOE announced in 2009 that it no longer considered Yucca Mountain a viable option for a final repository and announced plans to withdraw its license application for the site. President Obama thereafter created the Blue Ribbon Commission on America's Nuclear Future ("BRC").

In 2012, the BRC issued a set of recommendations for managing spent nuclear fuel, including that the U.S. government pursue consolidated interim storage of spent fuel, as part of an integrated program for spent fuel disposal. BRC Report at 40. The BRC cautioned that "a program to establish consolidated storage will succeed only in the context of a parallel disposal program that is effective, focused, and making discernable progress in the eyes of key stakeholders and the public." *Id.* A "robust repository program . . . will be as important to the success of a consolidated storage program as the consolidated storage program will be to the success of a disposal program," and therefore "[p]rogress on both fronts is needed." *Id.* The BRC also recognized that federal legislation would be needed before construction of a consolidated storage facility could begin. *Id.* at 41.

In January 2013, in response to the BRC Report, the DOE released *Strategy for the Management and Disposal of Used Nuclear Fuel and High-Level Radioactive Waste* (ML13011A138) (“DOE Strategy”) to provide “a basis for the Administration to work with Congress to design and implement a program to meet the government’s obligation to take title to and permanently dispose of used nuclear fuel and high-level radioactive waste.” *Id.* at 3. The DOE endorsed the BRC’s recommendation that the government should pursue consolidated interim storage of spent fuel, but recognized that:

The NWPA currently constrains the development of a storage facility by limiting the start of construction of such a facility until after the Nuclear Regulatory Commission (NRC) has issued a license for construction of a repository. This restriction has effectively eliminated the possibility of having an interim storage facility as an integral component of a waste management system.

Id. at 5-6. With respect to the issue of transferring ownership of spent fuel to the DOE during transportation, the DOE Strategy also states:

[T]he Department is proceeding with planning activities for the development of transportation capabilities and storage facilities to facilitate the acceptance of used nuclear fuel at a pilot interim storage facility within the next 10 years and later at a larger consolidated interim storage facility. The Administration will undertake the transportation planning and acquisition activities necessary to initiate this process with the intent to transfer them to a separate organizational entity *if and when it is authorized by Congress and in operation.*

Id. at 6-7 (emphasis added). Thus, both the BRC and the DOE recognized that an interim spent fuel storage facility entailing U.S. government ownership of spent fuel could not be built or operated without authorizing legislation by the U.S. Congress.

B. Holtec License Application for the Holtec CISF

On March 30, 2017, Holtec filed an application to the NRC for construction and operation of the proposed Holtec CISF in Lea County, New Mexico. Holtec Hearing Notice, 62 Fed. Reg. 13,802. The proposed Holtec CISF would “initially store 500 canisters or 8,680 metric

tons of uranium in the CISF and eventually store up to 10,000 canisters in the CISF.” *Id.*

Ultimately, Holtec proposes to store a total quantity of 173,600 MTUs of spent fuel, over twice the capacity limit of the Yucca Mountain repository. Holtec SAR, Table 1.0.1 at 1-4. Holtec proposes to operate the facility for as long as 120 years (40-year license term plus 80 years of extensions). Holtec Environmental Report at 1-1.

In its license application, Holtec proposes to build and manage the Holtec CISF as a private company. Holtec SAR at 1-1. Nevertheless, Holtec’s Environmental Report reveals that Holtec does not plan to begin construction of the facility until “after Holtec successfully enters into a contract for storage with the U.S. Department of Energy (DOE).” Holtec Environmental Report at 1-1. Holtec also assumes that ownership of spent fuel will be transferred to the DOE *before* it is shipped to the CISF. *See* Holtec Environmental Report at 3-104 (“DOE would be responsible for transporting SNF from existing commercial nuclear power reactor storage facilities to the CIS Facility.”). Thus, as demonstrated by Holtec’s Environmental Report, Holtec’s entire operation depends on the assumption that DOE will take responsibility for the spent fuel that is transported to the CISF and stored there.⁴

⁴ In various parts of its application, Holtec asserts that ownership or liability may rest with “either” licensees or the DOE. *See, e.g.*, HI-STORE CIS Facility Financial Assurance and Project Life Cycle Cost Estimates, Rev. 0 (Report No. HI-2177593) at 3 (“Additionally, as a matter of financial prudence, Holtec will require the necessary user agreements in place from the USDOE and/or the nuclear plant owners.”) But these disclaimers are meaningless in light of the crucial fact that Holtec does not intend to begin construction of the facility until DOE has taken title to spent fuel and assumed responsibility for transporting it to the facility. The suggestion that DOE would transfer spent fuel *back to licensees* is absurd, given that the NWPA anticipates that spent reactor fuel is ultimately destined for federal ownership and disposal in a repository. *See* Section IV.A, *supra*.

C. ISP License Application for WCS CISF

Like Holtec, ISP has applied for a license to build and operate a CISF, in Andrews County, Texas. ISF Hearing Notice, 83 Fed. Reg. 44,070 (Aug. 29, 2018). The proposed WCS CISF site is approximately 40 miles from the proposed Holtec CISF site. The WCS CISF would house a total of 40,000 MTU of spent fuel over a period of 60 years. WCS Environmental Report, Rev. 2 at 1-1 .

Like Holtec, ISP assumes federal ownership of the spent fuel to be shipped to and stored at the proposed WCS CISF. And like Holtec, ISP attempts to avoid the legal implications of that assumption by claiming a possibility that spent fuel ownership will rest with private licensees.

The first application for a centralized interim spent fuel storage facility at the WCS site in Texas was filed by Waste Control Specialists L.L.C. on April 28, 2016. *See* Waste Control Specialists LLC’s Consolidated Interim Spent Fuel Storage Facility Project, License Application; docketing and opportunity to request a hearing and to petition for leave to intervene, 82 Fed. Reg. 8,773 (Jan. 30, 2017). WCS candidly asserted that “[t]he U.S. Department of Energy (DOE) will be contractually responsible for taking title of the spent fuel at the commercial reactor sites and transporting the spent fuel to the CISF, by rail.” WCS License Application, Rev. 0 at 101. Furthermore, the application stated that “WCS shall not receive [spent nuclear fuel] until such a contract with the DOE is provided to the NRC as a condition of the license.” *Id.* at 1-6.

In 2017, WCS asked the NRC to suspend its review of its application. Then, in 2018, ISP formed as a new joint venture between WCS and Orano CIS, L.L.C., and submitted a revised application. 83 Fed. Reg. at 44,070-71. In all aspects where WCS’ application had previously referred to the DOE’s responsibility for spent fuel at the proposed facility, ISP now substituted the phrase “the U.S. Department of Energy (DOE) *or other holders of the title to SNF at*

commercial nuclear power facilities (SNF Title Holder(s)).” *See id.* ISP added this information without any comment, explanation, or evidence as to why it now thinks “other holders” would be willing to retain title to the waste during transportation and storage.

Thus, for instance, the License Application states:

The U.S. Department of Energy (DOE) *or other holders of the title to SNF at commercial nuclear power facilities (SNF Title Holder(s)) will hold title to the SNF during transportation to and from and while in storage at the CISF.*

WCS License Application at 1-1 – 1-2 (emphasis in original). Similarly, it states: “The funding for constructing the CISF is expected to be primarily through future contracts for storage of SNF with the DOE *or other SNF Title Holder(s).*” *Id.* at 1-6 (emphasis in original). And:

ISP will obtain funds to operate the CISF pursuant to future contracts with the DOE or other SNF Title Holder(s). ISP shall not receive SNF until such a contract with the DOE or other SNF Title Holder(s) is provided to the NRC as a condition of the license.

Id. at 1-7 (emphasis in original).

ISP also seeks an exemption from the NRC’s regulations for financial assurance for decommissioning, based on federal ownership of the spent fuel. WCS License Application at 1-7. The application asserts that if it fails to have a contract with DOE, it will obtain a surety bond for private owners, but again the assertion is *pro forma*:

ISP seeks this exemption for the case where the DOE will be contractually responsible for taking title of SNF prior to transport and while it is placed into interim storage at the CISF. The NRC has recognized that a contract by the DOE specifically guaranteeing that funds will be made available to decommission equipment, facilities, and land is an equivalent financial assurance instrument that may be relied upon and that will save tax payers in a manner that is in the public interest.

WCS License Application at 1-9. *See also* WCS Environmental Report at 3-5 (emphasis in original) (“The DOE *or the SNF Title Holder(s)* would be responsible for transporting spent nuclear fuel (SNF) from existing commercial nuclear power reactors to the CISF. SNF would be transported to the CISF by rail”); WCS Environmental Report at 7-15 (emphasis in original)

(asserting that “*ISP* expects to enter into a contract(s) with DOE *or the SNF Title Holder(s)* that will provide the funding for facility construction, operation, and decommissioning.”).

Thus, both Holtec and ISP rely on the assumption that the DOE will take responsibility for spent fuel during transportation and storage at their sites. And both Holtec and ISP also seek to legitimate their assumptions by citing the BRC Report and the DOE Strategy. Holtec Environmental Report at 1-3, WCS Environmental Report at 1-3. While they hedge this assumption by referring to the possibility of private ownership, such meaningless and unsupported references serve as nothing more than fig leaves over the essential premise of their proposals – that these facilities will be built *only* if DOE owns the waste.

VI. ARGUMENT: THE NRC MAY NOT ISSUE LICENSES TO HOLTEC AND ISP BECAUSE THEY ASSUME FEDERAL OWNERSHIP OF SPENT FUEL DURING STORAGE AND TRANSPORTATION IN VIOLATION OF THE NWPA.

The NRC must dismiss Holtec’s and ISP’s license applications because the key condition of both applications -- federal acquisition of title to commercially-generated spent fuel prior to the opening of a permanent repository -- is contrary to the NWPA, which precludes licensees from transferring title of spent fuel to the DOE until a repository has opened. *Indiana Mich. Power Co.*, 88 F.3d at 1273 (holding that DOE’s obligation to take title to spent fuel does not begin until a repository is opened.). Until such time as a repository opens and the DOE takes title to spent fuel, “[t]he generators and owners of high-level radioactive waste and spent nuclear fuel have the primary responsibility to provide for, and the responsibility to pay the costs of, the interim storage of such waste and spent fuel.” 42 U.S.C. § 10131. *See also* 42 U.S.C. § 10143 (providing that “[d]elivery, and acceptance by the Secretary [of Energy], of any high-level radioactive waste or spent nuclear fuel *for a repository* . . . shall constitute a transfer to the

Secretary of title to such waste or spent fuel” (emphasis added)); 42 U.S.C. § 10222(a)(5)(A) (providing that DOE will “take title” to spent fuel *only* “following commencement of operation of a repository”).⁵ There is no dispute that a final repository is not operational, let alone even licensed.

Thus, the NWPA establishes a clear sequential order for transference of title, possession, and physical movement of spent fuel: DOE may only transport spent nuclear fuel *subsequent to* taking title to the spent fuel, and DOE may only take title after a repository is operational. Given that no spent fuel repository has opened, the NWPA precludes DOE from taking title to the spent fuel, and thereby also precludes it from having any responsibility for the transportation of the spent fuel between a reactor storage facility and an interim storage facility.⁶

By assuming that DOE will take title to the spent fuel to be stored at the CISFs, Holtec and ISP flout the clearly stated limitations of the NWPA and federal government policy of giving spent fuel generators the “responsibility” of coming up with “their own interim storage solutions.” *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-29, 56 NRC 390, 404-06 (2002). Taking responsibility for spent fuel logically includes all

⁵ The language of 42 U.S.C. § 10222(a)(5)(A) is memorialized in the Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste, 10 C.F.R. § 961.11 (“This contract applies to the delivery by Purchaser to DOE of SNF ... acceptance of title by DOE to such SNF ... , subsequent transportation, and disposal of such SNF” and “The terms of this contract shall be from the date of execution until such time as DOE has accepted, transported from the Purchaser’s site(s) and disposed of all SNF...”). *See also* 10 C.F.R. § 961.1 (“This part establishes the contractual terms and conditions under which the Department of Energy (DOE) will make available nuclear waste disposal services ... DOE will take title to, transport, and dispose of spent nuclear fuel ...”).

⁶ As discussed above in note 7, under the statutory scheme of the NWPA and as a practical matter, DOE would never take title for transportation and return it to licensees.

obligations incident to the ownership of spent fuel, such as financing the cost of building and maintaining a facility to safely house the spent fuel, and liability for operational problems and accidents.

Notably, in *Private Fuel Storage*, the Commission concluded that the NWPA did not preclude it from licensing a private away-from-reactor spent fuel storage facility. 56 NRC at 405-06. But that decision concerned only privately-owned waste. The Commission has never asserted that in licensing a private spent fuel storage facility, it could ignore the NWPA's prohibition against transfer of title of spent fuel to the federal government in the absence of a repository. Thus the NWPA contains no current provision that would allow DOE to assume title and responsibility for the spent fuel to be stored at the proposed Holtec CISF or the WCS CISF.⁷

While both Holtec and ISP claim to rely on the BRC Report and DOE Strategy for support of their bids for NRC licensing of their proposed operations, neither document countenances their actions. As discussed above in Section V.A, the BRC explicitly stated that initiatives for consolidated interim storage of spent fuel should come from the U.S. government, should be integrated with an active spent fuel disposal program, and should be allowed by

⁷ The *only* NWPA provision that allows transfer of title to spent fuel from commercial licensees to the DOE, prior to the opening of a repository, is the emergency "Interim Storage Program" found in Subtitle B of the NWPA. *But the Interim Storage Program expired in 1990.* And the program also imposed extreme requirements that are not met here. For instance, the Interim Storage Program limited the amount of spent fuel that could be transferred to the DOE to only 1,900 MT. 42 U.S.C. §§10151(b)(2), 10155(a)(1). In contrast, both the Holtec and ISP seek to initially store over 5,000 MT of spent fuel, and Holtec would eventually store over 173,000 MT. Moreover, before transferring that stopgap quantity of spent fuel to DOE, a reactor licensee was required to persuade the NRC that a lack of adequate spent fuel storage capacity at an operating nuclear reactor would jeopardize "the continued, orderly operation" of the reactor. 42 U.S.C. § 10151(a)(3). Finally, the Interim Storage Program required that spent fuel must be stored at a public facility, not a private facility. 42 U.S.C. § 10151(b)(2). None of those circumstances exist here, and thus the Program's requirements could not be satisfied even if it were still available.

federal legislation. Given the federal government's abandonment of its repository siting program for Yucca Mountain, there is no active spent fuel disposal program with which Holtec's and ISP's proposals could be integrated. Furthermore, the DOE Strategy also acknowledged that consolidated interim storage could not go forward with federal ownership of spent fuel without Congressional authorization.

Accordingly, the NWPA precludes the DOE from taking title to commercial spent fuel for storage at Holtec and ISP's proposed facilities. And by the same token, the Administrative Procedure Act precludes the NRC from acting "contrary to law" or "in excess of statutory authority" by issuing a license premised on a wholesale reversal of the statutory scheme established by the NWPA. 5 U.S.C. §§ 706(2)(A), 706(2)(C).

VII. CONCLUSION

Given the fundamental incompatibility of Holtec's and ISP's license applications with the NWPA, the NRC has no lawful basis to review the applications. Therefore, the NRC should dismiss the applications and terminate the proceedings opened in the Holtec and ISP Hearing Notices.

Respectfully submitted,

 /signed electronically by/

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September 14, 2018

EXHIBIT 2

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

In the Matter of:)
)
Holtec International) Docket No. 72-1051
)
(HI-STORE Consolidated Interim Storage Facility)
)

In the Matter of:)
)
Interim Storage Partners) Docket No. 72-1050
)
(WCS Consolidated Interim Storage Facility))
)

**MOTION OF FASKEN LAND AND MINERALS AND PERMIAN BASIN LAND AND
ROYALTY OWNERS TO DISMISS LICENSING PROCEEDINGS
FOR HI-STORE CONSOLIDATED INTERIM STORAGE FACILITY
AND WCS CONSOLIDATED INTERIM STORAGE FACILITY**

INTRODUCTION

Movants Fasken Land and Minerals and Permian Basin Land and Royalty Owners hereby presents its Motion to Dismiss the the above-captioned matter based on the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. §10101, *et seq.* (“NWPA”) and the Administrative Procedure Act, 5 U.S.C. §§ 702(2)(A), 702(2)(C). Movants contend that U.S. Nuclear Regulatory Commission (“NRC” or “Commission”) must dismiss the application of Holtec International (“Holtec”) to build and operate a centralized interim spent fuel (“CISF”) storage facilities in New Mexico and Interim Storage Partners, L.L.P. (“ISP”) to do the same in Texas. The NRC lacks jurisdiction over the applications because both are premised on the proposition that the U.S. Department of Energy (“DOE”) will be responsible for the spent fuel that would be transported to and stored at the proposed facilities. This premise is prohibited under the NWPA

because the DOE is precluded from taking title to spent fuel until a permanent repository is available. 42 USC §§ 10222(a)(5)(A), 42 USC § 10143.

The NRC's acceptance and processing of the applications conflicts with the essential predicate that a permanent repository be available before licensure of a CISF. Further, processing the subject applications implies that the NRC disregards the NWPA's unambiguous requirement that spent fuel remain owned by and is the responsibility of reactor licensees until a permanent repository is available. The logic that underpins the plain language of the NWPA's requirement for a functioning permanent repository is effectively vitiated by processing these applications. Movants contend the CISF applicants should be required to show cause why their applications do not constitute a violation of the NWPA since no permanent repository for spent nuclear fuel exists in the United States. Processing these applications to licensure under the present circumstances invites the situation Congress was attempting to avoid because licensure of a CISF without an available permanent repository contradicts the NWPA's objective to establish a permanent repository. The prospect that any CISF will become a *de facto* permanent repository is precisely what the NWPA intends to avoid. (Taylor Declaration, para. 8).

**THE MOTIONS TO DISMISS SHOULD BE RESOLVED OUTSIDE
PENDING CISF LICENSING PROCEEDINGS.**

The motions to dismiss have been filed in the NRC's adjudicatory proceedings for Holtec and WCS in order to initiate the Commission's consideration of the motions. The *instant* motion raises the issue whether issuing licenses pursuant to Holtec's and ISP's CISF applications, in the absence of a permanent repository, is permitted by the NWPA. However, because the motions raise jurisdictional issues under the NWPA such do not require resolution of whether the applications conform to applicable requirements of the Atomic Energy Act ("AEA"), the National Environmental Policy Act ("NEPA") and pertinent NRC regulations at 10 C.F.R. §§

72.40, 51.101. Rather, the NWPA is the applicable law given the absence of a permanent repository.

FASKEN AND PBLRO HAVE STANDING TO BRING THIS MOTION.

For purposes of standing the participation of Fasken and PBLRO is consistent with the requirements in *Pac. Gas & Electric Co.* (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation) LBP-07-14, 56 NRC 413, 426 (2002). PBLRO is an association formed in response to the Holtec and ISC proposals for CISFs. (Taylor Dec., para. 3) Members of PBLRO are oil and gas producers and royalty owners. (*Id.*). PBLRO's purpose is to advocate on behalf of oil and gas producers and royalty owners who have substantial economic interests that are jeopardized by CISFs. The potential for harm to Fasken's interests parallels the potential for harm to other members of PBLRO. (Taylor Dec., paras. 5-8) No other petitioner/party nor the Applicants can adequately represent the interests of Fasken and the oil and gas producers and royalty owners in PBLRO. Fasken has individual standing based on these economic interests and as a member of PBLRO supports its organizational standing.

FASKEN AND PBLRO MEET TRADITIONAL STANDING REQUIREMENTS

Traditional standing anticipates injury-in-fact, causation, and redressability. *See Pac. Gas & Electric Co.*, LBP-02-23, 56 NRC at 426 (2002). Fasken and PBLRO satisfy the traditional standing requirements because harm to its members who live, work and travel on or along transportation routes that Holtec and ISP plan to use to transport spent nuclear fuel to the CISFs. *Duke*, LBP-01-35, 54 NRC at 417 (“[U]nwanted doses of ionizing radiation” from shipments of nuclear fuel transported “over the same public highways the Petitioners’ members travel” established standing because “incident-free shipping of plutonium provides a dose of ionizing

radiation, albeit small, to anyone next to the transport vehicle and a minor exposure to radiation, even one within regulatory limits, is sufficient to state an injury in fact.”).

Furthermore, there is a risk of radiologic harm from an accident caused by shipments of spent nuclear fuel being transported to the CISFs. *See e.g.*, Holtec Environmental Report 4-34 (the application analyzes “a spectrum of accidents that ranged from high-probability accidents of low severity and consequences to severe accidents with radiological consequences”). Highways in the area of Holtec are compromised and therefore make accidents more likely to involve radioactive waste shipments. *See e.g.*, *New Mexico GOP Governor Hopeful: Toll Roads for Oil Traffic*, Associated Press, KTBS (Aug. 21, 2018), https://www.ktbs.com/news/business/new-mexico-gop-governor-hopeful-toll-roads-for-oil-traffic/article_e8f4a10a-2542-5a9a-b64e-d0e6448c7bc8.html. Fasken and PBLRO members also may not be able to avoid radiological harm while travelling in the Permian Basin. The choice of routes is limited and travelers in the vicinity of a CISF may be unable to avoid radiological exposure and injury. *See Duke*, LBP-01-35, 54 NRC at 415. Moreover, the anticipated routes and methods of transport virtually assure that Fasken employees and members of PBLRO will be in close proximity to routine shipments of spent nuclear fuel and thereby exposed to unwanted radiation. *See Holtec Env. Report 2-4, 3-105, 4-30.*

As oil and gas producers and royalty owners, Fasken and PBLRO also have traditional standing based on CISF adverse impacts on property values. *See Kelley v. Selin*, 42 F.3d 1501, 1509–10 (6th Cir. 1995) (“Petitioners are clearly asserting a threatened injury. The injury can be fairly traced to respondents’ actions since petitioners allege that it is the storage of spent nuclear fuels in the VSC–24 cask that has the potential to interrupt enjoyment of their lakefront property and to diminish its value. Finally, a decision in their favor could redress the threatened harm.”);

see also Louisiana Energy Servs., L.P. (Claiborne Enrichment Ctr.), CLI-98-3, 47 N.R.C. 77 (1998). Close proximity to nuclear facilities and transportation routes for spent nuclear fuel may decrease property values as soon as a nuclear facility is licensed. And a radiological release that interferes or precludes continued production in the Permian Basin implicates the interests of Fasken and PBLRO. Accordingly, Fasken and PBLRO meet the requirements for traditional standing.

FASKEN AND PBLRO MEET STANDING REQUIREMENTS UNDER THE PROXIMITY PRESUMPTION

NRC recognizes standing may be based on the proximity presumption. *Tennessee Valley Auth.* (Sequoyah Nuclear Plant, Units 1 & 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-14, 56 NRC 15, 3 (2002) (“This so-called proximity or geographical presumption ‘presumes a petitioner has standing to intervene without the need specifically to plead injury, causation, and redressability...’ ”); *Armed Forces Radiobiology Research Inst.* (Combalt-60 Storage Facility), ALAB-682, 16 NRC 150, 154 (1982) (The “proximity to a large source of radioactive material establishes petitioner’s interest.”). Where the “nature of the proposed action and the significance of the radioactive source” create an “obvious potential for offsite consequences,” the NRC applies a presumption of standing to individuals residing, owning property, or having frequent and regular contacts within the radius of those potential offsite consequences. *Consumers Energy Co.* (Big Rock Point Indep. Spent Fuel Storage Installation), CLI-07-19, 65 NRC 423, 426 (2007) (quoting *Exelon Generation Co.* (Peach Bottom Atomic Power Station, Units 2 & 3), CLI-05-26, 62 NRC 577, 580-581 (2005)); *see also Kelley v. Selin*, 42 F.3d 1501 (6th Cir. 1995); *USEC, Inc.* (Am. Centrifuge Plant), CLI-05-11, 61 NRC 309 (2005).

Fasken has oil and gas interests approximately two miles from the proposed Holtec CISF site. PBLRO member D.K. Boyd has property near the ISP proposed facility. (Taylor Declaration, para. 3). These distances meet the proximity test for standing. The determination of the radius “beyond which . . . there is no longer an ‘obvious potential for offsite consequences’” is made on a case-by-case basis. *Exelon Generation Co. LLC & PSEG Nuclear, LLC* (Peach Bottom Atomic Power Station, Units 2 & 3), CLI-05-26, 62 NRC 577, 580-81 (2005). Licensing Boards have found standing based on proximity to spent nuclear fuel ranging from 4,000 feet to 17 miles that both Fasken and PBLRO satisfy. (Taylor Declaration, para. 3). *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142 (1997); *Pac. Gas & Elec. Co.*, LBP-02-23, 56 NRC at 428. The standard for assessing the potential for offsite consequences is whether the consequences are plausible, not whether consequences are probable or likely. *Cfc Logistics, Inc.*, LBP-03-20, 58 NRC 311, 320 (2003) *citing Ga. Inst. of Tech.* (Georgia Tech Research Reactor) CLI-95-12, 42 NRC 111 (1995) (Commission found standing based on a “plausible scenario, albeit a highly unlikely one, in which three independent redundant safety systems—all designed to function under normal circumstances—could simultaneously fail in a research reactor.”). It is plausible that radiological harm would impact Fasken’s interests situated two miles from the Holtec site and PBLRO member D.K. Boyd’s property near the ISP site.

The potential for offsite consequences from the Holtec CSIF is “obvious” due to the extraordinary volume of spent nuclear fuel anticipated for its facility. Holtec proposes to store a total of up to 173,600 MTU¹ of SNF. Further, Holtec recognizes at least one plausible scenario

¹ The final amount of spent nuclear fuel Holtec plans to store at the CISF is unclear. The Safety Analysis Report, 1-4 indicates 173,600 MTU as the maximum quantity of uranium for the CISF. But the Environmental Report at 3-104 specifies 3,000 canisters will be transported over 40

that would cause off-site radiological consequences stemming from stored SNF at its CISF. Safety Analysis Report 8-5 – 8-6 (flooded canister could result in criticality accident).

Fasken and PBLRO have standing to seek dismissal of the Holtec and ISP applications based on the proximity presumption because Fasken and PBLRO members own property and have frequent and regular contacts within the radius of potential obvious offsite consequences from the Holtec and ISP CISFs.

ARGUMENTS AND AUTHORITIES

Fasken and PBLRO incorporate by reference the arguments and authorities in the Beyond Nuclear Inc. Motion to Dismiss at sections IV, V and VI.

CONCLUSION

In enacting the NWSA's prohibition on establishing CISFs without an available permanent repository Congress intended that SNF would not end up stranded indefinitely in an interim facility. An interim facility that receives SNF would certainly relieve reactor owners of their responsibility to manage this waste stream. But this circumstance would also reduce the pressure to find a permanent repository. This is exactly what Congress did not intend. But Congressional intent, manifested by the prohibition on CISFs in the absence of a permanent repository, is in danger of being subverted if Holtec's and ISP's applications are processed and result in the issuance of one or perhaps, two licenses. The Commission should recognize that the

years. Holtec's ER at 1-1 states Holtec seeks authority to receive 500 canisters of SNF containing 5,000 metric tons of uranium (MTUs) Eventually, Holtec anticipates that approximately 10,000 canisters with 100,000 MTUs of SNF would be located at its CISF. 83 Fed. Reg. 32920 (July 16, 2018) ("Holtec is currently requesting authorization to possess and store 500 canisters of spent nuclear fuel (SNF) containing up to 8,680 metric tons of uranium (MTUs)"). Holtec's SAR, Table 1.0.1 at 1-4 indicates the CISF would eventually have 173,600 MTUs.

CISF licensing attempts of Holtec and ISP are futile under the NWPA and dismiss their applications.

Respectfully submitted,

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September 14, 2018

Certificate of Service

Undersigned certifies that a true and correct copy of the above and foregoing was submitted to the NRC's Electronic Information System for filing and service on participants in the above-captioned dockets.

/signed electronically by/
Robert V. Eye

EXHIBIT 3

UNITED STATES OF AMERICA
 NUCLEAR REGULATORY COMMISSION

_____)	
In the Matters of)	
)	
HOLTEC INTERNATIONAL)	Docket No. 72-1051
)	
(HI-STORE Consolidated Interim Storage)	
Facility))	
)	
INTERIM STORAGE PARTNERS LLC)	Docket No. 72-1050
)	
(WCS Consolidated Interim Storage Facility))	
)	
_____)	

ORDER

On July 16, 2018, the NRC provided notice in the *Federal Register* of Holtec International’s application to construct and operate a consolidated interim storage facility for spent nuclear fuel.¹ Separately, on August 29, 2018, the NRC provided notice in the *Federal Register* of Interim Storage Partners’ application to construct and operate a consolidated interim storage facility for spent nuclear fuel.²

On September 14, 2018, Beyond Nuclear, Fasken Land and Minerals, and Permian Basin Land and Royalty Owners filed motions to dismiss both the Holtec and Interim Storage Partners applications.³ These groups argue that the NRC cannot, as a threshold matter, issue

¹ Holtec International HI-STORE Consolidated Interim Storage Facility for Interim Storage of Spent Nuclear Fuel, 83 Fed. Reg. 32,919 (July 16, 2018).

² Interim Storage Partner’s Waste Control Specialists Consolidated Interim Storage Facility, 83 Fed. Reg. 44,070 (Aug. 29, 2018), corrected, 83 Fed. Reg. 44,608 (Aug. 31, 2018) (noting that the correct deadline to file intervention petitions is October 29, 2018). Interim Storage Partners is a joint venture of Orano USA and Waste Control Specialists.

³ Beyond Nuclear filed its own motion to dismiss. *Beyond Nuclear, Inc.’s Motion to Dismiss Licensing Proceedings for Hi-Store Consolidated Interim Storage Facility and WCS Consolidated Interim Storage Facility for Violation of the Nuclear Waste Policy Act* (Sept. 14,

licenses to Holtec or Interim Storage Partners because both applications are contrary to the Nuclear Waste Policy Act (NWPAA). Specifically, the groups argue that both applications contemplate the storage of Department of Energy-titled spent fuel in violation of various NWPAA provisions.

The NRC's regulations allow interested persons to file petitions to intervene and requests for hearing in which they can raise concerns regarding a particular license application. These regulations do not, however, provide for the filing of threshold "motions to dismiss" a license application; instead, interested persons must file petitions to intervene and be granted a hearing. I therefore deny both motions to dismiss on procedural grounds, without prejudice to the underlying merits of the legal arguments embedded within the motions.

Beyond Nuclear also filed hearing petitions in the Holtec and Interim Storage Partners proceedings that incorporated by reference the NWPAA arguments that it raised in its motion to dismiss and identified those arguments as proposed contentions.⁴ I am separately referring these hearing requests—as well as other hearing requests challenging the applications—to the Atomic Safety and Licensing Board Panel (ASLBP) for the establishment of a Board to consider *all* hearing requests in accordance with the hearing procedures set forth in 10 C.F.R. §2.309. And, in accordance with 10 C.F.R. § 2.346(i), I am referring the motion from Fasken Land and

2018) (ADAMS Accession No. ML18257A318). Fasken Land and Minerals joined with Permian Basin Land and Royalty Owners to file a motion to dismiss that is substantially similar to Beyond Nuclear's motion. *Motion of Fasken Land and Minerals and Permian Basin Land and Royalty Owners to Dismiss Licensing Proceedings for Hi-Store Consolidated Interim Storage Facility and WCS Consolidated Interim Storage Facility* (Sept. 14, 2018) (ML18257A330). Both the NRC Staff and respective applicants filed oppositions to the motions, and Beyond Nuclear, Fasken Land and Minerals, and Permian Basin Land and Royalty Owners then filed replies.

⁴ *Beyond Nuclear, Inc.'s Hearing Request and Petition to Intervene* (Sept. 14, 2018) (ML18257A324) (Holtec docket); *Beyond Nuclear, Inc.'s Hearing Request and Petition to Intervene* (Oct. 3, 2018) (ML18276A242) (Interim Storage Partners docket). Fasken Land and Minerals and Permian Basin Land and Royalty Owners have not filed related hearing petitions in either docket.

Minerals and Permian Basin Land and Royalty Owners to the ASLBP for consideration under § 2.309.

This Order is issued under my authority in 10 C.F.R. § 2.346(c), (g), (i), and (j).

IT IS SO ORDERED.

For the Commission

NRC SEAL

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 29th day of October 2018

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
INTERIM STORAGE PARTNERS LLC) Docket No. 72-1050-ISFSI
)
(WCS Consolidated Interim Storage Facility))
)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Order of the Secretary** have been served upon the following persons by the Electronic Information Exchange:

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Docket No. 72-1050-ISFSI
Order of the Secretary

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[Original signed by Herald M. Speiser]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 29th day of October, 2018

EXHIBIT 4

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1340

September Term, 2018

NRC-72-1050
NRC-72-1051

Filed On: June 13, 2019

Beyond Nuclear, Inc.,

Petitioner

v.

U.S. Nuclear Regulatory Commission and
United States of America,

Respondents

Holtec International and Interim Storage
Partners LLC,
Intervenors

BEFORE: Pillard, Katsas, and Rao, Circuit Judges

ORDER

Upon consideration of the motion to dismiss, the response thereto, the reply, and the Rule 28(j) letters; and the motion to hold in abeyance, the response thereto, and the reply, it is

ORDERED that the motion to dismiss be granted. This court lacks jurisdiction to review the Nuclear Regulatory Commission's October 29, 2018 order denying without prejudice petitioner's motion to dismiss, and referring petitioner's petitions to intervene and hearing requests to the Atomic Safety and Licensing Board, because the order is not a final order of the Commission. See 28 U.S.C. § 2342(4) (granting courts of appeals exclusive jurisdiction over "all final orders of the [Nuclear Regulatory Commission]," including final orders in licensing proceedings). Because the order merely directs petitioner to raise its arguments within ongoing administrative proceedings, it does not "mark the consummation of the agency's decisionmaking process," Bennett v. Spear, 520 U.S. 154, 178 (1997), and does not "impose[] an obligation, den[y] a right, or fix[] some legal relationship," Blue Ridge Env'tl. Def. League v. Nuclear Regulatory Comm'n, 668 F.3d 747, 753 (D.C. Cir. 2012) (internal quotation

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1340

September Term, 2018

marks and citation omitted). To the extent petitioner argues that the order is final because it requires petitioner to participate in administrative proceedings that it alleges are invalid, “[i]t is firmly established that agency action is not final merely because it has the effect of requiring a party to participate in an agency proceeding.” Aluminum Co. of America v. United States, 790 F.2d 938, 941 (D.C. Cir. 1986).

Finally, because the administrative proceedings are ongoing, and petitioners acknowledge that those proceedings may resolve the dispute underlying this petition, the petition is not ripe for judicial review. See Am. Petroleum Inst. v. EPA, 683 F.3d 382, 386 (D.C. Cir. 2012) (“In the context of agency decision making, letting the administrative process run its course before binding parties to a judicial decision prevents courts from entangling themselves in abstract disagreements over administrative policies, and protects the agencies from judicial interference in an ongoing decision-making process.”) (internal quotation marks, citation, and alterations omitted). It is

FURTHER ORDERED that the motion to hold in abeyance be denied.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam