

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

STATE OF NEW MEXICO, <i>ex rel.</i> HECTOR BALDERAS, Attorney General	)	
	)	
Plaintiff,	)	
	)	No. 1:21-cv-00284-MV-JFR
v.	)	
	)	
UNITED STATES NUCLEAR REGULATORY COMMISSION and CHAIRMAN CHRISTOPHER HANSON, in his official capacity as Chairman of the Commission	)	
Defendant.	)	

**RESPONSE BY HOLTEC INTERNATIONAL IN SUPPORT OF  
FEDERAL DEFENDANTS’ MOTION TO DISMISS FIRST AMENDED COMPLAINT**

Holtec International, Inc. (“Holtec”) hereby joins with the Federal Defendants<sup>1</sup> in their *Motion to Dismiss First Amended Complaint; Brief in Support* (Docket #12) and requests that the Court dismiss this action for lack of subject matter jurisdiction.<sup>2</sup>

**MEMORANDUM IN SUPPORT**

Plaintiff filed this action to challenge the authority of the United States Nuclear Regulatory Commission (“NRC”) to issue licenses to construct two facilities for the interim storage of spent nuclear fuel. One of these facilities is the HI-STORE Consolidated Interim Storage Facility, the subject of an application to the NRC filed by Holtec in March 2017 for a facility to be built in

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<sup>1</sup> The United States Nuclear Regulatory Commission and Chairman Christopher Hanson, in his official capacity (collectively, “Federal Defendants”).  
<sup>2</sup> Holtec’s Motion for Leave to Intervene (Document #4) was filed on April 29, 2021 and is pending before this Court.

Eddy and Lea Counties in southeastern New Mexico.<sup>3</sup> The NRC docketed the application in March 2018, thus beginning its review.<sup>4</sup>

Since that time, the NRC has been undertaking an extensive review of the safety and environmental aspects of the Holtec proposal.<sup>5</sup> In July 2018, the NRC afforded interested members of the public the opportunity to request a public hearing.<sup>6</sup> Six petitioners<sup>7</sup> took advantage of that opportunity. The State of New Mexico (and its Attorney General) did not. The issues that the petitioners before the NRC sought to raise included all the issues that Plaintiff is seeking to raise before this Court.<sup>8</sup>

In addition, several of those petitioners before the NRC have already filed court challenges that largely duplicate this suit. Those cases are all pending before the United States Court of Appeals for the District of Columbia Circuit.<sup>9</sup> These petitioners' challenges specifically include the same arguments raised by Plaintiff, supported by the same allegations, that the NRC lacks the statutory authority to license the two spent fuel storage facilities. The State of New Mexico has not sought to intervene in the pending suits or file in the D.C. Circuit.

As set forth in the NRC's Motion to Dismiss, Plaintiff's Amended Complaint is fatally deficient because Plaintiff filed its case in the wrong court, failed to exhaust its administrative

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<sup>3</sup> See 83 Fed. Reg. 32919 (July 16, 2018).

<sup>4</sup> 83 Fed. Reg. 12034 (March 19, 2018) (notice of docketing).

<sup>5</sup> See 83 Fed. Reg. 13802 (March 30, 2018) (notice of intent to prepare environmental impact statement).

<sup>6</sup> 83 Fed. Reg. 32919 (July 16, 2018).

<sup>7</sup> Sierra Club; NAC International Inc.; Beyond Nuclear, Inc.; Fasken Land and Minerals and Permian Basin Land and Royalty Owners; Don't Waste Michigan and six other organizations; and Alliance for Environmental Strategies.

<sup>8</sup> See, e.g., *Holtec International* (HI-STORE Consolidated Interim Storage Facility), CLI-20-4, 91 NRC 167, 176, 210-11 (2020); CLI-21-4, 93 NRC \_\_ (Feb. 18, 2021) (slip op.); CLI-21-07, 93 NRC \_\_ (Apr. 28, 2021) (slip op.); *Holtec International* (HI-STORE Consolidated Interim Storage Facility), LBP-19-4, 89 NRC 353, 358 (2019).

<sup>9</sup> *Beyond Nuclear v. NRC*, No. 20-1187 (D.C. Cir.); *Don't Waste Michigan, et al., v. NRC*, No. 20-1225 (D.C. Cir.); *Sierra Club v. NRC*, No. 21-1104 (D.C. Cir.); Orders [consolidating cases] dated June 23, 2020 and April 23, 2021. It is worth noting that these same petitioners also participated in the NRC proceeding to license the second interim spent fuel storage facility challenged by Plaintiff. See, e.g., First Amended Complaint, para. 4, and have also raised these same issues before the D.C. Circuit. *Beyond Nuclear v. NRC*, No. 21-1056 (D.C. Cir.); *Don't Waste Michigan, et al., v. NRC*, No. 21-1048 (D.C. Cir.); *Sierra Club v. NRC*, No. 21-1055 (D.C. Cir.); Orders [consolidating cases] dated March 5, 2021.

remedies, and failed to challenge a final order of the NRC. Any one of these deficiencies would be fatal. In combination, they leave no doubt that Plaintiff's Amended Complaint is fatally compromised.

Congress included the NRC as one of the agencies under the Hobbs Act because Congress intended to have a uniform and expedient judicial review of the NRC's licensing processes before the United States Courts of Appeals – consolidating litigation to a smaller number of fora and minimizing the burdens of appeals. Plaintiff cannot undermine the Hobbs Act by claiming that there is no “final order”, as that argument runs head-on into the requirement that Plaintiff (as the six other petitioners have done) must first exhaust its administrative remedies before seeking any judicial relief.<sup>10</sup> The Court should not allow the Plaintiff, by “artful pleading,” to sidestep the requirements of the Hobbs Act, exhaustion and finality, trying to plead its action as something that it is not. *Pub. Watchdogs v. S. Cal. Edison Co.*, 984 F.3d 744, 766-67 (9th Cir. 2020) (plaintiffs “cannot avoid the Hobbs Act's exclusive avenue of judicial review by artfully pleading its challenge to the 2015 License Amendments and the Certificate of Compliance for the Holtec System as a Price—Anderson, public nuisance, or strict products liability claim.” “reading § 2239 ‘liberally’ and the Hobbs Act ‘broadly’ to encompass not only all final NRC actions in licensing proceedings, but *all issues that are preliminary, ancillary, or incidental to those licensing proceedings* . . . claims fall within the scope of the Hobbs Act.” (emphasis added)); *see e.g., Rivet v. Regions Bank*, 522 U.S. 470, 475, 118 S. Ct. 921, 925 (1998); *Turgeon v. Admin. Review Bd.*, 446 F.3d 1052, 1060 (10th Cir. 2006) (failing to plead essential federal elements of the claim is “artful pleading”, invoking federal jurisdiction).

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<sup>10</sup> *See, e.g., Desrosiers v. NRC*, 487 F. Supp. 71 (E.D. Tenn. 1980); *Township of Lower Alloways Creek v. NRC*, 481 F. Supp. 443 (D.N.J. 1979); *Paskavitch v. NRC*, 458 F. Supp. 216 (D. Conn. 1978) (primary jurisdiction); *Thermal Sciences, Inc. v. NRC*, 29 F.Supp. 2d 1068 (E.D. Mo. 1998), *aff'd* 184 F.3d 803 (8<sup>th</sup> Cir. 1999),

Plaintiff's arguments have already been considered by the NRC and are currently pending in the United States Court of Appeals for the District of Columbia in three cases consolidated by that Court. It makes no sense to allow Plaintiff to move forward in *this* forum. Even putting aside that Plaintiff's Amended Complaint runs afoul of the Hobbs Act, finality and exhaustion, continuation of the suit in this forum wastes judicial resources.

For these reasons, and as set forth in the NRC's Motion to Dismiss, Holtec respectfully requests that the Court dismiss Plaintiff's complaint.

Dated: June 28, 2021

Respectfully submitted,

/s/ Hugh M. Ray, III

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**Counsel for Holtec International**

**Certificate of Service**

I hereby certify that the electronic original of the foregoing “Response by Holtec International in Support of Federal Defendants’ Motion to Dismiss First Amended Complaint” was filed with the United States District Court for the District of New Mexico on this 28th day of June, 2021 through the Court’s CM/ECF electronic filing system, and thus also served on parties or counsel of record by electronic means. Courtesy copies have also been sent by email to counsel for the State of New Mexico and the NRC.

/s/ Hugh M. Ray, III

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