

**United States Court of Appeals  
For the Fifth Circuit**

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No. 21-60743

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STATE OF TEXAS; GREG ABBOTT, GOVERNOR OF THE STATE OF  
TEXAS; TEXAS COMMISSION ON ENVIRONMENTAL QUALITY;  
FASKEN LAND AND MINERALS, LIMITED; and  
PERMIAN BASIN LAND AND ROYALTY OWNERS,

*Petitioners,*

v.

NUCLEAR REGULATORY COMMISSION;  
UNITED STATES OF AMERICA,

*Respondents.*

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**REPLY BRIEF OF PETITIONERS  
FASKEN LAND AND MINERALS, LTD. and  
PERMIAN BASIN LAND AND ROYALTY OWNERS**

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## I. INTRODUCTION

The Nuclear Regulatory Commission (“NRC”) seeks to avoid both substantive judicial review of its actions in licensing the ISP CISF and its obligation to engage in appropriate fact-finding, asserting instead various jurisdictional and procedural arguments. The NRC is obligated to comply with NEPA and other federal laws, including the APA, and it cannot avoid judicial review of its failure to do so by trying to funnel any challenges to its final agency action into the administrative process that it controls and uses to limit judicial review (all interventions and submitted contentions in this matter were denied).

The intent of NEPA and its implementing regulations is to focus the government and public attention on the environmental impacts of the proposed agency action and permit public participation. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989) (“the broad dissemination of information mandated by NEPA permits the public and other government agencies to react to the effects of a proposed action at a meaningful time”); 40 C.F.R. § 1506.6. The NRC’s position is contrary to the intent and purpose of NEPA, which requires publication of a draft Environmental Impact Statement (“EIS”) and invitation for public comment. Here, the NRC closed the adjudicatory proceeding and the administrative record before its draft EIS was published. Petitioners unsuccessfully asked to reopen the proceedings for appropriate fact-finding. Fasken Br. at 14-17. The NRC seeks to

restrict public participation in the NEPA process by forcing a party to intervene in an adjudicatory proceeding long before a draft EIS is even prepared. Respondents' attempts to avoid judicial review of their actions should be rejected.

## **II. ARGUMENT**

### **A. Respondents' Jurisdictional Challenges Should Be Rejected**

#### **1. Petitioners have standing**

Respondents' first argument is that Petitioners did not affirmatively present evidence of standing, specifically that Fasken and at least one member of the Permian Basin Land and Royalty Owners ("PBLRO") will suffer an injury-in-fact, in their opening brief. Petitioners did not include evidence of standing in their opening brief because, for several reasons, Petitioners believed standing is self-evident and not contested. *See* Fasken Br. at 3, n.2 (indicating that issues related to the Court's jurisdiction over Petitioners were fully briefed separately in conjunction with Respondents' motion to dismiss).

First, Petitioners have repeatedly been found to have standing in the underlying adjudicatory proceeding because both Fasken and members of the PBLRO own property within 18 miles of the CISF site and necessarily travel to and spend time in the area. *In re Interim Storage Partners LLC*, LBP-19-07, 90 NRC 31, 2019 WL 10353148, at \*1, 14-15, 58 (NRC Aug. 23, 2019) (relying on declarations of Tommy Taylor and D.K. Boyd); *In re Interim Storage Partners LLC*, CLI-20-14,

2020 WL 7490093, at \*1 (NRC Dec. 17, 2020). Indeed, Respondents acknowledge that Petitioners' petition for review in the D.C. Circuit with respect to the adjudicatory proceeding is "jurisdictionally proper." MTD at 13.

Further, the NRC's motion to dismiss filed in this matter raised jurisdictional issues (arguing that this Court lacks jurisdiction to hear a direct challenge by a party that unsuccessfully sought intervention in the NRC's adjudicatory proceeding), but the NRC did not assert an argument against jurisdiction due to lack of standing. Indeed, Petitioners noted this in opposition to the motion to dismiss. MTD Opp. at 7, n.5 ("Respondents only challenged Fasken's status as a 'party' and not whether Fasken was aggrieved. The Fifth Circuit incorporates a standing analysis to determine whether a petitioner is 'aggrieved.' . . . There is no dispute that Fasken is aggrieved and has standing."). The NRC did not refute this statement in its reply brief.

It is unclear from the NRC's brief whether it actually contests Petitioners' ability to demonstrate standing or if its argument is merely that Petitioners' opening brief did not include evidence of standing. To the extent the NRC asserts that Petitioners cannot establish standing on the merits, it is incorrect.

Petitioners have asserted concrete, imminent concerns of harm to their health due to their proximity to the significant quantity of highly radioactive material to be stored at the facility and their exposure to normal and accidental doses of radiation

during transportation of spent nuclear fuel (“SNF”) to the facility; to their businesses due to ISP’s use of the same regional rail and roadways to transport SNF that are regularly used by Petitioners in conducting their operations; and to their property values and interests which would diminish with the licensing of the CISF, all as a result of the NRC’s decision to grant ISP’s license. This is sufficient to satisfy Article III’s standing requirements. *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1266 (D.C. Cir. 2004) (finding standing for an environmental organization to challenge nuclear waste disposal facility licensing because one of its members “lives adjacent to the land where the Government plans to bury 70,000 metric tons of radioactive waste—sufficient harm in and of itself”); *Duke Power Co. v. Carolina Env’tl. Study Group, Inc.*, 438 U.S. 59, 74 (1978) (“And the 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.”); *Kelley v. Selin*, 42 F.3d 1501, 1509-10 (6th Cir. 1995) (finding standing where petitioners asserted harm to aesthetic interests, physical health, and diminished property value to land in close proximity to proposed spent fuel storage facility).

Petitioners also have standing based on a procedural injury resulting from the NRC’s failure to comply with NEPA’s procedural requirements in its EIS process.



*Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 938 (9th Cir. 2005) (“NEPA is a procedural statute, and thus it is not surprising that procedural injuries frequently suffice for standing in the NEPA context.”). A geographic nexus between the petitioner and the site of the proposed action has been found sufficient to satisfy the concrete interest requirement in NEPA claims. *Id.*; *Nuclear Information and Resource Service v. NRC*, 509 F.3d 562, 567 (D.C. Cir. 2007) (“The Supreme Court and this Court have repeatedly held that individuals who live near a proposed federal project and allege that they will suffer concrete injury from the project have standing in NEPA and other procedural rights cases.”); *WildEarth Guardians v. Jewell*, 738 F.3d 298 (D.C. Cir. 2013) (“Environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity.”) (internal quotation omitted); *see also Gulf Restoration Network v. Salazar*, 683 F.3d 158, 167-68 (5th Cir. 2012). As discussed below, Fasken and members of the PBLRO own and use the land impacted by the NRC’s actions in failing to prepare an adequate EIS and in its subsequent record of decision issuing the ISP license.

In their opening brief, Petitioners cited to comments submitted by Tommy Taylor, PBLRO member and Fasken representative, which supports standing here. Fasken Br. at 53-54 (citing C.I. 984). “Fasken owns approximately one-eighth of the surface land and minerals that make up Andrews County” and “conducts oil and gas

operations on their own land and upon leases in Andrews and surrounding counties.” C.I. 984 (Taylor comments). “PBLRO is a coalition of landowners, ranchers, royalty owners and oil and gas operators with interests in land, minerals and agriculture throughout the Permian Basin.” *Id.* Additional comments of former Fasken geologist and geoscientist Aaron Pachlhofer substantiate Mr. Taylor’s statements. “Fasken presently has lands and mineral interests within eighteen miles of the proposed WCS/ISP CISF located in Andrews County, Texas. The PBLRO presently has lands and mineral interests throughout Andrews County with the nearest member holding land and minerals within two miles of the proposed WCS/ISP CISF.” C.I. 1469.

In its response brief, the NRC repeatedly cites to Petitioners’ participation in the adjudicatory proceedings, including citing to Petitioners’ contentions submitted therein. Resp. Br. at 19, n.13. Petitioners submitted declarations evidencing standing in conjunction with their contentions.<sup>1</sup> As stated therein, Mr. Taylor’s employment duties require him to travel to and spend time in the area of the ISP site, travelling on State Highway 176, his usual route, which is approximately 1 mile from the site at its closest point. Taylor Decl. (10/29/18) at ¶ 3. Other Fasken employees travel

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<sup>1</sup> Petitioners’ contentions and supporting declarations were not included as part of the record in this case, but they are available at <https://www.nrc.gov/docs/ML1830/ML18302A412.pdf> (Declaration of Tommy Taylor (“Taylor Decl. (10/29/18)”) is attached as Exhibit 1, and the Declaration of D.K. Boyd (“Boyd Decl.”) is attached as Exhibit 2) and <https://www.nrc.gov/docs/ML2018/ML20189A581.html> (Declaration of Tommy Taylor (“Taylor Decl. (7/6/20)”) is attached as Exhibit 1).

this same route for employment and personal reasons. *Id.* Mr. Taylor expressed concerns over human health effects and associated economic costs of radiological contamination, as well as disruption or foreclosure of oil and gas extraction and production activities and agricultural and ranching activities due to radiological contamination or to a minimal transportation incident, such as derailment or collision involving SNF. *Id.* at ¶¶ 10-11; Taylor Decl. (7/6/20) at ¶¶ 9-10.

The PBLRO was formed in response and opposition to the proposed CISFs, and its purpose is to advocate on behalf of its members, oil and gas producers and land and royalty owners, including Fasken, who have long-term economic, social and environmental interests in the Permian Basin that are jeopardized by the proposed CISFs. Boyd Decl. at ¶ 2. PBLRO members have land and mineral ownerships near the ISP site. Mr. Boyd, a PBLRO member, owns and ranches on property four miles from the ISP site. *Id.* at ¶ 4. Mr. Boyd's brother and his employees regularly spend time within 15 miles of the facility due to his brother's cattle operations. *Id.* at ¶ 6. Mr. Boyd also regularly travels on the local transportation routes near the facility, such as Highway 18, in which rail cars on the Texas and New Mexico Railway, which will be used to transport SNF to ISP's facility, are within a couple hundred feet of the Highway for almost 40 miles. *Id.* at ¶ 7. The railway runs through Mr. Boyd's ranch and he and his family regularly cross the railroad to conduct cattle operations. *Id.* at ¶ 8. Mr. Boyd expressed concern

over the health and safety of himself, his family and his employees; his environment; the value of his mineral and working interests in gas and oil production; and the value of his ranch as a result of the proximity of the facility as well as the radiological exposure from the transportation and storage of SNF. *Id.* at ¶¶ 9-13.

To the extent the above evidence contained in the record and the prior declarations submitted in the referenced underlying adjudicatory proceeding are insufficient, further evidence of Petitioners' standing is set forth in the declarations of Tommy Taylor ("Taylor Decl. (5/13/22)"), D.K. Boyd ("Boyd Decl. (5/13/22)"), and Grant Huckabay ("Huckabay Decl.") included in the addendum submitted herewith. As set forth therein, Petitioners have mineral leases and grazing properties surrounding the ISP site and support the development of industry infrastructure and support services throughout the Permian Basin region. Taylor Decl. (5/13/22) at ¶¶ 3, 6-7, 9-10; Boyd Decl. (5/13/22) at ¶¶ 4-5, 7-9; Huckabay Decl. at ¶¶ 3, 10-11, 24. Members of PBLRO and Fasken regularly utilize regional rail transportation and local, state and federal highways to support their industries with individuals and personnel frequently visiting the region for work-related purposes, including but not limited to, routine checks and maintenance on oil and gas production equipment and to monitor operations. Taylor Decl. (5/13/22) at ¶¶ 5, 7, 8, 21-25; Boyd Decl. (5/13/22) at ¶¶ 6, 9-11; and Huckabay Decl. at ¶¶ 5, 23-24. Indeed, by virtue of the facility's location in the middle of the Permian Basin oil hub, Petitioners will

frequently and regularly travel in the vicinity of the facility for business-related purposes. *Id.* Likewise, Petitioners' operations will be forced to share regional transportation infrastructure and will intersect routes with or travel alongside multiple rounds of shipments of high-level radioactive waste and SNF in and out of the Permian Basin. Taylor Decl. (5/13/22) at ¶ 26; Boyd Decl. (5/13/22) at ¶ 10; Huckabay Decl. at ¶ 25. Thus, these declarations provide further evidence of Petitioners' specific and legitimate concerns regarding adverse health effects and impacts to their employees and business operations, including the costs associated with medical care and treatment of any radiation-related conditions and the adverse financial impacts on property values and threats to ongoing extraction and mineral development, agricultural and ranching activities posed by the construction, operation and decommissioning of the ISP facility. Taylor Decl. (5/13/22) at ¶¶ 15-20, 27-30; Boyd Decl. (5/13/22) at ¶¶ 12-17; Huckabay Decl. at ¶¶ 7-9, 13-17, 26-28.

Because both Fasken and Mr. Boyd are PBLRO members, their declarations support PBLRO's associational standing. *Center for Biological Diversity v. EPA*, 937 F.3d 533, (5th Cir. 2019) (stating the three-part test for associational standing: (1) the association's members would independently meet Article III standing requirements; (2) the interests the association seeks to protect are germane to the purpose of the organization; and (3) neither the claim asserted nor the relief

requested requires participation of individual members). As discussed above, Fasken and Mr. Boyd, members of PBLRO, both demonstrated standing. PBLRO was formed in response and opposition to the proposed CISFs and it seeks to protect the interest of its members in the Permian Basin. Taylor Decl. (5/13/22) at ¶¶ 4-6; Boyd Decl. (5/13/22) at ¶¶ 2-3. And PBLRO is able to represent its members without their individual participation.

Finally, the injuries to Petitioners' interests, discussed above, are directly tied to the NRC's violations of the NWPA, APA and NEPA in conjunction with its EIS and subsequent licensing decision, which this Court can redress by vacating the NRC's record of decision and issuance of the ISP license at least until the NRC has fully complied with NEPA. *Nuclear Information and Resource Service*, 509 F.3d at 567 (finding standing where petitioners asserted claims that, "if successful, would require the NRC to take additional procedural steps before granting the license and would at least temporarily prevent construction and operation of the facility near their homes"); *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) ("When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.").

Although the NRC asserts that Petitioners may not submit evidence supporting standing on reply (Resp. Br. at 28), the NRC misinterprets the D.C.

Circuit case on which it relies. As the D.C. Circuit explained in addressing an argument similar to the NRC's here,

MPAA's interpretation of *Sierra Club* rests on a faulty construction of the opinion and is inconsistent with the law of this circuit. Nothing in *Sierra Club* suggests that it is intended to create a 'gotcha' trap whereby parties who reasonably think their standing is self-evident nonetheless may have their cases summarily dismissed if they fail to document fully their standing at the earliest possible stage in the litigation . . . In *Communities Against Runway Expansion*, we ruled that, even though petitioners had failed to include submissions adequate to demonstrate standing with their opening brief, *Sierra Club* did not preclude the court from considering declarations submitted along with petitioners' reply brief, after an intervenor had challenged petitioners' standing.

*American Library Ass'n v. FCC*, 401 F.3d 489, 493-94 (D.C. Cir. 2005).

As set forth herein, Petitioners reasonably believed their standing was self-evident and was not contested, and thus, good cause exists to allow Petitioners to submit evidence of standing with their reply brief. *Id.* Petitioners respectfully request that the Court consider the standing declarations submitted herewith and reject Respondents' standing argument.

## **2. Petitioners are "parties aggrieved"**

Petitioners addressed Respondents' arguments regarding their "party aggrieved" status in their Response to the Motion to Dismiss, which the Court carried with the case, and which Petitioners do not repeat here.

However, to address Respondents' misleading characterization of Petitioners' arguments before this Court and their issues on appeal before the D.C. Circuit,

Petitioners clarify that their pending appeals are properly brought, based on two different final agency orders. Petitioners' pending appeal in the D.C. Circuit seeks review of an NRC Order denying their petition for intervention in the adjudicatory proceeding below, while Petitioners' appeal to this Court seeks review of the NRC's record of decision and issuance of the ISP license and asserts NEPA violations associated with the NRC's EIS preparation, consistent with the State of Texas' appeal here. While the usual course may be for litigants to seek review of all final orders in the same court, as was done by Sierra Club, Don't Waste Michigan, and Beyond Nuclear,<sup>2</sup> there is nothing preventing Petitioners from bringing their appeal on the final licensing decision in this Court.

Moreover, although the NRC complains that Petitioners' arguments to this Court are also the subject of review before the D.C. Circuit,<sup>3</sup> Petitioners note that their brief to this Court was filed before any briefing was submitted in the D.C. Circuit. *See* Resp. Br. at 20-21 (noting that briefing in the D.C. Circuit will not be

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<sup>2</sup> Notably, although these petitioners, like Fasken and PBLRO, sought review of NRC orders denying their respective petitions for intervention in the D.C. Circuit, following the NRC's final licensing decision issuing the ISP license, each of these entities also sought review of the licensing decision. *See* Resp. Br. at 20; MTD Opp. at 2-6. However, unlike in this Court with Fasken and PBLRO, the NRC did not seek to dismiss those petitions for lack of "aggrieved party" status, suggesting that the NRC's real objection is to venue, not jurisdiction.

<sup>3</sup> ISP disagrees, arguing that the majority of arguments raised here were not raised in the adjudicatory proceeding by Texas, Petitioners or any other party. Intervenor Br. at 22-23; *see also id.* at 34, 43.



completed until July 2022). The NRC's argument more appropriately addresses venue as opposed to the Court's jurisdiction. *See* MTD Opp. at 8-15 (contesting the NRC's transfer of venue argument). Respondents' arguments regarding lack of jurisdiction should be rejected.

**B. Respondents' Non-Jurisdictional Arguments Should Be Rejected**

The NRC contends review of Petitioners' NEPA and APA arguments are inappropriate or that such review should be limited, based on its position that all claims must be funneled through its administrative process and any other claims must be dismissed because of mandatory exhaustion. As discussed in Petitioners' opposition to the NRC's motion to dismiss, Petitioners' NEPA and APA claims are based on a different final agency action, namely the EIS preparation and record of decision associated with the NRC's issuance of the ISP license. As such, the Hobbs Act provides jurisdiction for the Court's review of this final agency action. MTD Opp. at 2-8.

Further, although the NRC argues that jurisdictional exhaustion is required, it does not cite to a specific statutory exhaustion requirement. This is because there is none. *Vermont Dept. of Public Service v. NRC*, 684 F.3d 149, 156 (D.C. Cir. 2012) (finding that the Hobbs Act does not contain the necessary unequivocal Congressional jurisdictional exhaustion requirement). As set forth in their opening brief, Petitioners participated in the proceeding and provided the NRC with an

opportunity to pass on the issues they raise here, including by submitting comments and even filing a motion to reopen the closed administrative proceeding (Fasken Br. at 15-18), satisfying the non-jurisdictional exhaustion requirements and the Hobbs Act. *See Vermont Dept. of Public Service*, 684 F.3d at 157 (noting that the petitioners could have petitioned the Commission for interlocutory review of the Board’s denial of late-filed contention; they could have filed a new, separate contention; or they could have submitted a comment for the Commission’s review in response to the draft EIS). Judicial review of the NRC’s EIS and record of decision associated with its issuance of the ISP license is proper.

With respect to the merits of their petition, Petitioners generally rest on the arguments in their opening brief; however, Petitioners briefly respond below to some of the NRC’s specific arguments.

**1. The NRC abused its discretion and violated NEPA and the APA by issuing the ISP License containing a condition that violates the NWPA**

The ISP license does not “merely require[] that ISP contract with the titleholder of the fuel being stored to provide funding necessary to sustain facility operations” as NRC argues in its response. Resp. Br. at 23, 56. Rather, it affirmatively allows ISP to contract with DOE wherein DOE retains title to the SNF and would be responsible for funding the storage of SNF at the ISP CISF. C.I. 130, ISP License at ¶¶ 15, 19. It is undisputed that this is unlawful and in violation of the

NWPA. NRC's response—that because it has recognized that a condition authorized by the ISP license is illegal and an illegal condition cannot satisfy the license requirement, the license does not authorize illegal storage of SNF—is nonsensical. Resp. Br. at 24. The question is not whether any other entity will violate the law by acting in compliance with the illegal license.<sup>4</sup> The question is whether NRC's decision to issue a license containing an unlawful condition is arbitrary, capricious and in violation of the law. The NRC acknowledges that its actions taken in violation of the NWPA would be subject to judicial review and properly enjoined because they are contrary to law. Resp. Br. at 56-57. This is precisely what Petitioners are asking of this Court.<sup>5</sup>

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<sup>4</sup> The NRC suggests that because an illegal contract is unenforceable, ISP could not rely on such contract for its operations. Resp. Br. at 56. But would such a contract be unenforceable, given that it would be in compliance with the license issued by the NRC? Further, the NRC argues that it surely would not permit such an illegal contract (*id.*); however the fact that it issued the license containing an illegal condition in the first place does little to instill public confidence in its practices going forward.

<sup>5</sup> Petitioners' NWPA argument concerns the illegality of privately-owned consolidated interim storage facilities for SNF *owned by the DOE*. In making this point, Petitioners cited *Bullcreek v. NRC*, 359 F.3d 536 (D.C. Cir. 2004), as authorizing the NRC to license privately-owned away-from-reactor storage facilities for privately-owned SNF, which Petitioners then distinguished from storage of DOE-owned SNF, to underscore the point that the NRC lacks authority to issue the ISP license that includes storage of DOE-owned SNF. Petitioners do not take any position on whether *Bullcreek* was correctly decided for purpose of this appeal. The NRC's statement to the contrary is incorrect. Resp. Br. 37. Moreover, *Bullcreek* did not read the AEA to allow for consolidated interim storage of the entire nation's SNF. Consolidation of the nation's SNF is the subject of the NWPA, not the AEA.

Further, as Petitioners argue, the NRC's allowance for an unlawful condition tainted its NEPA analysis. Although the NRC acknowledges differences, *e.g.*, in responsibility for emergency response, and liability for accidents, depending on whether the DOE or a private entity has title to the SNF (C.I. 125, EIS at 4-75, D-131), the NRC decided, without an evidentiary record, that issues relating to the title of SNF are outside the scope of the EIS and thus did no impact analysis based on whether the transporter of SNF is the DOE or a private entity. Who owns title to the SNF is not purely an administrative issue, as NRC contends.

## **2. Timing of a permanent repository**

NRC's response to Petitioners' arguments relating to the timing of a permanent repository ignores Petitioners' argument that the NRC arbitrarily and capriciously used the 2048 date for a permanent repository in its NEPA analysis. The stated purposes and need for the ISP CISF was to provide an option for off-site storage of SNF before a permanent repository is established; however, 2048 availability of a permanent repository occurs during the 40-year license period. Despite this, the NRC refused to consider transportation impacts and adverse effects of transporting the SNF from the ISP CISF to the permanent repository. *See Fasken Br.* at 28-31.

### 3. Purpose and need and consideration of alternatives

The consideration of alternatives is at the heart of a NEPA analysis. *City of Shoreacres v. Waterworth*, 420 F.3d 440, 450 (5th Cir. 2005). The purpose and need statement establishes the range of reasonable alternatives to satisfy the underlying need. C.I. 77 at B-14. As discussed in Petitioners' opening brief, the NRC accepted ISP's narrow purpose and need statement, which allowed it to eliminate all reasonable alternatives other than the no action alternative. Fasken Br. at 35-45. For example, the stated purpose of the ISP CISF is to provide an option for storage of SNF before a permanent repository is available. C.I. 125 at 1-3. This is similar to the purpose and need statement submitted by Holtec in its CISF license application; yet, the NRC did not consider the Holtec facility in its alternatives analysis because the NRC claims that a reasonable alternative must be an alternative the applicant is in the position to implement. Resp. Br. at 75.

The NRC's only support for this argument is *Environmental Law and Policy Center v. NRC*, 470 F.3d 676 (7th Cir. 2006), which is distinguishable. First, that case involved an application for an early site permit (ESP) for a nuclear power plant, which allowed the NRC to defer consideration of some environmental issues, including an analysis of the need for power, until the applicant sought the actual construction permit, which could be as long as forty years later. *Id.* at 684. Thus, the NEPA analysis was incomplete.

Further, in rejecting the petitioners' argument that reasonable alternatives were excluded because the purpose was defined too narrowly, the court found that the purpose adopted in the EIS was not unreasonably narrow, as it permitted consideration "of a host" of alternatives. *Id.* This is not the case here. The NRC construed the stated purpose and need (to provide an option for away-from-reactor storage of SNF before a permanent repository is available) even more narrowly than written by reading in a requirement that reasonable alternatives must also be something the applicant can implement. The court reiterated that blindly adopting the applicant's goals is improper because it does not allow for the full consideration of alternatives required by NEPA. *Id.* at 682. "NEPA requires an agency to exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project and to look at the general goal of the project rather than only those alternatives by which a particular applicant can reach its own specific goals." *Id.* at 683 (internal quotation omitted). Under NEPA, alternatives that accomplish the purpose of the proposed action are considered reasonable.<sup>6</sup> *Webster v. Dept. of Agriculture*, 685 F.3d 411, 422 (4th Cir. 2012). The NRC's catering to

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<sup>6</sup> The NRC's own guidance states that "[r]easonable alternatives are those alternatives that meet the proposal objectives and applicable environmental standards and are technically feasible." NUREG-1748 (NRC, 2003) at 5.5; *see also id.* at 5-7 ("Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant/licensee (CEQ, 1981).").

the interests of ISP resulted in the arbitrary and capricious elimination of reasonable alternatives in the EIS.

Similarly, in the EIS, the NRC did no assessment of the actual need for the facility and apparently believes this is not required, as it stated that it has no role in the planning decisions of private entities. C.I. 77 at B-14; C.I. 125 at D-31-32 (“Regarding whether reactor sites are advocating for or against the construction and operation of a CISF, the NRC staff concluded that absent findings in its safety review or NEPA analysis that the proposed facility does not meet regulatory requirements, the NRC has no role in the planning decisions of private entities.”). According to the NRC, it does not control the decisions of applicants and its mission is simply “to determine whether licensees are operating, and license applicants have demonstrated that they will operate, safely.” Resp. Br. 59. The NRC also ignores its prior findings that continued storage of SNF (on-site at Independent Spent Fuel Storage Installations (“ISFSIs”) and away-from-reactor ISFSIs) was safe until a permanent repository is established, suggesting there is no immediate need for consolidated interim storage. NUREG-2157 (NRC, 2014).

Wholesale adoption of an applicant’s purpose and need for federal action without any scrutiny or assessment of whether the proposed federal action is needed, is erroneous and leads to waste of federal resources. The NRC cannot seriously contend that it has no choice but to issue a license if an applicant jumps through the

relevant technical hoops. Not only does it have a choice, it has an obligation to assess the purpose and need for a federal action as part of its NEPA analysis, but it wholly ignored this obligation here. The NRC needs to make an appropriate evidentiary record for a reviewing court.

#### **4. Site selection**

Finally, the NRC argues that Petitioners do not point to any error in its site selection analysis. Resp. Br. at 76. This misses the point of Petitioners' argument, which is that the NRC did no independent analysis. Rather, the NRC simply rubber-stamped ISP's site selection process, despite its flaws. C.I. 125, EIS at 2-25 (deeming ISP's site selection process "reasonable").

For one, ISP itself stated that its CISF should only be located where it has the support of the hosting state and community, and it screened out several states for lack of support and chose Andrews County in part because it had expressed support. C.I. 88, ER (Rev. 3, Part 1) at 2-10, 2-61 to 2-64. The NRC confirmed this in its EIS. C.I. 125, EIS at 2-24. As explained in Petitioners' opening brief, this support was fleeting and no longer exists. Fasken Br. at 49-51. In its place is vocal opposition that includes laws and resolutions passed to prevent the transportation and/or storage and disposal of SNF within the region and state. *Id.*



Importantly for purposes of this appeal, the support ISP relied on as one of the criteria to support the chosen location for the ISP facility was received in 2014-2015<sup>7</sup> and was subsequently lost, but despite three revisions to its Environmental Report, ISP never acknowledged this fact or updated its discussion to indicate that Texas and Andrews County now opposed its CISF. Moreover, the NRC directly received comments from Governor Abbott of Texas voicing his opposition to the project (C.I. 127, 1128); yet, the NRC nevertheless accepted ISP's site selection process, to the exclusion of consideration of alternative sites, based on stale information impacting its specific site selection criteria. The NRC did not discuss this opposition or how the ISP CISF would operate in the face of such opposition, which includes legislation banning the storage and disposal of SNF in Texas, in violation of 10 C.F.R. 51.91(b)'s requirement to discuss relevant responsible opposing views.

In response to Petitioners' arguments concerning the unreasonable site selection process, the NRC cited the outdated support from Texas and Andrews County, again ignoring more recent, contrary information. Resp. Br. at 76-77. The NRC also contends that it cannot deny a license application for failure to conduct consent-based siting. Resp. Br. at 77. Yet, consent-based siting is precisely what ISP

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<sup>7</sup> See C.I. 88, E.R. (Rev. 3, Part 1) at 2-10 (referring to a 2014 letter from then-Governor Rick Perry of Texas) and 2-18 (referring to a 2015 Andrews County Resolution).

purported to do in its site selection process that NRC affirmed and that was based on incorrect information.

### **III. CONCLUSION**

For the reasons set forth herein and in Petitioners' opening brief, Petitioners respectfully request that this Court suspend activities on the ISP license until the NRC complies with applicable law.

Dated: May 16, 2022

Respectfully submitted by:

**KANNER & WHITELEY, LLC**

*/s/ Allan Kanner*

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Counsel for Petitioners Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners

## CERTIFICATE OF SERVICE

I certify that on this 16<sup>th</sup> day of May 2022, I electronically filed the foregoing Reply Brief of Petitioners Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners upon counsel for the parties in this action by filing the document electronically through the CM/ECF system. This method of service is calculated to serve counsel at the following e-mail addresses:

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**CERTIFICATE OF COMPLIANCE WITH TYPE-  
VOLUME LIMIT**

I certify that this document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because it contains 5,334 words, excluding the parts of the document exempted under Fed. R. App. P. 32(f).

I certify that this document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because it has been prepared in 14-point Time New Roman, a proportionally spaced font.

Dated: May 16, 2022

/s/Allan Kanner  
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Minerals, Ltd. and Permian Basin  
Land and Royalty Owners

**ADDENDUM**

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ADDENDUM EXHIBIT #1

Declaration of Tommy Taylor (05/13/2022)

**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

STATE OF TEXAS; GREG  
ABBOTT, GOVERNOR OF THE  
STATE OF TEXAS; and TEXAS  
COMMISSION ON  
ENVIRONMENTAL QUALITY

Case No. 21-60743

*Petitioners,*

v.

UNITED STATES NUCLEAR  
REGULATORY COMMISSION and  
UNITED STATES OF AMERICA,

*Respondents.*

**DECLARATION OF TOMMY TAYLOR**

1. My name is Tommy E. Taylor and my business address is 6101 Holiday Hill Road, Midland, Texas 79707. I reside at 4100 Timberglen Circle, Midland, Texas 79707. My position with Fasken Management, LLC (Fasken) is Senior Vice President and Director of Oil and Gas Development. I am authorized by Fasken to execute this declaration on its behalf and on behalf of the Permian Basin Coalition of Land and Royalty Owners and Oil & Gas Operators (PBLRO) of which Fasken is a member and of which I am an officer.

2. This declaration is in support of the Petition for Review of Fasken and PBLRO in the above-captioned docket.

3. Fasken Land and Minerals, of which Fasken Management, LLC is its General Partner, is engaged in ranching as well as oil and gas extraction and production activities in the Permian Basin and in the vicinity of the Interim Storage Partners, LLC (ISP) consolidated interim storage facility (CISF) in Andrews County, Texas and the proposed Holtec International (Holtec) CISF in Eddy County and Lea County, New Mexico. Fasken owns property and currently operates active oil and gas properties within eighteen miles of the ISP CISF site in Andrews County, Texas.

4. PBLRO is an association with long-term economic, social and environmental interests in the Permian Basin that formed in response to ISP's and Holtec's CISF applications to construct and operate CISFs.

5. PBLRO presently has substantial land and mineral interests, and active leases throughout Andrews County, Texas, with a founding PBLRO member owning land used for oil and gas operations, cattle operations, and living quarters within four miles of the ISP CISF site.

6. I am personally familiar with other members of PBLRO of which there are 65 individual members, with multiple ranchers engaged in agricultural activities and owning land in the area for over a century and at least three members being publicly traded corporations (two integrated and one large independent oil and gas operator),



as well as numerous private companies involved in the extraction and production of oil and gas in the Permian Basin and in close proximity to the proposed transport of spent nuclear fuel and storage of spent nuclear fuel at ISP and Holtec CISFs.

7. I am personally familiar with the agricultural use of the land within the vicinity of the ISP CISF site and of the members of the PBLRO that live, work and travel along proposed transportation routes, graze their animals within four miles of the ISP CISF and draw water from wells that are fed by shallow groundwater from formations that are present beneath the ISP CISF.

8. Both my employment duties and personal reasons require me to travel to and spend time in the area of the ISP CISF. I generally use State Highway 176 when I am in the area for travel purposes. At its closest point, State Highway 176 is approximately 1 mile from the ISP CISF site. Additionally, I am personally aware of other Fasken employees who regularly travel for employment and personal reasons to the area and use State Highway 176 as well.

9. As the Director of Oil and Gas Development for Fasken, I am personally familiar with ongoing oil and gas activities in the vicinity of the ISP CISF and throughout the Permian Basin. Fasken has owned the land and minerals within the vicinity of the ISP CISF for over a century and drilled its first well in the Permian Basin approximately 70 years ago.

10. I also have personal knowledge of the activities of other oil and gas entities that are members of the PBLRO, one of which began drilling in the Permian Basin approximately 80 years ago and has extensive interests within close proximity to the ISP CISF. Neither Fasken nor any member of PBLRO has relinquished control of their interests for the ISP CISF.

11. There are approximately 4,579 wellbores within a 10-mile radius of the proposed CISF of which 1,066 were drilled and plugged prior to 1967 thus posing a potential risk of contamination. There are thousands of active oil and gas wells within a 50-mile radius of the proposed rail and road routes that will transport radioactive materials to the ISP CISF.

12. It is well-established and acknowledged that the Permian Basin is home to one of the most productive oil and gas hubs in the world. The Basin contains billions of barrels of hydrocarbons and millions of acre-feet of groundwater. It is the largest and most important hydrocarbon producing basin in the United States. It produces 50% of domestic hydrocarbons and 5% of global oil (EIA, 2020). These hydrocarbon and groundwater resources ensure domestic energy needs and global security.

13. According to the Permian Basin Petroleum Association, the Permian Basin, which includes Andrews County, produced approximately 5 million barrels of oil per day in 2019 and anticipates an increase to as much as 8 million barrels per day by 2023. The region produced 6,668 million cubic feet (MMcf) of natural gas per

day in 2017; 9,076 MMcf per day in 2018; 11,874 MMcf per day in 2019; 12,934 MMcf per day in 2020; and 12,658 MMcf per day through July in 2021.<sup>1</sup>

14. According to the Texas Railroad Commission, the Permian Basin accounts for approximately one-third of the nation's oil production.

15. I understand that a radiation release from the ISP CISF or during transportation of spent nuclear fuel through or near the Permian Basin or during any intermodal transferring functions may contaminate the areas in which Fasken and other members of the PBLRO have oil and gas property interests and/or extraction and production facilities. Such a release of radiation would cause contamination that would interfere or preclude the continued production of oil and gas in the Permian Basin. A radiological contamination event has the potential to interrupt or foreclose further oil and gas extraction/production activities and thereby diminish or eliminate the economic value of the oil and gas assets of Fasken and other members of PBLRO.

16. Likewise, I understand a radiation release from the ISP CISF or during transportation of spent nuclear fuel through or near the Permian Basin may contaminate the areas in which Fasken and other members of PBLRO have land interests and agricultural or cattle operations. A radiological contamination event

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<sup>1</sup> Source: Texas Railroad Commission Production Data Query System (PDQ), *Texas Permian Basin Average Daily Natural Gas Production 2008 Through July 2021*, available at: <https://www.rrc.texas.gov/media/t3plr201/gas-production.pdf>.

also has the potential to interrupt agricultural and ranching operations and thereby diminish or eliminate the economic value of real property interests and related assets of Fasken and other members of PBLRO.

17. I am also concerned about the reduction in property values for property owned by Fasken and PBLRO members as the result of the ISP CISF's construction and operation in the vicinity.

18. I am concerned that radiological contamination also has potential human health effects that may cause death, radiation related ailments and/or genetic defects. This potential, in addition to the adverse impacts on human mortality and morbidity rates, also has substantial economic costs associated with medical care and treatment of radiation related conditions that affect Fasken and other members of PBLRO.

19. I understand that even the most minimal transportation incident, such as a derailment or collision involving spent nuclear fuel, would amount to a dangerous materials emergency that has the potential to interrupt or foreclose further oil and gas extraction/production activities within the area of the incident, as well as adversely affecting the recipients of oil commodities which are regularly transported by rail. A transportation incident involving either of the two rail lines, identified as the proposed transportation routes for shipments of spent nuclear fuel in the ISP final Environmental Impact Statement (EIS), the Union Pacific Railroad or the Texas-New Mexico Railroad, would likely diminish or has the potential to eliminate the

economic value of oil and gas assets belonging to Fasken and other members of PBLRO.

20. Even the most minimal transportation incident involving spent nuclear fuel has the potential to interrupt or foreclose agricultural and ranching activities in the Permian Basin, thereby diminishing or eliminating the economic value of the real property interests and assets of Fasken and other members of PBLRO.

21. Both Fasken and PBLRO regularly utilize rail transportation to support their industries and extensive and ongoing operations. Those named in the ISP EIS, Union Pacific Railroad and the Texas-Mexico Railroad, both serve the oil, gas, agricultural and ranching industries in the region of the ISP CISF.

22. According to Union Pacific, two of its four key operating segments are the agricultural and energy industries. Union Pacific reported revenue from energy freight in 2019 as \$3.8 billion. It reports that railroads are the most efficient and cost-effective means of transportation of crude, frac sand, and petroleum by-products and transported 1.4 million carloads of energy freight shipments in 2019. In fiscal year 2019, agricultural commodities accounted for 18% of Union Pacific's shipments and energy freight accounted for 22%.

23. The Texas-New Mexico Railroad extends from a Union Pacific connection at Monahans, Texas. It is one of two lines owned by Watco that primarily serve the Permian Basin. Watco reports oilfield commodities as its primary shipments on the

Texas-New Mexico Railroad and agricultural commodities as primary on its Lubbock and Western Railways shipments.

24. With regard to energy freight, Fasken relies upon the rail lines of the Permian Basin primarily for transporting sand, acid, casing and tubing, cement, gel, and various liquid and dry chemical components that are used for blending associated products that are all necessary to drill and complete an oil well and bring it to production.

25. PBLRO members utilize the Permian Basin rail lines primarily for materials similar to that of Fasken but also for water, additional frac chemicals, and acid.

26. According to the ISP EIS, the ISP CISF would utilize the same rail lines which the oil and gas industry of the Permian Basin heavily relies upon.

27. Any hazardous materials emergency upon the rails that interferes with energy freight poses a loss of millions of dollars per day affecting multiple operators in the Permian Basin, including Fasken and other members of PBLRO. Likewise, any deterioration of the existing rail lines as a result of transport of oversized railcars transporting spent nuclear fuel, dedicated single-use shipments of spent nuclear fuel or other infrastructure improvements necessary to accommodate shipments of spent nuclear fuel will cause substantial delays for industries throughout the Permian Basin.

28. As an example, a typical Fasken horizontal multi-well drilling project cannot be completed until the staging of materials is achieved. Rail delays amount to potential lost production totals of approximately 5,800 barrels of oil per day and 3,500 million cubic feet of gas daily, per multi-well horizontal drilling pad. This equates to a loss of \$350,000 daily and \$10.6 million monthly in lost production from a single multi-well pad. A delay on the rails that results in standby costs on a frac job amount to \$115,000 per day, per well and drilling rig operation standby costs amount to \$50,000 per day, per drilling rig.

29. Additionally, leases are susceptible to termination under Texas' rules on nonproducing wells. In the event such a loss occurs, an operator, such as Fasken or one of the members of PBLRO, stands to lose a capital investment of \$10 to \$14 million per well. Possible remedies, including lease extensions, are onerous and expensive. As a representative of the industry, one must look to the risks posed by sharing the same rail lines that have primarily and historically been transporting oil commodities with spent nuclear fuel and high-level radioactive waste over the course of at least the next forty years (and likely longer).

30. The single-track railway proposed in the ISP EIS for the transport of spent nuclear fuel traverses through rural, remote areas. Although the rail lines in the Permian Basin are a major means of transportation, they are situated in desert-like areas served mostly by volunteer fire departments or areas lacking emergency

responder resources. In consulting crane operators regarding the ISP EIS, there are real logistical problems in situating a crane capable of resetting a spent nuclear fuel transport cask and rail car in some of the more remote areas of the Permian Basin. Also, a single hazardous materials emergency would not only have a detrimental effect upon the oil and agricultural industries of the Permian Basin but would also overwhelm our first responders and healthcare facilities which are not equipped to cope with the challenges of a release, exposure or disaster nor are the small, rural communities adjacent to the rail track equipped to respond to an incident on any scale.

31. Not including derailments, the Permian Basin region has experienced a highly significant increase in rail related crashes in recent years. In fact, the Midland-Odessa Transportation Alliance (MOTRAN) reports that from 2016-2018, there were 158 rail related crashes in the Texas Department of Transportation Odessa District with just over half of those accidents occurring in Midland and Ector Counties. This is the very area through which the spent nuclear fuel would be transported via rail. MOTRAN reports that during that same period, other Permian Basin counties also experienced drastic increases: Ector County saw a 55% increase, Reeves saw a 266% increase, and Ward County saw a 700% increase in rail related crashes.



32. I am personally familiar with oil and gas activity in the vicinity of the ISP CISF and of the approximately 120 individual persons required to facilitate the completion of each individual oil and gas well in the vicinity of the ISP CISF. The potential harm to those individuals in the oil and gas industry, the potential harm to the ranchers and livestock, the potential impacts upon agriculture and, especially, upon human mortality and morbidity rates, and the economic costs associated with medical care and treatment of radiation related conditions would also adversely impact Fasken and other members of PBLRO, as well as their employees and families.

33. As a resident of Texas and given Fasken's work throughout the Permian Basin and familiarity with those in governance of the States of Texas and New Mexico, I have firsthand knowledge of the overwhelming opposition of the majority of the communities and elected representatives throughout Texas, as well as New Mexico, and of their shared health, safety, economic and environmental concerns in response to the egregious siting of the ISP and Holtec CISFs within the Permian Basin at locations that clearly do not qualify nor do they consent to hosting either of the CISFs.

Under penalty of perjury, the above is true and correct to the best of my knowledge and understanding.

Tommy E. Taylor  
Tommy E. Taylor  
Senior Vice President and Director of Oil and  
Gas Development, Fasken Management, LLC

May 13, 2022  
Date

ADDENDUM EXHIBIT #2

Declaration of D.K. Boyd (05/13/2022)

**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

STATE OF TEXAS; GREG  
ABBOTT, GOVERNOR OF THE  
STATE OF TEXAS; and TEXAS  
COMMISSION ON  
ENVIRONMENTAL QUALITY

Case No. 21-60743

*Petitioners,*

v.

UNITED STATES NUCLEAR  
REGULATORY COMMISSION and  
UNITED STATES OF AMERICA,

*Respondents.*

**DECLARATION OF D.K. BOYD**

1. My name is D.K. Boyd and I reside at 4200 Tanforan Avenue, Midland, Texas, 79707.

2. I am a member of the Permian Basin Land and Royalty Owners (PBLRO). The PBLRO is an association comprised of businesses, organizations and individuals that formed in response and opposition to the proposed consolidated interim storage facilities (CISFs) to be located in Andrews County, Texas, and Lea County New Mexico. PBLRO members have substantial long-term economic, social and environmental interests in the Permian Basin in the vicinity of the CISFs. Fasken Land and Minerals (Fasken) also has substantial land and mineral



interests in the Permian Basin in the vicinity of the CISFs and is a member of PBLRO.

3. I am authorized to execute this declaration on behalf of the PBLRO to express collective concerns about the economic, social and environmental risks posed by the construction, operation, transportation to and storage of high-risk and high-level radioactive waste and spent nuclear fuel at the CISFs located within the Permian Basin.

4. PBLRO has 65 individual members and at least three publicly traded corporations, as well as numerous private companies with substantial oil and gas operations and leases and agricultural and ranching activities throughout the Permian Basin in southeast New Mexico and Texas.

5. PBLRO members have been drilling and extracting oil in the region for over 80 years and presently have lands, mineral interests, and active leases throughout Andrews County.

6. PBLRO members regularly utilize rail transportation and local highways to support their industries and frequently visit the region for work-related and personal reasons, including routine checks and maintenance on oil and gas production equipment monitoring operations.

7. I own and ranch the Frying Pan Ranch, most of which I own by deed and some of which I lease from New Mexico. The Frying Pan Ranch is located on

137,599 acres in southeastern New Mexico and western Texas. The closest part of the Frying Pan Ranch to ISP's CISF is only four miles away. I have attached a map identifying the location of this part of the Frying Pan Ranch in relation to the ISP CISF. *See Attachment A.*

8. I have mineral interests and working interests in oil and gas operations on the Frying Pan Ranch. I also lease some of the Frying Pan Ranch to companies conducting oil and gas operations.

9. My brother and his employees frequently and regularly spend time within 15 miles of the ISP CISF because my brother runs cattle and agricultural operations on the Frying Pan Ranch. One of my brother's employees lives on Frying Pan Ranch in New Mexico in Township 23S, Range 38E, Section 8 located within 7.5 miles of the CISF.

10. I also frequently and regularly spend time on the local roads near the ISP CISF and proposed transportation routes for the ISP CISF. For instance, about once a week, I drive on State Highway 18 south of Eunice, New Mexico. State Highway 18 is the regional road I have to travel for business, between different parts of my ranch, and between my residences. When I am on this Highway, I have noticed rail cars traveling next to me on the Texas and New Mexico Railway because this railroad parallels Highway 18 within a couple hundred feet for almost 40 miles. It is my understanding that ISP plans to transport spent nuclear fuel to the



ISP CISF on this railroad. I further understand that this railroad currently provides the only route of rail access to the ISP CISF.

11. The Texas and New Mexico Railway also runs through approximately 5.5 miles of the Frying Pan Ranch. My family and I frequently and regularly cross this railroad via car or horse to conduct our cattle and agricultural operations.

12. I am concerned about the radiation risks posed by the construction and operation of the ISP CISF to my property, my health and safety, the health and safety of my family and employees, and my environment, by living and working next to a facility housing such an enormous inventory of radioactive material, and by transportation of spent nuclear fuel to the ISP CISF.

13. I am also concerned that an accident involving spent nuclear fuel at the ISP CISF will harm the health and safety of my family and property due to radiological exposure. I am also concerned that such an accident will harm the value of my mineral and working interests in gas and oil production or make them functionally inaccessible due to radiological exposure.

14. I am equally concerned about the impact the ISP CISF will have on the value of the Frying Pan Ranch and its operations. It is my understanding that property values near a nuclear facility can be reduced as early as when it receives its license to operate due to real and/or perceived risks of exposure to radiation



releases from the nearby facility. It is also my understanding that property values will continue to decrease as the ISP CISF is constructed and operating.

15. I am also concerned that the licensing, construction, and operation of the ISP CISF, in addition to the proposed Holtec CISF, will profoundly impact the economic prosperity of the counties where I live and own land. It is my understanding that the Permian Basin in New Mexico and Texas is the largest oil and gas producer in the United States and the second largest in the world. I am concerned that construction and operation of CISFs on top of the Permian Basin will impact the ability to continue drilling so successfully here and therefore have a negative effect on the economy. This could harm local businesses and the value of my property. I am also concerned that construction and operation of the ISP CISF and Holtec CISF will limit the domestic production of oil and gas in the United States.

16. I am also concerned that I will not be able to avoid small doses of unwanted radiation from frequently and regularly driving next to rail cars carrying shipments of spent nuclear fuel, which will harm my health and safety.

17. I am also concerned with the impacts to my interest and right to travel near my home and business operations posed by ISP's proposed transportation of spent nuclear fuel on the Texas and New Mexico Railway. In order to assure myself and my family, as well as my employees, travel on the safest roads to avoid unwanted





doses of radiation or potential accidents involving transportation of spent nuclear fuel, we would have to avoid the regional highways and roads that are our primary routes to access business and everyday necessities.

18. Finally, I am concerned that the environmental impacts and safety risks of the ISP CISF have not been adequately reviewed or evaluated, are unfairly discounted and not appropriately considered with respect to oil and gas and agricultural operations located in the Permian Basin near both CISFs.

19. The issuance of the ISP CISF license disregards and ignores the long-standing history, existing and future land uses within the Permian Basin and the overwhelming opposition of PBLRO among many other local communities in the region.

20. I previously authorized Fasken and PBLRO to protect my interests and express concerns in opposition to the ISP CISF and have authorized petitioners' counsel to appeal decisions relating to the ISP CISF to this Court.

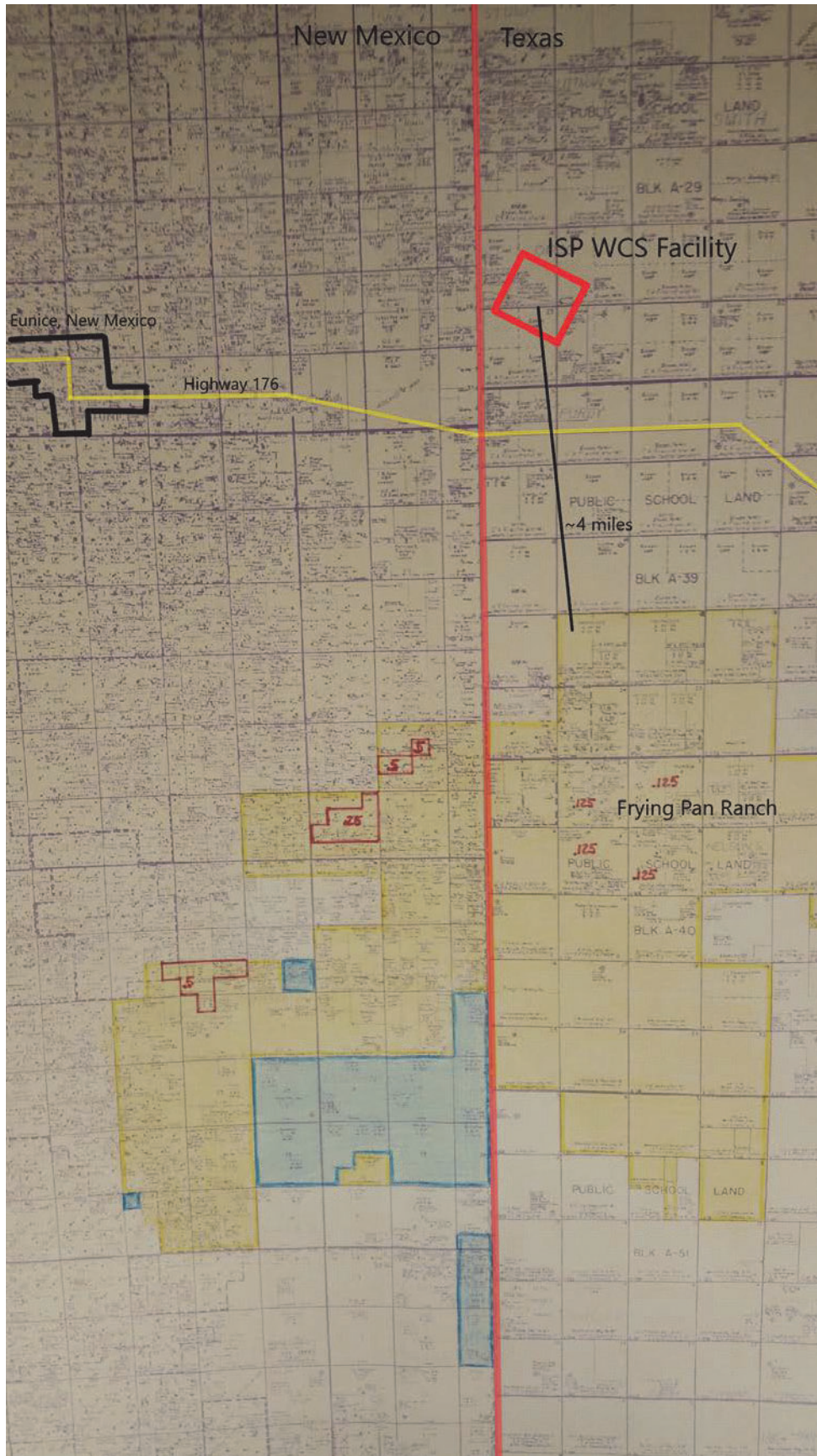
21. It is my understanding that the NRC had found Fasken and PBLRO established standing to express their concerns in prior proceedings because of members' properties and operations in the Permian Basin being in close proximity to the CISFs and because its members' and members' employees regularly and frequently drive to and visit areas in close proximity to CISFs for maintenance, monitoring and operational functions as part of their routine business.

Under penalty of perjury, the above is true and correct to the best of my knowledge and understanding as executed on the date of this Declaration.

  
\_\_\_\_\_  
D.K. Boyd

5-13-2022  
Date

# ATTACHMENT A



ADDENDUM EXHIBIT #3

Declaration of Grant Huckabay (05/13/2022)

**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

STATE OF TEXAS; GREG  
ABBOTT, GOVERNOR OF THE  
STATE OF TEXAS; and TEXAS  
COMMISSION ON  
ENVIRONMENTAL QUALITY

Case No. 21-60743

*Petitioners,*

v.

UNITED STATES NUCLEAR  
REGULATORY COMMISSION and  
UNITED STATES OF AMERICA,

*Respondents.*

**DECLARATION OF GRANT HUCKABAY**

1. My name is Grant Huckabay and I have a degree in natural resource management, legal studies, and urban development. Since May 3, 2021, I have been employed by Fasken Oil and Ranch, Ltd. (Fasken), located at 6101 Holiday Hill Road, Midland, Texas 79707, as Health, Safety & Environmental Coordinator. I am duly authorized to execute this affidavit on behalf of Fasken.

2. I have personal knowledge of the information as stated herein.

3. Fasken presently has lands and mineral interests within eighteen miles of the Interim Storage Partners, LLC (ISP) consolidated interim storage facility (CISF) located in Andrews County, Texas. Fasken is a member of the Permian Basin Land

and Royalty Owners (PBLRO). PBLRO presently has lands and mineral interests throughout Andrews County, Texas, with the nearest member holding land and minerals within four miles of the proposed ISP CISF.

4. In my capacity as Fasken's Health, Safety & Environmental Coordinator, my duties include primary management of all environmental policies, procedures, and programs for air, soil, and water concerns. My specific duties include coordination and oversight of all spill incidents, air permitting and air compliance, management of radiation issues, all regulatory interaction and notification, as well as management and oversight of environmental vendors. I have knowledge of, interpret, and prepare comments on and ensure compliance with all new and current federal, state, and local regulations under the U.S. Environmental Protection Act (EPA), the U.S. Bureau of Land Management (BLM), the Texas Railroad Commission (RRC), the Texas Commission on Environmental Quality (TCEQ), the New Mexico Environment Department (NMED), and the State of New Mexico Oil Conservation Division (NMOCD), among others. Additionally, I monitor legislation, regulations and ensure compliance with any protected, threatened and endangered species and habitat program requirements. I also ensure compliance with all Occupational Safety and Health Administration (OSHA) regulations

5. As part of my responsibilities at Fasken, I frequently travel in the vicinity of the ISP CISF along regional transportation infrastructure. I am generally familiar

with the natural resources of the area, including the air, geology, and soils throughout the Permian Basin Region and have personal knowledge of the geology and soils encompassing Fasken's land and mineral interests in the vicinity of the ISP CISF.

6. The ISP CISF site is situated in the approximate geographic center of the Permian Basin Region. The Permian Basin produces the largest volume of oil and gas in North America and recently surpassed Saudi Arabia in petroleum production. The Permian Basin region encompasses a relatively large region in Texas and southeastern New Mexico and has a population of more than half-a-million people.

7. The ISP CISF represents a threat to Fasken's personnel, private property, real property, mineral and water interests, oil and gas leases, and agricultural interests. It also represents a threat to numerous communities throughout Texas and New Mexico.

8. The Permian Basin Region is comprised of fifty-five counties in west Texas, and south-eastern New Mexico. The counties in the Permian Basin considered to be most imminently threatened by the ISP CISF site include some of the most prolific oil producing counties, including Andrews, Crane, Dawson, Ector, Gaines, Glasscock, Howard, Loving, Martin, Midland, Reeves, Upton, Ward, and Winkler Counties in Texas and Eddy and Lea Counties in New Mexico. These imminently threatened counties have a population of nearly 500,000 and a collective area of over 20,000 square miles in the Permian Basin. A radiological event within any of these

counties could be devastating to the nation's oil and gas industry and would decimate the economies of Texas and New Mexico. By way of comparison, the 1,835 square mile Chernobyl Exclusion Zone would compromise 13.2% of the highest oil producing region in the Americas, the Permian Basin.

9. Any pressurized release, dry cask rupture, explosion, or fire involving spent nuclear fuel will release radioactive particles and fragments into the air. This is a direct threat to both PBLRO member's and Fasken's personnel, private property, real property, oil and gas reserves and leases, as well as agricultural interests.

10. Currently, the closest Fasken oil and gas wells are approximately 18 miles due east of the ISP CISF (Fasken Monterrey University and Lowe University leases). Dozens of other Fasken oil and gas wells are present in all directions from the site.

11. Fasken's private property, the C-Ranch, begins 38 miles nearly due east (northwestern property line) of the site and continues south to the Midland city limits. This broad expanse of land has a high probability of receiving airborne radioactive contaminants from the ISP CISF as a result of typical wind patterns in the area.

12. Public data from the National Weather Service and the Texas Commission on Environmental Quality (TCEQ) indicates that regional winds around the ISP CISF blow to the southeast approximately 25% of the time on an annual basis. On average, the Permian Basin Region has higher winds than much of the rest of Texas



and the United States. According to the ISP application seeking a CISF license, the average windspeed is 11.0 miles per hour. It fails to account for the frequency of high-wind gusts in the area of the proposed CISF. In comparison Houston, Texas winds vary from 8.3 mph to 6.7 mph, depending on the season. Any release of radioactive material might arrive in the Midland-Odessa metropolitan area (with a population of more than 260,000) in a matter of hours with no warning. The most dominant direction of wind is from south to north, placing the town of Hobbs, New Mexico (population 38,000), which is less than 20 miles away from the proposed ISP CISF, in direct danger in the event of a release. Also, imminently threatened is the town of Eunice, New Mexico (population 2,900), which is approximately 5 miles from the proposed site.

13. The broader perspective is that the Permian Basin Region's winds are highly variable and change direction frequently throughout a given day. With the ISP CISF site's geographically central location in the Permian Basin, any release carried by winds in any direction risks contaminating large areas of the most productive oil and gas region in North America. Depending on wind direction and speed, hundreds of thousands of people could be affected, including personnel of Fasken and other members of PBLRO.

14. And any radiological incident in the Permian Basin poses a serious threat to regional industries and economies. A Department of Energy Report found that an

accident involving only one dry cask where only a small amount of waste was released in a rural setting would contaminate a 42-square mile area with clean-up costs exceeding \$620 million dollars. A similar release in an urban setting might cost \$9.5 billion per square mile.

15. The ISP CISF is also a direct threat to regional groundwater usage. Several aquifers or geologic formations containing groundwater exist in Andrews County, including the Ogallala aquifer with potable water, shown to be present and at a great thickness beneath the ISP site itself.

16. Water usage from wells near the ISP site are from the Ogalla / Antler / Gatuna aquifers and are crucial for domestic stock, irrigation, and commercial purposes, including the operations of Fasken and other members of PBLRO.

17. Any threat of radiological contamination of these important water resources poses a threat to regional land uses, a threat to the assets and property value of Fasken and PBLRO members a threat to ongoing regional industry operations generally, as well as threats to the environment and health and safety of nearby residents and those working or traveling through the area. Knowing that any radiological contamination would be virtually impossible to recover and would continue to emit radiation for decades until the half-lives are expended, those threats and adverse health, safety and environmental impacts could last for decades.

18. Without proper groundwater monitoring, the ISP CISF poses unacceptable and imminent threats to the environment, the health and safety of water supplies to nearby communities and extensive industry operations.

19. In addition to the presence of groundwater in the subsurface directly below and in the vicinity of the ISP CISF site, the location is also situated over Permian aged halite formations (rock salt) and other easily dissolved evaporite mineral formations leading to the potential for substantial ground movement issues, sinkhole formation and subsurface instability. For example, there is historical evidence of extensive sinkhole formation in the Permian Basin Region, including the very well known "Wink Sinks" outside of Wink, Texas, a large area of subsidence beneath the city in Carlsbad, New Mexico, and sinkholes and karst features north and east of Carlsbad, New Mexico. There are also numerous documented ground movement issues in Pecos, Crane, Monahans, Imperial, and Kermit, Texas where shipments of spent nuclear fuel will travel on over-sized railcars to the ISP CISF and share rail lines with the transport of oil and gas industry materials.

20. The WCS/ISP facility is located within 26,000 square miles of the Salado Salt Formation that is replete with surface salt lakes and salt formation outcrops that critically contain magnesium chloride salts ( $MgCl_2$ ) that are the most reactive salt species for the induction and propagation of Chloride induced stress corrosion cracking (CI-SCC). The proposed CISF location is increasingly experiencing the

“haboob” sandstorm phenomena that translocate tons of surface sediments for tens of miles. The historical paths of haboobs have included sweeping storms across the Salado surface salt flats in eastern New Mexico and West Texas.

21. Additionally, persistent fog and mist conditions are prevalent during the fall and winter in this region of the country. When combined, a single “salt deposition” event from a haboob, along with a sufficient amount of fog/mist event, could easily create the conditions that would initiate CI-SCC.

22. CI-SCC poses a critical and imminent threat to the integrity of canisters and increases the potential for radiological contamination and radiation in the region. In the NRC draft report, “Identification and Prioritization of the Technical Information Needs Affecting Potential Regulation of Extended Storage and Transportation of Spent Nuclear Fuel,” the federal government recognizes the potential risk for monitoring dry casks and the “pitting and crevice corrosion” of the stainless steel canisters, which affect the safety functions of confinement, criticality, retrievability (of fuel from the dry storage canister), shielding (of radiation from people and the environment), and thermal (degradation of the fuel, potentially leading to fuel fires).

23. I personally travel in the region of the ISP CISF as part of my responsibilities at Fasken. The area around the ISP CISF site is still under active exploration and active production. Within a 10-mile radius of the site, there have been a total of 4,947

well bores drilled in Texas and New Mexico. Presently 3,656 of these well bores are still in production. 905 wells are shown as a dry hole. Of the total of nearly five thousand wells within ten miles of the facility, only 386 have been recorded as permanently plugged and abandoned. Regardless of the current volume of oil produced within the vicinity of the proposed ISP site, there are hundreds of active oil and gas wells, tank batteries, gas plants, and other petroleum production facilities within reasonable vicinity of the site, each requiring frequent and regular visits from personnel for maintenance and monitoring. Some facilities, such as gas plants, are staffed 24-hours a day, seven days a week. I have concerns for personnel of Fasken and personnel of other members of PBLRO, who by the very nature of their profession will be in close proximity to the ISP CISF and be exposed to doses of radiation.

24. State Highway 176 serves as a main motor vehicle access to the ISP site. It is also a major artery for the travel of both private citizens and oil and gas industry traffic, including Fasken and PBLRO personnel in the region. I personally utilize State Highway 176 routinely for projects relating to my responsibilities at Fasken, which include monitoring the several dozen wells that Fasken operates in the area, and for personal reasons. At present, State Highway 176 between Andrews and Eunice is completing a widening project to accommodate the large volume of heavy oil industry traffic that utilizes this regional highway and Fasken is contributing land

to accommodate an overpass at the intersection of State Highways 176 and 1788 in Andrews County, Texas.

25. I have personal knowledge of the use of regional rail lines and can attest that the rail transport of oil commodities is the most prevalent in this region with the second highest use of regional rail lines being agricultural commodities. It is a risk to share these same regional rail lines with nuclear waste destined for the ISP CISF, as any delay or disruption in rail transport caused by said waste would devastate the oil and agricultural industry. I have personal knowledge of studies that show that even one 24-hour period of interruption of rail transport would cost millions of dollars in losses to the oil and agricultural industries.

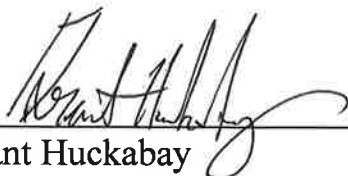
26. I also have concerns about the ISP CISF's adverse impacts and threats to the surrounding environment. The ISP CISF site is entirely within the known range of the Dune Sage Brush Lizard and a portion of the site lies within the known range of the Lesser Prairie Chicken. I have personal knowledge of the extensive conservation efforts in both Texas and New Mexico by the oil and gas and ranching industries, including Fasken and other members of the PBLRO, with respect to the Dune Sage Brush Lizard and the Lesser Prairie Chicken. Specifically, participation in conservation programs has prevented both species from being currently listed as endangered. Fasken is an active participant in conservation programs for these and other species that will be threatened by the ISP CISF. The Lesser Prairie Chicken in

particular is highly sensitive to surface disturbances such as construction activities, fences, power lines, and permanent structures that will be placed in and around the ISP CISF site. The failure of the NRC to participate in conservation programs and engage the United States Fish and Wildlife Service on this matter is an offense to state and federal regulations.

27. Any release of radioactive material or any amount of radiation or contamination to the environment will become a direct threat to the survivability of both species, as well as the Texas Horned Lizard, which is protected under Texas law and is the State reptile.

28. The ISP CISF also poses an imminent threat to surrounding playas, which according to Texas Parks and Wildlife, serve as the most important wetland habitat for waterfowl. Playas are a direct connection to groundwater and nexus for contamination from the surface to groundwater beneath the ISP CISF site, which could decimate known and historic migrating bird populations. The ISP CISF lacks proper identification of playas and recharge to aquifers and without proper conservation practices in place, will further harm important butterflies and pollinators vital to regional ecosystems.

I declare under penalty of perjury that the foregoing affidavit and the matters stated herein are true and correct to the best of my knowledge, information, and belief.



\_\_\_\_\_  
Grant Huckabay  
Health, Safety & Environmental Coordinator  
Fasken Oil and Ranch, Ltd.

5-13-22

\_\_\_\_\_  
Date