ORAL ARGUMENT REQUESTED

No. 21-9593

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF NEW MEXICO, ex rel. HECTOR H. BALDERAS, Attorney General
and the NEW MEXICO ENVIRONMENT DEPARTMENT,
Petitioners,

v.

NUCLEAR REGULATORY COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

On Petition for Review of Action
by the Nuclear Regulatory Commission

BRIEF FOR FEDERAL RESPONDENTS

TODD KIM
Assistant Attorney General

JUSTIN D. HEMINGER
Attorney
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
(202) 514-5442
justin.heminger@usdoj.gov

MARIAN L. ZOBLER
General Counsel

ANDREW P. AVERBACH
Solicitor
Office of the General Counsel
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852
(301) 415-1956
andrew.averbach@nrc.gov

STATEMENT REGARDING ORAL ARGUMENT

This Petition for Review presents a number of complex legal issues, both jurisdictional and under the substantive law involved, and the case arises in an unusual procedural context in which the issues that have been raised are substantially similar to issues raised in petitions for review pending in other circuit courts of appeals challenging the same license. The Nuclear Regulatory Commission and the United States (together, "Federal Respondents") accordingly believe that oral argument would be both appropriate and helpful to the Court in ensuring full understanding and deliberation of the questions presented.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Administrative Decisions

Decisions of the Nuclear Regulatory Commission

Decisions of the Atomic Safety & Licensing Board Panel

Statutes

Court Rules

Regulations

Federal Register Notices

STATEMENT OF RELATED CASES

Ten petitions for review relating to the license at issue in this case have been filed in the United States Court of Appeals for the District of Columbia Circuit and the United States Court of Appeals for the Fifth Circuit. *See Don't Waste Michigan v. NRC*, No. 21-1048 (D.C. Cir.) (consolidated with *Sierra Club v. NRC*, No. 21-1055; *Beyond Nuclear v. NRC*, No. 21-1056; *Fasken Land and Minerals, Ltd. v. NRC*, No. 21-1179; *Sierra Club v. NRC*; No. 21-1227; *Sierra Club v. NRC*, No. 21-1229; *Beyond Nuclear v. NRC*, No. 21-1230; *Don't Waste Michigan v. NRC*, No. 21-1231); *Texas v. NRC*, No. 21-60743 (5th Cir.) (consolidated with *Fasken Land and Minerals, Ltd. v. NRC*).

GLOSSARY

AEA	Atomic Energy Act of 1954
APA	Administrative Procedure Act
EIS	Environmental Impact Statement
ISP	Interim Storage Partners, LLC
NEPA	National Environmental Policy Act
NRC	Nuclear Regulatory Commission
NWPA	Nuclear Waste Policy Act of 1982

INTRODUCTION

New Mexico challenges the issuance by the Nuclear Regulatory Commission ("NRC" or "Commission"[1]) of a license to Interim Storage Partners, LLC ("ISP") permitting the temporary storage of spent nuclear fuel in Texas. NRC issued the license under the Atomic Energy Act of 1954 ("AEA"), which expressly permits the agency to issue licenses to private parties to possess the constituent materials of spent fuel. And the agency issued the license only after conducting a thorough safety review of the proposed facility and a complete evaluation of the reasonably foreseeable impacts of the construction, operation, and decommissioning of the facility in accordance with the National Environmental Policy Act ("NEPA"). This evaluation included analysis of scenarios, which themselves have been affirmed on judicial review, in which a permanent repository for spent fuel storage does not become available.

New Mexico does not attempt to demonstrate that it has standing to challenge a license for a facility in another state. It also fails to explain why it should be excused from the obligation to raise its arguments in an adjudicatory proceeding before the Commission before invoking the jurisdiction of this Court. And, besides raising unpersuasive challenges to the license (many of which are

[1] We use the terms "NRC" or "agency" to refer to the agency as a whole, and the term "Commission" to refer to the collegial body that oversees the agency and issues rules and adjudicatory decisions on its behalf.

being raised in another court of appeals by parties that properly exhausted their administrative remedies), New Mexico fails even to acknowledge that in *Skull Valley Band of Goshute Indians v. Nielson*, this Court rejected the argument, which New Mexico raises here, that NRC lacks authority to issue licenses of the type involved here. 376 F.3d 1223, 1232 (10th Cir. 2004). The Petition should be dismissed or, if the Court reaches the merits, denied.

STATEMENT OF JURISDICTION

New Mexico asserts that this Court has jurisdiction over the Petition for Review under the Hobbs Act, the Administrative Procedure Act ("APA"), and the Nuclear Waste Policy Act of 1983 ("NWPA"). Br. at 2-4. But this Court lacks jurisdiction over the Petition for two independent reasons. First, New Mexico fails to show standing, particularly because it will not suffer a concrete and imminent injury-in-fact from NRC granting the license for a facility in another state. Second, as explained in our pending motion to dismiss, New Mexico does not seek review of an NRC final order as a "party aggrieved."

In addition to the arguments it raised in response to our motion to dismiss, New Mexico contends (Br. 3 n.4) that it exhausted its administrative options by pursuing a petition to revoke or suspend the ISP license, pursuant to 10 C.F.R. § 2.206, before the agency, which the agency has denied. But that post-license petition is not a substitute for the State's failure to participate in the adjudicatory

proceedings before the agency. And if New Mexico was dissatisfied with NRC's response to the § 2.206 petition, it had the right to petition this Court for review of that decision, *see Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 746 (1985), which it has not done.

STATEMENT OF THE ISSUES

1. Whether New Mexico will incur an imminent and non-speculative injury-in-fact caused by NRC issuing the license to ISP, when its brief fails to even allege standing.

2. Whether New Mexico is a "party aggrieved" under the Hobbs Act, when it failed to participate in the adjudicatory proceedings before the agency.

3. Whether, as this Court held in *Skull Valley*, 376 F.3d at 1232, the AEA authorizes NRC to issue materials licenses to private parties permitting the storage of spent fuel away from the reactor where it was generated.

4. Whether NRC complied with NEPA in evaluating the potential environmental impacts of the proposed spent fuel storage facility, when it: (1) based its analysis upon reasonable assumptions that were upheld on judicial review; (2) evaluated the transportation-related impacts of the facility both locally and nationally; and (3) determined that the impacts from acts of terrorism do not require study beyond the agency's comprehensive evaluation of accidents at the proposed facility.

STATEMENT OF THE CASE

I. Statutory and regulatory background

In the AEA, Congress conferred broad authority on NRC to license and regulate the civilian use of radioactive materials. *See* 42 U.S.C. §§ 2011-2297h-13. The AEA authorizes NRC to license and regulate the storage of high-level nuclear waste, including spent fuel (fuel that is still radioactive but is no longer useful in the production of electricity) before its ultimate disposal. *Bullcreek v. NRC*, 359 F.3d 536, 538-39 (D.C. Cir. 1984); *Skull Valley*, 376 F.3d at 1232. To this end, NRC has promulgated regulations permitting licenses to store spent fuel both at the site of nuclear reactors and away from reactor locations. *See* 10 C.F.R. Part 72.

The agency's authority to issue licenses to possess spent fuel derives directly from three AEA provisions. First, the AEA authorizes NRC to issue licenses for the possession of "special nuclear material." 42 U.S.C. § 2073. Second, it authorizes NRC to issue licenses to possess "source material." *Id*. § 2092. And, third, it authorizes NRC to issue licenses for "byproduct material." *Id*. § 2111; *see also id*. § 2014 (defining each term). Spent fuel contains each of these types of materials.

Storage of spent fuel under the AEA is distinct from *disposal*. The NWPA establishes the federal government's policy to permanently dispose of high-level

radioactive waste in a deep geologic repository. *See* 42 U.S.C. §§ 10101-10270. Congress designated the Department of Energy ("DOE") as the agency responsible for designing, constructing, operating, and decommissioning a repository, *id.* § 10134(b); the U.S. Environmental Protection Agency ("EPA") as the agency responsible for developing radiation protection standards for the repository, *id*. § 10141(a); and 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).[2]

II. Factual Background

New Mexico challenges the materials license NRC issued to ISP in September 2021. The license authorizes ISP to store spent fuel in canisters using specified storage systems for a term of 40 years. 86 Fed. Reg. 51,926 (Sept. 17, 2021); C.I. 130.2 at 1-2 (license preamble)[3]; C.I. 130.3 at 2 (license) at 2; C.I.

[2] Although Congress designated Yucca Mountain, Nevada, as the site for a first spent fuel repository, 42 U.S.C. § 10172, DOE announced in 2010 that it considered the site untenable and attempted to withdraw its license application (a request that NRC did not grant). Since that time, Congress has not provided additional funding for the Yucca Mountain project and, while NRC has spent substantially all the appropriated funds it has received and has completed its safety and environmental review of the repository, the project has stalled. *See generally Texas v. United States*, 891 F.3d 553, 565 (5th Cir. 2018) (dismissing petition for writ of mandamus brought by Texas, which sought to compel completion of proceedings for licensure of the Yucca Mountain repository).

[3] "C.I. __" refers to the "Record ID" number associated with each document listed in NRC's Revised Certified Index of Record (Document No. 00516117700). A Record ID number followed by a period indicates that the document is part of a

130.4 at 2-1 (technical specifications). Under agency regulations, ISP may seek a renewal of the license for a period of up to 40 additional years. 10 C.F.R. § 72.42(a).

A. The license application

In April 2016, NRC received an application from ISP's predecessor for a license that would permit construction of a "consolidated interim storage facility" in Andrews County, Texas, at an existing low-level-waste and hazardous-waste storage and disposal site near the border with New Mexico. *See generally* 83 Fed. Reg. 44,070 (Aug. 29, 2018), *corrected*, 83 Fed. Reg. 44,680 (Aug. 31, 2018); C.I. 125 at 2-4. The proposed facility would consist of dry cask storage systems stored on concrete pads, constructed in eight phases over twenty years. C.I. 125 at 2-1 to 2-13; C.I. 134 at ES-1. These systems have already been certified for use by NRC under 10 C.F.R. Part 72 and employed at other facilities. C.I. 125 at 2-5 to 2-6.

B. NRC's safety and environmental evaluations and issuance of the license.

NRC conducted exhaustive safety and environmental reviews of the license application. NRC determined that the proposed facility is consistent with adequate protection of the public health and safety, as required by the AEA, as explained in the agency's September 2021 Final Safety Evaluation Report. C.I. 134. The

"package" in NRC's ADAMS database (https://adams.nrc.gov/wba). The number after the period indicates the document within the package to which the cited material corresponds.

Safety Report reflects the agency's conclusions that the proposed facility will be designed, constructed, and operated so that public health and safety will be adequately protected at all times, including during normal and credible-accident conditions. *Id.* at ES-3.

The agency also conducted an environmental review of the proposed facility as required by NEPA. In November 2016, NRC published a notice of its intent to prepare an Environmental Impact Statement ("EIS"). *See* 81 Fed. Reg. 79,531 (Nov. 14, 2016). In May 2020, NRC published a draft EIS (spanning nearly 500 pages) evaluating the effects of the proposed facility on 13 different resource areas.[4] The agency received over 2,500 unique comments on the draft. C.I. 125 at D-1. Both the State's Governor and the New Mexico Environment Department submitted timely comments on the draft EIS. C.I. 1295, 1386.

NRC issued its final EIS in July 2021.[5] Over nearly 700 pages, NRC analyzed the reasonably foreseeable radiological and non-radiological potential environmental impacts arising from the construction, operation, and decommissioning of the proposed facility. NRC examined potential impacts across thirteen different resource areas: land use, transportation, geology and soils, water

[4] The draft EIS (C.I. 97) is available at https://www.nrc.gov/docs/ML2012/ML20122A220.pdf.

[5] The EIS (C.I. 125) is available at https://www.nrc.gov/docs/ML2120/ML21209A955.pdf.

resources, ecology, air quality, noise, cultural and historic resources, visual and scenic resources, socioeconomics and environmental justice, public and occupational health, and waste management. C.I. 125 at 2-25 to 2-29. And NRC concluded that the potential environmental impacts of the facility would in most cases be small, but in a few cases small to moderate. *Id.*

In the EIS, NRC considered several alternatives to the ISP facility, including storage at a DOE-owned facility and alternate design or storage technologies. As for the first alternative, NRC concluded that a DOE-owned facility would satisfy the purpose and need for the facility (i.e., providing an option to the owners of spent fuel to move fuel offsite). *See id.* at 2-22. Nonetheless, it determined that a detailed comparison of the impacts of the ISP facility and a DOE facility could not be performed because a DOE facility was only in the planning stages and sufficient detail was unavailable to support such a comparison. *Id.* And as for the second alternative, NRC determined that (a) other existing forms of licensed dry cask storage were not technologically superior; and (b) options proposed for "hardened" onsite storage of spent fuel at or near existing plants would not satisfy the purpose and need that the agency had identified for the facility. *Id.* at 2-22 to 2-23. NRC further determined that none of the other potential sites that ISP identified through a screening process was clearly environmentally preferable. *Id.* at 2-23 to 2-25.

Accordingly, NRC's comprehensive evaluation of impacts compared the proposed ISP facility solely to the no-action alternative. *Id.* at 2-1, 2-25 to 2-29, 4-1 to 4-97.

Besides evaluating the potential environmental impacts of constructing, operating, and decommissioning the ISP facility during the term of the proposed license, the agency also addressed the potential effects of storage *after* the licensed term of the ISP facility. NRC's NEPA analysis included its generic analysis of the impacts of onsite and offsite spent fuel storage in its Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel ("Continued Storage Generic EIS"). C.I. 125 at 1-7; *see* 10 C.F.R. § 51.23(b) ("The impact determinations in [the Continued Storage Generic EIS] regarding continued storage shall be deemed incorporated into the environmental impact statements" for affected licenses); *id.* § 51.97(a) (specifically incorporating the agency's generic analysis into EISs for storage facilities licensed under 10 C.F.R. Part 72).[6] This analysis documents the agency's evaluation of the reasonably foreseeable impacts of the storage of spent fuel pending the shipment of fuel to a repository, including in a scenario in which a repository is unavailable. *See* Continued Storage Generic EIS at 1-13 to 1-15. *See generally New York v. NRC*, 824 F.3d 1012 (D.C. Cir.

[6] The entirety of the Continued Storage Generic EIS is available at https://www.nrc.gov/docs/ML1419/ML14196A105.pdf.

2016) (*New York II*) (upholding legal challenge to NRC rule adopting Continued Storage Generic EIS).

After completing the safety and environmental reviews, in September 2021, the agency issued (1) the license, C.I. 130.3; (2) the Final Safety Evaluation Report, C.I. 134; and (3) a Record of Decision documenting its NEPA review, C.I. 129, *see* 10 C.F.R. § 51.102(a).

III. Procedural background

A. Proceedings before the Commission

In July 2018, NRC provided public notice in the Federal Register that it was considering the license application, which had been revised to include ISP as the applicant. 83 Fed. Reg. at 44,071. The notice stated that interested persons could request a hearing and petition for leave to intervene as a party to the proceedings, and it further instructed that any petition "should specifically explain the reasons why intervention should be permitted" and "must also set forth the specific contentions which the petitioner seeks to have litigated." *Id.* (citing 10 C.F.R. § 2.309(d), (f)).

Several organizations raised contentions challenging the license application, which the Commission referred to its Atomic Safety and Licensing Board Panel ("Licensing Board"). These organizations asserted that the license would violate the AEA, the NWPA, and NEPA. The Licensing Board issued four decisions

ruling on the admission for hearing of the proposed contentions.[7] Except for one contention that the Licensing Board admitted but later dismissed as moot, the Board declined to admit the contentions, and it denied the organizations intervenor status. The organizations appealed to the Commission, and the Commission issued four orders resolving those appeals.[8]

B. Proceedings in the courts of appeals

Four of the organizations that were denied party status before the agency petitioned for review of these decisions before the D.C. Circuit, which petitions that court consolidated.[9] After NRC issued the license, these organizations filed additional petitions for review in three courts of appeals.

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[7] *Interim Storage Partners LLC*, LBP-19-07, 90 N.R.C. 31 (Aug. 23, 2019); *Interim Storage Partners LLC*, LBP-19-09, 90 N.R.C. 181 (Nov. 18, 2019); *Interim Storage Partners LLC*, LBP-19-11, 90 N.R.C. 358 (Dec. 13, 2019); *Interim Storage Partners LLC*, LBP-21-02 (Jan. 29, 2021) (available at https://www.nrc.gov/docs/ML2102/ML21029A084.pdf).

[8] *Interim Storage Partners LLC*, CLI-20-13, 92 N.R.C. 457 (Dec. 4, 2020); *Interim Storage Partners LLC*, CLI-20-14, 92 N.R.C. 463 (Dec. 17, 2020); *Interim Storage Partners LLC*, CLI-20-15, 92 N.R.C. 491 (Dec. 17, 2020); *Interim Storage Partners LLC*, CLI-21-09, 2021 WL 2592844 (June 22, 2021).

[9] *Don't Waste Michigan v. NRC*, No. 21-1048 (D.C. Cir.); *Sierra Club v. NRC*, No. 21-1055 (D.C. Cir.); *Beyond Nuclear* v. *NRC*, No. 21-1056 (D.C. Cir.); *Fasken Land and Minerals, Ltd. v. NRC*, No. 21-1179 (D.C. Cir.).

First, environmental organizations filed four more petitions for review in the D.C. Circuit, challenging the license and associated agency actions.[10] The D.C. Circuit consolidated those petitions with the original petitions. Briefing is expected to be completed in July 2022.

Second, Texas (which, like New Mexico, had not participated in the adjudicatory proceedings before NRC) and Fasken Land and Minerals (one of the original petitioners before the D.C. Circuit) petitioned for review before the Fifth Circuit.[11] Federal Respondents moved to dismiss each of these consolidated petitions for lack of subject-matter jurisdiction. The court carried both motions with the case, and briefing is expected to be completed in May 2022.

Third, New Mexico petitioned for review of the license and associated documents in this Court. This Court carried Respondents' motion to dismiss for lack of jurisdiction with the case.[12]

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[10] *Sierra Club v. NRC*, No. 21-1227 (D.C. Cir.); *Sierra Club v. NRC*, No. 21-1229 (D.C. Cir.); *Beyond Nuclear v. NRC*, No. 21-1230 (D.C. Cir.); *Don't Waste Michigan v. NRC*, No. 21-1231 (D.C. Cir.).

[11] *Texas v. NRC*, No. 21-60743 (5th Cir.).

[12] New Mexico also filed a complaint in the United States District Court for the District of New Mexico, challenging the licensing of the ISP facility and another interim storage facility in New Mexico. The case has been dismissed. *See* Order, *Balderas v. NRC,* No. 1:21-cv-00284-JB-JFR, Document No. 48 (D.N.M. Mar. 21, 2021).

SUMMARY OF ARGUMENT

1. This Court lacks jurisdiction to entertain the Petition for Review, both due to lack of standing and because New Mexico is not a "party aggrieved" under the Hobbs Act.

a. New Mexico does not face a concrete and imminent injury caused by the ISP license. The remote and speculative possibility that an accident conceivably could occur at some unknown point in the future, either at the ISP site (which is in Texas, not New Mexico) or during transportation of materials to the site does not, without more, constitute injury to New Mexico's legally protected interests.

b. The AEA and Hobbs Act required New Mexico to first raise its arguments as contentions during NRC's adjudicatory process and then to challenge the final orders resulting from that proceeding. New Mexico did not attempt to participate and should not be allowed to evade the agency-adjudication-exhaustion requirement that Congress codified in the AEA and the Hobbs Act.

2. The license accords with both the AEA and the NWPA.

a. NRC possessed delegated authority to issue the license. As the text of the AEA provides, and as two courts of appeals (including this Court) have held, Congress conferred upon NRC the authority to license facilities for the possession of the source, byproduct, and special nuclear material in spent fuel. The agency's

authority is apparent from the plain text of the statute, and Congress did not impliedly revoke that authority through passage of the NWPA. Even if the statute were ambiguous, the agency has articulated a permissible construction of its organic authority in an adjudicatory proceeding, and this Court must defer to that permissible interpretation.

b. Nor does the license constitute an end run around the NWPA's prohibitions. First, the license does not create a *de facto* repository. It is term-limited, and the agency has fully acknowledged the need for a new storage facility if a repository is unavailable when the license expires. Second, ISP has acknowledged that, under existing law, it cannot store fuel to which DOE holds title, and the Commission has confirmed that ISP would violate its license if it stores DOE-titled fuel. The license thus does not authorize illegal fuel storage.

3. Petitioners' NEPA arguments are unpersuasive.

a. NRC based its environmental analysis, including its assessments of the long-term consequences of fuel storage, upon reasonable assumptions that were affirmed on judicial review. It thoroughly evaluated transportation impacts by preparing site-specific analyses of local infrastructure and bounding analyses of representative rail routes. And it properly consulted with state and local authorities, which, contrary to New Mexico's assertions, supported development of the ISP project during the site-selection process.

b. The agency was not required in its NEPA analysis to specifically evaluate the risk of a terrorist attack. NEPA does not require consideration of impacts that are not proximately caused by a major federal action and are instead caused by an intervening event. Any impacts caused by an act of terrorism would be caused by a classic intervening event, namely, the undertakings of a third-party criminal actor. In any event, the agency fully analyzed the probability and consequences of the natural and man-made accident scenarios that a terrorist might seek to create.

STANDARD OF REVIEW

Under the AEA, 42 U.S.C. § 2239(b), judicial review of final orders in licensing proceedings is conducted "in the manner prescribed in" the Hobbs Act and the APA. Under the APA, an agency's decision is valid unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Colorado Wild v. U.S. Forest Service*, 435 F.3d 1204, 1213 (5th Cir. 2013) (citing 5 U.S.C. § 706(2)(A)). Agency action should likewise be set aside if it is beyond the scope of its delegated authority. 5 U.S.C. § 706(2)(C).

In considering the agency's resolution of the arguments that petitioners have raised, the Court should be mindful that the "the Commission's licensing decisions are generally entitled to the highest judicial deference because of the unusually broad authority that Congress delegated to the agency under the Atomic Energy

Act." *Massachusetts v. NRC*, 924 F.2d 311, 324 (D.C. Cir. 1991). And a reviewing court must be "most deferential" to the agency when its decisions are, like NRC's here, based upon its evaluation of complex scientific data that are "at the frontiers of science" and within its technical expertise. *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1983).

ARGUMENT

I. This Court lacks jurisdiction over the Petition for Review.

A. New Mexico lacks Article III standing.

For a party to have standing, it must "have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Baker v. USD 229 Blue Valley*, 979 F.3d 866, 871 (10th Cir. 2019).

The party invoking federal jurisdiction bears the burden of establishing standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). When the Court entertains a direct appeal from an administrative decision, the petitioner "must produce evidence on each element of standing as if it were moving for summary judgment in district court." *N. Laramie Range Alliance v. FERC*, 733 F.3d 1030, 1034 (10th Cir. 2013); *see also Shrimpers & Fishermen of the RGV v. TCEQ*, 968 F.3d 419, 423 (5th Cir. 2020) (following *North Laramie* and endorsing view of "sister circuits that in direct appellate review of a final

agency action, 'the petitioner carries a burden of production' with respect to standing that is 'similar to that required at summary judgment'" (quoting *Sierra Club v. EPA*, 793 F.3d 656, 662 (6th Cir. 2015))).

Unless standing is self-evident, the petitioner must "present specific facts supporting standing through citations to the administrative record or 'affidavits or other evidence' attached to its opening brief," *Sierra Club*, 793 F.3d at 662 (quoting *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002)), and it may not do so on reply, *Sierra Club*, 292 F.3d at 900; *see also Shrimpers & Fishermen of RGV*, 968 F.3d at 423 (claim of standing "cannot rest on mere allegations, but must instead be supported by citations to specific facts in the record"); *cf.* Fed. R. App. P. 28(a)(4) (requiring appellant's brief to contain a "jurisdictional statement," including "the basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction").

New Mexico may not claim *parens patriae* standing in suits against the United States because the federal government is presumed to represent the State's citizens. *Massachusetts v. Mellon*, 262 U.S. 447, 485-486 (1923); *see, e.g.*, *State ex rel. Sullivan v. Lujan*, 969 F.2d 877, 883 (10th Cir. 1992). Thus, to invoke the Court's jurisdiction, New Mexico must demonstrate that it has suffered cognizable injury to its interests—one that is "actual or imminent," rather than one that merely presents the possibility of future injury. *Baker*, 979 F.3d at 871 (noting that this

standard is met only by evidence of a "certainly impending" injury or "substantial risk of" harm).

New Mexico's standing to challenge a license for a facility in another state is far from self-evident, yet it has not even attempted to meet its burden of establishing standing. Even if New Mexico has property located near the ISP facility, that alone would be insufficient to show an injury-in-fact to its interests. Indeed, merely living within a few miles of a proposed facility alleged to pose a danger does not, without more, create a risk of harm sufficient to confer standing. *Shrimpers*, 968 F.3d at 425. And New Mexico's brief lacks any assertion—whether in the statement of jurisdiction or in the argument section—undermining NRC's record-based conclusion that the facility would pose no credible threat to protection of the health and safety of the public. Nor can the Court presume or speculate what injury might befall New Mexico. *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009) ("While it is certainly possible—perhaps even likely—that one individual will meet all of these criteria, that speculation does not suffice."). Absent demonstrated Article III injury, this Court should dismiss the Petition.

B. New Mexico is not a "party aggrieved" under the Hobbs Act.

We demonstrated in our motion to dismiss, which the Court referred to the merits panel, that this Court lacks jurisdiction over New Mexico's petition for

review. Federal Respondents' Motion to Dismiss (Document No. 010110616536) (Dec. 8, 2021); Federal Respondents' Reply (Document No. 010110628692) (Jan. 7, 2022). In short, the Hobbs Act provides that only a "party aggrieved" by a final order entered in a proceeding described in AEA § 189 may obtain judicial review of the issuance of an NRC license. *See* 42 U.S.C. § 2239(a)(1)(A), (b)(1); 28 U.S.C. §§ 2342(4), 2344. To obtain judicial review of an NRC license like the one issued here, a petitioner either must (1) participate in the adjudicatory proceedings before the agency by submitting adequate contentions under 10 C.F.R. § 2.309, *NRDC v. NRC*, 823 F.3d 641, 643 (D.C. Cir. 2016), or (2) seek review of the Commission's decision denying its request for party status, *Alaska v. FERC*, 980 F.2d 761, 763 (D.C. Cir. 1992).

As stated in our motion, New Mexico's Petition should be dismissed because it did not follow either path. Now that we have reviewed New Mexico's brief, however, we provide two further observations about the Court's lack of jurisdiction. First, Congress desired judicial review of NRC licensing decisions to be channeled through the agency's adjudicatory process. 42 U.S.C. § 2239. Allowing litigants to challenge the license itself, divorced from the agency's adjudicatory proceedings, effectively nullifies the exhaustion requirement, to the detriment of both comprehensive agency decisionmaking in the first instance and efficiency in subsequent judicial review.

Second, while there is no justification for departing from the exhaustion requirement for any reason, the only conceivable basis for entertaining any of New Mexico's arguments is the so-called *ultra vires* exception, stemming from the Supreme Court's decision in *Leedom v. Kyne,* 358 U.S. 184 (1958). But review under this theory is "exceedingly narrow." *Merchants Fast Motor Lines v. ICC*, 5 F.3d 911, 922 (5th Cir. 1993). It requires a showing, initially, that the challenged action "contravene[s] 'clear and mandatory' statutory language." *Pac. Mar. Ass'n v. Nat'l Labor Relations Bd.*, 827 F.3d 1203, 1208 (9th Cir. 2016). And "the party seeking review must be "wholly deprive[d] of a meaningful and adequate means of vindicating its statutory rights." *Id.*

Neither condition is met here, and New Mexico makes no effort in its brief to demonstrate otherwise. To begin, only New Mexico's assertions that NRC lacks authority to issue a license under the AEA for an away-from-reactor storage facility, or lacks authority to issue a license that would permit the storage of fuel to which DOE holds title, Br. 21-25, could possibly qualify for this exception. And as to Petitioners' arguments challenging NRC's statutory authority (which we address in Argument Section II *infra*), the AEA squarely permits NRC to issue licenses to "possess" the radiologically significant components of spent fuel, and the agency's authority to issue such licenses has already been recognized by this Court. There is no statutory prohibition against issuing a license, such as this one,

that permits the storage of privately owned fuel at an away-from-reactor storage facility, let alone a clear one. Instead, New Mexico's challenge, at most, raises an issue of statutory interpretation about the scope of agency authority rather than asserting a clear transgression of the limits of such power. *See Neb. State Legis. Bd., United Transp. Union v. Slater*, 245 F.3d 656, 659-60 (8th Cir. 2001).

Further, the State had a full and fair opportunity to raise its arguments before the Commission. Indeed, New Mexico's arguments about the scope of AEA authority mirror those that Utah raised when it challenged an away-from-reactor spent fuel storage license in an adjudicatory proceeding. These arguments were considered and rejected by the Commission and, in turn, considered and rejected by the D.C. Circuit. *In the Matter of Private Fuel Storage*, CLI-02-29, 56 N.R.C. 390 (Dec. 18, 2002); *Bullcreek v. NRC*, 359 F.3d 536 (D.C. Cir. 2004). Likewise, most if not all of the arguments that New Mexico raises under the NWPA and NEPA parallel the arguments that were in fact properly raised as contentions before the Commission as part of the adjudicatory process, and that are now the subject of the petitions for review pending before the D.C. Circuit.[13] There is this no basis to excuse New Mexico's failure to participate in the adjudicatory

[13] *Compar*e, *e.g.*, Br. 24-25 (ISP license illegal because DOE cannot take title to spent fuel) *with* Brief of Beyond Nuclear, *Don't Waste Michigan v. NRC*, D.C. Cir. No. 21-1048 (Document No. 1939572) 17-19 (making same argument).

proceedings before NRC, and thus no basis for the Court to exercise jurisdiction here.

II. The Atomic Energy Act authorizes NRC to issue a materials license to ISP.

NRC granted the materials license to ISP "pursuant to the Atomic Energy Act." C.I. 130.3 at 1 (license); *see also* C.I. 130.2 at 1 (license preamble). Yet nowhere in its brief does New Mexico address the scope of NRC's authority under the AEA or mention that, in *Skull Valley*, this Court relied on NRC's authority under the AEA to foreclose the assertion that the agency lacks the authority to issue a license to ISP for the temporary storage of spent fuel.

A. The Act unambiguously grants NRC authority to issue licenses to private parties to possess nuclear material.

"It is a cardinal principle of statutory construction that 'if the language is clear and unambiguous, the plain meaning of the statute controls.'" *United States v. Husted*, 545 F.3d 1240, 1243 (10th Cir. 2008) (quoting *Vaughn v. Epworth Villa*, 537 F.3d 1147, 1152 (10th Cir. 2008) (cleaned up)). This is such as case. The AEA plainly authorizes NRC to issue licenses for the "possession" by private parties of the "special nuclear," "source," and "byproduct" material in spent fuel. 42 U.S.C. §§ 2073, 2092, 2111. And that is what the agency has done here.

The clarity of this conclusion is confirmed by the context of these provisions within the statute as a whole and in light of the AEA's purpose. *See In re Mallo*,

774 F.3d 1313, 1317 (10th Cir. 2014). Indeed, it has long been established that NRC's authority under the AEA to regulate the civilian possession, use, and transfer of all the constituents of spent fuel—i.e., special, source, and byproduct materials—is comprehensive and exclusive. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 207 (1983) (recognizing that the AEA gives NRC "exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession and use of nuclear materials"); *Siegel v. Atomic Energy Comm'n*, 400 F.2d 778, 783 (D.C. Cir. 1968) (regulatory scheme codified in the AEA is "virtually unique in the degree to which broad responsibility is reposed in the administrative agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives."). NRC is the only federal agency tasked with regulating the safe use of nuclear materials by private parties, from cradle to grave, including the storage of spent fuel. It would be "illogical in the extreme" to believe that in enacting the AEA, Congress left a gap in NRC's otherwise exclusive and plenary authority by excluding an authorization to store spent fuel when it is stored away from reactors. *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 131 (1987).

The agency's authority under the AEA to issue materials licenses for the storage of spent fuel is borne out by the agency's practice, both in this case and historically. The license issued to ISP is a materials license that permits ISP to

"receive, acquire, and possess" "Byproduct, Source, and/or Special Nuclear Material." And this is one of several instances over the last forty years in which NRC, acting under its authority under 10 C.F.R. Part 72, has issued a license to private parties to store spent fuel away from operating reactor sites. *See* 71 Fed. Reg. 10,068 (Feb. 28, 2006) (materials license for away-from-reactor spent fuel storage facility in Tooele County, Utah); 47 Fed. Reg. 20,231 (May 11, 1982) (renewal of materials license for away-from reactor spent fuel storage facility in Morris, Illinois); *see also* 56 Fed. Reg. 57,539 (Nov. 12, 1991) (materials license awarded under 10 C.F.R. Part 72 at site of decommissioning reactor).

No court has ever held that this longstanding practice, which itself is a product of the notice-and-comment rulemaking efforts that codified Part 72, somehow violates the AEA.[14] Indeed, the two courts of appeals that have considered this issue have confirmed, in the face of arguments mirroring those that New Mexico raises here, that, by enacting the AEA, Congress granted NRC to power to issue licenses permitting an away-from-reactor spent fuel storage facility. In *Bullcreek v. NRC*, the D.C. Circuit explained that the AEA "authorized the NRC

[14] New Mexico asserts that NRC lacked a "specific regulatory basis" for promulgating Part 72. Br. 7 (citing 43 Fed. Reg. 46,309 (Oct. 6, 1978)). But this is not what NRC said. NRC acknowledged that it needed a "more definitive basis to issue" licenses for away-from-reactor storage, and it stated that it was promulgating Part 72 to fill that void. 43 Fed. Reg. at 46,309. NRC did not suggest that it lacked statutory authority to issue licenses of this type.

to regulate the possession, use, and transfer of the constituent materials of [spent fuel], including special nuclear material, source material, and byproduct material." 359 F.3d at 538. And it further recognized that the agency had promulgated its regulations for licensing both onsite and away-from-reactor storage "[p]ursuant to its AEA authority." *Id.* Likewise, in *Skull Valley*, *this Court* rejected a challenge to NRC's licensing authority under the AEA to license away-from-reactor storage of spent fuel in privately owned facilities, stating that it was "persuaded" by the D.C. Circuit's analysis of this issue in *Bullcreek*. 376 F.3d at 1231-32. New Mexico does not even mention this decision.

New Mexico attempts to distinguish the license issued in *Bullcreek* (Br. 22 n.10) by making various assertions about the ISP facility that it raises elsewhere in its brief—that the ISP license permits the storage of DOE-titled fuel, that the EIS failed to discuss reasonable alternatives, and that NRC failed to collaborate with other state and federal authorities. However, none of these arguments relates to NRC's *authority* under the AEA to issue an away-from-reactor license permitting spent fuel storage or provides a basis to undermine the legal conclusion that the D.C. Circuit reached in *Bullcreek* and this Court confirmed in *Skull Valley*. And, inasmuch as New Mexico's arguments are assertions that the agency erred in exercising its authority, we address them on their merits later in this brief.

New Mexico further asserts that any authority that the agency possessed to license away-from-reactor spent fuel storage was revoked by the NWPA. Again, however, it is mistaken. The two courts of appeals, including this Court, that have addressed this argument have squarely rejected it. *See Skull Valley*, 376 F.3d at 1232; *Bullcreek*, 359 F.3d at 542. And for good reason.

Repeating arguments raised by Utah in *Bullcreek* and *Skull Valley*, New Mexico emphasizes 42 U.S.C. § 10155, which empowers the Secretary of Energy to construct a federally operated interim storage facility. That provision further provides that "[n]othing in [the NWPA] shall be construed to encourage, authorize, or require the private or Federal use . . . of any storage facility located away from the site of any civilian nuclear power reactor and not owned by the Federal Government." Br. 22 (citing 42 U.S.C. § 10155(h)). But the plain text of this provision refers only to the NWPA itself. *Id.* § 10155(h) ("nothing *in this chapter*") (emphasis added). It says nothing about the agency's authority under *other*, preexisting legislation (i.e., the AEA) governing spent fuel storage. And the provision begins with the clause "[n]otwithstanding any other provision of law," which necessarily covers the AEA. New Mexico's arguments thus fail for the same reason that the D.C. Circuit articulated in *Bullcreek* and this Court adopted in *Skull Valley*—that § 10155(h) sets limits solely on NRC's NWPA authority. 359 F.3d at 543.

Because Congress enacted the NWPA *after* the AEA, New Mexico's argument also conflicts with the rule against repeals by implication. *See Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020) (repeals by implication are "not favored" and are "a rarity" only found where "Congress' intention to repeal is clear and manifest, or the two laws are irreconcilable" (cleaned up)). If Congress had intended § 10155(h) to revoke NRC's preexisting authority, then it chose a poor vehicle to do so when it carved out "any other provision of law" and limited the provision to the NWPA itself.

Along those lines, there would be no need to state that the *NWPA* should not be read to "encourage" private away-from-reactor storage if, as New Mexico asserts, the AEA did not authorize away-from-reactor storage in the first instance. And it certainly would have been odd for the Supreme Court to recognize NRC's authority to issue away-from-reactor storage licenses in 1983 if Congress had *clearly* revoked that authority when it passed the NWPA months earlier. *See Pacific Gas*, 461 U.S. at 217 (explaining that the Atomic Energy Commission, NRC's predecessor, "was given exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, *possession* and use of nuclear materials" and recognizing, in describing NRC's authority under the AEA, that NRC "has promulgated detailed regulations governing storage and disposal [of spent fuel] away from the reactor" (emphasis added)). As the D.C. Circuit explained, "Given

that Congress was aware of the NRC's regulations for licensing private away-from-reactor storage facilities, the plain language of § 10155(h) provides no support for [the] conclusion that Congress expressly disavow[ed] use of private away-from-reactor storage facilities or silently meant to repeal or supersede the NRC's authority under the AEA." *Bullcreek*, 359 F.3d at 542 (quotation marks omitted).

Nor do other provisions of the NWPA foreclose NRC's preexisting authority under the AEA, as New Mexico apparently suggests when it describes the conditions that New Mexico attached to federally operated interim storage, Br. 8-10. While the State asserts (Br. 10, 25) that the NWPA contains protections for state and local governments in the site-selection process, "generous procedural rights," and rights to financial assistance, it fails to note that the provisions it cites—42 U.S.C. §§ 10136, 10155(d), 10156(e), 10166, 10169—address only facilities to be constructed or operated by the federal government under the NWPA. None of the provisions addresses, or imposes conditions on, a license issued to a private party for spent fuel storage under the AEA.

B. Even if the AEA were ambiguous, the Commission's interpretation is reasonable and entitled to deference.

It remains a bedrock principle of statutory interpretation that an agency's reasonably permissible interpretation of an ambiguous statutory provision, on a subject matter within its organic authority, is entitled to deference. *Chevron,*

U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 843 (1984); *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). This deference extends to "an agency's interpretation of a statutory ambiguity that concerns the scope of the agency's statutory authority." *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 296 (2013).

NRC's authority to issue licenses for parties to possess byproduct, special nuclear, and source material is clearly spelled out in the agency's organic statute, the AEA. 42 U.S.C. §§ 2073, 2092, 2111. Accordingly, the Court need go no further. But, even if the statute were reasonably susceptible to an alternate reading, the Commission's determination that it possesses this authority is entitled to deference.

In 2002, NRC interpreted the AEA to confirm its authority to license a privately-owned, away-from-reactor, interim storage facility for spent fuel. *See In the Matter of Private Fuel Storage, L.L.C.*, CLI-02-29, 56 N.R.C. at 390. There, in ruling on its jurisdiction as part of an adjudication and denying a petition for a rulemaking, NRC addressed Utah's argument that "the NWPA contemplates a comprehensive and exclusive solution to the problem of spent nuclear fuel and does not authorize private, [away-from-reactor] storage facilities." *Id.* at 395-96. Like New Mexico here, Utah asserted that the language in § 10155(h) "overrides the Commission's general authority under the AEA to regulate the handling of spent fuel." *Id.* at 393. The agency squarely rejected this argument, noting that

NRC and its predecessor agency have "always regulated the storage of spent fuel from commercial reactors pursuant to their general authority under the AEA," including their authority to regulate the constituent materials of spent fuel. *Id.* at 395-96.

The Commission likewise concluded that nothing in the NWPA, including § 10155(h), purported to limit the agency's general authority under the AEA to regulate spent fuel, and that § 10155(h) "contains no language of prohibition." *Id.* at 397. The Commission sensibly observed that Utah, like Texas here, "offers no explanation why Congress would see a need to add that it was not 'encouraging' or 'requiring' private, offsite storage if its decision not to authorize it in the NWPA were tantamount to an across-the-board prohibition." *Id.* at 398. And it rejected the idea that the federal government's authority to construct an interim storage facility under the NWPA could not coexist with the agency's authority to issue licenses for private parties to construct facilities of their own. *Id.* at 401-07. The Commission's decision also exhaustively analyzed the legislative history of the NWPA and determined that "Congress was fully aware that existing law allowed for private parties to store spent nuclear fuel at an [away-from-reactor] facility and made a conscious decision not to prevent that storage." *Id.* at 410; *see also Bullcreek*, 359 F.3d at 542 (reaching same conclusion).

New Mexico makes no effort to assert that any of these justifications for the Commission's conclusions are unreasonable. Indeed, it does not refer to the Commission's longstanding explanation of its position or in any way grapple with the idea that the agency has been licensing away-from-reactor spent fuel storage facilities under the AEA for decades. Nor does it contend that the Commission's interpretation of its authority is not authoritative enough to warrant deference. *See Mead*, 533 U.S. at 230.

Simply stated, NRC's interpretation of its authority under the AEA represents, *at a minimum*, a permissible interpretation of the statute that Congress has given it the authority to administer. Accordingly, there is no basis to disturb NRC's longstanding, reasonable, and authoritative conclusion that it is empowered to issue licenses for away-from-reactor spent fuel storage.

C. The ISP facility is not subject to, and does not contravene, the NWPA.

1. The facility is not a *de facto* repository.

New Mexico suggests that by issuing a license to ISP to construct and operate an interim storage facility, NRC has effectively licensed a repository in violation of the NWPA. Br. 23. This argument is unavailing.

First, a repository is for permanent disposal, while the authorization that NRC has issued in the ISP license is for temporary storage "pursuant to the Atomic Energy Act." C.I. 130.3 at 1 (license). Unlike a repository (which will be

permanently sealed once fuel has been loaded), the design of the ISP facility contemplates removal of the fuel from the facility. C.I. 125 at 4-21. And the license issued to ISP has a term of 40 years, with the possibility of renewal. C.I. 130.3 at 1 (license); C.I. 130.2 (license preamble); 10 C.F.R. § 72.42. It is true that progress toward a repository has stalled. But that does not mean, as New Mexico necessarily asserts when it contends that the ISP facility is a *de facto* repository, that there will be no repository within 40 years, or (in the event of renewal) up to 80 years, or that fuel will not be moved from the ISP facility after the license expires.

Second, NRC has thoroughly analyzed the possibility that no repository will be constructed, and it has made clear that, in the event that no repository is available, a new storage facility would have to be licensed. The agency considered the no-repository scenario in the Continued Storage Generic EIS after the D.C. Circuit's 2012 holding, in *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012) (*New York I*), that the agency's prior attempt to account for the environmental effects of reactor operations, known as the Waste Confidence Decision, had not examined the environmental effects of failing to establish a repository. The agency's analysis in the Continued Storage Generic EIS analyzed the impacts of storing spent fuel across three scenarios, including one in which a repository does not become available at all. And NRC described a process in which spent fuel stored

in storage casks would be transferred, using a dry transfer system, to a new (and separately licensed) facility upon expiration of the license of the spent fuel storage facility. *See* Continued Storage Generic EIS at 1-13 to 1-15 (describing the three time frames), 2-20 to 2-24 (describing the dry transfer systems), 2-31 to 2-35 (describing additional activities that would be required to replace storage systems).

The agency's assessment of these impacts survived a comprehensive legal challenge by four states, a Native American community, and several environmental organizations. In *New York v. NRC*, 824 F.3d 1012, 1019-22 (2016) (*New York II*), the D.C. Circuit upheld NRC's generic analysis of the impacts of storing spent fuel both on the site of existing reactors and at offsite facilities. The court held that the agency adequately studied the probability and consequences of a failure to site a permanent repository. *Id*. And the court found reasonable NRC's assumption that spent fuel would be stored in dry casks that are replaced upon license expiration. *Id.*

To be sure, it is *possible* that fuel shipped to the ISP facility will remain in Texas after the expiration of the ISP license. But ISP would need to seek a new license after the expiration of the existing one. NRC must likewise prepare a new safety and environmental analysis if a renewal is sought, with attendant opportunities for a hearing. *See* 42 U.S.C. § 2239(a); 10 C.F.R. § 72.42. And it is not a foregone conclusion that the licensee would seek (or that NRC would allow

it) to keep the fuel at that particular site. Again, New Mexico's speculation that the fuel will not go to a repository and will, instead, stay at the same site in Texas does not convert a duly issued and term-limited license to store spent fuel in accordance with the AEA into a *de facto* permanent repository issued in contravention of the NWPA. The agency's analysis of the possibility that no repository will be available after the expiration of the term of the ISP license and its identification of the steps that would need to be taken to license a new storage facility, incorporated into the Final EIS here and affirmed on judicial review, reflects its considered judgment and forecloses New Mexico's arguments to the contrary.

2. The agency has not authorized the storage of DOE-titled fuel.

New Mexico also asserts that the facility was originally conceived as a facility for the storage of spent fuel to which DOE, rather than private entities, own title, and that the license therefore violates the NWPA. Br. 24-25. It criticizes a provision of the license stating that, "Prior to commencement of operations, the Licensee shall have an executed contract with the U.S. Department of Energy (DOE) or other SNF Title Holder(s) stipulating that the DOE or the other SNF Title Holder(s) is/are responsible for funding operations required for storing the material . . . ." C.I. 130.3 (license) at 3 ¶ 19. Its argument is unavailing for three reasons.

First, the Commission determined during the adjudicatory proceedings that the license did not violate the NWPA. The Licensing Board explained, when it rejected contentions on this issue, that ISP had *agreed* that "under current law, [it] may not contract for DOE to take title to private power companies' spent nuclear fuel. There is no credible possibility that such contracts will be made in violation of the law." *Interim Storage Partners LLC*, LBP-19-07, 90 N.R.C. 31, 59 (Aug. 23, 2019); *see also id*. at 59-60.[15] And the Commission, reviewing the same argument on appeal, determined both that "ISP plainly could not rely on [contracts with DOE] to ensure its operating funds" because those contracts would be illegal, and that "the proposed license is not premised on illegal activity because there is a lawful option by which ISP could fulfil the proposed license condition." *Interim Storage Partners LLC*, CLI-20-14, 92 N.R.C. 463, 468-69 (Dec. 17, 2020).

New Mexico provides no reason to contest these common-sense conclusions. Nor does it explain why this Court should resolve the issue at all, given that the D.C. Circuit is reviewing the Commission's resolution of contentions in which this issue was adjudicated before the Commission in the first

[15] As the Licensing Board explained, ISP acknowledged that "absent new legislation, the DOE could not lawfully assume ownership of the spent nuclear fuel in the proposed interim storage facility." *Interim Storage Partners LLC*, LBP-19-07, 90 N.R.C. at 57.

instance. *See* Brief of Beyond Nuclear, *Don't Waste Michigan v. NRC*, D.C. Circuit No. 21-1048 (Document No. 1939572) 17-19 (raising same argument).

Second, while New Mexico cites the license *application* for the proposition that the original conception of the facility was that it would store DOE-titled fuel, Br. 24 n.12, it is the license, not the application, against which the legality of the facility must be judged. Indeed, ISP amended its application to address concerns about the legality of the application. C.I. 31.2 at 1-1 to 1-2 (Revision 2 to License Application). And, as the Licensing Board and the Commission concluded, the license granted by NRC permits storage of spent fuel in a manner consistent with the NWPA—through the storage of spent fuel to which private entities retain title. *Interim Storage Partners LLC*, CLI-20-14, 92 N.R.C. at 468.

Third, the license provision that New Mexico challenges is not designed to *authorize* parties to do anything, let alone to do anything illegal. Rather, it *requires* that the entities that own the spent fuel to be stored—whoever they may be—agree to provide financial backing for facility operations. C.I. 130.3 (license) at 3 ¶ 19. The provision thus ensures that operational funding is guaranteed by the entities benefitting from the storage of the fuel, i.e., the fuel title holders. But there is no reason to believe either that DOE would enter into such a contract if it were illegal or that NRC would permit such a contract to satisfy this license condition, particularly given the express acknowledgement of the Commission in an

adjudicatory decision to the contrary. *Interim Storage Partners LLC*, CLI-20-14, 92 N.R.C. at 468-69. And, of course, if DOE or NRC took action purportedly contrary to the NWPA, those actions would be subject to judicial review. *See* 5 U.S.C. § 706(2)(A).

III. NRC complied with applicable law in issuing the license.

In addition to asserting that NRC lacks statutory authority to issue a license to ISP, New Mexico also criticizes the process the agency followed and the conclusions it drew along the way. It raises arguments arising under NEPA and the Administrative Procedure Act as well as under the U.S. Constitution. Its arguments are uncompelling.

A. The agency's process complied with its own regulations and with NEPA.

New Mexico contends that it lacked an opportunity to contest the agency's conclusions in the EIS. Br. 13. In particular, it complains that NRC "closed the administrative record *five months before* publication of its draft EIS and *before* the agency issued its notice soliciting public comments pursuant to NEPA." *Id.* (cleaned up; emphasis in original). Its arguments are unpersuasive.

It is true that the adjudicatory proceedings were completed before the publication of the draft EIS. But, as we established in our motion to dismiss, NRC regulations, repeatedly upheld on judicial review, require NEPA contentions to be raised at the earliest possible time and, where possible, in response to the license

applicant's Environmental Report. 10 C.F.R. § 2.309(f)(2); *see, e.g.*, *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 56-57 (D.C. Cir. 1990). NRC closed the adjudicatory proceedings before publishing the draft EIS because no party submitted timely and *admissible* contentions for adjudication, not because NRC's process is improper. And, had new information become available after the termination of the adjudication, putative intervenors could have sought leave to reopen the proceeding. But New Mexico failed to participate at all in the agency's adjudicatory proceedings, and its collateral attack on the agency's adjudicatory process should be rejected.

B. The agency reasonably assessed the purpose and need for the facility in light of uncertainty concerning repository availability.

New Mexico criticizes NRC's recognition of the purpose and need articulated in the EIS for the ISP project—to provide the owners of spent fuel with the option for offsite storage capability before disposal at a repository, C.I. 125 at 1-3—because of NRC's assumption that a repository will be available by 2048. Br. 33-36. It asserts that the assumption is unwarranted and that, if it were correct, there would be no reason to construct the ISP facility. New Mexico's arguments are unpersuasive.

As an initial matter, the reason for including the purpose and need for a project in an EIS is to help the agency determine what alternatives it should

consider, and which alternatives are too remote, speculative, impractical or ineffective to warrant further consideration. *See BioDiversity Conservation Alliance v. Bureau of Land Mgmt*., 608 F.3d 709, 714-15 (10th Cir. 2010). For this reason, agencies have considerable discretion to define the purpose and need of a project. *Wyoming v. Dep't of Agric.*, 661 F.3d 1209, 1243-44 (10th Cir. 2011). And where a private party's proposal triggers a project, the agency may "give substantial weight to the goals and objectives of that private actor." *BioDiversity Conservation Alliance*, 608 F.3d at 715 (quoting *Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv*., 297 F.3d 1012, 1030 (10th Cir. 2002)).

New Mexico's criticisms of NRC's consideration of the purpose and need of the project are inconsistent with these deferential standards and are in any event based on faulty premises. First, New Mexico misstates the assumptions governing NRC's analysis. The EIS does not say, as New Mexico asserts, that the agency has "conclude[d]" that "a repository will be available by 2048," such that no interim storage will be required beyond that date. Br. 33. Rather, the agency stated that it expects that fuel stored at the proposed facility will be shipped to a repository by the end of the facility's licensed term, and that this timeframe accords with the 25-to-35-year reasonable timeline to site, license, and construct a repository identified in the Continued Storage Generic EIS. C.I. 125 at 2-2. NRC's assumptions are consistent with this expectation, particularly given ISP representation in its license

application that it expects to seek a twenty-year renewal of the license term, for a total operating life of 60 years, until 2081. *Id.*

Nor is New Mexico correct when it asserts (Br. 34) that there is "no evidence in the record" for NRC's assessment of a realistic date for repository availability. NRC performed this analysis as part of the rulemaking effort associated with its Continued Storage Generic EIS, and it reached its conclusion concerning the time needed to construct a repository based on technical data available to it and historical and international experience. Continued Storage Generic EIS at xxx, 1-13 to 1-15, B-1 to B-9. NRC codified this analysis by rule at 10 C.F.R. § 51.23 so that it could serve as the NEPA analysis for future reactor and fuel storage licensing decisions. And the D.C. Circuit upheld the rule. *New York II*, 824 F.3d at 1020 (holding that "NRC adequately considered both the probability and consequences of failure to site a permanent repository for spent nuclear fuel"). New Mexico neither contested the applicability of this analysis nor sought a waiver of this rule in the adjudicatory proceedings before the agency, *see* 10 C.F.R. § 2.335(b), and it did not file a petition for rulemaking requesting that the Commission change its conclusions, *id*. § 2.802. Its criticisms of the agency's analysis ring hollow here.

New Mexico also asserts that, if correct, the "repository by-2048 assumption fundamentally clashes with" the asserted need to store fuel before a repository

becomes available, and it uses this criticism to assail the agency's selection of alternatives. Br. 34-36. Its arguments fail. Beyond the fact that NRC did not (and cannot) guarantee a repository by 2048, the agency reasonably concluded, consistent with its expertise over such matters, that shipping fuel to a repository will take time. *See, e.g.*, C.I. 125 at 4-23 (forecasting shipments of fuel from the facility to a repository over a 17-year time frame). Perhaps some reactor licensees will determine that, from a business perspective, they would prefer to keep fuel at reactor sites until 2048 or beyond rather than shipping it to the ISP facility. But the purpose and need of the facility, as expressed in the EIS, is to provide these spent-fuel owners with the *option* of shipping this fuel offsite during this period. It is simply not NRC's place to foreclose this option—which is entirely consistent with the likely progress of any repository— if it complies with applicable health and safety requirements. *See, e.g.*, *Louisiana Wildlife Fed'n, Inc. v. York*, 761 F.2d 1044 (5th Cir. 1985) (Under guidelines promulgated by EPA, "not only is it permissible for the Corps to consider the applicant's objective; the Corps has a duty to take into account the objectives of the applicant's project. Indeed, it would be bizarre if the Corps were to ignore the purpose for which the applicant seeks a permit and to substitute a purpose it deems more suitable."). NRC acted reasonably in defining the purpose and need for the project in light of the

uncertainty of a precise date when a repository will become available, and New Mexico fails to demonstrate otherwise.

C. The agency properly considered the impacts of transportation to and from the facility.

1. The agency did not segment its analysis of transportation.

New Mexico asserts that NRC illegally "segmented" the licensing of the ISP facility from the transportation of spent fuel from reactor sites. Br. 37-40. NEPA's "anti-segmentation rule is designed to 'prevent agencies from minimizing the potential environmental consequences of a proposed action [and thus short-circuiting NEPA review] by segmenting or isolating an individual action that, by itself, may not have significant environmental impact.'" *Audubon Society of Greater Denver v. U.S. Army Corps of Eng'rs*, 908 F.3d 593, 607 n.8 (10th Cir. 2018) (citation omitted). NRC did no improper segmentation here because it thoroughly analyzed transportation impacts in the EIS. New Mexico makes no mention of NRC's extensive analysis, and the State provides no basis to question the agency's expert judgment in formulating this analysis.[16]

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[16] In support of its arguments, New Mexico relies on C.I. 131, a set of comments prepared by the New Mexico Attorney General's office on the Final EIS, which in turn cites C.I. 128, a report criticizing the Final EIS prepared by an outside consultant (Great Ecology) and submitted to the agency by the attorneys representing Fasken (a petitioner in the Fifth and D.C. Circuits). Br. 38. But these documents, as well as additional comments on the final EIS from the New Mexico Environment Department (C.I. 132), were submitted long after the deadline for

In Section 3.3. of the EIS, NRC describes the local transportation infrastructure and potential rail routes for shipments of fuel to the ISP facility by rail. C.I. 125 at 3-6 to 3-10. In Section 4.3 of the EIS, NRC devotes nineteen pages of analysis to these issues, including the impacts caused by construction, operation, and decommissioning stages of the ISP facility. C.I. 125 at 4-6 to 4-24. This includes a detailed evaluation of the impacts (1) from supply shipments and commuting workers, *id.* at 4-8 to 4-9; (2) from nationwide shipments of spent fuel to the ISP facility, *id.* at 4-9 to 4-10; and (3) on workers and the public, both radiological and non-radiological, from transportation of spent fuel both in incident-free and accident scenarios, *id.* at 4-10 to 4-17, 4-17 to 4-24. And NRC devotes an entire section of the EIS's cumulative impacts analysis to the issue of transportation. *Id.* at 5-18 to 5-21. These analyses contradict New Mexico's assertion that the agency segmented or otherwise failed to consider the project's impacts on transportation.

It is not clear whether New Mexico is asserting that the agency should have specifically considered now the shipment of spent fuel from specific reactor sites. To the extent New Mexico relies on this argument to support its segmentation theory, its argument necessarily fails. ISP has no customers, and there is no

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submitting comments on the draft EIS, and the agency need not consider them. *See Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1059 (D.C. Cir. 2001); *Reytblatt v. Nuclear Regulatory Comm'n*, 105 F.3d 715, 723 (D.C. Cir. 1997).

shipment for NRC or the Department of Transportation to approve. *See* 10 C.F.R. Part 71, 73 (NRC transportation regulations). 49 C.F.R Parts 107, 171–180, 390–397 (Department of Transportation regulations). There is thus no federal action to "segment" from the ISP license.

And recognizing that it can only surmise at this time which reactor owners will eventually seek authorization to ship fuel to the ISP facility, the agency analyzed transportation impacts based on representative routes that it concluded were "bounding"—i.e., that "overestimate[] the impacts of the proposed transportation relative to a more dispersed route-specific approach." C.I. 125 at D-61. New Mexico does not challenge the agency's reasonable reliance on this conservative assumption, and NEPA requires no more under these circumstances. *See, e.g.*, *Suffolk County v. Secretary of Interior*, 562 F.3d 1368, 1379 (2nd Cir. 1977) (reversing district court's determination that approval of leases for oil and gas exploration had been illegally segmented due to alleged failure to specify probable pipeline destinations, which were not known at the time).

2. NRC has not imposed unfunded mandates on New Mexico.

New Mexico challenges the agency's identification of impacts on regional transportation infrastructure and asserts that the costs associated with rail shipments constitute "unfunded mandates" imposed on the State. Br. 26-29, 40-42.

Its argument fails because NRC's identification of the costs associated with rail shipments is not a "mandate."

We begin by noting that New Mexico's assertion (Br. 40) that the EIS is "silent on the significant regional and cumulative transportation impacts" associated with the project is incorrect. As discussed above, the agency addressed regional and cumulative transportation impacts within its extensive evaluation of the proposed facility's impacts on transportation. New Mexico does not acknowledge, let alone identify any flaws in, this analysis, and it should not be permitted to do so on reply.

With respect to New Mexico's mandate argument, the agency's analysis *does* observe that the use of the rails and the transportation infrastructure creates externalities. And the agency properly recognized these costs as part of its evaluation of the socioeconomic impacts of the ISP project (though it noted that some of these costs would be incurred regardless of whether the ISP project becomes operational). *See id.* at 4-74 to 4-75 (noting that states are responsible for protecting public health and safety during transportation accidents involving radioactivate materials but concluding that "[s]ignificant additional costs to States would likely not be incurred related to unique or different training to respond to potential transportation accidents involving spent fuel as compared to existing radioactive materials commerce"); *see also id.* at 8-11 ("Nationwide, there are

many shipments of radioactive material each year for which the States already provide capable emergency response."). But the agency's *description* of the potential costs that a state or municipality may incur in the event of an accident is not a "mandate"; it is a reflection of the limited authority of the federal government and the states' longstanding and traditional role in providing emergency services to infrastructure projects of all kinds.

New Mexico cites no case law suggesting that the state's responsibility for providing emergency services constitutes an unfunded mandate. It is undeniably true that the Federal Government may not "commandeer the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program," *New York v. United States*, 505 U.S. 144, 161 (1992), such as by requiring state employees to conduct background checks on handgun purchases, *see Printz v. United States*, 521 U.S. 898 (1997). But, unlike the anti-commandeering cases that New Mexico cites, no provision of the ISP license and no NRC regulation *requires* states or municipalities to assume costs that they were not already incurring. NRC has merely made the commonsense observation, in a document that does not impose legal obligations on anyone, that a transportation accident would draw upon state resources. This is true of *all* projects that the government authorizes, and an agency's recognition of this fact in an

environmental analysis does not convert the agency's action into a federal takeover of state authority.

3. The agency properly considered site-specific transportation impacts.

New Mexico's final argument related to transportation is its assertion that the agency failed to evaluate transportation issues on a site-specific basis. Br. 42-44. But the EIS contains a detailed description of the existing transportation infrastructure in the area surrounding the ISP facility, C.I. 125 at 3-6 to 3-8, as well as an evaluation of how that specific area will be affected by the construction, operation, and decommissioning of the ISP facility, *id.* at 4-6 to 4-8, 4-20. NRC properly identified the site-specific impacts of the facility on transportation and other affected resource areas.

Inasmuch as New Mexico contends that NRC should not have relied on generic analyses, including the Continued Storage Generic EIS (NUREG-2157), to inform its conclusions, its concerns are ill-founded. The agency offers intervenors an opportunity to challenge the applicability of the agency's generic determinations to particular license applications. But, as the D.C. Circuit properly recognized in *New York II*, this consideration takes place in adjudicatory proceedings, including via the Commission's allowance in 10 C.F.R. 2.335(b) for an adjudicatory participant to assert that a generic analysis set forth in a rule should be waived due to special circumstances. 824 F.3d at 1022-23. If New Mexico

were seriously concerned about the agency's use of generic analyses to satisfy its obligations under NEPA, it should have either (1) raised such an argument in a contention before the agency; or (2) invoked the agency's waiver procedure to demonstrate that the rules on which the agency has relied to invoke these analyses are not applicable. Having eschewed this hearing opportunity, New Mexico cannot now claim to be injured by the agency's reliance upon the analyses that it previously performed and that were upheld on judicial review.

New Mexico's list of alleged site-specific failures (Br. 43-44) includes its assertion that the ISP license does not contain provisions for a facility to repackage fuel. However, NRC explained that no such facility is anticipated during the term of the license because canisters can be safely transferred between transportation and storage casks. C.I. 125 at D-33. And the agency specifically explained in the Continued Storage Generic EIS that such a facility would be separately licensed if ultimately required. Continued Storage Generic EIS at 2-20 to 2-24 (describing the dry transfer systems), 2-31 to 2-35 (describing the additional activities that would be required to replace storage systems at approximately 100-year intervals). NRC's treatment of the issue here thus falls squarely within its generic analysis, and New Mexico does not demonstrate otherwise.

D. NRC properly considered the potential impacts of accidents of all forms but need not evaluate risks, such as terrorist attacks, attributable to superseding causes.

New Mexico asserts that NRC failed to address the risks from a potential terrorist attack. Br. 44-46. But NEPA does not require such an analysis.

The Third Circuit recognized as much in *New Jersey Department of Environmental Protection v. NRC*, 561 F.3d 132 (3rd Cir. 2009), when it rejected the argument New Mexico raises here based on Supreme Court precedent. Specifically, the Third Circuit heeded the Supreme Court's instruction that, in considering the scope of impacts that must be addressed as part of a NEPA analysis, courts should "draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not." *Id.* at 139 (quoting *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004)); *see also Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983) (analogizing the requirement to concept of proximate causation from tort law). As the court explained, the impacts from a terrorist attack—the consummate example of an intervening event—lie far beyond the "reasonably close causal relationship" that NEPA requires between a major federal action and a potential impact. *See New Jersey Dep't of Envtl. Prot.*, 561 F.3d at 140 (identifying the steps between licensing and an act of terrorism and concluding that a terrorist act is a "superseding cause" based on five of six factors identified in the Restatement

(Second) of Torts)); *see also City of Dallas, Tex. v. Hall*, 562 F.3d 712, 719 (5th Cir. 2009) ("'Reasonable foreseeability' does not include 'highly speculative harms' that 'distort[ ] the decisionmaking process' by emphasizing consequences beyond those of 'greatest concern to the public and of greatest relevance to the agency's decision.'").

New Mexico relies on *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006). But it fails to address the flaw in the *Mothers for Peace* decision that the Third Circuit identified in *New Jersey Department of Environmental Protection*—that *Mothers for Peace* had improperly rejected the "reasonably close causal relationship" test that the Supreme Court adopted in *Metropolitan Edison* and *Public Citizen*. 561 F.3d at 142-43 (observing "no other circuit has required a NEPA analysis of the environmental impact of a hypothetical terrorist attack" and citing cases from the Second, Third, Eighth, and D.C. Circuits for this proposition); *see also Public Citizen*, 541 U.S. at 767.

Moreover, the agency *did* analyze the effects of potential accidents in its NEPA analysis for the ISP facility. C.I. 125 at 4-94 to 97. What it has not done in the site-specific EIS that it prepared for the ISP facility is attempt to describe the effects of an accident-like event attributable only to the deliberate, criminal, and inherently unpredictable action of a third party. Accordingly, the agency's analysis of accidents in the ISP EIS describes the four types of "design basis" events, i.e.,

those events and accidents "for which the facility must be designed to ensure the capability to prevent or mitigate the consequences of accidents that could result in potential offsite exposures," as well as an analysis of transportation accidents. *Id.* at 4-17 to 4-19, 4-94 to 4-97.

And, as to severe accidents, the agency noted that NRC's approval of the license turned on its analysis of such infrequent and extremely unlikely events as explosions, fires, earthquakes, floods, lightning, tornado missiles, burial of casks under debris, cask tipovers and drops, complete blockage of storage cask air inlets and outlets, and accidents at nearby sites. *Id.* at 4-96. The agency thus determined that the safety requirements around which the facility is designed would ensure that the environmental effects of any such events would be small. *Id.* at 4-97; *cf. New York II*, 824 F.3d at 1021 (relying on assessment of impacts of spent fuel pool leaks in light of NRC regulations requiring leak detection). Given that the agency's evaluation encompasses consideration of the same types of natural and man-made scenarios (such as fires, explosions, and cask tipovers) as might reasonably be expected because of a terrorist attack, the agency sufficiently evaluated these issues.

In addition to the severe accident scenarios covered in the Final EIS for the ISP facility, NRC also has evaluated the threat of terrorism at dry storage facilities on a generic basis, including identifying the "catastrophic" effects of the

detonation of an improvised nuclear device. *See* Continued Storage Generic EIS at 4-94 to 4-97, 5-58 (describing anticipated short-term deaths caused by shockwaves and heat, and longer-term damage from radiation exposure). And the agency concluded on a generic basis that the environmental risk of a terrorist attack at a storage facility would be small because the potential impacts, though conceivably large (and otherwise evaluated), are unlikely to occur. *See id.* at 4-96 (evaluating the threat of terrorist attacks and concluding that the probability of a successful impact would be numerically indeterminate but very low because of the physical protection systems that licensees are required implement and the robust nature of dry cask storage systems); *cf. New York II*, 824 F.3d at 1021 (upholding NEPA analysis that relied on compliance with regulatory obligations to assess risk); *New Jersey Dep't of Envtl. Prot.*, 561 F.3d at 134 (concluding that NRC's site-specific analysis of severe accidents coupled with generic analysis of sabotage risks in NRC's generic analysis "together provide both generic and site-specific analyses of potential environmental impacts at [the reactor site] arising from terrorist attacks").

Furthermore, the agency's environmental analysis in the EIS is confirmed by NRC's safety analysis. In the Safety Report, the agency thoroughly evaluated the safety implications of accidents (including the types of events that might reasonably be expected to result from a terrorist attack) such as fires and

explosions; building structural failure; heatup and blockage of air inlets and outlets; dropped and tipped-over casks; earthquakes; lightning; floods; tornado wind and missiles; and accidents at nearby sites. C.I. 134 at 16-1 to 16-15. And the agency concluded that the design of the ISP facility, including the proposed storage systems, satisfied NRC's stringent requirements. *Id.* New Mexico provides no basis to question any of these conclusions.

E. NRC consulted with New Mexico and did not disregard its input during the site selection process.

New Mexico argues that NRC failed to consult with New Mexico and, in so doing, violated the NWPA, NEPA, and APA. Br. 25-26, 46-49. Its arguments fail both factually and legally.

First, New Mexico's invocation (Br. 25) of provisions of the NWPA related to the development of a site for a federally operated storage or disposal facility are irrelevant to NRC's issuance of a materials license to a private entity under the AEA. *See* discussion page 28 *supra*. The same is true of the New Mexico's reliance upon the recommendations of the Blue Ribbon Commission on America's Nuclear Future (Br. 25-26), which do not have the force of law.

Second, NRC engaged in extensive public outreach and dialogue with affected communities and government officials to understand and address public concerns about the project and the potential site-specific impacts. C.I. 125 at 1-4 to 1-6, 1-9 to 1-14, D-24 to D-25. This included consultation not only with

officials from Texas, where the facility is located, but also officials from New Mexico. *Id.* at 1-8 to 1-12, 1-14, A-1 to A-3. And, contrary to New Mexico's assertions (Br. 48), the agency responded to commenters' concerns about geology and seismic stability and other alleged technical deficiencies. *E.g.*, *id.* at 3-19 to 3-22, 4-25 to 4-29, 5-21 to 5-25, D-9. The notion that the agency "ignored" New Mexico's positions is simply incorrect, and the fact that it did not accede to the State's ultimate opposition to the project does not demonstrate otherwise.

Finally, New Mexico accuses ISP of making "patently false" statements in its Environmental Report concerning the support of Texas and New Mexico, and of using this support to justify the elimination of other potential sites. Br. 26, 46. To be sure, certain state and local officials ultimately opposed the facility. But when ISP was conducting the site-selection process, the proposed facility had the support of both the New Mexico and Texas Governors, and Andrews County, where the facility is to be located. The Governor of Texas voiced support for storing spent fuel in Texas, C.I. 88.3 (ML20052E152) at 2-10, and the Commissioners of Andrews County unanimously approved a resolution in support of establishing a consolidated interim storage facility, C.I. 88.4 (ML20052E154) at Attachment 1-1. And New Mexico's Governor "voiced her support for a consent based approach to locate a CISF in southeastern New Mexico" in a letter to the Secretary of Energy. C.I. 88.3 at 2-10 (ML20052E152); *see also* C.I. 88.4 at Attachment 2-1

(ML20052E154) (noting the "broad support in the region" for such a project). New Mexico can hardly complain about a lack of local support in a lawsuit against the federal government when, in correspondence with federal officials, it touted this support as a reason to locate such a facility in the region.[17]

CONCLUSION

The Court should dismiss or, if reaches the merits, deny the Petition for Review.

Respectfully submitted,

/s/ *Justin D. Heminger*
TODD KIM
Assistant Attorney General

JUSTIN D. HEMINGER
Attorney
Environment and Natural Resources Division

/s/ *Andrew P. Averbach*
MARIAN L . ZOBLER
General Counsel

ANDREW P. AVERBACH
Solicitor
U.S. Nuclear Regulatory Commission

May 9, 2022

[17] Finally, contrary to New Mexico's assertion in this same section of its brief (Br. 48-49), NRC considered the potential environmental impacts of a second interim storage facility, proposed to be constructed in New Mexico, throughout its analysis of the cumulative impacts associated with the ISP facility. C.I. 125 at 5-6, 5-7, 5-18, 5-20, 5-33, 5-49, 5-51.

CERTIFICATE OF SERVICE

I certify that on May 9, 2022, I served a copy of the foregoing **BRIEF FOR FEDERAL RESPONDENTS** 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:

Bruce C. Baizel
bruce.baizel@state.nm.us

William Gregory Grantham
wgrantham@nmag.gov, swright@nmag.gov

Justin Heminger
justin.heminger@usdoj.gov; efile_app.enrd@usdoj.gov

P. Cholla Khoury
ckhoury@nmag.gov, fdiaz@nmag.gov

Zachary E. Ogaz
zogaz@nmag.gov

Arnold Bradley Fagg
brad.fagg@morganlewis.com

Ryan Kennedy Lighty
ryan.lighty@morganlewis.com

Allan L. Kanner
a.kanner@kanner-law.com k.crowell@kanner-law.com, a.tennis@kanner-law.com

Marcus J. Rael, Jr.
marcus@roblesrael.com, vanessa@roblesrael.com

/s/ Andrew P. Averbach
Andrew P. Averbach

Counsel for Respondent
U.S. Nuclear Regulatory Commission

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit set forth in Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(B), this document contains 12,992 words.

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/s/ *Andrew P. Averbach*
Andrew P. Averbach

Counsel for Respondent
U.S. Nuclear Regulatory Commission