

ORAL ARGUMENT NOT YET SCHEDULED

Nos. 21-1048, 21-1055, 21-1056, 21-1179, 21-1227, 21-1229, 21-1230, 21-1231
(consolidated)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

DON'T WASTE MICHIGAN, et al., *Petitioners*,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and
THE UNITED STATES OF AMERICA, *Respondents*,
and
INTERIM STORAGE PARTNERS LLC, *Intervenor-Respondent*.

*On Petitions for Review of Orders by the
United States Nuclear Regulatory Commission*

**BRIEF FOR AMICUS CURIAE NUCLEAR ENERGY INSTITUTE, INC.
IN SUPPORT OF RESPONDENTS AND AFFIRMANCE**

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Dated: June 13, 2022

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies the following:

A. Parties and Amici

Except for amicus curiae Nuclear Energy Institute, Inc. (NEI), all parties, intervenors, and amici appearing in this Court are listed in the Brief for Federal Respondents.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Federal Respondents.

C. Related Cases

A list of related cases appears in the Brief for Federal Respondents.

CORPORATE DISCLOSURE STATEMENT

As required by Fed. R. App. P. 26.1 and D.C. Circuit Rule 26.1, NEI submits the following corporate disclosure statement. NEI is a nonprofit organization incorporated in the District of Columbia. NEI is a “trade association” as that term is defined in Fed. R. App. P. 26.1(b). NEI has no parent company and no publicly held company has any ownership interest in NEI. NEI represents the policy interests of its members in the nuclear power industry, including nuclear power plant licensees, reactor designers and advanced technology companies, architect and engineering firms, fuel suppliers and service companies, consulting services and manufacturing

companies, companies involved in nuclear medicine and nuclear industrial applications, radionuclide and radiopharmaceutical companies, universities and research laboratories, law firms, labor unions, and international electric utilities.

Respectfully submitted,

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GLOSSARY

AEA	Atomic Energy Act
CI	Certified Index
Commission	U.S. Nuclear Regulatory Commission (collegial body)
DOE	U.S. Department of Energy
EIS	Environmental Impact Statement
ISP	Interim Storage Partners, LLC
Licensing Board	Atomic Safety and Licensing Board
NEI	Nuclear Energy Institute
NEPA	National Environmental Policy Act
NRC	U.S. Nuclear Regulatory Commission (agency as a whole)
NWPA	Nuclear Waste Policy Act

I. INTRODUCTION AND STATEMENT OF INTEREST

The Nuclear Energy Institute, Inc. (NEI) submits this brief in support of the U.S. Nuclear Regulatory Commission (NRC), Interim Storage Partners, LLC (ISP), and affirmance of the NRC decisions granting a license to ISP for its consolidated interim storage facility in Texas.¹ NEI is the trade association for the commercial nuclear technologies industry. NEI's mission is to promote the use and growth of nuclear energy through efficient operations and effective policy. NEI has hundreds of members, and its membership includes companies licensed to operate commercial nuclear power plants and store commercial spent nuclear fuel in the United States, as well as nuclear plant designers, major architectural and engineering firms, entities that process nuclear fuel, and other organizations involved in the nuclear industry.

Nuclear energy is the largest and most efficient source of carbon-free electricity in the United States. Currently, 92 commercial nuclear power reactors in 28 states provide nearly 20 percent of America's electricity and half of its emissions-

¹ In accordance with D.C. Cir. R. 29(a)(4), no party's counsel authored this brief in whole or in part; neither a party nor a party's counsel contributed money that was intended to fund preparing or submitting the brief; and other than amicus curiae, its members, and its counsel, no person contributed money that was intended to fund preparing or submitting this brief. All parties have consented to NEI filing this brief.

free electricity.² In addition to its substantial clean energy benefits, nuclear generation is critical to grid reliability, annually providing nearly 800 billion megawatt-hours of 24/7 electricity. Nuclear plants are hardened facilities that are protected from physical and cyber threats, helping to ensure we have a resilient electricity system in the face of potential disruptions. Nuclear power plants also are valuable contributors to the nation's economy, adding \$60 billion annually and serving as engines for job creation. The U.S. nuclear energy sector directly employs about 100,000 people in high-quality, long-term jobs with salaries that are 50 percent higher on average than those of other electricity generation sources. All told, these facilities are responsible for 475,000 direct and secondary jobs.³

In generating nearly half of the nation's carbon-free energy, nuclear plants produce spent nuclear fuel, which consists of metal fuel rods that contain solid, irradiated-uranium fuel pellets. Once removed from a nuclear reactor after it can no longer efficiently sustain power production, spent fuel is stored safely and securely

² U.S. Energy Info. Admin., *Frequently Asked Questions (FAQ), How Many Nuclear Power Plants Are in the United States, and Where Are They Located?*, <https://www.eia.gov/tools/faqs/faq.php?id=207&t=3> (last updated May 25, 2022); U.S. Energy Info. Admin., *Frequently Asked Questions (FAQ), What Is U.S. Electricity Generation by Energy Source?*, <https://www.eia.gov/tools/faqs/faq.php?id=427&t=3> (last updated Mar. 4, 2022).

³ See NEI, *Jobs*, <https://www.nei.org/advantages/jobs> (last visited June 13, 2022).

in accordance with stringent NRC requirements. Storage, however, was never intended to be permanent and the U.S. Department of Energy (DOE) is legally obligated to dispose of spent fuel generated by U.S. commercial power reactors.

The storage and disposal of spent fuel has been and remains an important issue facing the nuclear industry and the nation. NEI has a strong interest in this case and can provide a useful perspective on the issues presented. NEI is uniquely positioned to offer insight into the benefits of developing consolidated interim storage facilities designed to maintain spent fuel produced from multiple nuclear power plants before permanent disposal in a repository. NEI has on many occasions participated in litigation concerning the storage and disposal of spent fuel.⁴ NEI's perspectives in this case can help ensure that the Atomic Energy Act (AEA),⁵ National Environmental Policy Act (NEPA),⁶ and Nuclear Waste Policy Act (NWPA)⁷ are

⁴ See, e.g., *Texas v. United States*, 891 F.3d 553 (5th Cir. 2018); *New York v. NRC*, 824 F.3d 1012 (D.C. Cir. 2016); *Nat'l Ass'n of Regulatory Util. Comm'rs v. DOE*, 736 F.3d 517 (D.C. Cir. 2013); *In re Aiken County*, 725 F.3d 255 (D.C. Cir. 2013); *Nat'l Ass'n of Regulatory Util. Comm'rs v. DOE*, 680 F.3d 819 (D.C. Cir. 2012); *Devia v. NRC*, 492 F.3d 421 (D.C. Cir. 2007); *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012); *Nevada v. DOE*, 457 F.3d 78 (D.C. Cir. 2006); *Nevada v. DOE*, 400 F.3d 9 (D.C. Cir. 2005); *NEI v. EPA*, 373 F.3d 1251 (D.C. Cir. 2004).

⁵ 42 U.S.C. §§ 2011-2297h-13.

⁶ *Id.* §§ 4321-4370m-12.

⁷ *Id.* §§ 10101-10270.

interpreted and implemented correctly to protect the public and the environment without needless delay and expense.

II. APPLICABLE STATUTES AND REGULATIONS

All pertinent statutes and regulations are contained in Federal Respondents' and Beyond Nuclear's Addenda of Statutes and Regulations.

III. BACKGROUND

A. Atomic Energy Act and NRC regulation of spent fuel storage

In enacting the AEA, Congress created a “regulatory scheme, which is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives.”⁸ Exercising that broad responsibility, NRC relies upon longstanding regulations that govern the storage of spent nuclear fuel.⁹ Spent fuel is composed of special nuclear material, source material, and byproduct material—materials that are all defined in the AEA¹⁰ and the possession of which have long been regulated by the NRC and its predecessor, the Atomic

⁸ *Siegel v. Atomic Energy Comm'n*, 400 F.2d 778, 783 (D.C. Cir. 1968).

⁹ *See* 10 C.F.R. Part 72; Licensing Requirements for the Storage of Spent Fuel in an Independent Spent Fuel Storage Installation, 45 Fed. Reg. 74,693 (Nov. 12, 1980).

¹⁰ *See* 42 U.S.C. § 2014(e), (z), (aa).

Energy Commission.¹¹ Given that the AEA explicitly authorizes the NRC to license and regulate the possession of each of these constituent materials,¹² this Court and others have upheld NRC's reliance upon its AEA authorities to license and otherwise regulate the storage of spent fuel both at and away from nuclear power reactor sites.¹³

B. National Environmental Policy Act

NEPA mandates that federal agencies take a “hard look” at the environmental impacts of any major federal action. This requires the agency to assemble an environmental impact statement (EIS) or prepare an environmental assessment concluding with a finding of no significant impact. As relevant in this case, NRC regulations require an EIS associated with the issuance of a license for a spent fuel storage facility at a site not occupied by a nuclear power reactor.¹⁴ An EIS ensures that the agency, in reaching its licensing decision, will have available, and will carefully consider, detailed information concerning significant

¹¹ See *Bullcreek v. NRC*, 359 F.3d 536, 538 (D.C. Cir. 2004).

¹² See 42 U.S.C. §§ 2073 (NRC authority to license the possession, among other things, of special nuclear material), 2092 (same with regard to source material), 2111 (same with regard to byproduct material).

¹³ *Bullcreek*, 359 F.3d at 541-43 (holding that the AEA authorizes NRC to license away-from-reactor spent fuel storage facilities); *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1231-32 (10th Cir. 2004) (endorsing *Bullcreek*'s conclusion that the AEA authorizes NRC to license away-from-reactor spent fuel storage facilities).

¹⁴ 10 C.F.R. § 51.20(b)(9).

environmental impacts. It also guarantees that relevant information will be disclosed to the public and that public input will be considered in both the decision-making process and the implementation of the decision.¹⁵ NEPA, however, is procedural at its heart; it does not dictate specific licensing decisions or outcomes.¹⁶

C. NRC hearing process for proposed licensing actions

As required by the AEA, NRC provides the public with notice of proposed licensing actions.¹⁷ NRC also grants interested members of the public a hearing on license applications, so long as the participant seeking a hearing has standing and proffers at least one contention that meets NRC's admissibility requirements.¹⁸ NRC regulations dictate the criteria that a participant's contention must meet to initiate a contested hearing.¹⁹

¹⁵ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

¹⁶ *Id.* at 353.

¹⁷ 42 U.S.C. § 2239(a).

¹⁸ 10 C.F.R. § 2.309(a) (requiring any person “who desires to participate as a party must file a written request for hearing and a specification of the contentions which the person seeks to have litigated in the hearing” and that such request will be granted if “the requestor/petitioner has standing . . . and has proposed at least one admissible contention”).

¹⁹ *Id.* § 2.309(f)(1).

In addition to providing an opportunity to participate in the NEPA scoping process and comment on a draft EIS,²⁰ NRC has adopted regulations directing stakeholders to raise environmental issues in its hearing process.²¹ By allowing stakeholders to raise NEPA issues as part of the AEA-mandated hearing, NRC permits public participation that exceeds what is required by NEPA.²² This Court has consistently held that NRC's approach satisfies both the AEA and NEPA.²³

D. Nuclear Waste Policy Act and DOE obligation to dispose of spent fuel

The NWPA codified DOE's obligation to dispose of spent fuel generated by U.S. commercial nuclear power plants and the reciprocal obligation of plants owners and operators to offset disposal costs by paying fees into the Nuclear Waste Fund.²⁴

²⁰ *Id.* §§ 51.28, 51.73.

²¹ *Id.* § 2.309(f)(2).

²² *Nat. Res. Def. Council v. NRC*, 823 F.3d 641, 642 (D.C. Cir. 2016) (“NEPA does not mandate particular hearing procedures and does not require hearings.” (quoting *Beyond Nuclear v. NRC*, 704 F.3d 12, 18-19 (1st Cir. 2013))).

²³ *See, e.g., Union of Concerned Scientists v. NRC*, 920 F.2d 50, 56-57 (D.C. Cir. 1990) (holding that NRC's “procedural rules [under 10 C.F.R. § 2.309(f)] do not facially violate the Atomic Energy Act or the [Administrative Procedure Act and] they are also consistent with NEPA”); *Blue Ridge Env'tl. Def. League v. NRC*, 716 F.3d 183, 196 (D.C. Cir. 2013).

²⁴ *See, e.g., 42 U.S.C. § 10131(a)(4)* (“[W]hile the Federal Government has the responsibility to provide for the permanent disposal of high-level radioactive waste and such spent nuclear fuel as may be disposed of in order to protect the public health and safety and the environment, the costs of such disposal

Subtitle A of the NWPA established DOE's program to site, build, and operate a geologic repository for the permanent disposal of spent fuel.²⁵ Subtitle B granted DOE temporary (now expired) authority to establish a federally owned and operated interim storage program for spent fuel from commercial nuclear power plants that were facing onsite storage capacity constraints.²⁶ Subtitle C authorized DOE to explore the development of a "monitored retrievable storage" program, another federal interim storage program, as an option for safely storing spent fuel while a permanent repository is developed.²⁷

To fund these programs, the NWPA required plant owners and operators to enter into the legally binding standard contract with DOE.²⁸ Pursuant to that contractual obligation, the owners and operators of nuclear plants—and the

should be the responsibility of the generators and owners of such waste and spent fuel.").

²⁵ *See id.* §§ 10131-10145.

²⁶ *See id.* §§ 10155-10157. Other provisions in Subtitle B provided for expedited licensing procedures and other ways to encourage the use and expansion of onsite spent fuel storage at commercial nuclear power plants. *See id.* §§ 10151-10154.

²⁷ *See id.* §§ 10161-10169.

²⁸ *Id.* § 10222(a)-(b).

consumers of their electricity—have paid billions into the Nuclear Waste Fund.²⁹ However, despite these massive investments, DOE has fallen far short of meeting its end of the bargain. DOE’s failure to meet its statutory and contractual obligations—and the resulting harm to the industry, consumers, taxpayers, and local communities—has spurred dozens of lawsuits.³⁰ In addition to lawsuits, DOE’s failure has spurred ISP and others to invest private capital to license consolidated interim storage facilities that have the potential to create significant operational efficiencies, reduce overall fuel management costs, and kickstart progress on the spent fuel quagmire.

²⁹ See DOE, *Nuclear Waste Fund (NWF) Annual Financial Report Summary FY2021 and Cumulative* (Nov. 2021), <https://www.energy.gov/sites/default/files/2021-12/FY21%20-%20NWF%20Annual%20Financial%20Report%20Summary.pdf> (stating that commercial nuclear generators have paid more than \$20 billion into the Nuclear Waste Fund and that, with interest income, more than \$44 billion remains in the Fund).

³⁰ See, e.g., *Texas*, 891 F.3d 553; *Nat’l Ass’n of Regulatory Util. Comm’rs*, 736 F.3d 517; *In re Aiken County*, 725 F.3d 255; *Nat’l Ass’n of Regulatory Util. Comm’rs*, 680 F.3d 819; *Dairyland Power Coop. v. United States*, 645 F.3d 1363 (Fed. Cir. 2011); *Pacific Gas & Elec. Co. v. United States*, 536 F.3d 1282 (Fed. Cir. 2008); *Yankee Atomic Elec. Co. v. United States*, 536 F.3d 1268 (Fed. Cir. 2008); *Alabama Power Co. v. DOE*, 307 F.3d 1300 (11th Cir. 2002); *Roedler v. DOE*, 255 F.3d 1347 (Fed. Cir. 2001); *Northern States Power Co. v. United States*, 224 F.3d 1361 (Fed. Cir. 2000); *Maine Yankee Atomic Power Co. v. United States*, 225 F.3d 1336 (Fed. Cir. 2000); *Northern States Power Co. v. DOE*, 128 F.3d 754 (D.C. Cir. 1997); *Indiana Michigan Power Co. v. DOE*, 88 F.3d 1272 (D.C. Cir. 1996).

IV. SUMMARY OF ARGUMENT

Given the delays in establishing a permanent repository for disposal of spent nuclear fuel, ISP and others have invested private capital to license consolidated interim storage facilities. Although federal legislation may ultimately authorize DOE to contract with ISP and other private entities to facilitate the storage of federally owned spent fuel, that is a matter for Congress. Even without such legislation, however, private consolidated interim storage is available under the AEA and has the potential to create operational efficiencies and reduce overall fuel management costs. Given the currently available private option and the prospect of legislation that would allow DOE to contract with private entities, it was reasonable for the license condition to clarify that ISP would need to provide NRC with executed contracts regardless of whether they were with a private entity or DOE. Because the license does not—and could not—authorize ISP and DOE to enter an illegal contract, this license condition does not violate the NWPA.

In addition, to the extent NEPA issues before the Court were not raised during NRC adjudicatory proceedings, those issues are not properly before the Court on judicial review. Requiring compliance with these statutory and administrative

requirements promotes fairness and administrative certainty, and avoids delay, duplicative proceedings, and other needless costs for litigants.

V. ARGUMENT

A. **Consolidated interim storage can create operational efficiencies and reduce overall fuel management costs.**

Unlike fossil fuel-fired power plants, which emit carbon dioxide and other air pollutants to the atmosphere, nuclear generation's primary byproduct is contained in the solid fuel it uses to produce electricity. After generating electricity for about five years, spent nuclear fuel assemblies are removed from the reactor and safely stored initially in a concrete and steel fuel pool. When cool enough that the spent fuel no longer needs to be stored underwater—a few years after removal from the reactor—it can be transferred and stored in dry casks, which are large steel-reinforced concrete containers. Over the past three decades, industry has safely loaded and placed 3,600 of these containers into storage. All the spent fuel produced by the U.S. nuclear energy industry in more than 50 years of operation would, if stacked end to end, cover a football field to a height of approximately 12 yards.³¹

Today, commercial spent fuel is stored safely and securely at reactor and other storage sites in 34 states. Storage at nuclear power reactor sites, however, was

³¹ NEI, *Fact Sheet, Safely Managing Used Nuclear Fuel* (Feb. 2018), <https://www.nei.org/resources/fact-sheets/safely-managing-used-nuclear-fuel>.

intended to be temporary until DOE meets its legal obligation to develop and operate a geologic repository for the permanent disposal of spent fuel. Action by DOE is long overdue but the consensus within the scientific and technical community engaged in spent fuel management is that safe geologic disposal is achievable with currently available technology.³² Consensus also is building that consolidating spent fuel at interim storage facilities would provide a safe, flexible, and cost-effective way to enhance the nation's spent fuel management capabilities.

NEI agrees and supports both private and federal efforts to develop consolidated interim storage facilities in parallel with developing a geologic repository. Although these private and federal storage efforts are both commonly referred to as "consolidated interim storage," they involve different statutory requirements and federal storage would benefit from further congressional action. Both, however, have the potential to leverage industry's successful use of innovative dry-cask storage technology to store spent fuel safely and securely.

Storing spent fuel at 76 reactor sites around the country is safe, but highly inefficient. Each site is responsible for staffing and other costs associated with meeting security, monitoring, maintenance, and other requirements for spent fuel

³² See, e.g., Blue Ribbon Commission on America's Nuclear Future, *Report to the Secretary of Energy* 29 (Jan. 2012) (Blue Ribbon Commission Report), https://www.energy.gov/sites/default/files/2013/04/f0/brc_finalreport_jan2012.pdf.

storage. Because of operational efficiencies gained by the presence of an operating reactor, the costs associated with meeting these requirements are generally lower at sites that have an operating reactor than at sites that have decommissioned and have only spent fuel storage facilities remaining on site.³³ For example, a security guard responsible for patrolling an operating reactor site may already be performing some functions necessary to satisfy security requirements associated with spent fuel storage. But once the reactor shuts down and is decommissioned, those costs are now fully attributable to the storage of spent fuel and those efficiencies are lost. Based on real world experience with this phenomenon, NRC found that annual operation and maintenance costs for storing spent fuel at decommissioned reactor sites were ten times greater than those at sites with an operating reactor.³⁴

Consolidating security, monitoring, inspection, and other operational efforts at interim facilities would create significant efficiencies and reduce overall fuel

³³ See NRC, Environmental Impact Statement for Interim Storage Partners LLC's License Application for a Consolidated Interim Storage Facility for Spent Nuclear Fuel in Andrews County, Texas at 8-8 (ISP EIS) (CI 355). There are currently nine former reactor sites that have been completely decommissioned and only have spent fuel storage facilities remaining onsite. Blue Ribbon Commission Report at 35. More than a dozen other sites currently undergoing decommissioning could soon be similarly situated.

³⁴ See ISP EIS at 8-8 (CI 355) ("The annual operation and maintenance costs for storing [spent nuclear fuel] at a decommissioned reactor site were estimated to be \$10,864,743 . . . , whereas this cost was estimated at \$1,086,474 . . . for a site with an operating reactor.").

management costs, especially for spent fuel currently stored at decommissioned reactor sites. For example, consolidated interim storage would avoid the need for each decommissioned reactor site to maintain separate staff responsible for monitoring and inspecting their own dry cask storage systems. Based on these operational efficiencies and accounting for additional construction and transportation costs, NRC found that over the course of the ISP project, consolidated interim storage would save at least \$636 million compared to continuing to store spent fuel at existing locations.³⁵

Taxpayers have been saddled with the consequences of DOE's delays and inaction, already having paid \$9 billion in damages from the Judgment Fund and billions more in liability will continue to mount the longer DOE action is delayed.³⁶ The efficiencies and cost savings associated with private consolidated interim storage could reduce the financial burden on U.S. taxpayers to compensate plant operators for damages caused by the government's inaction and partial breach of contract. In addition, with new legislation authorizing DOE to safely relocate robust

³⁵ *See id.* at 8-11 (CI 355).

³⁶ DOE, Office of Inspector General, *Audit Report – The Department of Energy Nuclear Waste Fund's Fiscal Year 2021 Financial Statement Audit* at 25 (Nov. 2021), <https://www.energy.gov/sites/default/files/2021-11/DOE-OIG-22-08.pdf> (“After deducting the cumulative amount paid of \$9.0 billion as of September 30, 2021 under these settlements and as a result of final judgments, the remaining liability is estimated to be approximately \$30.9 billion.”).

dry-cask storage systems currently spread across 34 states, the country would appropriately begin to establish an integrated approach to spent fuel management. Removing fuel from shutdown sites also would spur economic growth by allowing for the redevelopment of nuclear reactor sites that are otherwise fully decommissioned but continue to house spent fuel.

B. The NRC license does not violate the NWPA because it does not authorize ISP to contract with DOE for interim storage.

As part of its robust AEA safety evaluation, NRC reviews each applicant's funding plans to provide reasonable assurance that it is financially qualified to construct and operate a spent fuel storage facility.³⁷ ISP's application stated that its operating costs would be funded through contracts with its customers (*i.e.*, the owners of spent fuel) whether they were the owners and operators of commercial nuclear plants or, after appropriate legislative action, DOE.³⁸ ISP thus proposed a license condition stating that it must have an executed contract with its customers specifying responsibility for funding operations before beginning operations.³⁹

³⁷ 10 C.F.R. § 72.22(e) (“Except for DOE, [each application must state] information sufficient to demonstrate to the Commission the financial qualifications of the applicant to carry out, in accordance with the regulations in this chapter, the activities for which the license is sought.”).

³⁸ NRC, Final Safety Evaluation Report for the WCS Consolidated Interim Storage Facility Independent Spent Fuel Storage Installation Specific Materials License No. SNM-2515 at 14-7 (Sept. 2021) (CI 364).

³⁹ *Id.* (CI 364).

Consistent with prior agency decisions, NRC accepted this condition because it would ensure compliance with the agency's financial qualifications requirements by providing reasonable assurance that ISP would obtain the funds necessary to operate the facility.⁴⁰

Although this license condition clearly imposes an additional legal requirement on ISP, Beyond Nuclear seeks to turn the condition on its head, arguing that this limitation authorizes ISP and DOE to enter an illegal contract.⁴¹ As the Atomic Safety and Licensing Board and the Commission thoroughly explained, the license does nothing of the sort and thus plainly does not violate the NWPA. In denying Beyond Nuclear's contention, the Licensing Board explained that ISP *agreed* that under current law it could not contract to provide DOE with consolidated interim storage services.⁴² Accordingly, the Licensing Board found "[t]here is no credible possibility that such contracts will be made in violation of the law."⁴³

⁴⁰ *Id.* (CI 364).

⁴¹ Beyond Nuclear Br. 3, 17.

⁴² *Interim Storage Partners LLC*, LBP-19-7, 90 NRC 31, 58-59 (2019).

⁴³ *Id.* at 59.

To be sure, Congress has considered enhancing the federal government's ability to develop consolidated interim storage capabilities.⁴⁴ Whether legislation ultimately authorizes DOE to contract with ISP or other private entities is a matter for Congress to decide. But given the prospect of such legislation, it was reasonable for the license condition to clarify that ISP would need to provide NRC with executed contracts regardless of whether they were with DOE or a private entity. Referencing DOE in this license condition avoids the unnecessary regulatory burden that would come with requiring that ISP file a new or amended application if Congress, in the future, authorized DOE to contract with private storage providers. And given that NRC regulations excuse DOE from demonstrating compliance with NRC's financial qualifications regulations,⁴⁵ including this clarification was a prudent way to avoid a potential later ambiguity in interpreting the license condition.

On appeal, the Commission upheld the Licensing Board decision, agreeing that ISP could not rely on an illegal DOE contract to satisfy its license condition.⁴⁶

⁴⁴ See, e.g., Nuclear Waste Policy Amendments Act of 2019, H.R. 2699, 116th Cong. §§ 101-108 (2019).

⁴⁵ See 10 C.F.R. § 72.22(e).

⁴⁶ *Interim Storage Partners LLC*, CLI-20-14, 92 NRC 463, 468-69 (2020); see also *Interim Storage Partners, LLC*, CLI-20-15, 92 NRC 491, 499 (2020) (“Nothing in the proposed condition purports to authorize ISP or the DOE to enter into the contracts” but the “condition, as written, would allow ISP to take advantage of a future change in the law to bid on a DOE disposal contract without first amending its license.”).

Notably, the Commission also emphasized 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.”⁴⁷ In other words, the Commission pointed out that the license condition could clearly be met by ISP entering into contracts with the owners and operators of commercial nuclear plants. Importantly, Beyond Nuclear does not—and cannot—claim that this meaningful option for satisfying the condition would violate the NWPA. This private option would provide for operational efficiencies and reduce overall fuel management costs, reducing the financial burden on U.S. taxpayers to compensate plant operators for damages caused by the government’s inaction and partial breach of contract.⁴⁸ Because the license condition may be lawfully met through this private option, and in any event, only “expresses a limitation on ISP’s operating authority,” it does not violate the NWPA.⁴⁹

C. NEPA claims that are not raised in NRC’s administrative hearing process are waived on judicial review.

The NRC argues that the Court lacks jurisdiction to consider arguments by Sierra Club and Don’t Waste Michigan (jointly, Sierra Club) that challenge the

⁴⁷ *Interim Storage Partners LLC*, CLI-20-14, 92 NRC at 469.

⁴⁸ *See supra* at note 36.

⁴⁹ *Interim Storage Partners, LLC*, CLI-20-15, 92 NRC at 499.

final EIS but that Sierra Club never raised in the NRC adjudicatory process.⁵⁰ NEI agrees and writes to emphasize that exhaustion principles support this conclusion.

The Supreme Court has made clear that when “an agency’s regulations . . . require issue exhaustion in administrative appeals[,] . . . courts reviewing agency action regularly ensure against the bypassing of that requirement by refusing to consider unexhausted issues.”⁵¹ Applying this principle, this Court has held that NRC’s adjudicatory hearing regulations—including its contention and administrative appeal rules—require that petitioners “afford the full Commission an opportunity to pass on . . . [an] issue before seeking judicial review.”⁵² This requirement gives NRC, applicants, and other interested parties a fair opportunity to address issues before they are raised in court.⁵³

Despite having raised other NEPA issues before the Board in proposed contentions and the Commission on administrative appeal, Sierra Club argues that

⁵⁰ Federal Respondents Br. 2-4, 45-51.

⁵¹ *Sim v. Apfel*, 530 U.S. 103, 108 (2000); *see also United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952) (stating the “general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice”).

⁵² *Vermont Dep’t of Pub. Serv. v. NRC*, 684 F.3d 149, 157 (D.C. Cir. 2012).

⁵³ *See Cape Cod Hosp. v. Sebelius*, 630 F.3d 203, 211 (D.C. Cir. 2011) (describing requirement to exhaust administrative remedies as a matter of “simple fairness” (quoting *L.A. Tucker Truck Lines*, 344 U.S. at 37)).

some of its other “NEPA claims are distinct from their claims raised in the NRC’s administrative licensing proceedings” and that NRC “has an independent obligation to comply with . . . NEPA’s established procedures, which afford rights to public comments and impose independent procedural obligations on the agency.”⁵⁴ NRC has an obligation to respond to comments on a draft EIS.⁵⁵ But under this Court’s binding precedent, by failing to file a contention challenging the EIS and then seek an administrative appeal of any unfavorable decision regarding such a contention, Sierra Club failed to exhaust its administrative remedies and therefore waived its right to raise those issues on judicial review.⁵⁶

The instant case stands in sharp contrast to *Brodsky v. NRC*,⁵⁷ on which Sierra Club relies. That case did not involve a challenge to the issuance of a license brought under the Hobbs Act, but rather an appeal from a district court’s grant of summary judgment on an action to challenge the issuance of an exemption brought under the

⁵⁴ Sierra Club Br. 8 (citing *Brodsky v. NRC*, 704 F.3d 113 (2d Cir. 2013)); *see also* Sierra Club Br. 4 (“Petitioners also participated in the NRC’s NEPA process by submitting comments, forming the basis for Issues XI through XVIII.”).

⁵⁵ *See* 10 C.F.R. § 51.91(a)(1).

⁵⁶ *Vermont*, 684 F.3d at 157-60. NRC properly argues that the Court lacks jurisdiction to consider Sierra Club’s challenge to the license and claims that it did not raise in the adjudicatory process. Non-jurisdictional exhaustion provides another reason for the Court to decline to consider those issues.

⁵⁷ 704 F.3d 113 (2d Cir. 2013).

Administrative Procedure Act.⁵⁸ Indeed, the district court case was filed after the Second Circuit dismissed a petition for review relying on the Hobbs Act to challenge NRC's grant of the exemption because neither the AEA nor NRC regulations provide for an opportunity for a hearing on exemptions.⁵⁹ Because *Brodsky* involved NRC's grant of an exemption—an agency action not covered by the NRC's hearing and contention requirements—it does not support Sierra Club's claim that it may obtain judicial review under the Hobbs Act on NEPA issues for which it ignored NRC's adjudicatory hearing and exhaustion requirements.

Allowing Sierra Club to ignore NRC's adjudicatory hearing rules would make the NRC hearing process “optional” for petitioners seeking judicial review and undermines important agency practices and procedures. These rules were promulgated after a recognition that NRC adjudicatory hearings consumed enormous amounts of time and resources and created significant delays with no ascertainable safety benefits.⁶⁰ To promote fairness and avoid needless delay and

⁵⁸ *See id.* at 115.

⁵⁹ *Brodsky v. NRC*, 578 F.3d 175, 180 (2d Cir. 2009). NEI notes that district court review of exemption requests conflicts with *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985), which held that courts of appeals are to review NRC regulatory orders even if they are not subject to the AEA hearing requirement. Even so, the orders at issue here are connected to a licensing action subject to the AEA hearing requirement.

⁶⁰ *See, e.g.*, James R. Tourtellotte, NRC Assistant Chief Hearing Counsel, *Nuclear Licensing Litigation: Come on in, the Quagmire is Fine*, 33 Admin.

other costs for all litigants, NRC regulations now require that proposed contentions be raised at the earliest possible time.⁶¹ For NEPA issues, this means that petitioners must “file contentions based on the applicant’s environmental report” (*i.e.*, the portion of the application submitted to assist NRC in complying with NEPA).⁶² As the Commission has explained, this requirement gives NRC technical staff the chance “to request additional information from the applicant and work to resolve any deficiencies” as it develops the EIS.⁶³

These adjudicatory hearing requirements promote fair and efficient administrative proceedings and help ensure orderly judicial review by giving the agency reasonable notice of any genuine material disputes and the opportunity to develop a robust administrative record. This well-settled system promotes consistency, predictability, and conservation of resources—all of which are important to industry and the public. By flouting these requirements, “the petitioners undermined the functions exhaustion serves: ‘giving agencies the

L. Rev. 367, 367 (1981) (“[A]lthough there are several reasons for delays in nuclear licensing, the basic structure of the hearing process is a significant causal factor.”).

⁶¹ See 10 C.F.R. § 2.309(b)-(c), (f)(2).

⁶² *Id.* § 2.309(f)(2). If new information is included in NRC’s draft or final EIS (or otherwise later becomes available), NRC regulations allow for the filing of new or amended contentions. *Id.* §§ 2.309(c), (f)(2), 2.326(d).

⁶³ *Private Fuel Storage, LLC*, CLI-04-22, 60 NRC 125, 130 (2004).

opportunity to correct their own errors, affording parties and courts the benefits of agencies' expertise, and compiling a record adequate for judicial review.”⁶⁴

Accordingly, this Court should find that having failed to present certain NEPA issues during NRC administrative proceedings, Sierra Club failed to preserve those issues for judicial review.

VI. CONCLUSION

Consolidated interim storage has the potential to create significant operational efficiencies and reduce overall fuel management costs. Because the license does not—and could not—authorize ISP and DOE to enter into an illegal contract, it does not violate the NWPA and thus Beyond Nuclear's arguments fail. Furthermore, to the extent Sierra Club neglected to present NEPA issues during NRC administrative proceedings, it has failed to preserve those issues for judicial review. For these reasons and those presented in the Brief for the Federal Respondents, the petitions for review should be denied.

⁶⁴ *Vermont*, 684 F.3d at 158 (quoting *Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1247 (D.C. Cir. 2004)).

Respectfully submitted,

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Case Caption: Don't Waste Michigan, et al.

v.
U.S. Nuclear Regulatory Commission

Case No: 21-1048

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