

CORRECTED JULY 18, 2022

July 13, 2022

Mark Langer, Clerk
U.S. Court of Appeals for the D.C. Circuit
333 Constitution Avenue N.W.
Washington, D.C. 20001

Re: *FRAP 28(j) Notice of Supplemental Authority, Don't Waste Michigan v. U.S. Nuclear Regulatory Comm., No. 21-1048 (Consolidated)*

Dear Mr. Langer:

On behalf of Petitioner Beyond Nuclear, Inc., we write to advise this court of the Supreme Court's June 30th decision in *West Virginia v. EPA*, 2022 WL 2347278 (2022) (attached). That decision demonstrates the Nuclear Regulatory Commission ("NRC") lacks statutory authority to issue the Interim Storage Partners, LLC ("ISP") license.

West Virginia supports Petitioner's contention that NRC violated the constitutional separation of powers doctrine by considering and issuing a license in violation of the Nuclear Waste Policy Act ("Act"). See Petitioner's Corrected Opening Brief at 21-22. As the Court held, "[a]gencies have only those powers given to them by Congress, and enabling legislation is generally not an open book to which the agency [may] add pages and change the plot line." *West Virginia*, 2022 WL 2347278, at *19 (internal quotations and citations omitted). Here, Congress did not give NRC authority to issue a license whose plain terms violate the Act.

As in *West Virginia*, this case raises matters of "economic and political significance," *id.* at *17, for which courts must "presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies." *Id.* at *19. See Nuclear Energy Institute Amicus Brief 8-9 (describing the significant costs of the "spent fuel quagmire"); Natural Resources Defense Council Amicus Brief 5-18 (describing Congress' consistent refusal to abandon the Nuclear Waste Policy Act's cardinal requirement that a repository must be open before private reactor licensees may transfer ownership of spent fuel to the federal government). Congress has "conspicuously and repeatedly declined" to allow the action now taken by NRC in licensing ISP to store spent fuel owned by the U.S. Department of Energy ("DOE"). See *West Virginia*, 2022 WL 2347278, at *13.

West Virginia mandates that for a “major question,” such as licensing a private company to store DOE waste, NRC “must point to clear congressional authorization for the power it claims.” *See Id.* at *19. But NRC has failed to do so, and thus “a decision of such magnitude and consequence rests with Congress itself.” 2022 WL 2347278, at *31.

Sincerely,

/s/Diane Curran

Diane Curran

/s/Mindy Goldstein

Mindy Goldstein

Counsel to Beyond Nuclear

Cc: ECF Service List