ORAL ARGUMENT NOT SCHEDULED

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

D.C. Cir. No. 21-1048
(Consolidated with D.C. Cir. Nos. 21-1055, 21-1056,
21-1179, 21-1227, 21-1229, 21-1230, 21-1231)

DON'T WASTE MICHIGAN, *ET AL.*,

Petitioners

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION
and the UNITED STATES OF AMERICA,
Respondents

INTERIM STORAGE PARTNERS LLC,
Intervenor

Petition for Review of Final Administrative Action of the
United States Nuclear Regulatory Commission

PETITIONER BEYOND NUCLEAR'S REPLY BRIEF

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GLOSSARY

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

Act	Nuclear Waste Policy Act of 1982
APA	Administrative Procedure Act
Br.	Brief
DOE	U.S. Department of Energy
JA	Joint Appendix
ISP	Interim Storage Partners, LLC
NRC	Nuclear Regulatory Commission
Petitioner	Beyond Nuclear, Inc.
Pet.	Petitioner

INTRODUCTION

In this appeal, Petitioner Beyond Nuclear, Inc. seeks review of Nuclear Regulatory Commission ("NRC" or "Commission") decisions to consider and approve a license application by Interim Storage Partners ("ISP") to store spent fuel owned by the Department of Energy ("DOE") at ISP's private facility, on condition that ISP contract with DOE to pay operating and decommissioning costs. *Holtec International and Interim Storage Partners LLC*, Docket Nos. 72-1051 and 72-1050, Order (Oct. 29, 2018) ("*2018 Order*") (JA_); *Interim Storage Partners LLC,* 92 N.R.C. 463 (2020) (JA_) ("*ISP Decision*"), respectively. By considering and approving ISP's storage of DOE-owned spent fuel if it satisfies a license condition to provide NRC with DOE contracts, NRC violates multiple prohibitions of the Nuclear Waste Policy Act ("Act").[1] It also violates the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A),(C), and runs afoul of the constitutional separation of powers doctrine. *See* Pet. Br. 17-21, 21-23, respectively. NRC's decisions therefore must be reversed, or the unlawful license condition for DOE contracts must be severed. Pet. Br. 20-21 (citing *Barr v.*

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[1] The Act prohibits licensing of any facility for storage of federally-owned spent fuel before the opening of a federal repository (42 U.S.C. § 10222(a)(5)(A)); licensing entities other than DOE to store DOE-owned spent fuel (42 U.S.C. § 10168(b)); and shifting the costs of spent fuel storage from private entities to the federal government (42 U.S.C. § 10161(a)(4)). *See also* Petitioner's Corrected Opening Brief ("Pet. Br.") 17-18.

American Association of Political Consultants, 140 S.Ct. 2335, 2350 (2020); *K-Mart Corp. v. Cartier*, 486 U.S. 281, 294 (1988); and Restatement (Second) of Contracts 184(1) (1981)).

Instead of refuting Petitioner's argument that the unlawful license condition must be severed to avoid reversal of its licensing decisions, NRC makes the novel argument that the license condition's references to DOE contracts can simply be ignored on judicial review; and even incorrectly suggests that Beyond Nuclear does not ascribe any current legal significance to the DOE license condition. NRC Br. 27-29. Because these arguments depend on the impermissible disregard of explicit unlawful terms in ISP's license, they must fail. *Private Fuel Storage, L.L.C.,* 52 N.R.C. 23, 34 (2000).

NRC's only strategy for avoiding the full legal effect of the license condition is to promise not to honor contracts between ISP and DOE unless and until the law is changed. NRC Br. 28. But promises to forbear from future unlawful action do not excuse current violations of the law.

Finally, NRC has violated the constitutional separation of powers doctrine by stepping into Congress' shoes to help ISP and others try to "kickstart" changes to the Nuclear Waste Policy Act. *See* Nuclear Energy Institute Amicus Brief 9. Only Congress can take that role.

Therefore, NRC's decisions to review and issue the ISP license must be reversed and vacated.[2]

ARGUMENT

I. ISP'S LICENSE MUST BE JUDGED AGAINST ITS EXPLICIT TERMS, WHICH ARE UNLAWFUL.

As the Commission has held, license conditions provide "an acceptable method for providing reasonable assurance of financial qualifications" in a spent fuel storage licensing proceeding. *Private Fuel Storage,* 52 N.R.C. at 29. In order to ensure that post-licensing verification of compliance with a license condition does not involve an exercise of "professional judgment" that would require the opportunity for "debate" in a public hearing, NRC requires that a license condition must be "precisely drawn." *Id.,* 52 N.R.C. at 34 (citing *Union of Concerned*

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[2] Inexplicably, ISP's principal claim is that Petitioner "did not even address the substance, reasoning, support or sufficiency" of the NRC orders on appeal. ISP Br. 5 ("Statement of the Issues"). For example, ISP contends that "[t]he argument section of Beyond Nuclear's brief fails to acknowledge or address the Commission's adjudicatory actions in CLI-20-14 [*ISP Decision*] or its application of law to the facts of this case: that order is not cited, mentioned, or discussed." ISP Br. 20. *See further* ISP Br. 3, 12. Similarly, ISP claims that "the argument section of Beyond Nuclear's brief does not *mention* [the *2018 Order*]." ISP Br. 17-18 (emphasis in original).

But Petitioner's brief *does* cite the *ISP Decision* throughout. *See e.g.* Pet. Br. 17, 19, 20, 22, 23 (Argument section) and 1, 2, 14, 15 (elsewhere). Petitioner's argument also alludes to NRC's *2018 Order* throughout. *See e.g.* Pet Br. 17, 23 (Argument section) and 1, 2, 15 (elsewhere).

ISP's claim is entirely without substance.

Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984); *Long Island Lighting Co.,* 20 N.R.C. 1102 (1984); *Consolidated Edison of New York*, 7 A.E.C. 947 (1974)). Requiring precision in the wording of license conditions ensures that "the verification of compliance becomes a largely ministerial rather than adjudicatory act." *Id.* Consistent with this requirement, ISP's license explicitly provides that: "[p]rior to commencement of operations, the licensee shall have an executed contract with the [DOE] or other [spent fuel] Title Holder(s) stipulating that DOE or the other [spent fuel] Title Holder(s) is/are responsible for funding operations required for storing the material." Interim Storage Partners LLC, License SNM-2515, Provision 19 (Sept. 13, 2021) (JA_).[3]

Audaciously ignoring its own jurisprudence, NRC proposes to recharacterize ISP's license in a way that removes all meaning from its specific references to DOE. First, NRC incorrectly contends that ISP's license "fully complies with the [Nuclear Waste Policy Act] because it authorizes a *private* party (Interim Storage Partners) to temporarily store spent fuel owned by *private* parties." NRC Br. 25 (emphasis added). NRC's license condition plainly authorizes spent fuel storage by

[3] It bears noting that the purpose of drafting ISP's license condition precisely, *i.e.,* to ensure that post-licensing verification of compliance will be a "largely ministerial" act, *Private Fuel Storage,* 92 N.R.C. at 34, is not served by ISP's license condition. NRC has no idea whether or how Congress may change the Nuclear Waste Policy Act. Instead, the license condition's language is based only on ISP's "hope" that future legislation will match up with ISP's license condition. *ISP Decision,* 92 N.R.C. at 468.

both a "public" and a potentially private party. NRC may not ignore the plain language of the license condition, which is a part of ISP's license. *Private Fuel Storage,* 52 N.R.C. at 29. In fact, NRC's approval of the lawfulness and adequacy of ISP's license depends on the precision of the license condition. *Id.,* 52 N.R.C. at 34.[4]

Similarly, NRC asserts that "the language of the license does not specifically authorize the storage of DOE-owned spent fuel. It merely states that the owner of the spent fuel, *whoever it may be,* must contractually commit itself to providing operational funding for the facility." NRC Br. 29. But NRC mischaracterizes ISP's license condition, which nowhere refers generically to the "owner" of spent fuel, "whoever that may be." Instead, the license condition refers to two specific types of spent fuel owners: "DOE or other Title Holder(s)." As in *Private Fuel Storage,* this condition was "precisely drawn," and may not be ignored. *Id.,* 52 N.R.C. at 34.[5]

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[4] Separate from its attempt to read DOE out of the license condition, NRC claims the license condition has no legal effect because it "does not "*authorize*" the licensee to do anything." NRC Br. 27 (emphasis in original). It is undisputed that the license condition does not *per se* require or authorize ISP to enter a contract with DOE. But the license itself authorizes ISP to store DOE-owned spent fuel, provided ISP satisfies the license condition. *See ISP Decision*, 92 N.R.C. at 468 (JA_).

[5] The specific reference in ISP's license condition to DOE-owned spent fuel contrasts markedly with the license condition for storage of privately-owned spent fuel in the *Private Fuel Storage* case. The license condition approved by the Commission in *Private Fuel Storage* generally required the applicant to have in

Even more audaciously, NRC claims that "[a]ll parties … agree that the license does not currently permit the storage of DOE-titled spent fuel." NRC Br. 29-30. NRC Br. 29. But no such agreement exists. Petitioner contends the license is unlawful because it *does* permit the storage of DOE-titled spent fuel *if* ISP satisfies the license condition requiring contracts with DOE. Pet. Br. 17. That authorization is fully effective now and throughout ISP's license term, requiring no further amendment of ISP's license for implementation. *Id.*; *ISP Decision,* 92 N.R.C. at 468.

Finally, NRC claims that "[t]he conduct authorized by the license would be no different if, rather than specifically referring to DOE, it had generically referred to the entity owning the spent fuel as the "title holder." NRC Br. 29. To the contrary, the conduct authorized by the license – storage of government-owned spent fuel at the government's expense – would be quite different from the conduct

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place "long-term Service Agreements with prices sufficient to cover the operating, maintenance, and decommissioning costs of the Facility." 52 N.R.C. at 27. No reference was made to the identity of the contracting parties, who were assumed to be private businesses.

Had ISP's license condition omitted any reference to DOE, the scope of contracting parties in the license condition would likewise have been restricted to the class of title holders of spent fuel with which federal law currently allows ISP to contract: private businesses. *See Private Fuel Storage,* 52 N.R.C. at 32 (license conditions must be "fully enforceable"); *see further United States v. Armstrong,* 517 U.S. 456, 464 (1996) (noting judicial presumption that government officials "properly discharged their official duties").

now authorized by the Atomic Energy Act – storage of privately owned spent fuel at the expense of private owners. *See* Nuclear Energy Institute Amicus Brief 17 (asserting that NRC, by including DOE contracts in ISP's license, provides "clarification" that "NRC regulations [at 10 C.F.R. § 72.22(e)] excuse DOE from demonstrating compliance with NRC's financial qualifications regulations"). And as recognized by NRC in the *ISP Decision,* shifting financial liability from private licensees to DOE would "require statutory amendment" to the Act. 92 N.R.C. at 468.

II. PROMISES NOT TO ACT UNLAWFULLY IN THE FUTURE DO NOT EXCUSE CURRENT VIOLATIONS OF THE LAW.

In the alternative, as in the *ISP Decision,* NRC attempts to excuse the unlawful language of ISP's license by promising not to fulfill the license condition in the future. NRC Br. 27-28 (arguing there is "no reason to believe either that DOE would enter into a contract that violates the NPWA (sic) or that the NRC would permit such a contract to satisfy [the] license condition"); *see also* NRC Br. 20; ISP Br. 21; *ISP Decision,* 92 N.R.C. at 468. In light of this promise, NRC urges the Court not to let NRC's "extensive consideration of the safety and environmental issues raised by the license application" go to waste by reversing its licensing decisions. NRC Br. 30*; see also* Nuclear Energy Institute Amicus Br. 17 (asserting that upholding the unlawful license condition would spare ISP the

"unnecessary regulatory burden" of applying for a license amendment if Congress changes the law).

NRC relies on this promise of future forbearance from illegal activity to apply the presumption of regularity to its current conduct. NRC Br. 28. According to NRC, "there is no evidence, let alone 'clear evidence," of "Government impropriety." *Id.* (quoting *Nat'l Archives & Records Admin. v. Favish,* 541 U.S. 154, 174 (2004)). But NRC may not apply a future presumption of regularity to escape the APA's prohibition against current conduct that is "not in accordance with law." 5 U.S.C. § 706(2)(A). NRC's very consideration and approval of a patently unlawful license, *see 2018 Order* (JA__) and *ISP Decision* (JA__), provides "clear" and substantial evidence of "Government impropriety." *Nat'l Archives & Records Admin.,* 541 U.S. at 174.

Further, the APA's prohibition against unlawful agency conduct is not equivocal, subject to practical considerations, or mitigated by promises to avoid implementing illegal license provisions. As a result, all terms of ISP's license, including its license condition, must be valid and "fully enforceable" at the time of licensing, under current law. *Private Fuel Storage,* 52 N.R.C. at 32. *See also Natural Res. Defense Council v. U.S. E.P.A.*, 822 F.2d 104, 111 (D.C. Cir. 1987)

(presumption of regularity does not extend to actions that are "not in accordance with law").[6]

III. NRC VIOLATED THE CONSTITUIONAL SEPARATION OF POWERS DOCTRINE.

NRC contends it has not violated the separation of powers doctrine, because the question of whether Congress will amend the Nuclear Waste Policy Act to allow ISP to store DOE-owned spent fuel is "a matter for Congress to decide." NRC Br. 30. In the meantime, NRC argues, the license "cannot be construed to authorize illegal conduct." *Id.* And if Congress does change the law, it will not be "inappropriate for Interim Storage Partners to be permitted to 'take advantage' of the change." *Id. See also ISP Decision*, 92 N.R.C. at 468.

Given the patent illegality of allowing ISP to store DOE-owned spent fuel under contract with DOE, NRC's only conceivable purpose for approving the unlawful language was to help ISP and others to "kickstart progress on the spent fuel quagmire" caused by the cancellation of the Yucca Mountain repository and

[6] Had NRC acted lawfully and with "regularity" in the ISP licensing proceeding, it would have issued a license that did not include any reference to DOE contracts, as is its standard practice for the licensing of private spent fuel storage facilities. *See* note 5, *supra.* Later, if Congress were to change the Nuclear Waste Policy Act to allow private storage of DOE-owned spent fuel, ISP would need to seek a license amendment. 10 C.F.R. § 72.56 ("Whenever a holder of a specific license desires to amend the license (including a change to the license conditions), an application for an amendment shall be filed with the Commission fully describing the changes desired and the reasons for such changes.").

Congress' failure to amend the Nuclear Waste Policy Act. *See* Nuclear Energy Institute Amicus Brief 9. Following this colorful imagery, if the Nuclear Waste Policy Act is a motorcycle stuck in the mud, only Congress can "kickstart" the legislative machinery to dislodge it, or, determine in what direction it should go. Only Congress can decide whether to abandon one of its primary strategies for ensuring the completion of a federal repository: preventing private licensees from shifting spent fuel storage costs to the federal government before the opening of a repository. Pet. Br. 5-7. *See also* Natural Resources Defense Council Amicus Brief 5-17.

The separation of powers doctrine precludes NRC from taking the saddle. Instead, NRC must be held to its role of disinterested regulator, as designated by both the Nuclear Waste Policy Act and the Atomic Energy Act. *See* 42 U.S.C. § 10168(c) (assigning NRC licensing authority for federal Monitored Retrievable Storage Facilities); *Bullcreek v. NRC,* 359 F.3d 536, 537 (D.C. Cir. 2004) (holding that Atomic Energy Act gives NRC "regulatory authority over private away-from reactor spent fuel storage facilities").

CONCLUSION

For the foregoing reasons, and as required by the APA and the U.S. Constitution, the court should hold unlawful and set aside NRC's decisions in the administrative proceeding below, reversing and vacating them.

Respectfully submitted,

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Counsel for Petitioner

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure Rule 32(a)(7)(C) and Circuit Rule 32(a)(2)(C), I certify that the attached Petitioner's Reply Brief is proportionately spaced, has a typeface of Times New Roman, 14 points, and contains 2,485 words. This figure includes footnotes and citations, but excludes the Cover Page, Table of Contents, Table of Authorities, signature blocks, Certificate of Compliance, Certificate of Service, Addendum of Statutes, Rules and Regulations, and Standing Addendum. I have relied on Microsoft Word's calculation feature for this calculation.

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Regulations

10 C.F.R. § 72.22 Contents of application: General and financial information.

Each application must state:

(a) Full name of applicant;

(b) Address of applicant;

(c) Description of business or occupation of applicant;

(d) If applicant is:

(1) An individual: Citizenship and age;

(2) A partnership: Name, citizenship, and address of each partner and the principal location at which the partnership does business;

(3) A corporation or an unincorporated association:

(i) The State in which it is incorporated or organized and the principal location at which it does business; and

(ii) The names, addresses, and citizenship of its directors and principal officers;

(4) Acting as an agent or representative of another person in filing the application: The identification of the principal and the information required under this paragraph with respect to such principal.

(5) The Department of Energy:

(i) The identification of the DOE organization responsible for the construction and operation of the ISFSI or MRS, including a description of any delegations of authority and assignments of responsibilities.

(ii) For each application for a license for an MRS, the provisions of the public law authorizing the construction and operation of the MRS.

(e) Except for DOE, 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. The

information must state the place at which the activity is to be performed, the general plan for carrying out the activity, and the period of time for which the license is requested. The information must show that the applicant either possesses the necessary funds, or that the applicant has reasonable assurance of obtaining the necessary; funds or that by a combination of the two, the applicant will have the necessary funds available to cover the following:

(1) Estimated construction costs;

(2) Estimated operating costs over the planned life of the ISFSI; and

(3) Estimated decommissioning costs, and the necessary financial arrangements to provide reasonable assurance before licensing, that decommissioning will be carried out after the removal of spent fuel, high-level radioactive waste, and/or reactor-related GTCC waste from storage.

(f) Each applicant for a license under this part to receive, transfer, and possess power reactor spent fuel, power reactor-related Greater than Class C (GTCC) waste, and other radioactive materials associated with spent fuel storage in an independent spent fuel storage installation (ISFSI) shall protect Safeguards Information against unauthorized disclosure in accordance with the requirements in § 73.21 and the requirements of § 73.22 or § 73.23, as applicable.

[53 FR 31658, Aug. 19, 1988, as amended at 66 FR 51839, Oct. 11, 2001; 73 FR 63573, Oct. 24, 2008]

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