No. 21-60743

In the United States Court of Appeals

FOR THE FIFTH CIRCUIT

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

Petitioners

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION;
UNITED STATES OF AMERICA,

Respondents

On Petition for Review of Action by the United States Nuclear Regulatory Commission

BRIEF OF INTERVENOR INTERIM STORAGE PARTNERS, LLC

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CERTIFICATE OF INTERESTED PERSONS

No. 21-60743

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

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UNITED STATES NUCLEAR REGULATORY COMMISSION; UNITED STATES OF AMERICA,

Respondents

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Petitioners

- State of Texas; Greg Abbott, Governor of the State of Texas; and Texas Commission on Environmental Quality (collectively "Texas")
    - Counsel for Texas:

      Michael Abrams
      Ryan Baasch
      OFFICE OF THE ATTORNEY GENERAL, STATE OF TEXAS

- Fasken Land and Minerals, Limited; Permian Basin Land and Royalty Owners (together, "Fasken")

    - Counsel for Fasken:

        Allan Kanner
        Annemieke M. Tennis
        KANNER & WHITELEY, L.L.C.

Federal Respondents

- U.S. Nuclear Regulatory Commission

    - Counsel for U.S. Nuclear Regulatory Commission:

        Andrew Paul Averbach
        U.S. NUCLEAR REGULATORY COMMISSION

- United States of America

    - Counsel for United States of America:

        Justin Heminger
        U.S. DEPARTMENT OF JUSTICE

Intervenor-Respondent

- Interim Storage Partners, LLC

Interim Storage Partners, LLC is a limited liability company organized and existing under the laws of the State of Delaware with principal offices in Andrews, Texas. The sole purpose of Interim Storage Partners, LLC is to license, design, construct and operate the Consolidated Interim Storage Facility at the Waste Control Specialists site in Andrews County, Texas. Interim Storage Partners, LLC is jointly owned by Orano CIS, LLC (51%) and Waste Control Specialists, LLC (49%). No other publicly held company has 10 percent or more equity interest in Interim Storage Partners, LLC.

Orano CIS, LLC is owned 100% by Orano USA, LLC. Orano CIS, LLC and Orano USA, LLC are both limited liability companies formed in the State of Delaware. Orano USA, LLC is 100% owned by Orano SA, a French entity. Orano SA is ultimately majority (70%) owned and controlled by the French State, through two French government entities. Two Japanese entities (Mitsubishi and Japan Nuclear Fuel) each own a 5% (non-voting) interest in Orano SA. The remaining 20% interest (non-voting) in Orano SA is held in two (non-voting) trusts, in connection with financing arrangements.

Waste Control Specialists, LLC is wholly-owned by Fermi Holdings, Inc., an investment affiliate of J.F. Lehman & Co. The full ownership chain includes several other privately held J.F. Lehman & Co. investment affiliates, with no individual shareholders owning more than 25% of any of the entities.

- Counsel for Interim Storage Partners, LLC:

Brad Fagg
Timothy P. Matthews
Ryan K. Lighty
MORGAN, LEWIS & BOCKIUS LLP

s/ Brad Fagg
Attorney of Record for Interim Storage Partners, LLC

Dated: April 25, 2022

STATEMENT REGARDING ORAL ARGUMENT

The petitions in this case purport to invoke substantial issues of agency authority, and the unique posture of these appeals implicates questions of jurisdiction, exhaustion, overlapping statutory allegations, and a complex, voluminous, and highly technical agency record. Accordingly, ISP agrees that oral argument would be appropriate, to help ensure complete and accurate review by the Court.

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GLOSSARY OF ABBREVIATIONS

AEA	Atomic Energy Act of 1954
APA	Administrative Procedure Act
Board	Atomic Safety and Licensing Board
Commission	Nuclear Regulatory Commission (multimember body)
CISF	Consolidated Interim Storage Facility
EIS	Environmental Impact Statement
ISP	Interim Storage Partners, LLC
NEPA	National Environmental Policy Act of 1969
NRC	Nuclear Regulatory Commission (agency as a whole)
NWPA	Nuclear Waste Policy Act of 1982
SNF	Spent Nuclear Fuel

INTRODUCTION

As a threshold matter, the petitions in this case should be dismissed by this Court because of jurisdictional, exhaustion, or related defects, for all of the reasons explained by the Federal Respondents. Resp. Br. at 27–36.

Even beyond that, however, the petitions are fatally flawed. Throughout their briefs, Texas and Fasken inaccurately conflate the U.S. Department of Energy ("DOE"), the U.S. Nuclear Regulatory Commission ("NRC"), and Interim Storage Partners, LLC ("ISP"), and that fundamental mischaracterization fatally infects many, if not most, of the arguments presented. Those three entities are very different, with very different roles. The DOE has statutory and contractual duties under the Nuclear Waste Policy Act of 1982 ("NWPA"), Pub. L. No. 97-425, 96 Stat. 2201 (codified as amended at 42 U.S.C. ch. 108 §§ 10101 *et seq.*) to dispose of spent nuclear fuel, which (as everyone knows and agrees) the DOE has breached. *E.g., Ind. Mich. Power Co. v. United States*, 422 F.3d 1369, 1372 (Fed. Cir. 2005) ("partial breach"). That continuing partial breach (again as everyone knows and agrees) has created real-world circumstances regarding the interim storage of spent nuclear fuel, with

which everyone must now deal. But, other than that self-apparent fact, at the end of the day the DOE (and the NWPA) have nothing at all to do with this case. The NRC is a regulator of nuclear safety. It does not have legal obligations to accept and dispose of spent nuclear fuel, nor otherwise have policy, business, or other "goals" or "plans" or "wants" of the sort attributed to it by Texas and Fasken. ISP is a private party, the licensee in this case, and interested in developing a temporary away-from-reactor storage facility for spent nuclear fuel, just like the several that have long existed and which have been routinely licensed under the Atomic Energy Act of 1954 ("AEA"), Pub. L. No. 83-703, 68 Stat. 919 (codified as amended at 42 U.S.C. ch. 14 §§ 2011 *et seq*.) and the NRC's long-standing regulatory scheme, both before and after the passage of the NWPA. *See Bullcreek v. NRC*, 359 F.3d 536, 543 (D.C. Cir. 2004). There is nothing unusual, extraordinary, or uncommon about the circumstances of this case. Petitioners' *ultra vires* and illegality arguments miss the mark.

The specific procedural and environmental arguments asserted by the petitioners in this case were, or should have been, raised under the mandatory NRC adjudicatory scheme under the AEA, and in many

instances are being simultaneously litigated by Fasken and other parties in an earlier-filed action in the U.S. Court of Appeals for the D.C. Circuit, after proper exhaustion of the required agency processes. *Don't Waste Mich. v. NRC*, No. 21-1048 (D.C. Cir.). Even if properly raised in this Court, however, petitioners could not demonstrate arbitrary or capricious agency action with regard to their grab-bag of allegations regarding the NRC's 684-page Environmental Impact Statement ("EIS"), C.I. 125.[1] Those allegations, which include alleged violation of the NWPA by the license, alleged failure to adequately consider environmental impacts of hypothesized terrorist activity, alleged violations regarding "purpose and need" determinations, allegations regarding cost-benefit analyses, site-selection commentary, and misdirected procedural complaints, all misconstrue the applicable statutory requirements and/or disregard relevant information in the administrative record.

For all of these reasons, the Petitions for Review should be denied if they are not dismissed on jurisdictional grounds.

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[1] "C.I. __" refers to the "Record ID" number associated with each document or document "package" listed in the Revised Certified Index of Record that the NRC filed on December 6, 2021 (Document No. 00516117700).

STATEMENT OF JURISDICTION

ISP agrees with Federal Respondents' arguments regarding jurisdiction. Resp. Br. at 27–36. ISP will not repeat those arguments here, but will instead address Texas's and Fasken's claims assuming, for argument's sake, that jurisdiction exists.

STATEMENT OF THE ISSUES

1. Whether the doctrine of administrative exhaustion requires dismissal of Petitioners' challenges that were not raised before the Commission in the ISP adjudicatory proceeding.

2. Whether the NRC acted illegally, or in an arbitrary and capricious manner, when it issued a license authorizing ISP to possess spent nuclear fuel under the Atomic Energy Act, long-standing NRC regulations, and settled precedent allowing for the licensing of away-from-reactor possession and storage of such material.

3. Whether a miscellany of allegations regarding argued non-compliance with the Administrative Procedure Act ("APA"), Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. ch. 5, subch. I §§ 500 *et seq*.) and the National Environmental Policy Act of 1969 ("NEPA"), Pub L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at

42 U.S.C. §§ 4321 *et seq*.), all of which were or should have been raised under the mandatory NRC adjudicatory scheme, rise to the level of arbitrary and capricious action by the NRC on the record in this case.

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

Two statutes lie at the center of this case. First, the AEA grants the NRC broad authority to regulate radiological safety. Second, NEPA requires agencies, including the NRC, to document the environmental impacts and possible alternatives to proposed "major Federal actions significantly affecting the quality of the human environment." NEPA, § 102(C), 42 U.S.C. § 4332(C). Texas and Fasken also assert that a third statute—the NWPA—is implicated here.

A. AEA

Under the AEA as originally enacted, a single agency, the Atomic Energy Commission, had responsibility for the development and regulation of civilian uses of nuclear materials. The Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233, split these functions, assigning to one agency, now the DOE, the responsibility for the *promotion* of nuclear power, and assigning to the NRC the *regulatory*

and licensing function. As such, the NRC is a neutral arbiter of license applications; it does not promote or build commercial nuclear facilities. One of the NRC's primary functions is "to ensure the safe use of radioactive materials for beneficial civilian purposes while protecting people and the environment." NRC, *About NRC*, https://www.nrc.gov/about-nrc.html (last visited Apr. 22, 2022).

As relevant here, the AEA grants the NRC authority to license civilian possession of nuclear materials, which fall into three general categories: special nuclear material; source material; and byproduct material. *See* AEA, §§ 53, 62, 63, 81, 161(b), 42 U.S.C. §§ 2073, 2092, 2093, 2111, 2201(b). Spent Nuclear Fuel ("SNF") contains all three of these materials. *See* 10 C.F.R. § 72.3 (definition of "Spent Nuclear Fuel"). These materials are defined to include uranium (both natural and enriched), thorium, plutonium, and "any radioactive material . . . yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material." AEA, § 11(e)(1), (z), (aa), 42 U.S.C. § 2014(e)(1), (z), (aa). The NRC has regulated the possession of SNF under this AEA-based authority from the agency's inception.

In 1980, the NRC formally promulgated regulations, codified in 10 C.F.R. Part 72, governing the licensing of SNF storage. *See* Licensing Requirements for the Storage of Spent Fuel in an Independent Spent Fuel Storage Installation, 45 Fed. Reg. 74,693 (Nov. 12, 1980). In doing so, the NRC invoked its AEA-based authority to regulate the possession of special nuclear, source, and byproduct materials. *See* 10 C.F.R. Part 72 ("Authority"). The Part 72 regulations expressly permit NRC licensing of away-from-reactor (as well as at-reactor) SNF storage.

B. NWPA

Congress enacted the NWPA in 1982, two years *after* the NRC promulgated its Part 72 SNF storage regulations. The Ninth Circuit summarized the genesis of the NWPA as follows:

> Prior to the late 1970's private utilities operating nuclear reactors were largely unconcerned with the storage of spent nuclear fuel because it was accepted that spent fuel would be reprocessed. Utilities entered contractual agreements for their spent fuel with private reprocessors. In the mid-70's, however, the private reprocessing industry collapsed for both economic and regulatory reasons.[ ] As a consequence, the nuclear industry was confronted with an unanticipated accumulation of spent nuclear fuel, inadequate private facilities for the storage of the spent fuel, and no long term plans for managing the nuclear waste.
>
> Because of the dangers of this unanticipated nuclear waste accumulation, Congress enacted the [NWPA]. The [NWPA]

> was directed toward both the immediate and long-term problems associated with storage [and disposal] of nuclear waste. Congress settled on a long-term policy of permanent [disposal in Subtitle A]. Because the construction of permanent nuclear waste repositories would take years and the nuclear waste bottleneck caused by the collapse of the reprocessing industry threatened the continued operation of many reactors, Congress authorized the [DOE] to contract with private utilities for interim storage at existing federal facilities.
>
> Understood in terms of its history, the interim storage provisions of the [NWPA] are not comprehensive regulations governing all federal storage of nuclear waste, but remedial legislation addressed to a specific problem. Congress recognized that federal facilities could provide interim storage for a limited quantity of the spent fuel left unaccounted for by the collapse of the reprocessing industry.

Idaho v. DOE, 945 F.2d 295, 298–99 (9th Cir. 1991).

Subtitle A of the NWPA, which provided for the permanent federal repository, expresses Congressional policy that "the generators and owners of . . . spent nuclear fuel have the primary responsibility to provide for, and the responsibility to pay the costs of, the interim storage of . . . spent fuel until such . . . spent fuel is accepted by [DOE for permanent disposal]." NWPA, § 111(a)(5), 42 U.S.C. § 10131(a)(5). Subtitle B of the NWPA established a limited federal program for interim spent fuel storage for utilities showing they were in need. NWPA, §§ 135–137, 42 U.S.C. §§ 10155–10157. Subtitle C initiated the study

and development of another federal program for interim storage which was intended to be available if the permanent federal repository was not available by a specified deadline. NWPA, § 141, 42 U.S.C. § 10161.

Although establishing a federal program, the NWPA severely restricted the federal obligation to assist nuclear plant owners with spent fuel storage. For example, DOE was authorized to provide no more than 1900 metric tons of capacity for the interim storage of spent fuel from a civilian nuclear power reactor. NWPA, § 135(a)(1), 42 U.S.C. § 10155(a)(1). Section 135(a)(1) authorized DOE to provide this 1900 metric tons of capacity through various onsite storage methods, or by use of available storage capacity at existing facilities "owned by the Federal Government on [the date of enactment of the NWPA]." 42 U.S.C. § 10155(a)(1)(A). Moreover, Congress provided a limited window of opportunity (until January 1, 1990) for reactor owners to enter into contracts for federal interim storage. NWPA, § 136(a)(1), 42 U.S.C. § 10156(a)(1). The federal interim storage option ultimately expired with no generators having taken advantage of the program.

Subtitle B also contains provisions designed to encourage private reactor owners to explore new at-reactor storage options. Section 132

explicitly directs the NRC and DOE to take actions to "encourage and expedite the effective use" of existing and additional at-reactor storage. 42 U.S.C. § 10152. Section 133 directs the NRC to establish procedures for licensing dry storage technologies developed through a DOE research program established under Section 218(a), 42 U.S.C. § 10198. 42 U.S.C. § 10153. And Section 134 establishes an expedited hearing process for NRC licensing of expansions of onsite storage capacity. 42 U.S.C. § 10154. Finally, in a provision that received attention in prior challenges to the NRC's authority under the AEA, and which Petitioners invoke again here, Subtitle B provides that "notwithstanding" any other law, "nothing in [the NWPA] shall be construed to encourage, authorize, or require" private or federal use of an away-from-reactor storage facility at a site not already owned by the government. NWPA, § 135(h), 42 U.S.C. § 10155(h). *See Bullcreek*, 359 F.3d at 543.

C. NEPA

The NRC has treated the licensing of away-from-reactor SNF storage as an action requiring an EIS. 10 C.F.R. § 51.20(b)(9). Although NEPA requires "that the agency take a 'hard look' at the environmental consequences before taking a major action," it does "not require agencies

to elevate environmental concerns over other appropriate considerations." *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

II. Factual Background and Procedural History

A. ISP's Application

By letter dated April 28, 2016, Waste Control Specialists, LLC applied to the NRC for a license to store SNF at a consolidated interim storage facility ("CISF") adjacent to its existing low-level radiological waste facility in Andrews County, Texas. C.I. 5, 6. On April 18, 2017, Waste Control Specialists, LLC requested that the NRC suspend its review of the application. *See* Interim Storage Partner's Waste Control Specialists Consolidated Interim Storage Facility, 83 Fed. Reg. 44,070 (Aug. 29, 2018). By letter dated June 8, 2018, ISP, a joint venture between Waste Control Specialists, LLC and Orano CIS, LLC, requested that the NRC resume its review of the application under the new joint venture. *Id.*

While the position of Texas has since changed, at the time the application was submitted, the project had strong support from the state,

regional, and local communities located in west Texas. As noted in the application:

> In March 2014, Texas Governor Rick Perry called for a Texas solution for SNF generated at 6 reactor sites located in the state. On September 19, 2014, the Texas Radiation Advisory Board also issued a position stating it is in the state's best interest to request that the federal government consider Texas as a [CISF] site. On January 20, 2015, the Andrews County Commissioners unanimously approved a resolution in support of establishing [a CISF] in Andrews County, Texas, for the consolidated interim storage of SNF and high level radioactive waste.

C.I. 88 (ER) at 1-3; *see also id.* Attach. 1-1 (providing documents) (construction of facility "will enhance the health, safety, and welfare of the citizens of Andrews County") ("I believe it is time for Texas to act.").

B. Adjudicatory Proceeding

The NRC's adjudicatory process is the means by which members of the public and interested government entities may "participate" in a licensing proceeding and raise environmental, safety, or legal challenges. *See* AEA, § 189.a, 42 U.S.C. § 2239.a; 10 C.F.R. § 2.309. On August 29, 2018, the NRC published a notice in the *Federal Register* providing the public an opportunity to participate in the ISP licensing proceeding by (1) requesting a formal evidentiary hearing to challenge the Application, and (2) petitioning for leave to intervene in that proceeding. *See* 83 Fed.

Reg. 44,070. That notice also provided States, local government bodies, Federally-recognized Indian Tribes, and agencies thereof, an opportunity to participate in the proceeding—either as a "party," under 10 C.F.R. § 2.309(h)(1), or as a "non-party," under 10 C.F.R. § 2.315(c). *Id.*

Between September 2018 and November 2018, multiple individuals and organizations, including Fasken (collectively, the "Administrative Challengers"), submitted to the NRC various filings, including hearing requests and petitions to intervene in the adjudicatory proceeding, purporting to challenge ISP's license application ("Initial Filings"). *See generally Interim Storage Partners, LLC* (WCS Consol. Interim Storage Facility), LBP-19-7, 90 N.R.C. 31 (2019). NRC procedural regulations require petitioners to identify the specific "contentions" they wish to litigate in a hearing. 10 C.F.R. § 2.309(a), (f)(1). Fasken proposed five contentions generally related to the following topics: the "purpose and need" for the CISF; oil and gas wells; the Facility's emergency response plan; groundwater; and threatened and endangered species. LBP-19-7, 90 N.R.C. at 110–18. Fasken also "adopted" another petitioner's claim that the requested license would authorize ISP and the DOE to "violate" the NWPA. *Id.* at 110.

Texas did not request to participate in the proceeding—either as a "party," under 10 C.F.R. § 2.309(h)(1), or as a "non-party," under 10 C.F.R. § 2.315(c).

In November 2018, the Commission referred the Initial Filings to the NRC's Atomic Safety and Licensing Board Panel for consideration under the NRC's Rules of Practice and Procedure at 10 C.F.R. § 2.309. The Panel is a separate component of the NRC, independent from the Commission and the NRC Staff, and is composed of administrative judges who are lawyers, engineers, and scientists. *See* NRC, *Atomic Safety and Licensing Board Panel*, https://www.nrc.gov/about-nrc/organization/aslbpfuncdesc.html (last visited Apr. 22, 2022). The Panel's Chief Administrative Judge then established a three-judge Atomic Safety and Licensing Board ("Board") to adjudicate the Initial Filings. *See generally* LPB-19-7, 90 N.R.C. at 42–45 (procedural history).

The NRC's Rules of Practice and Procedure at 10 C.F.R. § 2.309(c) also permit new or amended contentions to be filed *after* the initial intervention deadline if they are based on materially different information that was not previously available. Certain of the Administrative Challengers, including Fasken, proposed such

contentions. Fasken's two subsequent filings proposed (1) an amended contention related to groundwater and (2) a new contention related to transportation impacts.

Following multiple rounds of briefing and oral argument, the Board issued, between 2019 and 2021, a series of orders ultimately denying or dismissing all challenges filed by the Administrative Challengers.[2] *See Interim Storage Partners, LLC* (WCS Consol. Interim Storage Facility), LBP-19-7, 90 N.R.C. 31, 118 (2019); LBP-19-9, 90 N.R.C. 181 (2019); LBP-19-11, 90 N.R.C. 358 (2019); LBP-21-2, 93 N.R.C. 104 (2021).

Each of the Administrative Challengers also appealed certain aspects of the Board's orders up to the full Commission. In a series of orders between 2020 and 2021, the Commission affirmed each of those orders because the Administrative Challengers failed to demonstrate any error of law or abuse of discretion by the Board. *See Interim Storage Partners, LLC* (WCS Consol. Interim Storage Facility), CLI-20-13, 92 N.R.C. 457 (2020); CLI-20-14, 92 N.R.C. 463 (2020); CLI-20-15, 92 N.R.C. 491 (2020); CLI-21-9, 93 N.R.C. 244 (2021).

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[2] The Board granted Sierra Club's hearing request and petition to intervene and partially admitted one of its contentions. LBP-19-7, 90 N.R.C. at 118. However, the contention was later mooted and dismissed. LBP-19-9, 90 N.R.C. at 192.

C. NRC Staff Review

In parallel with the adjudicatory process, the NRC Staff conducted its own review of ISP's application. On November 14, 2016, the NRC staff published in the *Federal Register* a notice of intent to prepare an EIS and to conduct an environmental scoping process. Waste Control Specialists LLC's Consolidated Interim Spent Fuel Storage Facility Project, 81 Fed. Reg. 79,531 (Nov. 14, 2016). The NRC staff invited government entities and members of the public to provide comments on that process. *Id.* The initial scoping period closed on April 28, 2017. *Id.* The NRC staff initially hosted four public scoping meetings, one in Hobbs, New Mexico, on February 13, 2017; a second in Andrews, Texas, on February 15, 2017; and two nationally webcast sessions from Rockville, Maryland, on February 23, 2017, and April 6, 2017. C.I. 16, 17, 21, 26 (Transcripts). Following the suspension and re-initiation of the NRC's review of the application, on September 4, 2018, the NRC staff reopened the scoping process. *See* Interim Storage Partners LLC's Consolidated Interim Spent Fuel Storage Facility, 83 Fed. Reg. 44,922 (Sept. 4, 2018). The additional scoping period was subsequently extended to November 19, 2018. *See* Interim Storage Partners LLC's Consolidated Interim Storage Facility,

83 Fed. Reg. 53,115 (Oct. 19, 2018). The NRC staff then issued a scoping summary report in October 2019 addressing all public comments. C.I. 77.

In May 2020, the NRC staff issued a draft EIS. C.I. 97. A 120-day comment period began on May 8, 2020, to allow members of the public and governmental entities an opportunity to comment on the draft EIS. *See* Interim Storage Partners Consolidated Interim Storage Facility Project, 85 Fed. Reg. 27,447 (May 8, 2020). On July 22, 2020, the NRC staff extended the comment period an additional 60 days to close on November 3, 2020. *See* Interim Storage Partners Consolidated Interim Storage Facility Project, 85 Fed. Reg. 44,330 (July 22, 2020). Additionally, the NRC staff held public meetings on October 1, 6, 8, and 15, 2020, to discuss the preliminary findings in the draft EIS. C.I. 110, 113, 116, 120 (Transcripts).

Texas did not elect to "participate" in the licensing proceeding; instead, both Governor Abbott (C.I. 1128) and the Texas Commission on Environmental Quality (C.I. 1148) submitted letters in response to the NRC's solicitation of comments on the draft EIS. Fasken submitted written comments (C.I. 1560) as well. The comment letter Fasken

primarily invokes in this appeal (C.I. 128), however, was not submitted during the comment period, but, rather, 10 months after the close of that period, and a mere two days before the NRC issued the license. Responses to *all* public comments, written and oral, received during the draft EIS comment period were included in an appendix to the final EIS, which was issued in July 2021. C.I. 125 (EIS) App. D.

On September 13, 2021, based on its robust, multi-year environmental and safety reviews, the NRC issued Materials License No. SNM-2515 to ISP, pursuant to 10 C.F.R. Part 72. C.I. 130.

SUMMARY OF ARGUMENT

1. The well-established doctrine of administrative exhaustion dictates dismissal of most issues raised by Petitioners, because the claims were not raised before the Commission in the ISP adjudicatory proceeding. This Court should not permit Petitioners to simply side-step the NRC's well-settled and fulsome adjudicatory participation process.

2. Even beyond exhaustion, Texas's new arguments concerning the NRC's authority to license and regulate private, away-from-reactor SNF storage fail for multiple reasons. First, the D.C. Circuit and the 10th Circuit (*i.e.*, the other two courts considering simultaneous

challenges to the ISP License) previously and specifically rejected such claims. *See Bullcreek v. NRC*, 359 F.3d 536 (D.C. Cir. 2004); *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223 (10th Cir. 2004). And Texas fails to offer sufficient grounds for this Court to reach a different conclusion—both courts correctly held that the AEA in fact provides authority to license private away-from-reactor storage of SNF, and that that authority was not repealed by the NWPA. Second, the NRC did not act unreasonably in following the D.C. Circuit precedent, which, indeed, binds the NRC as a federal agency. Third, contrary to Texas's claims, the License does not—directly or indirectly—authorize ISP to *permanently dispose* of SNF. By its own terms, the License authorizes *time-limited storage*. No finding of *de facto* "permanent disposal" can be justified on this record.

3. This Court also should reject Petitioners' various APA and NEPA challenges. Contrary to Petitioners' portrayal, the NRC thoroughly analyzed the potential impacts of the licensing action in a 684-page EIS that responded to all timely public comments. Certain of Petitioners' challenges were raised—and rejected—in the agency adjudicatory proceeding. Petitioners fail even to acknowledge the

Commission's rulings on those challenges, or engage with the Commission's reasoning, much less explain how the NRC's actions were arbitrary and capricious. Others of Petitioners' challenges were not raised before the agency, and are improperly being raised here, on appeal, for the first time. But, in any event, those challenges also fail on the merits. For example, Texas asserts that the "NRC" acted arbitrarily because, in licensing a private CISF, it failed to do various things supposedly required by the NWPA. But the NWPA directs DOE (not the NRC) to take those actions, and the NWPA pertains solely to *federally-owned* facilities, not private ones. For these and all of the other reasons explained below, Petitioners have no valid complaint under the APA or NEPA about the NRC's thorough and careful environmental review.

STANDARD OF REVIEW

This court reviews federal agency decisions under the standard of review established by the Administrative Procedure Act, 5 U.S.C. § 706. Applying that standard, this Court will affirm an agency decision unless it is "arbitrary, capricious, an abuse of discretion, or otherwise contrary to law." *Macktal v. U.S. Dep't of Labor*, 171 F.3d 323, 326 (5th Cir. 1999). Licensing decisions such as the one challenged in these appeals are

"generally entitled to the highest judicial deference," *Massachusetts v. NRC*, 924 F.2d 311, 324 (D.C. Cir. 1991), and that is especially true where, as here, the agency decision is based upon "evaluation of complex scientific data within [the agency's] technical expertise." *BCCA Appeal Grp. v. U.S. E.P.A.*, 355 F.3d 817, 824 (5th Cir. 2003) (citing *Balt. Gas & Elec. Co.*, 462 U.S. at 103).

ARGUMENT

I. Claims That Were Not Raised Before the Commission in the Adjudicatory Proceeding Should Be Dismissed on Administrative Exhaustion Grounds

The Supreme Court has consistently endorsed the doctrine of administrative law that, "[i]n most cases, an issue not presented to an administrative decisionmaker cannot be argued for the first time in federal court." *Sims v. Apfel*, 530 U.S. 103, 112 (2000) (O'Connor, J., concurring in part and concurring in the judgment). The administrative exhaustion requirement serves the important purposes of "giving agencies the opportunity to correct their own errors, affording parties and courts the benefits of agencies' expertise, and compiling a record adequate for judicial review." *Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1247 (D.C. Cir. 2004) (citation and brackets omitted).

"[A]s a general rule[,] 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*." *Woodford v. Ngo*, 548 U.S. 81, 90 (2006) (citation omitted). The Supreme Court has recognized that it is improper and inefficient to permit a litigant to "side-step[] a corrective process which might have cured or rendered moot the very defect later complained of in court." *McGee v. United States*, 402 U.S. 479, 483 (1971). This Court should not permit Texas and Fasken to do so here.

As noted above, Texas had an opportunity, but chose not to participate in the NRC adjudicatory proceeding, either as a "party" or a "non-party." Texas did not "object" to any aspect of the agency's action in the adjudicatory proceeding and did not pursue any administrative appeal "before seeking judicial review," as required by the agency's procedural rules. 10 C.F.R. § 2.341(b)(1), (b)(2)(iii), § 2.1212. Fasken did participate in the NRC adjudicatory proceeding and proposed certain contentions. Fasken filed administrative appeals on a subset of those contentions (and abandoned others). Nevertheless, the majority of arguments raised in Texas's and Fasken's Petitions in this Court were

not raised before the Commission—by Texas, Fasken, or any other party—and are being improperly "argued for the first time in federal court."

Neither Texas nor Fasken can demonstrate any reason why this Court should depart from the longstanding jurisprudential exhaustion doctrine. As the Federal Respondents note at pages 32–34 of their brief, the only conceivable argument that could be offered in response would be an attenuated (at best) *ultra vires* theory, but: (a) such a theory, even if valid in the abstract (which is a dubious proposition), is not implicated on the facts of this case for all of the reasons described below and by the Federal Respondents; and (b) cannot even theoretically apply to the new APA and NEPA arguments asserted by Petitioners.

This, if this Court does not dismiss the petitions on jurisdictional grounds, it should dismiss, on separate jurisprudential exhaustion grounds, all claims that were not properly raised before the Commission in the agency adjudicatory proceeding (*i.e.*, all arguments discussed in Sections II and III.A, *infra*).

II. Petitioners' Ultra Vires and Illegality Claims Are Meritless

Texas argues that the NRC acted *ultra vires* in issuing the ISP License. Texas Br. at 15–27. According to Texas, the agency lacks statutory authority to license and regulate the storage of *any* SNF at a privately-owned, away-from-reactor location.[3] *Id.* at 18. That is not the case. First, the U.S. Court of Appeals for the District of Columbia Circuit previously considered that issue and concluded the opposite, *Bullcreek v. NRC*, 359 F.3d 536 (D.C. Cir. 2004), and the conclusion in *Bullcreek* was eminently correct. *See also Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1232 (10th Cir. 2004). Second, it was not arbitrary and capricious for the NRC and the U.S. Government to follow the law of the Circuit in which they are deemed to reside. Third, there is nothing about the NWPA, or the DOE's continuing partial breach of its obligations under the NWPA, that call into question the NRC's authority here.

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[3] Fasken appears to differ from Texas on this point. *E.g.*, Fasken Br. at 1-2, 23 ("the NRC is authorized to license privately-owned away-from-reactor interim facilities for storage of private SNF, *Bullcreek*, 359 F.3d at 542."). Yet, in another part of its brief, Fasken claims "the NRC lacks explicit statutory or regulatory authority to license a CISF." *Id.* at 33. In any event, to the extent Fasken's brief can be read to challenge the NRC's statutory authority to license private, away-from-reactor SNF storage, that challenge fails for the reasons described above.

A. The NRC Has Statutory Authority to License Private, Away-From-Reactor SNF Storage

Texas urges this court to disregard the D.C. Circuit's holding in *Bullcreek* and to reach the opposite conclusion. Texas Br. at 23–25. Even assuming *arguendo* that the NRC was not required to follow *Bullcreek*, the D.C. Circuit's conclusion in that case was the right one.

First, Texas argues that the AEA does not empower the NRC to license and regulate private, away-from reactor storage of SNF, observing that the AEA, by its terms, "does not specifically refer to the storage or disposal of [SNF]." *Id.* at 16. But this is not a novel observation, nor does it support Texas. Texas is merely quoting the D.C. Circuit, which concluded that the NRC has the requisite authority *notwithstanding* this unremarkable observation. *Bullcreek*, 359 F.3d at 538. While it is true enough that the words "spent nuclear fuel" and "storage" do not appear in the AEA, the NRC has broad statutory authority to license the "possession" of *all* component parts of SNF, without regard to their aggregate form. *See* AEA, §§ 53, 62, 63, 81, 161(b), 42 U.S.C. §§ 2073, 2092, 2093, 2111, 2201(b). There is no basis whatsoever to believe that Congress intended to carve out SNF from the list of nuclear materials the NRC is authorized to regulate, or to exclude

"storage" from the scope of "possession" activities the NRC can authorize. Texas' claims depend upon insertion of unstated (and illogical) statutory limitations that appear nowhere in the text. As such, they fail at the threshold, as a matter of statutory interpretation. *See, e.g., Marchetti v. United States*, 390 U.S. 39, 60 n.18 (1968) (noting that courts should not insert words into statutes that their drafters omitted); *United States v. Reese*, 92 U.S. 214, 221 (1875) ("To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one."); *Stem v. Gomez*, 813 F.3d 205, 212 (5th Cir. 2016) ("courts should not insert words in a statute except to give effect to *clear* legislative intent" (emphasis added) (quoting *In re Bell*, 91 S.W.3d 784, 790 (Tex. 2002)).[4] Even if the AEA was in some way ambiguous on this point (and it is not), the NRC's interpretation was certainly reasonable, and entitled to

[4] Texas also notes that other portions of the AEA (unrelated to the License) authorize the NRC to license "utilization facilities" and "production facilities." Texas Br. at 16. According to Texas, because the AEA does not contain an analogous reference to a "storage facility," Congress declined to give the NRC authority to license such "facilities." *Id.* That is incorrect. "Utilization facility" and "production facility" are defined terms of art that refer to certain "equipment" and "device[s]," such as nuclear reactors. *See* AEA, § 11.v & cc, 42 U.S.C. § 2014(v), (cc). The clear and broad statutory authority of the NRC to regulate "possession" of nuclear materials is not tied to such specifically-defined "facilities." *See* Resp. Br. at 39-40.

deference for the reasons explained by the Federal Respondents at pages 47–50 of their brief.

Second, Texas claims that even if the AEA did grant the NRC authority, its exercise is now "precluded" by the subsequent passage of the NWPA. Texas Br. at 18–22. Texas relies on a statement in the NWPA that "[n]otwithstanding any other provision of law, nothing 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." Texas Br. at 19 (citing 42 U.S.C. § 10155(h)).

As explained by the Federal Respondents at pages 42–45, that is simply incorrect, as two other Circuit have expressly, and correctly, held. *Bullcreek*, 359 F.3d at 542; *Skull Valley*, 376 F.3d at 1232.

Texas also claims that the NRC's promulgation of regulations in 1980 governing the licensing of SNF storage constituted an "invalid" and "dramatic expansion of its power." Texas Br. at 17. To the extent Texas is seeking to challenge those regulations, its claim is untimely. *See* 28 U.S.C. § 2344 (sixty-day statute of limitations for challenges to NRC rules). And, in any event, Congress apparently did not share Texas's

current view. As the D.C. Circuit noted, despite Congress's awareness that the NRC had—just two years earlier—promulgated its Part 72 regulations for that *exact* purpose, the NWPA contained no language expressly *repealing* that authority. *Bullcreek*, 359 F.3d at 542. As the Supreme Court has long recognized, it is a "cardinal rule [of statutory construction] that repeals by implication are not favored." *Morton v. Mancari*, 417 U.S. 535, 549 (1974). This Court should reject Texas's request to read an implied repeal into the NWPA here.

Finally, Texas argues that the NRC lacks authority to regulate SNF storage because the NWPA requires "the Secretary" to focus on developing a permanent disposal facility at Yucca Mountain, and because the NWPA affords states additional opportunities (not otherwise included in the AEA) to participate in proceedings for licensure of federal storage and disposal facilities. Texas Br. at 20–22. According to Texas, the D.C. Circuit's approach allegedly would "nullify" these procedural protections. *Id.* at 24. Not so—Texas again incorrectly conflates the NRC and the DOE (which are different agencies), and *private* interim storage (which is what the ISP License authorizes, pursuant to the AEA) and

federal interim storage and permanent *disposal* (which are what the NWPA addresses).

The plain language of the statutory provisions cited by Texas directs "the Secretary" (i.e., DOE, not the NRC) to focus on Yucca Mountain, *e.g.*, 42 U.S.C. §§ 10133(a), 10172(a)(1) and (2), and prescribes additional procedural requirements for the licensing of *federally-owned* (not private) interim storage and permanent disposal facilities, *e.g.*, *id.* §§ 10135–10138. Those provisions do not direct the NRC to do anything, and have no bearing on private commercial activity. For all of these reasons and those explained by the Federal Respondents at pages 45–47 of their brief, this Court should reject Texas's misreading of the NWPA and conclude, as did the 10th and D.C. Circuits, that the NWPA contains no language repealing the NRC's AEA-based authority to license private, away-from-reactor SNF storage.

B. The NRC Did Not Err by Following the *Bullcreek* Precedent

The NRC considered, and properly rejected, the same argument made by Texas here. In the adjudicatory proceedings before the NRC, another Administrative Challenger (Sierra Club) raised the same argument—*i.e.*, that the AEA does not authorize the NRC to license

interim storage of SNF away from the site of a reactor. *See* LBP-19-7 at 59. The Board rejected that claim, for reasons that included the U.S. Court of Appeals for the District of Columbia Circuit had previously "confirmed that the NRC has such authority under the AEA, and that the NWPA did not repeal or supersede that authority." *Id.* at 60 (citing *Bullcreek*, 359 F.3d at 543). Sierra Club abandoned that argument on administrative appeal (*see* CLI-20-15, 92 N.R.C. at 498 n.50) and no other party raised the argument before the Commission.

Texas does not engage with these relevant agency decisions, much less explain why the agency's conclusion was arbitrary or capricious. As a federal agency, the NRC, and the United States, are deemed to reside within the D.C. Circuit. *See* 28 U.S.C. § 2343 (establishing the D.C. Circuit as an appropriate venue for challenges to any agency action under the APA). And the D.C. Circuit has spoken definitively on this issue, as Texas admits. It would have been unreasonable for the NRC *not* to follow that binding precedent.

C. The ISP License Does Not Exceed the NRC's Authority

Texas further argues that, even if the NRC has authority to license private, away-from-reactor SNF storage, the ISP License exceeds that

authority because it essentially authorizes "de facto" *permanent disposal* of SNF.[5] Texas Br. at 25–27. However, Texas misreads or misunderstands the scope of agency action here.

As an initial matter, time-limited interim storage of SNF and permanent disposal of SNF are quite different things. Indeed, they are governed by separate statutory and regulatory provisions. *Compare, e.g.*, 10 C.F.R. Part 72 (licensing provisions for SNF storage), *with id.*, Parts 60 and 63 (licensing provisions for SNF disposal). On its face, the ISP License authorizes only the former. C.I. 130. Even if renewed for one or more terms under 10 C.F.R. § 72.42 (which renewals would trigger additional safety and environmental reviews),[6] the temporary storage license (on a scale of tens or hypothetically even a hundred years or more) cannot accurately be characterized as anything like "permanent disposal," which contemplates a "time frame of tens to hundreds of *thousands* of years." Public Health and Environmental Radiation

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[5] Fasken also raises "de facto" disposal claims, albeit in the APA/NEPA context, not under a theory of *ultra vires* action. ISP addresses those claims in Section III.A.5, *infra*.

[6] *See also* NUREG-2157, Vol. 1, "Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel" at B-25 (2014) ("The current regulatory framework for storage of spent fuel allows for multiple license renewals, subject to aging management analysis and planning.").

Protection Standards for Yucca Mountain, NV, 66 Fed. Reg. 32,073, 32,087 (June 13, 2001) (emphasis added). Thus, the record establishes that the unambiguous scope of authorized activity in the ISP License lies squarely within the NRC's statutory authority. Texas cannot evade that controlling fact just by saying that it is not so.

More broadly, Texas speculates that Congress and the DOE (notably separate entities from ISP and the NRC) may never provide a federal facility for permanent disposal of SNF. Texas Br. at 25–27. According to Texas, the ISP facility therefore may ultimately become a "de facto" permanent disposal facility.[7] *Id.* at 27. But Texas cites no support for the notion that otherwise-lawful agency action must be deemed *ultra vires* based upon speculation, by a litigant, that non-party government actors, many decades in the future, will lawlessly choose *never* to comply with their statutory obligations.

Texas describes the significant historical delays associated with developing a federal facility for permanent disposal of SNF. Texas Br.

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[7] Notably, Texas does not make the same assertion regarding the other temporary SNF storage facilities within its borders—just the ISP facility. *See also generally* Act of Sept. 2, 2021, 87th Leg., 2d C.S., ch. 2, 2021 Tex. Sess. Law Serv. 3813 (excepting those other facilities from legislation banning SNF storage within the state).

at 26. ISP does not dispute those delays—indeed they are a driving force behind the need for private interim storage options. *See* C.I. 125 (EIS) at 1-3 (discussing the "purpose and need" for the project). However, project *delays* do not justify a finding that the DOE will *never* fulfill its obligations—no court has ever so held, in any of the many, many lawsuits involving DOE's continuing breach. Indeed, recent and relevant government action on this issue contradicts speculation of no solution, ever. For example, the Consolidated Appropriations Act, 2021 passed by Congress provides funding for the DOE to "carry out the purposes of" the NWPA. *See* Consolidated Appropriations Act, 2021, H.R. 133 at 185 (Jan. 3, 2020). And the DOE recently restarted its consent-based siting process for federally-owned storage facilities. Notice of Request for Information (RFI) on Using a Consent-Based Siting Process To Identify Federal Interim Storage Facilities, 86 Fed. Reg. 68,244 (Dec. 1, 2021). Petitioners' arguments depend upon this Court explicitly holding that the ISP site will, in fact, become a "de facto" permanent disposal facility. The record in this case simply will not support such an extraordinary and unprecedented finding.

III. This Court Should Reject Petitioners' Remaining Claims Because They Do Not Constitute Any APA or NEPA Violation.

A. Petitioners' New APA and NEPA Arguments Are Meritless.

As a general matter, NEPA provides no cause of action against federal agencies for alleged noncompliance with the statute; nor does it provide a basis for subject matter jurisdiction over such claims. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 872 (1990). Accordingly, it is well established that a petitioner alleging NEPA noncompliance must base its cause of action on the Administrative Procedure Act. *Save Our Cmty. v. U.S. E.P.A.*, 971 F.2d 1155, 1161 & n.11 (5th Cir. 1992). As detailed below, many of Petitioners' new APA- and NEPA-based arguments are factually or legally inaccurate, and all are meritless because they fail to demonstrate any APA violation.

1. Texas's New "Minimum Transportation" Argument Confuses the NRC with the DOE

Texas asserts that, under the NWPA, "Congress provided that the national *regulatory* authorities 'shall seek to minimize the transportation of spent nuclear fuel.'" Texas Br. at 33 (citing 42 U.S.C. §§ 10155(a)(3), 10164(2)) (emphasis added). Texas then argues that the NRC's action was arbitrary and capricious because the Commission "ignore[d]" this "clear statutory directive." *Id.* However, the plain text of the statute

does not support these claims. The cited provisions relate solely to an obligation of "the Secretary" to provide *federal* SNF storage capacity for civilian nuclear power reactors and directs "the Secretary" (in choosing a method of doing so) to "seek to minimize the transportation of spent nuclear fuel." NWPA, §§ 135(a)(3), 144(2), 42 U.S.C. §§ 10155(a)(3), 10164(2). The NWPA defines "Secretary" to mean the Secretary of Energy, and separately defines the "Commission," which refers to the NRC. NWPA, § 2(7) and (20), 42 U.S.C. § 10101(7) and (20). And the License authorizes *private*—not federal—SNF storage. Contrary to Texas's assertion, the cited provision does not require the NRC to do anything, and does not apply at all to private storage. Texas's mischaracterization of the NWPA does not establish an APA violation by the NRC.

2. Texas's New "Unauthorized Purpose" Argument Misapprehends the Role of the "Purpose and Need" Statement in an EIS and Conflates the Regulator (NRC) with the Project Proponent (ISP)

Texas also argues that the NRC's action was arbitrary and capricious because the Commission's "stated purpose for the ISP license" is not one Congress has explicitly authorized the NRC to pursue. Texas Br. at 27–33. Texas points to the "purpose and need" statement in the

EIS, which discusses ISP being able to provide an option "to allow existing facilities to offload their waste so that their land can be restored to non-nuclear uses." Texas Br. at 28. *See also* C.I. 125 (EIS) at 1-3. Texas claims "the Commission wants" this outcome, and characterizes the statement as "the agency's stated restoration goal." Texas Br. at 28, 32. Texas then argues that the NRC has made an unlawful "land use determination" and "seeks to justify the entire license on this basis." *Id.* at 29–30. According to Texas, the NRC's action is arbitrary and capricious because the agency is prohibited from basing any regulatory decision on any "purpose" beyond the primary safety and security considerations articulated in the agency's organic statute—the AEA. *Id.* at 28–29.

Texas's argument conflates the proponent of the action (ISP, a private entity) with the cognizant regulatory agency (the NRC). The NRC does not "want" to build an interim storage facility. Indeed, it lacks to the authority to do so. The agency's limited "purpose" here—as directed by Congress—is to review the license application against certain safety, security, and environmental criteria, and to approve or deny the application on the basis of that review. For these and all of the other

reasons explained by the Federal Respondents at pages 59–65 of their brief, Texas's arguments regarding "purpose and need" do not establish any APA violation.

3. Texas's New "Cost-Benefit" Arguments Misapprehend the Role of the "Cost-Benefit" Analysis in an EIS and Disregard Relevant Facts in the Administrative Record

Texas attacks the agency's "cost-benefit analysis," claiming that it "does not justify the ISP license." Texas Br. at 37–41. Texas suggests that the agency's mere consideration of a cost-benefit analysis allows "economic considerations [to] override statutory safety and environmental factors." Texas Br. at 37. However, Texas misunderstands the limited role of a cost-benefit analysis in the context of an environmental review. Texas also disregards the administrative record on this issue.

As noted in the EIS and explained by the Federal Respondents at pages 65–66 of their brief, the purpose of the cost-benefit analysis is not to "justify" the licensing action. Rather, as part of the alternatives analysis required by NEPA, and as required by the NRC's NEPA regulations at 10 C.F.R. § 51.71(d), consideration of economic costs and benefits merely "provides input to determine the relative merits of

various alternatives; however, the [NRC] will ultimately base its [licensing] decision on the protection of public health and safety." C.I. 125 (EIS) at 8-1.

Texas also attacks various aspects of the cost-benefit analysis as allegedly unreasonable. However, all of those claims are meritless because they fail to engage with the relevant portions of the administrative record or otherwise rest on mistaken factual or legal assertions.

First, Texas notes that the cost-benefit analysis calculates the benefits of the ISP facility based on an assumed operational period of 40 years. Texas Br. at 39. Texas claims that this assumption is unreasonable because of the assumption that a permanent repository will be available after only 27 years of facility operation. *Id.* Texas implies that the entire inventory of spent nuclear fuel would disappear from the ISP facility *instantaneously* upon the opening of a permanent repository. *Id.* at 39–40. But that would be illogical, and also fails to engage with the realistic transportation timing projections in the EIS. *See, e.g.*, C.I. 125 (EIS) at 8-5; App. C at C-13. The EIS assumes that the ISP facility would continue storing spent fuel *during* the transportation

campaign, which would run through the 40-year licensed life of the facility. *Id.* Texas fails to engage with that assumption or explain why it is arbitrary and capricious.

Second, Texas asserts that, in calculating the costs of the ISP facility, the NRC assumed that ISP's operational costs would remain "static" regardless of how much spent nuclear fuel was stored at the facility. Texas Br. at 39. Texas argues that this was "irrational" because this assumption is "implausible." *Id.* As the Federal Respondents explain at page 68, that is not the case, and is belied by the record. Moreover, the NRC performed two independent analyses: one based on a scenario in which only 1 phase is built ("Scenario A"), and another based on a scenario in which all 8 phases are built ("Scenario B"). C.I. 125 (EIS), App. C at C-3. The EIS itself shows, in plain terms, that the operations costs assumed by the NRC for those two scenarios in fact *differ* depending on how much spent fuel is stored at the facility. *Compare, e.g.*, *id.*, tbl. C-3 (showing Scenario A operational costs of $5,041,229), *with id.*, tbl. C-4 (showing Scenario B operational costs of $12,170,532).

Similarly, Texas suggests that the NRC arbitrarily assumed that "every facility from which ISP would receive spent nuclear fuel would be

decommissioned by the twenty-third year of ISP's operation." Texas Br. at 40 (citing C.I. 125 (EIS) at C-18 to C-19). Texas claims that the NRC provided no "support" for this assumption. *Id.* at 41. However, Texas is incorrect. The EIS explains that the assumed shutdown dates were provided by ISP and based on the 36 reactors that have storage systems compatible with the ISP facility. C.I. 125 (EIS) at C-1 (citing C.I. 88 (ISP's ER)); *see also id.* at 8-5 to 8-6. The cited source document further explains that "[t]he assumed schedule of plant shutdowns is based upon the expiration date of each plant's *existing permit*." C.I. 88 (ER) at 7-12 (emphasis added). Texas fails to acknowledge this cited "support," much less explain why it was arbitrary for the NRC to rely on factual information from actual plant licenses.

4. Fasken's New Claim That the NRC "Ignored" Public Comments Is Contradicted By the Administrative Record

In a background discussion, Fasken asserts that the NRC prematurely closed the "administrative record" of the ISP licensing proceeding. Fasken Br. at 14–19. Fasken also frames the question of whether the NRC acted "properly" in doing so as one of the key issues presented for review in this proceeding. *Id.* at 3. Surprisingly, the

"Argument" section of Fasken's brief is otherwise silent on this topic. Still, Fasken's background recitation misconstrues the administrative record and does not support any implied process-related challenge.

Fasken cites a decision in which the Board "terminated" the *adjudicatory* proceeding after every contested matter pending before the Board had been resolved. *Id.* at 14–15. Fasken emphasizes the fact that this occurred "five months *before* publication of the NRC's draft EIS and *before* the agency issued its notice soliciting public comments pursuant to NEPA." *Id.* at 14 (emphasis in original). Fasken then asserts that the NRC improperly closed the "administrative record" and "ignored" public comments on the draft EIS. *Id.* at 14–18. These statements are untrue.

As a procedural matter, the Commission has explained that closing an *adjudicatory* record and terminating an *adjudicatory* proceeding is simply a "ministerial act" performed by the Board when its adjudicatory work is done, "[b]ut the *administrative record* (and the hearing process) remains open" until the conclusion of the proceeding. *Entergy Nuclear Generation Co.*, (Pilgrim Nuclear Power Station), CLI-08-9, 67 N.R.C. 353, 354–55 (2008). Fasken misconstrues, and misstates, the effect of closing the *adjudicatory* record. It does not, as Fasken suggests, mean

that the agency stopped considering public input before the draft EIS was issued.

Furthermore, the Record of Decision erases any doubt. C.I. 129. The agency plainly states that it considered, among other things, "public comment on the draft EIS." C.I. 129 (ROD) at 1. Fasken repeatedly asserts that the NRC "ignored" those comments. *E.g.*, Fasken Br. at 17, 18. That claim is, again, simply untrue. "Responses to all public comments received during the draft EIS comment period are included in Appendix D to the FEIS." C.I. 129 (ROD) at 3. To the extent Fasken derides the agency's responses as "[p]aying only lip service" to those comments, Fasken Br. at 17, it fails to identify any particular response it finds deficient, much less explain why.

Finally, to the extent Fasken's complaint about "termination" of the adjudicatory proceeding, Fasken Br. at 14, implies that, after that point, members of the public and government entities were no longer able to raise new or amended adjudicatory challenges based on new information, that claim is incorrect. The NRC's adjudicatory rules expressly allow for such challenges. *See* 10 C.F.R. §§ 2.309(c), 2.326. Indeed, Fasken itself

invoked those provisions to file two such challenges. *See supra* "Statement of the Case" § II.B.

Ultimately, Fasken's vague assertions regarding alleged procedural improprieties and inadequate opportunities for public and governmental participation are counterfactual. For the reasons stated above and by the Federal Respondents at pages 57–58 of their brief, Fasken fails to establish any deficiency under the APA or NEPA.

5. Fasken's Additional New NEPA Arguments Fail to Establish Any Deficiency Under the APA or NEPA

Fasken raises multiple new NEPA-related arguments for the first time on appeal. But none of these arguments identify any way in which the NRC's actions somehow fall short of the APA or NEPA.

i. *Project alternatives.* A substantial portion of Fasken's argument is that the NRC unreasonably failed to consider certain project alternatives. Fasken Br. at 35–47. For example, Fasken argues the NRC should have evaluated two CISFs owned by entities other than ISP (namely, Holtec International and Private Fuel Storage, LLC). *Id.* at 41–45. However, Fasken fails to show how or why the NRC had an obligation to do so.

A CISF owned by a *competitor* certainly would not fulfill *ISP's* commercial purpose for the project. Indeed, Holtec could not accept the same SNF as the ISP facility.[8] The two facilities are not interchangeable, and so the Holtec facility is not an "alternative" at all. Moreover, the Holtec CISF was, in fact, plainly analyzed as a cumulative action. C.I. 125 (EIS) at 5-6 to 5-7 (§ 5.1.1.4). Fasken fails to explain why NEPA requires the Holtec CISF to be analyzed a second time (as a project alternative) or why that duplicative analysis would meaningfully inform the agency's environmental review. As the NRC explained in a comment response:

> The NRC staff has conducted separate environmental and safety reviews for the ISP and Holtec license applications because they are individual proposals by separate private entities, and each proposed facility is evaluated based on its own merits and the ability of the facility to meet regulatory requirements. Neither proposal or environmental review was triggered by the other; nor were either triggered by a larger Federal action. However, the NRC staff agrees that because the proposed ISP and Holtec CISFs are within close

[8] SNF is stored at various sites around the country in storage systems designed and built by different vendors. ISP can accept SNF only in "NUHOMS" and "NAC" storage systems and certain associated SNF canisters. C.I. 130 (ISP License Technical Specifications) at 4-1. If approved by the NRC, Holtec could store SNF "only in . . . Holtec's HI-STORM UMAX storage system [which], in turn, only allows storage of two specific type of Holtec canisters—not NAC's or anyone else's canisters." *Holtec Int'l* (HI-STORE Consol. Interim Storage Facility), LBP-19-4, 89 N.R.C. 353, 371-72 (2019).

> geographic proximity, overlapping impacts could occur. Thus, the NRC staff evaluated the other proposed CISF as a source of potential cumulative impacts (as a reasonably foreseeable future action) in Chapter 5 of each EIS.

C.I. 125 (EIS) at D-8. Nothing more was required, and Fasken cannot establish that it was.

Fasken also fails to explain why the Private Fuel Storage, LLC facility must be viewed as a "reasonable alternative." The NRC issued a license, but that facility was never built. More than a decade ago, the Court of Federal Claims observed that "the [PFS] project is defunct." *S. Cal. Edison Co. v. United States*, 93 Fed. Cl. 337, 359 (Fed. Cl. 2010), *aff'd,* 655 F.3d 1319 (Fed. Cir. 2011). Fasken fails to explain why such a suspended project is a "reasonable" alternative.

Fasken also cites various comment letters proposing other project alternatives the agency allegedly should have considered in the EIS. Fasken Br. at 37–40. But the agency responded to *all* such comments received during the comment period. *See, e.g.*, C.I. 125 (EIS) at D-41 to D-43. As the agency explained, some of those proposals already had been considered in the EIS, but none were appropriate for detailed alternatives analysis. The agency reached that conclusion on three primary grounds, because the suggestions variously: (1) failed to meet

the purpose and need for the proposed action, (2) advocated impracticable technologies, or (3) raised things that were not, in fact, project alternatives. *Id.* Fasken offers vague criticism that the agency's response amounts to "after-the-fact rationalization." Fasken Br. at 40. But Fasken does not meaningfully engage with—or dispute—the NRC's articulated bases, much less show how NEPA or the APA requires something more.

Fasken also attacks the agency's "cumulative impacts" discussion, claiming the NRC must consider the "cumulative" and "synergestic effects of the proposed Holtec CISF." Fasken Br. at 46. However, the NRC did precisely that. Cumulative impacts are evaluated in Chapter 5 of the EIS. And in Section 5.1.1.4 of the EIS (C.I. 125), titled "Second Proposed CISF," the NRC notes that "information about this reasonably foreseeable future action is included where appropriate in this EIS." Fasken derides this approach because the NRC only included relevant information "in its discretion." Fasken Br. at 46. But Fasken fails to identify any way in which the NRC abused that discretion.

ii. *Belated EIS comments.* Fasken repeatedly cites a 30-page comment letter its counsel submitted to the NRC *two days before* the

License was issued and more than *ten months after* the comment period closed. Fasken references certain arguments therein criticizing the NRC's consideration of project alternatives and cumulative impacts. Fasken Br. at 39–40, 46, 51–54 (citing C.I. 128, "Great Ecology"). The NRC surely cannot be faulted for not responding to a lengthy comment letter that was submitted on the eve of its final action, after a multi-year proceeding, and which was tardy by almost a year. Indeed, the NRC clearly communicated the risks of tardy comment submissions beforehand. *See* Interim Storage Partners Consolidated Interim Storage Facility Project, 85 Fed. Reg. 59,831, 59,832 (Sept. 23, 2020) ("Comments received after [the November 20, 2020 comment deadline] will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date.").

Even so, the main argument Fasken advances from the Great Ecology letter is meritless. Namely, Fasken notes that the EIS analyses of various environmental resource areas do not all rely on the same, static geographic scope. Fasken Br at 51–56. Fasken then argues it was "improper" for the NRC to use different "radii." *Id.* But, Fasken does not explain why that allegedly is so—and, facially, it is illogical. For

example, impacts from "noise" are likely, as a matter of common sense, to have a fairly limited geographic scope; whereas, other issues such as "waste management" may have effects at a greater distance. Fasken fails to support its conclusory assertion that the use of different "radii" for different resources was *per se* unreasonable.

Fasken also takes issue with the geographic scopes on individual issues; but, it fails to connect its vague preferences and criticisms with any allegedly unmet legal obligation, much less demonstrate that any particular radius was somehow inappropriate. In reviewing NEPA challenges, a court's task is not to "flyspeck" the EIS for minor deficiencies. *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 75 (D.C. Cir. 2011). The court's task is "simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Balt. Gas & Elec. Co.*, 462 U.S. at 97–98. Fasken's vague quibbles with the selected geographic scopes amount to little more than "flyspecking" here. Furthermore, as shown in Fasken's table, Fasken Br. at 53, the geographic scope used by the NRC to consider "cumulative impacts" is equal to or greater than the scope used to evaluate "impacts from the

proposed action" for each listed resource area. Fasken fails to identify any reason that that was somehow inappropriate. At bottom, these criticisms fail to contrast the agency's EIS with any particular requirement related to cumulative impacts, and therefore fail to show how the NRC's analysis was arbitrary.

iii. *Entities holding title to the SNF.* Fasken also asserts the environmental impacts of the proposed action may differ depending on the entity holding title to the SNF. Fasken Br. at 27. Fasken cites no record support for this counter-intuitive speculation, or for its incorrect claim that the NRC "refused to analyze" this alleged difference. *Id.* The NRC plainly considered it and concluded that "the environmental impacts of the proposed action would remain at the same level of significance regardless of ownership." C.I. 125 (EIS) at D-38. More broadly, the relevant safety, security, and environmental requirements for the ISP CISF (the proposed action) and future SNF transportation activities by entities other than ISP (which are not part of the proposed action)[9] also do *not* differ in any material respect based on the identity of

[9] As to transportation, Fasken makes a brief, unexplained assertion that the NRC has engaged in "improper segmentation." Fasken Br. at 31. But that assertion is demonstrably incorrect because the EIS plainly analyzes transportation. *See, e.g.*,

the particular ISP customer. Ultimately, Fasken fails to dispute the NRC's conclusion with any record information, or otherwise explain why the NRC acted improperly.

iv. *Availability of a permanent repository.* Fasken claims the EIS relies on a "fatally flawed assumption" that a permanent federal repository for SNF disposal will be available in the year 2048.[10] Fasken Br. at 28, 29. Fasken suggests that projection is impracticable. But even assuming, *arguendo*, that is correct, Fasken fails to identify any portion of the EIS that would be materially impacted.

The EIS mentions the 2048 repository availability date only twice. First, in the context of the "purpose and need" statement, the NRC references this date for the proposition that a repository will not be

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EIS § 3.3 (Transportation Affected Environment); § 4.3 (Transportation Impacts); § 5.3 (Transportation Cumulative Impacts).

[10] To the extent Fasken's references to "de facto" disposal, *see* Fasken Br. at 30, 39, are viewed as assertions that the NRC failed to consider the environmental impacts of a scenario in which a repository is never built, Fasken is factually incorrect. Certain Administrative Challengers raised that claim in the agency adjudicatory proceeding and the Board rejected it as to each because the NRC, in fact, prepared a Generic EIS (which it incorporated into the EIS for the ISP License) that analyzes the impacts of storing SNF for different lengths of time, "including the indefinite time scenario where no repository is ever constructed." LBP-19-7, 90 N.R.C. at 67; *see also id.* at 100, 109, 111. None of the Administrative Challengers—including Fasken—appealed that finding to the Commission.

available in the near term—and thus private interim SNF storage may have a role to play in bridging the gap between now and the date of repository availability. C.I. 125 (EIS) at 1-3. If a repository is not available until *after* 2048, as Fasken suggests, that would not undermine the NRC's assertion; indeed, it would strengthen it.

Second, in the description of the proposed action, the NRC projects that SNF stored at the ISP facility will be shipped to a repository by "the end of the license term of the proposed CISF," *i.e.*, by the year 2081 (assuming one 20-year renewal period). C.I. 125 (EIS) at 2-2. The NRC merely observed that this expectation was "consistent" with a 2048 repository availability projection in another document. *Id.* (referencing NUREG-2157, "Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel" (2014)).[11] But Fasken does not engage with or dispute the agency's projection in this proceeding that SNF stored at the ISP CISF will be shipped offsite by the year 2081, or explain why *that* projection is unreasonable.

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[11] *Available at* https://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr2157/index.html.

Finally, Fasken claims that the NRC provides no "support or evidence" for the 2048 projected availability date. Fasken Br. at 30. That is false. The NRC plainly references "(DOE, 2013)," C.I. 125 (EIS) at 1-3, which corresponds to the following item in the references section:

> DOE. "Strategy for the Management and Disposal of Used Nuclear Fuel and High-Level Radioactive Waste." ADAMS Accession No. ML13011A138. Washington, DC: U.S. Department of Energy. 2013."

C.I. 125 (EIS) at 1-16. That document remains the most up-to-date guidance from the DOE—the agency responsible for providing the repository—about when and how it expects to begin accepting SNF. Quite clearly, the NRC's limited references to 2048 in the EIS were not pulled from thin air, as Fasken contends. The NRC is doing the best that it can—and, more importantly, all that it is legally required to do—in the face of the ongoing political stalemate over Yucca Mountain. Ultimately, Fasken's vague and factually incorrect criticisms do not establish any violation of the AEA or NEPA.

B. Fasken's Claim That the License Authorizes ISP and the DOE to "Violate" the NWPA Is Incorrect

Fasken correctly notes that the NWPA currently prohibits the federal government from taking title to SNF or entering contracts for its interim storage until a permanent SNF repository has opened. Fasken

Br. at 23. The ISP License contains an important restriction providing that, prior to accepting any SNF from a customer (either DOE or a private owner), ISP must have a contract with the entity. C.I. 130 (License) (Condition 19). Fasken asserts that this condition of the ISP License "violates" the NWPA because DOE cannot enter such a contract. Fasken Br. at 21. But Fasken misconstrues the effect of the condition. According to Fasken, the condition disregards the current NWPA prohibition on DOE entering into interim storage contracts and purports to authorize DOE to disregard that prohibition. But Fasken's assertion contradicts the administrative record, which establishes the opposite.

Indeed, this claim was raised—and rejected—in the adjudicatory proceeding before the agency, and is being litigated right now in the D.C. Circuit. The Board noted ISP's acknowledgement on the record, and DOE's public statements, that DOE cannot contract for private interim storage without violating the NWPA as currently in effect. LBP-19-7, 90 N.R.C. at 58. Given this clarity, the Board concluded that "[t]here is no credible possibility that such contracts will be made in violation of the law." *Id.* at 59; *see also id.* at 109. On administrative appeal, the Commission affirmed the Board's conclusion, noting that any assertion

that the ISP license purports to "allow" DOE to enter illegal contracts simply "misunderstands the nature of the [ISP License] and its conditions." CLI-20-14, 92 N.R.C. at 468. In fact, the Commission confirmed the opposite—that the ISP License does "not 'authorize' ISP to enter into illegal contracts" and does "not grant any rights to DOE." *Id.* at 468–69. It also noted that the license condition (requiring ISP to enter into a contract with DOE as a prerequisite to storing any DOE-owned SNF) could not be satisfied by a contract made in violation of the NWPA "[b]ecause an illegal contract is unenforceable." *Id.* Removing any doubt, the Commission reiterated that nothing in the ISP License "purports to authorize ISP or DOE to enter" such contracts and confirmed that the subject license condition merely "expresses a *limitation* on ISP's operating authority." CLI-20-15, 92 N.R.C. at 499 (emphasis added). Thus, Fasken's assertion—that the NRC's action violates the APA and NEPA because the License allegedly authorizes illegal activity—is baseless and contrary to the record.

C. Texas' Claims Regarding "Terrorism" Fail to Demonstrate Any Deficiency Under the APA or NEPA

Texas argues that the NRC "violated NEPA" because the EIS did not evaluate the potential environmental impacts of a hypothetical

terrorist attack.[12] Texas Br. at 41–46. However, Texas's arguments establish no deficiency under the APA.

First, for the reasons explained by the Federal Respondents at pages 79–86 of their brief, the causation principles and generic determinations regarding accident scenarios as reflected in *New Jersey Department of Environmental Protection v. United States Nuclear Regulatory Commission*, 561 F.3d 132 (3d Cir. 2009) are correct, in accord with controlling Supreme Court precedent, and require rejection of Texas's challenges here.

Second, this claim was raised by multiple participants in the NRC adjudicatory proceeding; and it was correctly rejected by the agency. *See* LBP-19-7, 90 N.R.C. at 63–66, 107–109; CLI-20-14, 92 N.R.C. at 488–489; LBP-21-2, 93 N.R.C. at 111, 116; CLI-21-9, 93 N.R.C. at 249. Texas does not acknowledge these agency determinations, nor try to demonstrate

[12] Fasken observes that the EIS does not consider terrorist attacks, Fasken Br. at 48, and suggests that the question of whether the NRC was required to do so is an issue presented for review here, *id.* at 4, but otherwise advances no arguments on this subject in its brief. Nevertheless, to the extent its brief is viewed as advancing an argument that the NRC had such an obligation, that argument should be rejected for the reasons described above and at pages 79-86 of the Federal Respondents' brief.

how these agency rulings were arbitrary and capricious. For that reason alone, this Court should reject Texas's claim.

Third, what Texas is really challenging is a discretionary policy determination by the NRC about how the agency discharges its obligations on a nation-wide basis, and Texas cannot show that determination to be arbitrary or capricious. In 2006, the Ninth Circuit held that NEPA requires a terrorism analysis. *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1035 (9th Cir. 2006). As a matter of policy, the agency declined to follow that precedent outside the Ninth Circuit, observing (as to non-D.C. Circuit decisions) that it is "not obliged to adhere, in all of its proceedings, to the first court of appeals decision to address a controversial question." *Amergen Energy Co.* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 N.R.C. 124, 128–29 & n.14 (2007) (citing *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 173 (1984)); *United States v. Mendoza*, 464 U.S. 154, 160 (1984). Texas fails to explain how the NRC's 2007 policy decision was in any way arbitrary, capricious, or an abuse of discretion.

A few years after the NRC announced its policy decision, the Third Circuit considered the same NEPA question and rejected the Ninth

Circuit's reasoning; the Third Circuit instead concluded that NEPA does *not* require the NRC to perform NEPA terrorism analyses. *N.J. Dep't of Envtl. Prot.*, 561 F.3d at 143. Texas fears that the NRC may contend that a NEPA terrorism analysis is not required here because the rationale of the Third Circuit decision is correct and excuses the NRC from separately trying to analyze such issues. Texas Br. at 43. It does. But, as described above, the NRC policy determination that Texas really challenges (i.e., the determination not to follow *San Luis Obispo Mothers for Peace* outside of the Ninth Circuit) pre-dated *N.J. Dep't of Envtl. Protection.* Specifically, the agency explained that it declined to perform a NEPA terrorism analysis here because the proposed storage site "would be located in Andrews County, Texas, outside of the jurisdiction of the Ninth Circuit." CLI-21-9, 93 N.R.C. at 249 n.36. Accordingly, Texas simply appears to have a policy disagreement with the NRC about how the agency addresses rulings by regional circuit courts on a nation-wide basis, but Texas does not even address that policy in its brief, and certainly does not demonstrate that it violates the APA.

And, to be crystal clear, the NRC has not *ignored* the safety and security implications of its action. The agency conducted a

comprehensive review against stringent NRC safety and security requirements. *See generally* C.I. 134 (Final Safety Evaluation Report). More broadly, the NRC also evaluated the environmental impacts of a wide range of hypothetical radiological accidents, including: "fire; partial blockage of SNF storage canister basket vent holes; tornado missiles; flood; earthquake; explosion; lightning; complete blockage of air inlet and outlet ducts; cask tipover; cask drop; adiabatic heatup; burial under debris; and accidents at nearby sites." C.I. 88 (ER) § 4.15. Texas fails to: (1) identify any deficiencies in those analysis; (2) explain why this extensive *range* of accident scenarios, evaluated in the environmental review, is inadequate; or (3) explain why the potential environmental impacts of a hypothetical terrorist attack would *materially* differ from those already considered by the agency (e.g., "fire" or "explosion" or "tornado missile" impacts). It was incumbent upon Texas to show, at a minimum, that the *triggering cause* of the various analyzed severe accident scenarios would somehow matter, and Texas did not do so. The agency thoroughly evaluated a broad range of accidents and impacts, and Texas has not established an obligation under NEPA or the APA to do anything more.

D. Fasken's Challenge to the Scope of the "Purpose and Need" Statement Disregards Applicable Law

Fasken argues that the agency's "purpose and need" statement in the EIS is "unreasonably narrow," thereby allowing the agency to avoid considering "reasonable alternatives." Fasken Br. at 31–32. In essence, Fasken's complaint takes issue with the use of a "purpose and need" statement that acknowledges the commercial interests of a private entity.

For the reasons explained by the Federal Respondents at pages 59–65 of their brief and in Section III.A.2. above, Fasken's "purpose and need" arguments miss the mark. Indeed, this Court has long recognized that "it would be *bizarre* if the [agency] were to ignore the purpose for which the applicant seeks a permit and to substitute a purpose it deems more suitable." *La. Wildlife Fed'n, Inc. v. York*, 761 F.2d 1044, 1048 (5th Cir. 1985) (emphasis added).

E. Fasken's "Site Selection" Commentary Fails to Establish Any APA or NEPA Deficiency

Finally, Fasken complains that the NRC "blindly accepted ISP's site-selection process," Fasken Br. at 47, and criticizes "NRC's rubber-stamped approval of ISP's site selection," *id.* at 48. Fasken also notes the

NRC's response, in the EIS, to public comments on the site-selection discussion. *Id.* at 47–48 (citing C.I. 125 (EIS) § D.2.7.3). But it is not clear what, specifically, Fasken purports to dispute in the EIS. Fasken makes the vague assertion that the NRC has not evaluated "site-specific impacts." Fasken Br. at 48, 49. But site-specific impacts of the proposed action are evaluated in Chapter 4 of the EIS, not in the site-selection discussion. C.I. 125 (EIS) ch. 4.

Furthermore, the challenges related to site selection were raised in the adjudicatory proceeding, and the agency found those challenges meritless. LBP-19-7, 90 N.R.C. at 75; CLI-20-15, 92 N.R.C. at 504; LBP-21-2, 93 N.R.C. at 111, 116; CLI-21-9, 93 N.R.C. at 249–51. Fasken neither acknowledges nor disputes the associated rulings on this subject. Whatever its intent, Fasken's fuzzy commentary on site-selection does not establish any violation of NEPA or the APA.

IV. License Vacatur Would Not Be a Proper Remedy In Any Event

Texas asserts that, if the court finds that the NRC "fell down in its NEPA obligations," then the "proper remedy is vacatur of the ISP license." Texas Br. at 46–47. But, even assuming that the agency's NEPA review was inadequate (and it was not), vacatur would not be

required or appropriate. As Texas acknowledges, courts can and do "remand action to an agency without vacating it." *Id.* at 47.

For example, in fashioning an appropriate remedy for a post-issuance NEPA defect, the D.C. Circuit has long employed a two-pronged test that considers (1) the "seriousness" of the deficiency, and (2) "the disruptive consequences of an interim change." *Allied-Signal, Inc. v. NRC*, 988 F.2d 146, 151–52 (D.C. Cir. 1993) (citation omitted). This Court has adopted that test and noted that remand without vacatur is appropriate when "'there is at least a serious possibility that the [agency] will be able to substantiate its decision'" and vacatur would be "'disruptive.'" *Cent. & S. W. Servs., Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000) (quoting *Radio-Television News Directors Ass'n v. FCC*, 184 F.3d 872, 888 (D.C. Cir. 1999) (quoting *Allied-Signal*, 988 F.2d at 151)).

Accordingly, even if this Court concludes that the NRC's NEPA review was inadequate (which it should not), vacatur is not the proper or automatic remedy. The appropriate measure would be to balance the equities of vacatur under an *Allied-Signal* analysis.

CONCLUSION

For all these reasons, the Court should either dismiss or deny the Petitions for Review.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

On April 25, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of FED. R. APP. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by FED. R. APP. P. 32(f) and Circuit Rule 32.2, this brief contains 12,647 words. This brief also complies with the typeface requirements of FED. R. APP. P. 32(a)(5)(A) and Circuit Rule 32.1 and the type-style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point (body) and 12-point (footnotes) Century Schoolbook font.

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