ARGUMENT NOT YET SCHEDULED

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

BEYOND NUCLEAR, INC., *et al.,*	)	
Petitioners,	)	No. 20-1187, consolidated with Nos. 20-1225, 21-1104, and 21-1147
v.	)	
UNITED STATES NUCLEAR REGULATORY COMMISISON and the UNITED STATES OF AMERICA,	)	
Respondents.	)	

AMICUS CURIAE BRIEF OF THE STATE OF NEW MEXICO SUPPORTING PETITIONERS AND SEEKING REVERSAL

Raúl Torrez
Attorney General of New Mexico
William Grantham
Assistant Attorney General
P.O. Drawer 1508
Santa Fe, NM 87504-1508
(505) 218-0850

Lindsay A. Lovejoy, Jr.
3600 Cerrillos Road, Unit 1001A
Santa Fe, NM 87507
(505) 983-1800

Counsel for Amicus Curiae
State of New Mexico

September 8, 2023

-Certificate as to parties, rulings, and related cases-

Pursuant to Circuit Rule 28(a)(1), undersigned counsel certifies that all parties, intervenors, and amici appearing in this Court are listed in the Brief for Petitioners Beyond Nuclear, *et al,* with the exception of *amici* the State of New Mexico and any other *amici* who had not yet entered an appearance as of the filing of Petitioners' initial brief.

References to the rulings under review are listed in the Brief for Petitioners Beyond Nuclear, *et al*.

References to related cases are listed in the Brief for Petitioners Beyond Nuclear, *et al*.

All applicable statutes, etc., are contained in the Addendum for Petitioners Beyond Nuclear, *et al*.

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The State of New Mexico is the proposed host state for the licensed facility. Its interest is the safety and well-being of the citizens of the State and their rights and property. The State files this amicus brief under the authority of Federal Rule of Appellate Procedure 29(a)(2), and the Attorney General acts pursuant to his authority under NMSA 1978, § 8-5-2(B), (J) (1975).

-Argument-

The State of New Mexico respectfully addresses the Court as it considers the application of the Nuclear Waste Policy Act, 42 U.S.C. § 10101 *et seq.* (NWPA), to the license issued by the Nuclear Regulatory Commission (NRC) to Holtec International (Holtec) (License No. SNM-2516).

The NWPA emerged from Congress's sense that the failure of a commercial reprocessing industry left the country with accumulating spent fuel and the knowledge that deep geologic disposal in a permanent repository is the only responsible solution. Congress's solution was a permanent repository, built through a consent-based process. Under the NWPA interim storage is severely limited to avoid preempting the repository.

Forty years on, progress towards a repository is stalled. But Congress has not changed the statutory plan for a consent-based process. New Mexico has not

consented to the Holtec storage site. It has not even been asked for its consent. Instead, the NRC here seeks to force on the State a solution using a supposedly temporary storage site. It has been emphasized by DOE's Blue Ribbon Commission, comprised of 15 individuals with pertinent background and experience:

> Experience in the United States and in other nations suggests that any attempt to force a top-down, federally-mandated solution over the objections of a state or community—far from being more efficient—will take longer, cost more, and have lower odds of ultimate success.

Blue Ribbon Comm'n on America's Nuclear Future, Jan. 2021, at ix. The Blue Ribbon Commission emphasized the importance of exchanges of information and authority between federal and state actors, unlike the process followed here:

> In this context, any process that is prescribed in detail up front is unlikely to work. Transparency, flexibility, patience, responsiveness, and a heavy emphasis on consultation and cooperation will all be necessary—indeed, these are attributes that should apply not just to siting but to every aspect of program implementation.

Id.

Unabashed, the NRC has pressed forward over the objections and concerns of the State and its various agencies, local municipalities, and area tribes. The license here authorizes Holtec, as operator of an interim storage site, to contract to store spent fuel owned by the U.S. Department of Energy (DOE). Such a contract is now unlawful in the absence of an operating repository for permanent disposal

of spent fuel. Should Congress amend the NWPA to allow DOE to take title to spent fuel despite the absence of a repository, the license here would allow DOE to store up to 173,600 metric tons of spent fuel at the Holtec site without any further license amendment, hearing, or regulatory consideration. Introduction of such waste, none of which was generated or stored in the State, would have a massive impact on the State.

Specifically, 42 U.S.C. § 10222(a)(5)(A), part of NWPA, declares that DOE may not take title to spent nuclear fuel until a repository for permanent disposal of spent fuel has been constructed and put into operation. *See* 42 U.S.C. §§ 10131(a)(5), 10151(a)(1), 10161(a)(4) (generators, owners have primary responsibility for spent fuel), 10143 (delivery and acceptance at repository transfers title to DOE).

Some have advocated a different approach that would prioritize interim storage and postpone a permanent solution to be achieved by future generations. Such a viewpoint has apparently led NRC here to approve a license which allows DOE to take title to spent fuel and contract with Holtec to store the spent fuel *before* any repository exists. Plainly, the resulting prospect is that, if the repository fails to be built and licensed, the temporary storage facility, by default, will become permanent, contrary to its purpose and design.

The license here expressly allows Holtec and DOE to pursue a plan that the NWPA prohibits. "Holtec readily acknowledges that it hopes Congress will change the law, and allow it in most instances to contract directly with DOE to store spent fuel." *In re Holtec Int'l*, ASLBP No. 18-958-01-ISFSI-BD01 at 84 (May 7, 2019). The Atomic Safety and Licensing Board ("ASLB") and the NRC expressly approved the license, declaring their hope that Congress will change the law and allow such storage.

The Holtec plan and the NRC licensing action are clearly contrary to the law of the past 41 years. Congress adopted a different plan, as explained in the House Report on the NWPA:

- [H]igh level wastes should not be a burden on future generations, and must be disposed of by those who benefited from the energy derived from the nuclear activities which created the wastes.

(H.R. Rep. No. 97-491, Part 1, at 29 (April 27, 1982)). Congress enacted:

- Total financial support for the Federal repository development program by generators of high level waste who will use the repository developed under the program.

(*id.* 30). Congress included provisions to avoid

- the serious consequences which commitment to construction of [interim storage] facilities could have on the effort to develop permanent, high level waste repositories.

(*id.* 41; *see* 42). Congress insisted that

- interim storage of such waste and spent fuel is primarily the responsibility of the generators of such waste and spent fuel until it is accepted for disposal in a Federal facility.

(*id.* 58). Therefore, NWPA authorized contracts with utilities under which

- the Secretary will be required to take title to high level waste or spent fuel, at the request of the generator, as expeditiously as practicable *following commencement of operation of a repository* . . . .

(*id.* 59) (emphasis added). Again:

- [T]he Secretary is not intended to accept such waste or fuel, unless the repository is constructed and operating and the Commission has authorized the Secretary to possess such material pursuant to requirements for licensing under the Atomic Energy Act.

(*id.* 61). And:

- Section 135 prohibits the Secretary from accepting title to any spent fuel, high level waste or transuranic waste in providing interim storage for any such material under this subtitle.

(*id.* 63). So Congress had a plan, with reasons supporting it, and the law as enacted does not permit federal ownership of spent fuel until a repository has been built and put into operation.

A license cannot be approved when it contains a term that is contrary to law. Judicial review asks whether an agency decision is arbitrary, capricious, or *not in accordance with law*. *Motor Vehicle Mfrs'Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983) (emphasis added); 5 U.S.C. § 706(2). The license is not in accordance with the NWPA. *Texas v. NRC*, No. 21-60743, ___ F.4th ___, 2023 WL 5498874, at *12 (5th Cir. Aug. 25, 2023)

The ASLB ignored this unlawfulness, reasoning that if Congress changed the law to allow DOE to take title to spent fuel and contract with Holtec to store it at the licensed facility, "the only difference would be that DOE could then lawfully contract with Holtec to store the same spent fuel that presently belongs to the nuclear power plant owners." ASLBP No. 18-958-01-ISFSI-BD01 at 34 (May 7, 2019). It stated that to prohibit storage of DOE-owned fuel, thereby requiring a license modification should Congress make such storage lawful, would "require the NRC to perform a useless act." (*id.*). The NRC avoided the subject of federal

title, stating only, "We disagree with the assertions that the license would violate the NWPA. The NWPA does not prohibit a nuclear power plant licensee from transferring spent nuclear fuel to another private entity." *In re Holtec Int'l*, CLI-20-04, at 8 (April 23, 2020).

But to change the ownership requirement is not a trivial difference; a hearing about DOE contracting with Holtec is not a "useless act," and DOE is not a "private entity." The NWPA proviso that allows DOE to take title only if a repository is in operation, § 10222(a)(5)(A), has a specific congressional purpose, namely to require the utilities to be responsible for their spent fuel so that they would support the completion and operation of a repository. The utilities have a clear business incentive to promote a repository, so long as they are responsible for their spent fuel until a repository exists. If DOE can take the spent fuel off their hands, their motivation is gone, and DOE's incentives and avenues of influence are those of a government agency, which are not those of the private sector. *See, e.g.,* 18 U.S.C. § 1913 (Anti-Lobbying Act). Congress knew that, in that situation, a repository might never be built.

Under the basic principles of *State Farm*, the Court may not sustain a license that authorizes an unlawful act. NWPA, § 10222(a)(5)(A), declares the national policy that the government may not take title to spent fuel unless there is a

repository in operation to receive it. NRC may not supplant that decision with its own, different strategy:

> [T]he record suggests that the Commission, as a policy matter, simply may not want to pursue Yucca Mountain as a possible site for storage of nuclear waste. But Congress sets the policy, not the Commission. And policy disagreement with Congress's decision about nuclear waste storage is not a lawful ground for the Commission to decline to continue the congressionally mandated licensing process.

In re Aiken County, 725 F.3d 255, 260 (D.C. Cir. 2013). Thus, "an agency may not rely on political guesswork about future congressional [actions] as a basis for violating existing legal mandates." *Id.*

Finally, nothing in this Court's prior decisions authorizes a license that allows DOE to contract with Holtec for "interim" storage of spent nuclear fuel. In *Bullcreek v. NRC*, 359 F.3d 536 (D.C. Cir. 2004), this Court "essentially assumed that the Atomic Energy Act had granted the Commission authority to license away-from-reactor storage facilities, despite explicitly recognizing that the Act 'does not specifically refer to the storage or disposal of spent nuclear fuel.'" *Texas v. NRC*, 2023 WL 5498874, at *10. (finding *Bullcreek* and *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223 (10th Cir. 2004), unpersuasive as authority for a license to store spent nuclear fuel at a facility in Texas). Even where the AEA authorizes away-from-reactor storage, it does not authorize a license condition in violation of the later-enacted NWPA. *See* 42 U.S.C. § 2011 *et seq.*

-Conclusion-

The State respectfully requests that the Court grant the relief requested by Petitioners: to hold unlawful and set aside NRC's decisions, reverse and vacate them, and declare that NRC cannot approve a license application that allows for private storage of DOE-owned waste.

Respectfully submitted,

RAÚL TORREZ
Attorney General of New Mexico

/s/ William Grantham
William Grantham
Assistant Attorney General
P.O. Drawer 1508
Santa Fe, NM 87504-1508
(505) 218-0850

Lindsay A. Lovejoy, Jr.
3600 Cerrillos Road, Unit 1001A
Santa Fe, NM 87507
(505) 983-1800

Counsel for Amicus Curiae
State of New Mexico

-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 Brief Amicus Curiae is proportionately spaced, has a typeface of Times New Roman, 14 points, and contains 1791 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, and Certificate as to Parties, Rulings, and Related Cases. I have relied on Microsoft Word's calculation feature for this calculation.

/s/William Grantham
(electronic signature)
Assistant Attorney General

-Certificate of Service-

I hereby certify that on this 8th day of September, 2023, I filed the foregoing Brief Amicus Curiae in the Court's electronic case filing system, which according to its protocols would automatically be served on all counsel of record.

/s/William Grantham
(electronic signature)
Assistant Attorney General