**ORAL ARGUMENT NOT YET SCHEDULED**

No. 20-1187 (consolidated with Nos. 20-1225, 21-1104, and 21-1147)

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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BEYOND NUCLEAR, *et al.*,
*Petitioners*,
v.
NUCLEAR REGULATORY COMMISSION and
UNITED STATES OF AMERICA,
*Respondents*,

HOLTEC INTERNATIONAL,
*Respondent-Intervenor*.

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On Petition for Review of Orders
by the Nuclear Regulatory Commission

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**INITIAL BRIEF FOR FEDERAL RESPONDENTS**

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with Circuit Rule 28(a)(1), Respondents United States Nuclear Regulatory Commission and the United States of America submit this certificate as to parties, rulings, and related cases.

**(A) Parties, Intervenors, and Amici**

Petitioners are (1) Beyond Nuclear; (2) Sierra Club; (3) Don't Waste Michigan; Citizens' Environmental Coalition; Citizens for Alternatives to Chemical Contamination; Nuclear Energy Information Service; San Luis Obispo Mothers for Peace; and Sustainable Energy and Economic Development Coalition; and (4) Fasken Land and Minerals, Ltd. and the Permian Basin Land and Royalty Owners.

Holtec International has been granted leave to intervene.

The City of Fort Worth is an amicus.

**(B) Rulings under Review**

Petitioners identify the following documents as the rulings under review:

(1) Nuclear Regulatory Commission Order, *Holtec International and Interim Storage Partners LLC*, Docket Nos. 72-1051 and 72-1050 (Oct. 29, 2018);

(2) Nuclear Regulatory Commission Memorandum and Order, *Holtec International*, CLI-20-4, 91 N.R.C. 167 (Apr. 23, 2020);

(3) Nuclear Regulatory Commission Memorandum and Order, *Holtec International*, CLI-21-4, 93 N.R.C. 119 (Feb. 18, 2021); and

(4) Nuclear Regulatory Commission Memorandum and Order, *Holtec International*, CLI-21-7, 93 N.R.C. 215 (Apr. 28, 2021).

**(C) Related Cases**

One petition for review is pending in the United States Court of Appeals for the Fifth Circuit that is related to this case. It was brought by one of the groups of Petitioners in this case, Fasken Land and Minerals, Ltd. and the Permian Basin Land and Royalty Owners. That petition challenges the issuance of the license that was the subject of the agency adjudicatory decisions under review in this case. *See Fasken Land and Minerals, Ltd. v. NRC*, No. 23-60377 (5th Cir.).

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## GLOSSARY

| | |
|---|---|
| AEA | Atomic Energy Act |
| DOE | U.S. Department of Energy |
| EIS | Environmental Impact Statement |
| EPA | U.S. Environmental Protection Agency |
| NEPA | National Environmental Policy Act |
| NRC | U.S. Nuclear Regulatory Commission |
| NWPA | Nuclear Waste Policy Act |

## INTRODUCTION

These Petitions for Review challenge decisions of the Nuclear Regulatory Commission ("Commission" or "NRC"[1]) denying Petitioners' requests to be admitted as parties to a licensing proceeding. Petitioners sought a hearing to challenge the issuance of a license to Intervenor Holtec International ("Holtec") to store spent nuclear fuel at a consolidated interim storage facility in Lea County, New Mexico. Each Petitioner or group of Petitioners here—Beyond Nuclear; Fasken Land and Minerals, Ltd. and the Permian Basin Land and Royalty Owners (collectively, "Fasken"); and the remaining Petitioners ("Environmental Petitioners")—submitted one or more "contentions" in support of a request for a hearing. The Commission declined the hearing requests, reasonably concluding that Petitioners had failed to identify a genuine legal or factual dispute with respect to the license application, that some of the proposed contentions were untimely, or both.

[1] We use the terms "NRC" or "agency" to refer to the agency as a whole, and the term "Commission" to refer to the collegial body that issued the adjudicatory decisions under review in this case.

Petitioners provide no basis to overturn the Commission's reasonable application of its rules governing contention admissibility and its resulting decisions not to admit Petitioners as parties to the licensing proceeding. Accordingly, the Petitions for Review should be denied.

## STATEMENT OF JURISDICTION

The Hobbs Act grants the courts of appeals exclusive jurisdiction to entertain challenges to "final orders" entered in proceedings conducted under Section 189.a of the Atomic Energy Act ("AEA"). 28 U.S.C. § 2342(4); 42 U.S.C. § 2239(a), (b). The term "final order" includes final decisions of the Commission not to admit putative intervenors as parties to an adjudicatory proceeding before the agency. *Ecology Action v. Atomic Energy Comm'n*, 492 F.2d 998, 1000 (2d Cir. 1974); *Thermal Ecology Must Be Preserved v. Atomic Energy Comm'n*, 433 F.2d 524, 526 (D.C. Cir. 1970). Here, after thoroughly considering all of Petitioners' contentions, the Commission found the contentions inadmissible and, in three separate final orders, declined to admit any

Petitioner to the proceeding.[2] The Court has subject-matter jurisdiction to consider Petitioners' challenges to these orders. *See Matson Nav. Co. v. U.S. Dep't of Transp.*, 77 F.4th 1151, 1159 (D.C. Cir. 2023). Petitioners timely filed Petitions for Review following issuance of these orders, and the case was placed in abeyance until the license was issued to Holtec in May 2023.

Petitioners have submitted detailed declarations to support standing, and Federal Respondents do not dispute Petitioners' standing.

## STATEMENT OF THE ISSUES

1. Whether the Commission reasonably declined to admit Beyond Nuclear's contention challenging the issuance of a license for the storage of spent nuclear fuel, when it found that the license could be exercised in a manner that is consistent with the Nuclear Waste Policy Act and it credited the licensee's representation that, absent a change

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[2] *Holtec International*, CLI-20-4, 91 N.R.C. 167 (Apr. 23, 2020) ("Commission 2020 Order") (JA____); *Holtec International*, CLI-21-4, 93 N.R.C. 119 (Feb. 18, 2021) ("Commission February 2021 Order") (JA____); *Holtec International*, CLI-21-7, 93 N.R.C. 215 (Apr. 28, 2021) ("Commission April 2021 Order") (JA____).

in legislation, the licensee would not store fuel to which the U.S. Department of Energy owns title?

2. Whether the Commission reasonably denied Fasken's motion to reopen the adjudicatory proceeding to address late-filed contentions concerning mineral rights under the surface of the proposed facility, when the contentions were based on information previously available to Fasken and in any event provided no evidentiary basis to contest the issuance of the license?

3. Whether the Commission reasonably denied admission of Environmental Petitioners' contentions, when Environmental Petitioners do not address or rebut the Commission's rationales for declining to admit them and did not provide a legal or factual basis to contest issuance of the license?

## PERTINENT STATUTES AND REGULATIONS

All pertinent statutes and regulations are set forth in the separate Addendum of Statutes and Regulations filed contemporaneously with this Brief.

## STATEMENT OF THE CASE

### I. Statutory and regulatory background

#### A. The NRC's regulation of spent nuclear fuel

The NRC is an independent regulatory commission created by Congress. *See* Energy Reorganization Act of 1974, 42 U.S.C. § 5841. In the Atomic Energy Act ("AEA"), Congress conferred broad authority on the agency to license and regulate the civilian use of radioactive materials. *See* 42 U.S.C. §§ 2011-2296b-7. The AEA authorizes the NRC to license the construction and operation of *facilities* that produce or use nuclear material, including nuclear power plants. The AEA also authorizes the NRC to license and regulate the storage of nuclear *material* that poses radiological hazards, including the storage of spent nuclear fuel (fuel that is still radioactive but is no longer useful in the production of electricity) before its ultimate disposal.

Congress granted the NRC authority to license parties to possess spent nuclear fuel in three AEA provisions governing the three types of nuclear material contained in spent fuel. 42 U.S.C. §§ 2073(a), 2093(a), 2111(a); *see also id.* § 2014 (defining each term). First, the AEA authorizes the NRC to issue licenses for the possession of "special

nuclear material" such as plutonium. *Id.* § 2073(a). Second, it authorizes the issuance of licenses to possess "source material." *Id.* § 2093(a). And third, it authorizes the issuance of licenses for the possession of "byproduct material." *Id.* § 2111(a). As a consequence of the authority set forth in these provisions, "it has long been recognized that the AEA confers on the NRC authority to license and regulate the storage and disposal of [spent] fuel." *Bullcreek v. NRC*, 359 F.3d 536, 538 (D.C. Cir. 2004); *see also* 42 U.S.C. § 2201(b) (permitting the NRC to promulgate rules and regulations governing the possession of source, byproduct, and special nuclear material).

Consistent with this statutory authority, the agency has promulgated regulations allowing it to issue materials licenses permitting the storage of spent fuel both at the site of nuclear reactors and away-from-reactor locations. *See* 10 C.F.R. Part 72; Licensing Requirements for the Storage of Spent Fuel in an Independent Spent Fuel Storage Installation, 45 Fed. Reg. 74,693, 74,694, 74,696 (Nov. 12, 1980). The agency has issued several such licenses pursuant to Part 72, both at and away from the site of reactors, in the ensuing 43 years. As discussed below, the proceedings in this case pertain to a license that

the agency issued pursuant to authority granted under the AEA and in accordance with its regulations in Part 72.

Temporary *storage* of spent fuel under the AEA is distinct from *disposal*. The Nuclear Waste Policy Act ("NWPA") establishes the federal government's policy to permanently dispose of high-level radioactive waste in a deep geologic repository. *See* 42 U.S.C. §§ 10101-10270. In the NWPA, Congress designated the U.S. Department of Energy ("DOE") as the agency responsible for designing, constructing, and operating a repository, *id.* § 10134(b); the U.S. Environmental Protection Agency ("EPA") as the agency responsible for developing radiation protection standards for the repository, *id.* § 10141(a); and the NRC as the agency responsible for developing regulations to implement EPA's standards and for licensing and overseeing construction, operation, and closure of the repository, *id.* §§ 10134(c)-(d), 10141(b).

In addition to setting a policy of deep geologic disposal of spent nuclear fuel, the NWPA created two avenues for DOE to operate "interim" storage facilities prior to repository operations. *Id.* §§ 10151-10157 (interim storage program), 10161-10169 (monitored retrievable storage program). As this Court has recognized, these forms of federal

interim storage by DOE were designed to operate in parallel with, and not to supplant, the operation of privately owned temporary fuel storage facilities, both at and away from the sites of nuclear reactors, authorized by the AEA and specifically contemplated by 10 C.F.R. Part 72. *See Bullcreek*, 359 F.3d at 543.

Although Congress designated Yucca Mountain, Nevada, as the site for a first spent fuel repository, 42 U.S.C. § 10172, DOE announced in 2010 that it considered the site untenable and attempted to withdraw its license application (a request that the NRC did not grant). Since that time, Congress has not provided additional funding for the Yucca Mountain project and, while the NRC has spent substantially all the appropriated funds it has received and has completed its safety and environmental review of the repository, the project has stalled. *See generally Texas v. United States*, 891 F.3d 553, 565 (5th Cir. 2018) (dismissing petition for writ of mandamus brought by Texas, which sought to compel completion of proceedings for licensure of Yucca Mountain repository).

### B. Avenues for participation in NRC's licensing proceedings

In the AEA, Congress provided interested persons with an opportunity to attempt to intervene in NRC licensing proceedings and to object to the issuance of a license. Specifically, Section 189.a of the AEA enables a person to request to intervene in the proceeding and request a hearing contesting the legal or factual basis for the agency's licensing decision. *See* 42 U.S.C. § 2239(a)(1).

Adjudicatory hearings are governed by the NRC's regulations. *See* 10 C.F.R. Part 2. To be admitted as a party to such a proceeding, a putative intervenor must, among other things, establish administrative standing and timely submit at least one "contention" setting forth an issue of law or fact to be controverted. *See id.* § 2.309(d), (f)(1). The proponent of a contention must provide "sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact," *id.* § 2.309(f)(1)(vi), supported by a "concise statement of the alleged facts or expert opinions which support [its] position . . . , together with references to the specific sources and documents on which [it] intends to rely." *Id.* § 2.309(f)(1)(v). "Materials cited as the basis for a contention are subject to scrutiny . . . to

determine whether they actually support the facts alleged; otherwise, the aims of the rules and of Congress would be thwarted." *Beyond Nuclear v. NRC*, 704 F.3d 12, 21 (1st Cir. 2013) (alteration and citation omitted); *see also Blue Ridge Envtl. Def. League v. NRC*, 716 F.3d 183, 198-99 (D.C. Cir. 2013) (contentions must be supported by particularized information identifying specific matter to be resolved at hearing).

An admissible contention also must raise an issue that is within the scope of the licensing proceeding and is material to the agency's licensing decision. *See* 10 C.F.R. § 2.309(f)(1)(iii), (iv); *Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1443 (D.C. Cir. 1984). Thus, intervenors may challenge the NRC's compliance with NEPA through the NRC's adjudicatory process. *See, e.g.¸ Beyond Nuclear*, 704 F.3d at 20-23 (reviewing Commission disposition of contentions raised under NEPA).

Under the NRC's rules, an applicant for a license to construct and operate a spent fuel storage facility must submit to the agency, along with its application, an "Environmental Report" containing an analysis of each of the considerations required by NEPA. 10 C.F.R. §§ 51.45,

51.61. So as to bring any NEPA deficiencies to the agency's attention as soon as possible, and thus to facilitate the prompt resolution of assertions that the agency has not acted or is not acting in compliance with NEPA, putative intervenors seeking to raise contentions arising under NEPA must challenge the analysis in the Environmental Report. *See id.* § 2.309(f)(2).

If any deficiencies in that analysis are not cured in the draft or final Environmental Impact Statement ("EIS") prepared by the NRC, or if those documents contain new and materially different information from the information contained in the Environmental Report, these putative intervenors may seek leave to file new or amended environmental contentions after the intervention deadline to challenge the analyses in those later documents. *Id.* § 2.309(c)(1) (permitting filing of contentions after original deadline based on demonstration of good cause); *see also id.* § 2.326 (permitting the reopening of an otherwise closed adjudicatory proceeding, prior to issuance of license, to raise contentions based on stricter good-cause requirements).

If a putative intervenor is denied admission to the proceeding, the AEA provides for judicial review of the agency's final order denying

admission, either in the United States Court of Appeals for the circuit in which the petitioner is located or in this Court. 42 U.S.C. § 2239(b) (specifying that the courts of appeals must review the agency's decision in accordance with the APA and the Hobbs Act); 28 U.S.C. § 2342(4) (providing jurisdiction in the courts of appeals under the Hobbs Act); *see also id.* § 2343 (establishing venue for Hobbs Act cases); *Matson*, 77 F.4th at 1159.

## II. Factual background

Petitioners' challenges relate to a Part 72 materials license the Commission issued to Holtec in May 2023. All the orders under review relate to Petitioners' requests to be admitted as parties to the adjudication, the last of which was denied in April 2021.

In March 2017, the NRC received an application for a license that would permit construction of a "consolidated interim spent fuel storage facility" (at times referred to as a "CISF") in Lea County, New Mexico. *See* Holtec International's HI-STORE Consolidated Interim Storage Facility for Interim Storage of Spent Nuclear Fuel, 83 Fed. Reg. 32,919 (July 16, 2018). The facility, as proposed, would consist of an in-ground system for the storage of sealed canisters containing spent nuclear fuel

in vertical modules. Environmental Report Rev. 0 at 2-13 (diagram) (JA___). The NRC has certified this system as safe for use in storing spent nuclear fuel. *See* Holtec International's HI-STORE Consolidated Interim Storage Facility for Interim Storage of Spent Nuclear Fuel, 83 Fed. Reg. at 32,919 (referencing HI-STORM UMAX Canister Storage System); 10 C.F.R. § 72.214 (including UMAX system among list of certified systems); List of Approved Spent Fuel Storage Casks: Holtec International HI-STORM Underground Maximum Capacity Canister Storage System, Certificate of Compliance No. 1040, 80 Fed. Reg. 12,073 (Mar. 6, 2015).

Holtec submitted an Environmental Report (JA____) and a Safety Analysis Report (JA___) with its March 2017 application, and it prepared numerous revisions of each document (JA____, ____, ____, ____,____, ____) (revisions to Environmental Report); JA(____, ____,____, ____) (revisions to Safety Analysis Report). In August 2020, the NRC published a draft EIS ("Draft EIS") evaluating the impacts of the proposed facility. Holtec International HI-STORE Consolidated Interim Storage Facility Project, 85 Fed. Reg. 49,396 (Aug. 13, 2020); (JA____).

Holtec's Environmental Report and the Draft EIS addressed the potential environmental impacts of constructing and operating the Holtec facility during the term of the proposed license. Environmental Report Rev. 0 at 1-1 (JA____); Draft EIS at 1-5 (JA____).

The Environmental Report and Draft EIS also incorporated the agency's analysis of the potential effects of "continued storage," i.e., the effects of storing fuel *after* the licensed term of the facility, as set forth in the agency's Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel ("Continued Storage Generic EIS"). Environmental Report Rev. 0 at 1-5 (JA____); Draft EIS at 1-4 (JA____); *see* 10 C.F.R. § 51.23(b) ("The impact determinations in [the Continued Storage Generic EIS] regarding continued storage shall be deemed incorporated into the environmental impact statements" for affected licenses); *id.* § 51.97(a) (specifically incorporating the agency's generic analysis into EISs for spent fuel storage facilities licensed under 10 C.F.R. Part 72).[3] The Continued Storage Generic EIS documents the agency's evaluation of the reasonably foreseeable environmental

[3] The Continued Storage Generic EIS is available in its entirety at https://www.nrc.gov/docs/ML1419/ML14196A105.pdf.

impacts of storing the spent fuel after a facility's license term ends, including in a scenario in which a repository is not available. *See New York v. NRC*, 824 F.3d 1012 (D.C. Cir. 2016) (upholding legal challenge to NRC rule adopting Continued Storage Generic EIS).

The NRC issued its final EIS for the Holtec facility in July 2022, after the completion of the adjudicatory proceeding under review in this case. Holtec International HI-STORE Consolidated Interim Storage Facility Project, 87 Fed. Reg. 43,905 (July 22, 2022). In May 2023, the agency issued the materials license to Holtec, along with a Final Safety Evaluation Report and a Record of Decision documenting its NEPA review. Holtec International; HI-STORE Consolidated Interim Storage Facility, 88 Fed. Reg. 30,801, 30,801-02 (May 12, 2023).[4] The license authorizes Holtec to store spent nuclear fuel for a term of 40 years, with the possibility of renewal, prior to the ultimate decommissioning of the site in accordance with NRC regulations. *Id.* at 30,801; *see* 10 C.F.R. §§ 72.42(a), 72.54.

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[4] These documents, including a copy of the license, as issued, are available at https://www.nrc.gov/docs/ML2307/ML23075A179.html.

## III. Procedural background

### A. Adjudicatory proceedings before the Licensing Board and Commission

In July 2018, the NRC published a notice in the *Federal Register* announcing that Holtec had applied for a license to construct and operate a consolidated interim storage facility and requiring that requests to intervene in the proceeding be submitted within 60 days. Holtec International's HI-STORE Consolidated Interim Storage Facility for Interim Storage of Spent Nuclear Fuel, 83 Fed. Reg. 32,919, 32,919-20 (July 16, 2018). In September 2018, Fasken and Beyond Nuclear lodged with the Commission "motions to dismiss" Holtec's application. Fasken and Beyond Nuclear asserted that the application violated the NWPA because it sought authorization to store spent fuel to which DOE, rather than private parties, held title.[5]

The Commission denied the motions, explaining that the agency's rules do not provide for the filing of motions to dismiss license applications. Commission October 2018 Order at 2 (JA____). But the

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[5] Order of the Commission at 1-2, *Holtec International and Interim Storage Partners LLC*, Docket Nos. 72-1051 and 72-1050 (Oct. 29, 2018) ("Commission October 2018 Order") (JA____-____).

Commission referred the underlying arguments about the NWPA to the Commission's Atomic Safety and Licensing Board Panel[6] as contentions. *Id.* at 2-3 (JA____). Beyond Nuclear petitioned for review of the Commission October 2018 Order in this Court, which dismissed the petition because the referral of the arguments to the Licensing Board Panel was not a final order reviewable under the Hobbs Act. Order, *Beyond Nuclear v. NRC*, No. 18-1340, Document #1792613 (D.C. Cir. June 13, 2019).

Meanwhile, the Licensing Board that had been established for the Holtec proceeding considered the contentions filed by Fasken and Beyond Nuclear, as well as by Don't Waste Michigan (and its co-petitioners, to whom the Licensing Board and the Commission referred as "Joint Petitioners") and Sierra Club.[7] The Licensing Board issued

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[6] The Licensing Board Panel is a panel of administrative judges, appointed by the Commission, that is authorized by the AEA to conduct hearings. 42 U.S.C. § 2241. When the Panel receives a petition for action, the Chief Administrative Judge establishes a three-judge Board ("Licensing Board") to adjudicate the matter, generally comprised of one legal and two technical judges.

[7] Sierra Club and Don't Waste Michigan and its co-petitioners have submitted a combined brief here; we refer to them collectively as "Environmental Petitioners," including when discussing contentions

three orders ruling on the admission of the proposed contentions and motions to submit amended contentions that were filed after the original contention deadline.[8] The Licensing Board declined to admit the contentions, and it denied intervenor status to each Petitioner here. The organizations appealed to the Commission from those Licensing Board decisions, and the Commission issued three orders affirming the Board.[9]

### B. Proceedings in the courts of appeals

After the Commission affirmed the dismissal of the contentions raised by Beyond Nuclear, Don't Waste Michigan (and its co-

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raised by either Sierra Club or by Don't Waste Michigan and its co-petitioners.

[8] *Holtec International*, LBP-19-4, 89 N.R.C. 353 (2019) (JA____) ("Licensing Board 2019 Order") (addressing admissibility of contentions raised by all putative intervenors); *Holtec International*, LBP-20-6, 91 N.R.C. 239 (2020) ("Licensing Board June 2020 Order") (JA____) (addressing contentions raised by Sierra Club and Fasken); *Holtec International*, LBP-20-10, 92 N.R.C. 235 (2020) ("Licensing Board September 2020 Order") (JA____) (addressing additional contentions raised by Fasken).

[9] Commission 2020 Order, 91 N.R.C. 167 (JA____) (appeal by all putative intervenors of Licensing Board 2019 Order); Commission February 2021 Order, 93 N.R.C. 119 (JA____) (appeal by Sierra Club of Licensing Board June 2020 Order); Commission April 2021 Order, 93 N.R.C. 215 (JA____) (appeal by Fasken of Licensing Board September 2020 Order).

petitioners), Sierra Club, and Fasken, those organizations filed four Petitions for Review in this Court.[10] The Court consolidated the Petitions.

Meanwhile, in addition to its Petition here, Fasken separately petitioned for review in the United States Court of Appeals for the Fifth Circuit.[11] Unlike its claim before this Court, Fasken's petition in the Fifth Circuit challenges the license (distinct from the Commission's adjudicatory decisions denying Fasken's request to intervene). Federal Respondents moved to dismiss the Fifth Circuit petition for review for lack of subject-matter jurisdiction (because the petitioners there, who are seeking review of the license in that court without having been admitted to the adjudicatory proceeding, were not parties aggrieved by the orders under review). The Fifth Circuit referred the motion to the merits panel. Fasken filed its brief before the Fifth Circuit on October 2, 2023. Federal Respondents have requested that that court place

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[10] *Beyond Nuclear* v. *NRC*, No. 20-1187 (D.C. Cir.); *Don t Waste Michigan v. NRC*, No. 20-1225 (D.C. Cir.); *Sierra Club v. NRC*, No. 21-1104 (D.C. Cir.); *Fasken Land and Minerals, Ltd. v. NRC*, No. 21-1147 (D.C. Cir.).

[11] *Fasken Land and Minerals, Ltd. v. NRC*, No. 23-60377 (5th Cir.).

Fasken's petition in abeyance pending resolution of the proceedings in *Texas v. NRC*, discussed below; that request remains under consideration as of the filing of this Brief.

### C. Administrative and judicial proceedings concerning the Interim Storage Partners license

The licensing of the Holtec facility proceeded largely in parallel with the licensing of a similar proposed spent fuel storage facility to be built by Interim Storage Partners in Andrews, Texas (adjacent to the New Mexico border). All Petitioners here sought leave to intervene in the Interim Storage Partners licensing proceeding, but the Commission denied them admission as parties. The NRC issued a license to Interim Storage Partners LLC in July 2021.

The Interim Storage Partners licensing proceeding generated litigation that also proceeded in parallel with the litigation over the Holtec facility. Beginning in 2021, the same petitioners here filed in this Court seven separate petitions for review of the Commission's denial of their petitions to intervene and of the issuance of the license to Interim Storage Partners. The Court denied the petitions for review challenging the Commission's denial of their requests to intervene, and it dismissed, for lack of subject-matter jurisdiction, their challenges to

the license itself. *Don't Waste Michigan v. NRC*, No. 21-1048, 2023 WL 395030 (D.C. Cir. Jan. 25, 2023) (per curiam).

Both Fasken and the State of Texas challenged the issuance of the Interim Storage Partners license in the United States Court of Appeals for the Fifth Circuit, and the State of New Mexico challenged the issuance of the license in the United States Court of Appeals for the Tenth Circuit. In January 2023, the Tenth Circuit dismissed New Mexico's petition for lack of subject-matter jurisdiction, ruling that New Mexico's failure to participate in the adjudicatory proceeding prevented it from attaining party status under the Hobbs Act and precluded judicial review. *Balderas v. NRC*, 59 F.4th 1112 (10th Cir. 2023).

However, in August 2023, the Fifth Circuit granted Texas's and Fasken's petitions for review, (a) disagreeing with the Tenth Circuit's decision in *Balderas* (as well as numerous other courts, including this one) that participation in the adjudicatory proceeding before the agency is a prerequisite to judicial review under the Hobbs Act; and (b) disagreeing with both this Court and the Tenth Circuit in holding that the NRC lacks statutory authority to license away-from-nuclear-reactor storage of spent nuclear fuel. *Texas v. NRC*, 78 F.4th 827 (5th

Cir. 2023). Federal Respondents and Interim Storage Partners filed petitions for en banc review of this decision in October 2023, and the Fifth Circuit has since requested responses from Texas and Fasken.[12]

## SUMMARY OF ARGUMENT

Petitioners' three opening briefs raise numerous challenges to the Commission's orders denying Petitioners intervention in the adjudicatory proceeding. We address each opening brief in a separate Argument section.

1. In Argument Section I, we explain how the Commission acted consistently with the NWPA and thus properly declined to admit Beyond Nuclear's contention.

Beyond Nuclear contends that the Commission violated the NWPA by considering Holtec's application for a license contemplating the storage of spent fuel to which DOE holds title. But the Commission

[12] Fasken asserts that the decision in *Texas* renders this case moot. Fasken Br. 3 n.2. This is plainly incorrect. As an initial matter, a petition for rehearing en banc is pending in *Texas* as of the time of the filing of this Brief and, even if the petition is denied, the possibility of further review by the Supreme Court remains. And as of this writing, the Fifth Circuit has not yet adjudicated Fasken's petition for review challenging the Holtec license, so that license remains in effect.

correctly determined that the license could be exercised in a manner that comports with the NWPA—through the storage only of fuel owned by private parties. Indeed, Holtec acknowledged during the adjudicatory proceeding that, under current law, the storage of spent fuel to which DOE owns title would be illegal and that, absent a change in law, it only intended to store fuel owned by private parties. The possibility that the law could be amended someday to permit storage of DOE-titled fuel did not require dismissal of Holtec's application.

2. In Argument Section II, we explain that the Commission properly denied Fasken's requests to admit a series of contentions that were both untimely and inadmissible. Fasken raised these contentions after the deadline for seeking leave to intervene and after the adjudicatory proceeding had closed (thus requiring reopening of the adjudication). Each contention was premised on variations of Fasken's assertion that Holtec lacked control over subsurface mineral and development rights at or near the proposed facility. The Commission reasonably and correctly found that the information underlying Fasken's arguments was available long before it sought leave after the close of the intervention window to raise each of its contentions.

In particular, Holtec disclosed the information concerning public ownership of subsurface rights in documents that it submitted with the application, so Fasken could have raised its contentions before the intervention deadline. Moreover, Fasken fails even to address the independent reasons the Commission declined to reopen the proceedings, including that Fasken (1) failed to address the reopening standards for one of its contentions; (2) failed to demonstrate that its contentions raised significant safety or environmental issues; and (3) failed to generate a genuine dispute with respect to an issue material to licensing the facility. Fasken has forfeited the opportunity to challenge those independent bases for the Commission's denial of its request to reopen the proceedings. In any event, these failures independently demonstrate that the agency acted reasonably in declining to admit Fasken as an intervenor.

3. In Argument Section III, we explain how the Commission reasonably declined to admit the contentions of Environmental Petitioners. Environmental Petitioners raised a series of contentions that the Commission rejected because, among other things, they misunderstood the role of the Continued Storage Rule, they contained

unsubstantiated assertions concerning the potential for contamination of canisters, and they refused to recognize that the license can be exercised in a manner that comports with the NWPA.

Although Environmental Petitioners also contend that the NRC lacks statutory authority to issue the Holtec license, that argument is foreclosed by this Court's contrary holding in *Bullcreek*. As this Court has already correctly held, the Commission has authority under the AEA to license private parties to store spent fuel away from reactors, and the NWPA left untouched the Commission's preexisting AEA authority. Three AEA provisions, 42 U.S.C. §§ 2073(a), 2093(a), 2111(a), expressly authorize the Commission to issue licenses to possess the radiologically hazardous components of spent nuclear fuel, and Environmental Petitioners fail to explain why these provisions do not authorize issuance of a license here.

## STANDARD OF REVIEW

This Court's review is governed by the Administrative Procedure Act, which permits this Court to set aside an agency order only where it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); 42 U.S.C. § 2239(b); *see also*

*CTIA-Wireless Ass'n v. FCC*, 466 F.3d 105, 112-18 (D.C. Cir. 2006). This deferential standard applies in cases, like this one, involving judicial review of NRC orders resolving contentions filed in an NRC licensing proceeding. *Blue Ridge*, 716 F.3d at 195-96; *Massachusetts v. NRC*, 708 F.3d 63, 77 (1st Cir. 2013). Thus, agency factual conclusions are reviewed for "substantial evidence," a standard more deferential than the "clearly erroneous" standard for appellate review of trial court findings. *See Dickinson v. Zurko*, 527 U.S. 150, 162, 164 (1999). And when NRC's decision involves the application of its adjudicatory rules to Petitioners' contentions, the relevant question is whether the agency's determination constitutes a reasonable application of its rules; if so, the agency's conclusions are entitled to deference. *Blue Ridge*, 716 F.3d at 196.

Where the issues raised involve NEPA compliance, the Court should set aside the agency's substantive findings only where it has committed a clear error of judgment. *Blue Ridge*, 716 F.3d at 195; *see WildEarth Guardians v. Jewell*, 738 F.3d 298, 308 (D.C. Cir. 2013) (courts do not "flyspeck" an agency's environmental analysis looking for minor deficiencies). Indeed, courts "must give deference to agency

judgments as to how best to prepare an EIS." *Indian River Cnty. v. U.S. Dept. of Transp.*, 945 F.3d 515, 533 (D.C. Cir. 2019).

Because the NEPA process "involves an almost endless series of judgment calls," the "line-drawing decisions necessitated" by that process "are vested in the agencies, not the courts." *Duncan's Point Lot Owners Ass'n Inc. v. FERC*, 522 F.3d 371, 376 (D.C. Cir. 2008) (quoting *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 66 (D.C. Cir. 1987)). And when a high level of expertise is required, such as when NRC makes "technical judgments and predictions," this Court must defer to the agency's weighing of the evidence as long as its decisionmaking is informed and rational. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377 (1989); *Blue Ridge*, 716 F.3d at 195 (citing *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1983)).

## ARGUMENT

### I. The Commission acted consistently with the NWPA in considering the license application.

Beyond Nuclear asserted before the Commission that Holtec's license application violated the NWPA and that the NRC should not have considered it at all because it contemplated that Holtec would enter into a contract with DOE in which DOE would transport spent

fuel to the Holtec facility, and Holtec would store that DOE-titled spent fuel. The Commission reasonably and properly rejected this argument for three related reasons.[13]

First, the Commission observed that there was a lawful option by which Holtec could enter into contracts with third parties for the storage of spent fuel—through the storage of spent fuel to which private entities retain title. Commission 2020 Order, 91 N.R.C. at 176 (JA____). *Id.* Indeed, under the NWPA, private entities own title to the spent fuel they generate until it is accepted by DOE for permanent disposal. *See* 42 U.S.C. §§ 10143, 10222(a)(5)(A). And the Commission

[13] In *Don t Waste Michigan*, Beyond Nuclear had raised a similar argument in the Interim Storage Partners administrative proceeding, asserting that because the "central premise" of Holtec's application was the storage of DOE-titled fuel, the application was unlawful. This Court held that the Commission did not err in declining to admit Beyond Nuclear's contention because it "ignor[ed] the possibility of private ownership" and therefore "failed on its face." *Don t Waste Michigan*, 2023 WL 395030 at *2. Unlike *Don t Waste Michigan*, here Beyond Nuclear amended its contention in the adjudicatory proceeding before the agency, asserting that the mere mention of the possibility of storing DOE-titled fuel in the license application documents—even if accompanied by the option of storing fuel owned by private generators—rendered the application unlawful. Licensing Board 2019 Order, 89 N.R.C. at 380-81 (JA____-____). *Don t Waste Michigan* therefore does not control the result here with respect to this issue.

properly concluded both that "the NWPA does not prohibit a nuclear power plant licensee from transferring spent nuclear fuel to another private entity," and that issuance of a license to Holtec would not itself effectuate or authorize an illegal transfer of fuel. Commission 2020 Order, 91 N.R.C. at 176 (JA____). Although Beyond Nuclear asserted that a business model based on the storage of privately owned fuel would be unrealistic, it provides no basis to contest the legality of this proposed conduct or to refute the Commission's conclusion that the agency's role in a licensing proceeding is to assess the safety and legality of the proposed facility, and not to question the wisdom of Holtec's business judgment. *See id.* at 175-76, 193 (JA____-____, ____).

Second, the Commission observed that Holtec had *agreed* during the adjudicatory proceeding that "it would be illegal under [the] NWPA for DOE to take title to the spent nuclear fuel at this time," and that Holtec merely "hope[d]" that Congress would amend the NWPA in the future so that this might be accomplished. *Id.* at 176 (JA_____). In light of Holtec's acknowledgment to the Licensing Board that storage of DOE-titled fuel would contravene the NWPA and that, absent a change in legislation, it was committed to pursuing the license solely by

contracting with private plant owners who own title to their spent fuel, Licensing Board 2019 Order, 89 N.R.C. at 381 (JA____), the Commission was not obligated to presume (as Beyond Nuclear advocated) that the license would be exercised in a manner that is inconsistent with the law. Simply stated, the Commission reasonably credited Holtec's representations, and its determination to do so is entitled to deference.

Nor, third, did the Commission err in joining the Licensing Board in declining to presume that DOE would enter into a contract that violates the NPWA (or that the NRC itself would permit such an arrangement), or in affording future government action the presumption of regularity. *See id.* at 381-82 (JA____-____) (citing *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926)). Indeed, the Commission rationally determined that it expected DOE to follow the law, and were DOE (or the NRC) to take action that allegedly contravened the NWPA, those actions would be subject to judicial review. *See* 42 U.S.C. § 10139(a)(1) (judicial review provision of NWPA); 5 U.S.C. § 704.

Beyond Nuclear challenges (Beyond Nuclear Br. 18-19) the agency's reliance on the presumption of regularity, but none of the authorities it cites involves a situation where, as here, the agency has authorized conduct that *can* be performed in a legal manner and the regulated party acknowledges both that it lacks legal authority to undertake the actions in question and represents that it does not intend to do so. Under these circumstances, there is no evidence, let alone "clear evidence," of "Government impropriety." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004).

And to the extent that Beyond Nuclear asserts that the presumption of regularity does not extend to actions that are "not in accordance with law," Beyond Nuclear Br. 18-19 (quoting *NRDC v. EPA*, 822 F.2d 104, 111 (D.C. Cir. 1987)), it puts the cart before the horse. To be sure, a presumption that agencies act consistently with the law can be rebutted with evidence of illegality. But there is no evidence of illegality here. Given that Holtec sought authorization to conduct lawful spent fuel storage activities and expressly disclaimed any intent, absent a change in law, to store fuel to which DOE owns title, there is no basis to conclude that the company will in fact

undertake action that contravenes the NWPA; that DOE or the NRC would permit the licensee to operate illegally; or, most of all, that the agency should not have entertained the application to begin with.

Nor is Beyond Nuclear correct when it asserts (Br. 19-20) that the existence of a legal means of exercising the license does not "rescue" allegedly offending portion of the application (in which Holtec had articulated an intent to store DOE-titled fuel, *e.g.* Environmental Report Rev. 0 at 1-1 (JA____)). The entire point of a licensing *proceeding* is to ensure that any license is consistent with applicable law. The fact that a provision of the application, as originally applied for, partially or even wholly contemplated conduct that would have been inconsistent with the NWPA is not, in and of itself, a reason to dismiss the application, where the deficiency can be cured. And that is exactly what the licensing *process*, including Holtec's on-the-record representations during the adjudicatory proceeding that it will not (absent a change in governing law) seek to store fuel to which DOE owns title and the Commission's conclusion that the license can be exercised legally, has accomplished.

Finally, Beyond Nuclear asserts that the agency has violated the separation of powers doctrine by prognosticating about future legislation (Beyond Nuclear Br. 20-22). This argument is unpersuasive. Unlike *In re Aiken County*, 725 F.3d 255 (D.C. Cir. 2013), the NRC did not make any determination in this case based upon an assessment or a "hope" about legislation that might be enacted in the future—the Commission dismissed Beyond Nuclear's contention challenging Holtec's application based on the Commission's determination that a license could be validly issued based on the current state of the law. Perhaps Congress will one day amend the NWPA so as to permit Holtec to store fuel to which DOE owns title. But that is a matter for Congress to decide, and it has no bearing on the current status of the Holtec license.

Nor is Beyond Nuclear correct when it asserts that consideration of Holtec's application somehow gives Holtec an unfair advantage going forward. Beyond Nuclear Br. 21-22. The Commission has done nothing to transfer property rights to Holtec, as Beyond Nuclear asserts; it merely determined that there is a valid path under existing law for Holtec to exercise a license to store privately held spent fuel. At some

point, Congress might authorize the storage of fuel to which DOE holds title. Or it might not. But in the meantime, the Commission reasonably determined that the license sought could be exercised in a manner that was consistent with existing law, and Beyond Nuclear's arguments do not provide a reason for the agency not to have entertained the license application.

## II. The Commission reasonably determined that the contentions that Fasken sought to admit were neither timely raised nor admissible.

The Licensing Board issued a comprehensive decision on all the timely filed requests to intervene in May 2019, including those based on the motion to dismiss that Beyond Nuclear and Fasken filed. Licensing Board 2019 Order, 89 N.R.C. at 353 (JA____). Because no putative intervenor was admitted as a party, the Licensing Board terminated the adjudicatory proceeding. *Id.* at 463 (JA____).

In August 2019, Fasken sought leave to submit a new contention (and ultimately submitted three such contentions). Because these contentions all were raised after the closure of the adjudication, Fasken was required to show not only that its contentions presented a genuine dispute concerning the application, *see* 10 C.F.R. § 2.309(f)(1)(vi), but

also that the contentions satisfied the heightened requirements necessary to reopen an otherwise closed adjudicatory proceeding, *see* 10 C.F.R. § 2.326(a) (requiring contentions submitted after record has closed to be timely (or to present an "exceptionally grave" issue), to raise a significant safety or environmental issue, and to be accompanied by a demonstration that a materially different result would have been likely had the newly proffered evidence been considered initially). The Commission denied Fasken's request, generally concluding that: (1) the information supporting Fasken's contentions was known to and available to Fasken prior to the deadline for submitting contentions; (2) Fasken failed to timely raise its arguments; and (3) in any event, the arguments did not raise a genuine dispute concerning Holtec's application.

Fasken does not meaningfully confront the primary reasons why the Commission denied admission of its contentions. In fact, and as exemplified by the conclusion of its Brief (in which it repeats the request it made to the agency that its "[m]otions to [r]eopen should be granted and [its] [c]ontentions submitted for further consideration," Fasken Br. 22), Fasken merely rehashes the arguments that the

Commission rejected, and it does not identify any error in the Commission's thorough explanations for declining to admit its contentions. Its Petition should therefore be denied.

### A. The Commission reasonably determined that Fasken's assertions were not based on new information and that its contentions were in any event inadmissible.

Fasken raises a series of arguments challenging the Commission's decisions not to admit Contention 2, either in its original form or as amended, or Contention 3. In this Part II.A., we provide context for Fasken's arguments by describing the contentions and the Commission's thorough resolution of them. Then in Part II.B., we explain why Fasken's arguments lack merit.

In Contention 2, Fasken asserted that Holtec's application failed to describe the control of subsurface mineral rights and oil, gas, and mineral extraction operations beneath and in the vicinity of the proposed facility, precluding a proper NEPA analysis and satisfaction of the NRC's siting criteria. Licensing Board June 2020 Order, 91 N.R.C. at 254 (JA____). Fasken submitted an Amended Contention 2 after the publication of the Draft EIS, asserting that statements in that document "continue to misrepresent" the nature of ownership of

subsurface mineral rights and the status of petroleum operations and geologic characteristics in the region. Licensing Board September 2020 Order, 92 N.R.C. at 243 (JA____).

In Contention 3, also submitted after the adjudication had closed and after the publication of the Draft EIS, and in response to information conveyed in the comments to the Draft EIS, Fasken asserted that the project would interfere with mineral development, which could not proceed safely alongside the proposed facility, and that the Draft EIS and documents submitted as part of Holtec's application were based on "misleading and speculative information and assertions and glaring material omissions as to land use, land rights and land restrictions at, under and around the proposed site." Commission April 2021 Order, 93 N.R.C. at 229 (JA____).

With respect to Contention 2 in its original form, the Licensing Board found that the contention was both untimely and did not raise "exceptionally grave" environmental and safety issues warranting a departure from its timeliness rules concerning reopening. Licensing Board June 2020 Order, 91 N.R.C. at 254-56 (JA____-____); *see also* 10 C.F.R. § 2.326(a)(1) (requiring a timely motion to reopen the record

but allowing discretion for an "exceptionally grave" issue to be considered even if untimely). Fasken did not appeal the Licensing Board's dismissal of Contention 2, instead choosing to amend it after the Draft EIS was published.

The Licensing Board reached the same conclusion concerning the timeliness of Amended Contention 2. Licensing Board September 2020 Order, 92 N.R.C. at 240-53. (A____-____). The Licensing Board determined that inasmuch as Amended Contention 2 challenged the description of ownership and control of mineral rights, it was not based on new information that would excuse its untimeliness because it (1) challenged documents contained in Holtec's application, as distinct from documents that became available after the deadline for raising contentions and after closure of the adjudicatory proceeding, *id.* at 243 (JA____); and (2) contained information concerning ownership of mineral rights and the nature of ongoing oil and gas activities about which Fasken had been aware for several years, *id.* at 245-47 (JA____-____).

On appeal, the Commission affirmed the Licensing Board's September 2020 Order, noting that Fasken had merely pointed to its

filings before the Board but had not identified any error in the Board's reasoning. Commission April 2021 Order, 93 N.R.C. at 225 (JA____). The Commission likewise concluded that Fasken had not explained how the facility would have an exceptionally grave impact on economics, security, or employment, and that the Licensing Board had not abused its discretion in declining to waive the timeliness requirements. *Id.* at 225-26 (JA____); *see* 10 C.F.R. § 2.326(a). And the Commission further found that, beyond Fasken's failure to comply with the agency's timeliness requirements, its contention did not present a genuine dispute material to issuance of the license. *Id.* at 226-28 (JA____-____) (noting, among other things, that the Draft EIS had acknowledged that the State of New Mexico owned mineral rights beneath and surrounding the site, and that continued mineral development was possible).

The Commission reached similar conclusions with respect to Contention 3 (which it considered without referring the matter to the Licensing Board). First, it determined that Fasken's assertions about mineral rights and mineral development were not based on previously unavailable information. Fasken claimed to have discovered the

information through comments on the Draft EIS and responses Holtec provided to requests for additional information issued by the NRC staff. *Id.* at 230 (JA____). But the Commission noted that the Draft EIS acknowledged New Mexico's ownership interests in mineral rights, as had the initial Environmental Report submitted by Holtec in March 2017. *Id.* (JA____). And, with respect to oil and gas deposits, the Commission observed that Holtec's Environmental Report had stated that "[f]urther oil and gas development [was] not allowed by the New Mexico Oil Conservation Division due to the presence of potash ore on the [s]ite," which Holtec subsequently clarified to indicate that drilling through potash deposits would not be permissible. *Id.* at 230-31 (JA____-____).

The Commission stressed that, under NRC's rules, the "time for Fasken to dispute these specific assertions" was when those assertions were first made, and that Fasken was responsible for understanding background principles of New Mexico property law that governed the rights of subsurface-estate leaseholders. *Id.* at 231-32 (JA____-____). And the Commission ruled that Fasken had not presented a significant

environmental issue or a hazardous condition justifying waiver of its timeliness rules. *Id.* at 233-34 (JA____).

In sum, the Commission and Licensing Board properly enforced the agency's timeliness rules when they declined to admit Fasken's Contention 2, Amended Contention 2, and Contention 3. And, with respect to the issues that Fasken appealed, the Commission reasonably determined that, even if the contentions had been timely raised, they would still not have been admissible.

### B. Fasken presents no arguments undermining the Commission's determination that its contentions were either untimely, not admissible, or both.

Fasken makes a series of arguments suggesting that the agency acted arbitrarily and capriciously in declining to admit its contentions. Fasken Br. 12-22. None of these arguments are directly responsive to the rationales that the Commission provided for upholding the denial of Fasken's intervention request, and, in any event, they are incorrect.

First, Fasken asserts that the "piecemeal" disclosure of information relating to mineral rights created a "perpetually evolving target . . . that prevented timely filed contentions." Fasken Br. 13. However, Fasken makes no effort to demonstrate how the information it

claims to have been inconsistently conveyed relates to its contentions or to the agency's analysis of the safety and environmental issues presented by the license application.

Fasken next challenges the dismissal, on timeliness grounds, of Contention 2 in its original form. Fasken Br. 14-16. The "Basis for Contention" 2, as Fasken presented it to the agency, was that Holtec "falsely indicat[ed] that it had control over mineral rights below the site." JA____ (quotation marks omitted). Fasken asserts before the Court that the New Mexico Land Commissioner's June 2019 letter stating that neither the State nor oil and gas lessees had agreed to limit mineral development or drilling activities contradicted previous statements in Holtec's application and justified the filing of a late contention. Fasken Br. 15. Its argument fails for several reasons.

As a threshold matter, Fasken fails even to mention, let alone to provide reason for the Court to excuse, two procedural defaults before the agency with respect to Contention 2 that foreclose consideration of its argument here. First, the Licensing Board found that Fasken had failed to address the relevant criteria in NRC's rules for reopening a closed record, and that this failure was itself sufficient ground to deny

admission of its contention. Licensing Board June 2020 Order, 91 N.R.C. at 255 (JA____) (noting that Fasken had created the "extraordinary situation of a petitioner who not only failed to move to reopen, as required by the NRC's regulations, but has actually refused to do so"); *see* 10 C.F.R. § 2.326(a). The Licensing Board's conclusion constitutes a reasonable application of the agency's rules and warrants deference. *Blue Ridge*, 716 F.3d at 196.

Second, because the Licensing Board declined to admit Contention 2 in its June 2020 Order, and because Fasken did not appeal that order to the Commission, Fasken has forfeited its right to seek judicial review of this issue. In *Vermont Department of Public Service v. NRC*, 684 F.3d 149 (D.C. Cir. 2012), this Court faced a similar circumstance—the petitioners unsuccessfully attempted to raise an issue before the Licensing Board and declined to seek review of that determination by (and otherwise to raise the issue before) the Commission, yet they sought review of that issue under the Hobbs Act. *Id.* at 154-55. The Court deemed the issue forfeited, concluding that the "petitioners here were required under agency regulations to afford the full Commission an opportunity to pass on the [ ] issue before seeking judicial review."

*Id.* at 157-58; *see also Environmentel, LLC v. FCC*, 661 F.3d 80, 84 (D.C. Cir. 2011) (holding that petitioner failed to exhaust remedies with respect to argument that it raised before agency bureau but failed to pursue before full Federal Communications Commission); 10 C.F.R. § 2.1212 (requiring "a party to an NRC proceeding [to] file a petition for Commission review before seeking judicial review of an agency action").[14]

Moreover, Fasken offers no rebuttal to the underlying reasons identified by the Licensing Board as to why the information contained in the June 2019 letter was available long before Fasken moved to file Contention 2. The Licensing Board properly recognized that the thrust of Contention 2 was Fasken's assertion that Holtec lacked "control" over

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[14] The fact that Petitioners declined to pursue this argument before the Commission (while asserting others) distinguishes this case from *Darby v. Cisneros*, 509 U.S. 137 (1993). *Darby* presented the question whether a party challenging agency action and seeking judicial review could forego altogether its right to appeal a determination to the head of the agency. Here, Fasken *did* file an appeal to the Commission of the Licensing Board's other decisions declining to admit its contentions. It simply chose not to include its arguments concerning Contention 2 as originally submitted—which, by that time had been rendered moot by issuance of a Draft EIS and Fasken's filing of an amended contention challenging that document—in its appeal.

mineral rights. Licensing Board June 2020 Order, 91 N.R.C. at 255-56 (JA____-____). The Licensing Board explained that Holtec's Environmental Report (filed with its application) had specifically acknowledged that subsurface mineral rights were owned by the State of New Mexico, and that Holtec had acknowledged in responses to requests for supplemental information from the agency, months before Fasken filed its motion for leave to reopen, that subsurface mineral rights were held in trust by the New Mexico Commissioner of State Lands. Licensing Board June 2020 Order, 91 N.R.C. at 255-56 (JA____-____). Simply stated, the Licensing Board reasonably determined that Fasken's contention challenging Holtec's assertions about its control of mineral rights could have been raised prior to the deadline for filing contentions (or, at a minimum, long before it was actually filed), and Fasken provides no evidence to the contrary.

The same is true of Fasken's arguments (Fasken Br. 17-20) pertaining to its Amended Contention 2 (the denial of which Fasken did appeal to the Commission). In Amended Contention 2, Fasken again asserted that "Holtec's application fails to adequately, accurately, completely and consistently describe the control of subsurface mineral

rights and oil and gas and mineral extraction operations beneath and in the vicinity of the proposed Holtec Facility site." Licensing Board September 2020 Order, 92 N.R.C. at 240 (JA_____).

The Licensing Board denied admission of this contention because the allegedly new information in the Draft EIS to which Fasken referred did not materially differ from that which was previously available to it, such that the contention could have been raised earlier. *See id.* at 246 (JA____). The Board noted, specifically, that Fasken had failed to identify any difference between the impacts of extraction of oil and gas at depths greater than 5,000 feet, as referenced in Holtec's Environmental Report, and extraction at greater below 3,050 feet, as described in the Draft EIS. *Id.* (JA____). And it rejected Fasken's assertion that the Draft EIS "for the very first time" referred to an active oil and gas well near the site, referencing a portion of the safety evaluation contained in Holtec's license application that discussed the existence of the same well. *Id.* at 247 (JA____).

On appeal, the Commission ruled that that Fasken failed to explain how the Licensing Board erred in addressing its arguments or why the factual basis for Amended Contention 2 could not have been

raised earlier. Commission April 2021 Order, 93 N.R.C. at 225 (JA____). Fasken repeats that error here, failing to identify any flaw in the Commission's reasoning or even respond to the evidence that the Licensing Board and the Commission identified reflecting the availability of information before the deadline to submit contentions. And while Fasken repeats its assertion (Br. 18) that the Draft EIS indicated for the first time that oil and gas production extraction would occur below the Salado Formation at depths of only 3,050 feet, it cites to no record evidence to contest the Licensing Board's determination that the delta between extraction activity at 3,050 feet (the depth identified in the Draft EIS) and 5,000 feet (the depth identified in Holtec's Environmental Report) does not materially affect the agency's environmental or safety analyses.

Moreover, Fasken fails to address the Licensing Board's determination, affirmed by the Commission on appeal, that Amended Contention 2 would not have been admissible even if it had been timely raised. Licensing Board September 2020 Order, 92 N.R.C. at 249-53 (JA____-____); Commission April 2021 Order, 93 N.R.C. at 227 (JA____). Indeed, the Commission explained that Fasken had failed to identify a

genuine dispute of material fact in Amended Contention 2 because, by the time the Draft EIS had been prepared, it had been fully disclosed that continued mineral development near and even under the site was possible. Commission April 2021 Order, 93 N.R.C. at 227 (JA____). And the Commission concluded that Fasken failed to identify any part of the Draft EIS that relied on a land-use restriction to inaccurately assess the impacts of development activities. *Id.* (JA____). Fasken's failure to address these aspects of the Commission's ruling is an independent reason to reject its arguments about Amended Contention 2.

Fasken's final argument (Fasken Br. 21-22) relates to Contention 3, which the Commission rejected in its April 2021 Order and which also raises issues pertaining to mineral rights and development. Again, however, Fasken entirely fails to mention, let alone to demonstrate error in, the Commission's determination that the contention was both untimely and inadmissible. Commission April 2021 Order, 93 N.R.C. at 229-35 (JA____-____).

Rather than address the Commission's explanation for denying admission of its contention, Fasken asserts that it submitted new

information in support of Contention 3 about the legal interests of third parties in subsurface mineral estates. Fasken Br. 21. Fasken claims that information only came to light in October 2020 as a result of public comments on the Draft EIS and in Holtec's responses to requests for information from the NRC. *Id.*

But as the Commission's explanation shows, the information Fasken relied on to support Contention 3 was simply a variant of the same type of information that was known (or knowable) to the public long before Fasken belatedly sought to raise it. Commission April 2021 Order, 93 N.R.C. at 230-31 (JA____-____). Fasken does not address the Commission's explanation that the basis for Contention 3 was ascertainable long before October 2020 through (1) statements in the Environmental Report acknowledging New Mexico's ownership of mineral rights, 93 N.R.C. at 230 (JA_____); (2) the characterization of the land as lying within New Mexico's Designated Potash Area (which would preclude drilling through potash deposits to reach oil and gas deposits), *id.* at 231 (JA____); or (3) background principles of New Mexico oil and gas law, *id.* (JA____). And Fasken offers no basis to question the Commission's conclusion that the comments Fasken relied

on mischaracterized the Draft EIS and, were in any event, challenges that Fasken could have raised earlier. *Id.* at 232 (JA____).

In sum, the Commission reasonably determined that Fasken's contentions were untimely, inadmissible, or both; and its conclusions, which Fasken does not meaningfully address in its Brief, are both correct and, at a minimum, entitled to deference as a reasonable application of its adjudicatory procedures. Fasken's Petition should be denied.

## III. The Commission reasonably declined to admit Environmental Petitioners' contentions.

### A. Environmental Petitioners forfeited their challenge to NRC's statutory authority, and in any event, this Court has correct, binding precedent that NRC has statutory authority to issue this kind of license.

The AEA's plain text authorizes the Commission to issue licenses for temporary storage of spent fuel away from reactor sites. In *Bullcreek v. NRC*, this Court held that the Commission has this authority and that the NWPA did not repeal it. 359 F.3d 536, 538-543 (D.C. Cir. 2004). Seeking to sidestep this Court's precedent, Environmental Petitioners rely on the Fifth Circuit's recent decision in *Texas v. NRC*, 78 F.4th 827 (5th Cir. 2023), which created a circuit split

with *Bullcreek* and with the Tenth Circuit's later decision in *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1232 (10th Cir. 2004). Environmental Petitioners Br. 7-10. Environmental Petitioners' challenge to the Commission's statutory authority fails for several independent reasons.

First, Environmental Petitioners failed to raise their statutory authority argument before the Commission. To be sure, Sierra Club asserted in a contention that the NRC lacked statutory authority to issue a license for an away-from-reactor storage facility. The Licensing Board dismissed that contention, concluding that (1) NRC regulations expressly allow licensing of such facilities and Sierra Club could not challenge that regulation in a licensing proceeding absent a waiver under 10 C.F.R. § 2.335 (which Sierra Club had not sought); and (2) this Court has held the Commission has authority under the AEA to license privately owned facilities like the Holtec facility and the NWPA did not repeal or supersede that authority. *See* Licensing Board 2019 Order, 89 N.R.C. 353, 383 (JA____). Despite raising numerous other arguments before the Commission, Environmental Petitioners did not appeal the Licensing Board's ruling on this issue to the Commission and therefore

forfeited their right to assert it here. *See Vermont Dep't of Pub. Serv.*, 684 F.3d at 157; *Environmentel,* 661 F.3d at 83-84.

Second, this Court has rejected the precise argument that Environmental Petitioners raise here. In *Bullcreek*, the Court held that the NRC had authority under the AEA to issue licenses for the away-from-reactor temporary storage of spent fuel and that the NWPA did not revoke this authority. 359 F.3d at 538-43. The Court recognized that the AEA gave the Commission authority over spent fuel and that the Commission had properly exercised that authority in 1980, when it issued regulations covering licensing of temporary, away-from-reactor storage of spent fuel. *Id*. at 538-40.

The Court also surveyed the developments that led Congress to enact the NWPA in 1982 and concluded that "there is no basis to conclude that in enacting the NWPA Congress implicitly repealed or superseded the NRC's authority." *Id*. at 543. When Congress passed the NWPA, it was aware of the Commission's 1980 regulations and, as part of a legislative compromise permitting public and private storage programs to exist in parallel, Congress left the "pre-existing regulatory scheme as it found it." *Id*. Thus, this Court held in *Bullcreek* that the

NWPA did *not* disturb the Commission's preexisting AEA authority. *Id.* at 542-43.

Facing similar issues later that same year, the Tenth Circuit found this Court's reasoning in *Bullcreek* persuasive and declined to revisit the issues. *See Skull Valley*, 376 F.3d at 1232. Thus, the Tenth Circuit agreed with this Court's holding that the AEA authorized the Commission to license privately-owned, away-from-reactor, temporary storage facilities for spent nuclear fuel and the NWPA did not repeal or supersede the Commission's AEA authority. *Id.*

Environmental Petitioners' suggestion (echoed by Beyond Nuclear) that the Court in *Bullcreek* simply assumed the existence of this authority is refuted by the Court's reasoning. The Court explained in *Bullcreek* that:

- Congress was fully aware in 1982, when it passed the NWPA, that the NRC had promulgated 10 C.F.R. Part 72 in 1980 and that Part 72 allowed for both onsite and offsite storage of spent fuel, *id.* at 543 ("Utah ignores that private away-from-reactor storage was already regulated by the NRC under the AEA prior to the NWPA.");

- Congress intended for a licensing program for private offsite storage pursuant to the AEA to exist in parallel with any program conducted by DOE pursuant to the NWPA, *id.* (in enacting 42 U.S.C. § 10155(h), which stated that the NWPA did not itself authorize or encourage private storage facilities, "Congress limited the scope of the NWPA, but left untouched prior and subsequent statutes that authorized such facilities," *id.* at 542); and
- Congress declined to disturb the Commission's authority to issue licenses for away-from-reactor storage as part of the compromise that led to passage of the NWPA, *id.* at 543 (compromise "ensured that DOE would not take over private facilities to fulfill its NWPA obligations, and clarified that private generators were not obligated under the NWPA to exhaust all away-from-reactor options prior to receiving federal assistance").

Simply stated, this Court's recognition of the Commission's authority under the AEA to license away-from-reactor temporary storage facilities was not "assumed," as Environmental Petitioners (and Beyond Nuclear) contend; it was an essential component of the holding in *Bullcreek* that could only be overturned by this Court sitting en banc.

If it reaches the issue, this Court should follow *Bullcreek* and uphold NRC's authority under the AEA to grant the Holtec license.

### B. Contrary to the Fifth Circuit's recent decision, the AEA authorizes the NRC to license temporary storage of spent nuclear fuel away from reactor sites.

Though the NRC's authority is not an open question here, both this Court in *Bullcreek* and the Tenth Circuit in *Skull Valley* correctly concluded that the AEA grants the NRC authority to license temporary storage of spent nuclear fuel away from reactor sites. Environmental Petitioners misplace their reliance on the Fifth Circuit's recent *Texas* decision, which rests on a flawed reading of the AEA's and the NWPA's text.

The AEA provides for licenses to possess three types of material—"special nuclear material," 42 U.S.C. § 2073(a), "source material," *id.* § 2093(a), and "byproduct material," *id.* § 2111(a); *see also id.* §§ 2014(aa), (z), (e) (defining the terms). Spent nuclear fuel contains each of these materials. Tying these three provisions together, the AEA authorizes the Commission to issue regulations governing the "possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary or desirable

. . . to protect health or to minimize danger to life or property." 42 U.S.C. § 2201(b).

The Commission has for decades consistently exercised its materials licensing authority to ensure the safe, temporary storage of spent nuclear fuel. In 1980, recognizing the need for more storage, the Commission relied on all four statutory provisions identified above to issue the Part 72 regulations providing a definitive framework for temporary storage of spent nuclear fuel, both at nuclear reactors and offsite. *See* Licensing Requirements for the Storage of Spent Fuel in an Independent Spent Fuel Storage Installation, 45 Fed. Reg. 74,693, 74,694 (Nov. 12, 1980) (recognizing the demand for storage space in light of the cessation of programs for SNF reprocessing).

Environmental Petitioners primarily rely on the Fifth Circuit's recent decision in *Texas v. NRC*. In *Texas*, the Fifth Circuit held that the AEA permits the Commission to issue licenses only for specific enumerated purposes, including for "certain types of research and development." 78 F.4th at 840. But that cramped reading of the AEA's plain text is incorrect.

The AEA authorizes the Commission to license special nuclear material "for such other uses as the Commission determines to be appropriate to carry out the purposes" of the AEA. 42 U.S.C. § 2073(a)(4). A central purpose of the AEA is maximizing the generation of electricity from nuclear material. *See id.* § 2013(d). The Commission acted consistently with that purpose by promulgating the Part 72 regulations covering licensing of temporary storage of spent fuel both at reactors and away from reactors.

Similarly, the AEA authorizes the Commission to issue licenses to any qualified applicant to possess source material "for any other use approved by the Commission as an aid to science or industry." 42 U.S.C. § 2093(a)(4). Allowing nuclear reactor operators to store spent fuel, whether at or away from reactor sites, aids the electric-generation industry.

*Texas* dismissed both those provisions as catchall provisions limited to the uses listed elsewhere in their respective statutory sections. 78 F.4th at 840. But Congress added Section 2073(a)(4) to the AEA in 1958 to expand the purposes for which special nuclear material licenses could be issued beyond those set forth in Section 2073(a)(1)-(3).

Pub. L. No. 85-681, § 1, 72 Stat. 632 (1958). *Texas* also overlooked the statutory context that should inform interpretation of Sections 2073(a)(4) and 2093(a)(4), including other provisions that authorize licenses to use special nuclear material and source material under a license to operate a nuclear reactor. 42 U.S.C. §§ 2073(a)(3), 2093(a)(3).

The NRC's authority also extends to licensing possession of the byproduct materials contained in spent fuel. 42 U.S.C. § 2111(a). But *Texas* mistakenly focused on Section 2111(b), which concerns disposal of certain radioactive wastes, not temporary storage of the nuclear materials covered by the license here. 78 F.4th at 841. Thus, *Texas*'s comparison of radium-226 with plutonium is misguided. *Id.* Radium-226 is waste that may be disposed of under Section 2111(b). Because plutonium is special nuclear material, 42 U.S.C. § 2014(aa), the Commission has authority to license its possession and temporary storage.

*Texas* compounded its interpretive errors when it turned to the NWPA. To begin with, the court failed to address the NRC's Part 72 regulations or the NRC's longstanding interpretation of the NWPA, which this Court credited in *Bullcreek*. *Compare Texas*, 78 F.4th at

841-42 *with Bullcreek*, 359 F.3d at 538-43; *see also In the Matter of Private Fuel Storage, L.L.C.*, 56 N.R.C. 390 (2002). *Texas* also departed from this Court's holding in *Bullcreek* that Congress left the "pre-existing regulatory scheme as it found it," and that the NWPA did not disturb the NRC's preexisting AEA authority. 359 F.3d at 542-43.

*Texas's* brief discussion of the major questions doctrine—which the court addressed in the alternative, after holding that the AEA and NWPA unambiguously preclude the licensure of an away-from-reactor storage facility, 78 F.4th at 844—is also flawed.[15] In *West Virginia v. EPA*, the Supreme Court recognized a small category of "extraordinary cases in which the history *and* the breadth of the authority that the agency has asserted, *and* the economic *and* political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority." 142 S. Ct. 2587, 2608 (2022) (quotation marks and alterations omitted; emphasis added). *Texas* touched on just

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[15] Environmental Petitioners did not raise the major questions doctrine in their initial brief, so in addition to forfeiting the issue before the Commission, they have forfeited the issue before this Court. *See, e.g.*, *New York Rehabilitation Care Mgmt. v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007).

one of these elements in a paragraph suggesting that "*disposal* of nuclear waste is an issue of great 'economic and political significance.'" 78 F.4th at 844 (emphasis added). That discussion conflated temporary *storage* with disposal. And unlike situations where the Supreme Court and other courts have applied the major questions doctrine, the safe, temporary storage of spent nuclear fuel lies at the core of NRC's expertise and statutory role.

Because the Fifth Circuit's holding on NRC's authority is erroneous and consciously created a circuit split with decisions of this Court and the Tenth Circuit, Federal Respondents have sought rehearing en banc in that case. Federal Respondents also have sought rehearing en banc on *Texas*' holding that the Hobbs Act's jurisdictional requirement that a petitioner be a party to NRC's proceedings is subject to a judge-made *ultra vires* exception. At this time, the rehearing petition is currently pending before the Fifth Circuit.

In sum, Environmental Petitioners forfeited their statutory authority argument by failing to exhaust it before the Commission, and this Court already decided the issue in *Bullcreek*. But even if this were not true, the AEA's plain text gives the NRC authority to issue the

Holtec license. For all these reasons, Environmental Petitioners' argument should be rejected.

### C. The Commission properly declined to dismiss the license application when it reasonably concluded that Holtec's license application was accurate.

In a variant of Beyond Nuclear's NWPA-based argument, Environmental Petitioners challenge (Br. 10-16) the Commission's decision not to deny the license application because, in their view, Holtec misrepresented its plans to take title to fuel owned by nuclear power plants and only intended to store fuel to which DOE holds title.

The Commission's disposition of this issue was entirely reasonable. The Commission agreed with the Licensing Board's conclusion that, even assuming 42 U.S.C. § 2236 empowers the agency to deny an application based on a willfully and materially false statement,[16] the statements contained in Holtec's license application were accurate. Commission 2020 Order, 91 N.R.C. at 191-93 (JA____-

[16] Section 2236 provides that the agency may "revoke" an existing license. On its face, it does not require the agency to deny a license application if it identifies a willful material misrepresentation.

____); *see also* Licensing Board 2019 Order, 89 N.R.C. at 421 & n.446 (JA___).

This conclusion was amply supported by the record. As the Licensing Board explained, Holtec acted transparently during the licensing process by amending its application to include the possibility of storing privately held fuel and readily *acknowledging* that it was hoping for a change in the law that would permit it to contract with DOE. Licensing Board 2019 Order, 89 N.R.C. at 421-22, 452 (JA____,____). Further, the Commission properly observed that the issue in the licensing proceeding was whether the license applicant could operate the facility safely, and not whether it would operate the facility if it could only rely on private customers or its plans to lobby Congress for a change in the law. Commission 2020 Order, 91 N.R.C. at 193 (JA____). Environmental Petitioners demonstrate no error in the Commission's conclusion that Holtec's statements in its application were not false, and certainly not materially so.

Environmental Petitioners rely on a "Reprising 2018" newsletter published by Holtec (JA____), in which Holtec suggested that "deployment of the facility will ultimately depend on the Department of

Energy and the U.S. Congress," but that isolated and ambiguous sentence does not change the Commission's conclusion. Beyond being vague, this innocuous statement in a marketing email in no way suggests that Holtec's "true" intention was to await Congressional action so that it could exclusively store fuel to which DOE owns title; the newsletter states no such thing.

Moreover, to the extent that it is appropriate to read a motive into Holtec's statement, the newsletter just as plausibly leads to the opposite conclusion as the one that Environmental Petitioners suggest—i.e., it suggests that a private storage facility will not be necessary if Congress, and DOE working at Congress's direction, provide an alternate site either in the form of a repository or a federally owned interim storage site. And, as the Commission correctly noted, the issue in the licensing proceeding was whether the facility could be operated safely, and not whether, in the exercise of its business judgment, Holtec would decline to operate the facility if it only could store privately owned fuel. Commission 2020 Order, 91 N.R.C. at 193 (JA____).

At a minimum, the statement does not establish a willful material misrepresentation, let alone one that would require the NRC to deny

the license application. Again, Holtec *acknowledged* during the licensing proceeding that its original plan was to store fuel to which DOE owns title and, confronted with its current inability to so, adjusted its application accordingly and disclaimed any intent to act inconsistently with applicable law. The NRC reasonably declined to penalize Holtec for altering its application during the licensing process, and Petitioners cite to no authority requiring it to have done so.

### D. The Commission reasonably declined to admit contentions related to seismology and geological and hydrological impacts.

Environmental Petitioners challenge the Commission's disposition of Contentions 11, 15, 16, 17, and 19, in which they made various challenges to the environmental analysis of seismology and the facility's geological and hydrological impacts. Environmental Petitioners Br. 16-22. As to each contention, addressed below in turn, the Licensing Board carefully examined the issues raised and then made a reasonable conclusion that is supported by the record, and the Commission affirmed each of the Licensing Board's conclusions. These issues required the agency's technical expertise and warrant deference to the Commission's judgment. *See Blue Ridge*, 716 F.3d at 195. Moreover,

inasmuch as Environmental Petitioners' arguments challenge assertions made by Holtec in its license application, it was their burden to identify specific facts sufficient to generate a genuine dispute. *See Beyond Nuclear*, 704 F.3d at 21-22 (agency acted reasonably in declining to admit contention, and did not improperly decide facts at contention admissibility stage, where petitioner failed to supply facts contesting applicant's conclusion in environmental report).

In Contention 11, Environmental Petitioners challenged the discussion in the license application of earthquake risks to the facility, asserting that the discussion was out of date and inadequately addressed the effects of oil and gas recovery operations on seismicity. The Commission declined to admit the contention, agreeing with the Licensing Board that the data used from the U.S. Geological Survey was the latest provided before the application was submitted in 2017, and that the application discussed increased seismicity from the oil and gas industry. Commission 2020 Order, 91 N.R.C. at 185-87 & n.112 (JA____-____).

Environmental Petitioners challenge these conclusions, asserting, first, that a study prepared by Stanford University in 2018 undermined

the seismicity data in the application and, second, that the Commission erred in considering their argument on appeal concerning the effects of oil and gas recovery on seismicity to be new (and therefore inadmissible) and in any event unsupported. Environmental Petitioners Br. 17.

These arguments are unpersuasive. Though Environmental Petitions assert that the seismic analysis in the Environmental Report was out of date because it failed to account for the Stanford study, they cite no evidence suggesting that the Commission erred in finding that the Stanford study was, in fact, fully consistent with the analysis that Holtec had provided. Commission 2020 Order, 91 N.R.C. at 187 (JA____). And, with respect to Environmental Petitioners' second argument, the statement from their contention that Petitioners rely on in their Brief—alleging that the application "is contradicted by the Stanford University study"—has nothing to do with the new question raised on appeal to the Commission—whether fracking activities were inducing new geologic faults. Moreover, the Commission correctly observed that Environmental Petitioners did not point to any statement in the Stanford study demonstrating that new faults were getting closer

to the Holtec site as a consequence of oil and gas activities, *id.* (JA____), and they likewise fail do so in their Brief here. The Commission therefore did not err in declining to admit the contention. *See Beyond Nuclear*, 704 F.3d at 22.

Environmental Petitioners also take issue with the Commission's dismissal of four Contentions—15, 16, 17, and 19—related to groundwater impacts. In Contention 15, Environmental Petitioners challenged a statement in Holtec's Environmental Report suggesting that "shallow alluvium is likely non-water bearing at the Site." Licensing Board June 2020 Order, 91 N.R.C. at 243 (JA____). The Commission upheld the Licensing Board's determination not to admit the contention, ruling that Environmental Petitioners were incorrect in their assertion that the conclusion was based only on the data from a single monitoring well, and that Holtec had provided a 2017 Geotechnical Data Report reflecting data from five such monitoring wells. Commission February 2021 Order, 93 N.R.C. at 122 (JA___).

Environmental Petitioners argue that the Commission erred in declining to credit Sierra Club's expert's claim that only one of the wells was relevant because it was the only one "at the interface of the

alluvium and the Dockum formation." Environmental Petitioners Br. 19. But as with their claims related to seismic impacts, these arguments fail to show how the Commission erred in affirming the Licensing Board's rejection of the contention.

Indeed, the Licensing Board specifically addressed the alleged infirmity identified by Environmental Petitioners' expert, determining that the expert had overlooked the work plan in the Geotechnical Data Report, which made clear that the wells were adjusted based on the conditions encountered, the personnel performing the study were regularly monitoring for groundwater, and that the boring logs reflected the absence of groundwater throughout the shallow alluvium. Licensing Board June 2020 Order, 91 N.R.C. at 243-44 (JA____-____). Environmental Petitioners' naked assertions that the Licensing Board and Commission should have exercised their technical judgment differently, unaccompanied by any explanation as to why the specific reasons that the Board and Commission determined that Environmental Petitioners had failed to identify a genuine dispute for a hearing, do not demonstrate error. *See Blue Ridge*, 716 F.3d at 198 (upholding Commission's decision not to admit contention where

petitioners failed to refer to particularized information that would support their assertions and that would reflect the existence of a genuine dispute to be resolved by hearing); *Beyond Nuclear*, 704 F.3d at 22 (recognizing petitioner's lack of evidentiary support for claim that genuine dispute existed).

In Contention 16, Environmental Petitioners asserted that Holtec's Environmental Report did not indicate whether there was brine in groundwater beneath the site (and that brine could adversely affect the storage of spent fuel canisters). The Commission declined to admit the contention, noting that the application had in fact acknowledged the presence of brine in the shallow groundwater. The Commission observed that the water table is below the excavation depth of the facility and deferred to the Licensing Board's determination that the contention lacked sufficient factual support to raise a genuine dispute. Commission February 2021 Order, 93 N.R.C. at 123 (JA___); *see also* Licensing Board June 2020 Order, 91 N.R.C. at 245 (JA____).

Environmental Petitioners object (Br. 20) to the Licensing Board's observation, echoed by the Commission, that Environmental Petitioners

only posed questions on the matter without providing the required factual support to demonstrate a genuine dispute with Holtec's license application. But Environmental Petitioners again point to no error by the Commission, which reasonably credited the Licensing Board's conclusion that the contention did not raise a genuine issue because "brine disposal facilities, and the site where brine was located, are on the far side of the site and downgradient of the proposed" facility. Commission February 2021 Order, 93 N.R.C. at 123 (JA____); *see also* Safety Analysis Report (Rev. 0F) Figs. 2.1.6(a) and 2.4.7 (JA____, _____), *cited in* Licensing Board June 2020 Order, 91 N.R.C. at 245 n.28 (maps illustrating distance between CISF and site of brine detection and topography).

In Contention 17, Environmental Petitioners asserted that the Environmental Report and Safety Analysis Report prepared by Holtec failed to discuss the presence or likely presence of fractured rock. Environmental Petitioners Br. 21. The Licensing Board rejected this contention because it was factually unsupported (and, specifically, because the application documents identified "either fractures or tight sandy loams between the depths of 85 and 100 feet" and cited to reports

that, as Environmental Petitioners' expert acknowledged, referenced such fractures). Licensing Board June 2020 Order, 91 N.R.C. at 245-46 & nn.31-32. The Commission affirmed the decision on this ground. Commission February 2021 Order, 93 N.R.C. at 124 (JA____). Environmental Petitioners' one-paragraph discussion of this issue fails to identify any flaw in the Commission's determination or to explain why the information provided in the application documents was somehow materially inadequate.

Finally, Environmental Petitioners challenge (Br. 21-22) the Commission's disposition of Contention 19, which alleged deficiencies in Holtec's Environmental Report related to tests (known as "packer" tests) that were performed to measure the permeability of the Santa Rosa Formation, an underground aquifer in the area of the Holtec site. The Licensing Board found these allegations to be "mere speculation," Licensing Board June 2020 Order, 91 N.R.C. at 247 (JA__). The Commission upheld this conclusion, explaining that (1) the mere fact that the report in which the tests were published was silent with respect to certain details related to issues such as cleaning of the boreholes did not provide ground to assume that the test was performed

improperly; and (2) the work was performed under a quality assurance program. Commission February 2021 Order, 93 N.R.C. at 125 (JA____).

Environmental Petitioners identify no basis to contest these conclusions. While they assert that their expert "identified three specific areas where the packer tests were deficient," Environmental Petitioners Br. 22, they provide no evidence that the tests were performed improperly and no support for their assertion that the Commission erred in failing to accept their expert's unsupported assertions. *See Blue Ridge*, 716 F.3d at 198 (upholding Commission's determination that contentions lacking particularized information sufficient to demonstrate the existence of a genuine dispute were inadmissible); *Beyond Nuclear*, 704 F.3d at 21-23.

To summarize, the Licensing Board and the Commission thoroughly considered and rejected Environmental Petitioners' Contentions 11, 15, 16, 17, and 19, and found that none of them adduced specific evidence sufficient to identify a genuine dispute for a hearing. On these technical issues, the Court should defer to the agency's expert judgment.

### E. The Commission reasonably and properly declined to admit contentions related to the volume of low-level waste.

Environmental Petitioners next challenge the exclusion of a contention relating to the calculation of low-level waste likely to be generated from the Holtec facility at decommissioning. Environmental Petitioners Br. 22-29. Environmental Petitioners primarily focus on the amount of concrete (8,000,000 tons) that they assert will "undergo bombardment by neutron beta radiation for a century and be considered" low-level radioactive waste, and challenge the assessment in Holtec's Environmental Report that decommissioning would result in only a "small" amount of additional waste. *Id.* at 25.

The Commission declined to admit this contention, agreeing with the Licensing Board's assessment that Petitioners had failed to identify a genuine dispute material to issuance of the license because Environmental Petitioners (1) had not provided any expert testimony to support their claims that this amount of concrete would, in fact, become contaminated; and (2) failed even to take a position on whether, as Holtec had asserted, decontamination of any contaminated concrete was possible. Commission 2020 Order, 91 N.R.C. at 204-05 (JA____-____).

The Commission further credited the Licensing Board's finding that Environmental Petitioners had failed to provide evidentiary support that, contrary to Holtec's projections, spent fuel canisters would need to be replaced during the operating life of the facility and that the calculation of waste should include this material. *Id.* at 205 (JA____).

Environmental Petitioners fail to demonstrate any error in the Commission's insistence on an evidentiary basis to validate their assertions. As the Commission recognized, Holtec explained in its Environmental Report that contamination of the storage canisters and pads did not constitute a plausible scenario because (1) the steel canisters would be surveyed prior to shipment *and* upon arrival at the Holtec facility to ensure the absence of radiological contamination; (2) the spent fuel would remain inside sealed canisters while being stored at the Holtec facility; and (3) activation of the storage casks would produce negligible radioactivity. *Id.* at 203 & n.225 (JA____); *see also* Licensing Board 2019 Order, 89 N.R.C. at 435 (JA____) (noting that the design of the facility includes a liner that protects the concrete from contamination from canister). Environmental Petitioners fail to cite to any competent evidence in the record undermining these conclusions, or

otherwise supporting their theory that additional waste would be generated during the period of licensed operation of the Holtec facility.

Environmental Petitioners also question the Licensing Board's citation to the Continued Storage Rule in this context, and, in particular, the Rule's identification of the impacts identified in the Continued Storage Generic EIS associated with the disposal of the concrete and canisters that might ultimately need to be replaced. Environmental Petitioners Br. 27-28. But the Commission explained that (for the reasons stated above) Petitioners had not demonstrated that contamination or replacement was likely during the licensed life of the facility. Commission 2020 Order, 91 N.R.C. at 205 (JA____).

And, indulging Petitioners' unsupported assumption that replacement would be required during the life of the facility, the Commission explained that "[t]he portion of the Continued Storage GEIS that the Board discusses refers to the expected consequences of temporary storage in [a] large scale ISFSI—a facility like the proposed facility—and found that the expected consequences of replacing concrete pads, casks, canisters and the [dry transfer system] would be small." *Id.* (JA____). It further found, as is the case now, that Environmental

Petitioners had failed to provide any basis to challenge this conclusion. *Id.* (JA____).

Environmental Petitioners assert that application of the rule to the Holtec facility is "regrettable" (ostensibly because of the amount of fuel to be stored at the Holtec facility), Environmental Petitioners Br. 27; *see also id.* at 33 (making the same argument in connection with a dry transfer system). However, the Commission made clear that neither it nor the Licensing Board was applying the Continued Storage Rule to foreclose consideration of impacts of replacing concrete, canisters, and the like *during* the licensed term of the facility; the Commission merely employed the analysis from the Continued Storage Generic EIS to support its alternative conclusion that, even if replacement activities were to take place during the period of licensed operation, Environmental Petitioners had not provided any evidence sufficient to create a genuine issue of fact concerning the reasonably foreseeable impacts of facility operations. Commission 2020 Order, 91 N.R.C. at 205 (JA____).

Finally, inasmuch as Petitioners now assert that the rule should not be applied to the impacts of the facility *after* its licensed term, they

are too late. The time for Environmental Petitioners to have argued that the generic analysis adopted in the Continued Storage Rule was inapplicable to this facility was in adjudicatory proceeding before the agency, pursuant to a request for a waiver under 10 C.F.R. § 2.335(b). *See generally New York v. NRC*, 824 F.3d 1012, 1021-22 (D.C. Cir. 2016) (acknowledging the agency's process for granting of a waiver of generic analyses adopted as a consequence of Continued Storage Rule and the Court's jurisdiction to review denials of waiver petitions asserting that site-specific analysis is warranted). Petitioners did not make such a request, and they have forfeited such an argument here.

### F. The Commission analyzed the impacts of facility construction and operation on a site-specific basis.

Environmental Petitioners also challenge reliance on the Continued Storage Rule to "exclude[] from scrutiny under NEPA" the site-specific impacts of the Holtec facility. Environmental Petitioners Br. 29. However, neither Holtec's Environmental Report (which was the subject of Environmental Petitioners' contention as originally raised) nor the Commission, which rejected the contention, excluded site-specific impacts from their analyses. As the Commission explained,

Holtec's Environmental Report evaluated the impacts of the *construction* and *operation* of the Holtec facility, including the impacts of transporting fuel to and from the site, on a site-specific basis, and it applied the Continued Storage Rule to identify the impacts caused by the facility *after* the period of operations of the facility. Commission 2020 Order, 91 N.R.C. at 206-07 (JA____-____); Environmental Report (Rev. 0) at 1-1, 1-5, 4-30 to 4-40, 4-44 to 4-57 (JA____, ____, ____-____). Thus, Environmental Petitioners' assertion that the environmental analysis had not considered, on a site-specific basis, the steps that would be necessary "to safely transport [fuel] to and from the Holtec [facility] and . . . to maintain safe conditions while the waste is present," Environmental Petitioners Br. 30, is simply incorrect, and the Commission did not err in rejecting it.

Environmental Petitioners emphasize the quantity of the spent fuel to be stored at the Holtec site, as compared to the facility referenced in the Continued Storage Generic EIS, and the increased likelihood of some form of radiological hazard because of this increased quantity. *E.g.*, Environmental Petitioners Br. 33 ("The Holtec plan means ***more than four times the risks and chances that a flawed***

***cargo will be delivered*** . . . .") (bold and italics in original). But again, their argument ignores the fact that the risks associated with such hazards, whether associated with the construction or operation of the facility or the transportation of spent fuel to or from the facility, were analyzed as part of the site-specific analysis contained in Holtec's Environmental Report. Commission 2020 Order, 91 N.R.C. at 207 (JA____). The agency therefore did not err in declining to admit Environmental Petitioners' contention.

Finally, Environmental Petitioners suggest that the Commission erred by rejecting the portion of their contention that objected to the lack of a dry transfer system in Holtec's application. Environmental Petitioners Br. 34 (suggesting that "Holtec is balking at installing even a single" such system). But their arguments fare no better here than when this Court rejected similar ones in *Don't Waste Michigan*.

In that case, Environmental Petitioners argued that the applicant's "plan to not have a dry transfer system or other technological means dealing with damaged, leaking or externally contaminated canisters or damaged fuel in the canisters contradicts the expectations of the Continued Storage Generic EIS." Brief of

Environmental Petitioners at 22, *Don't Waste Michigan v. NRC*, No. 21-1048, Document #1958831 (D.C. Cir. Aug. 10, 2022). The Court rejected this argument (along with all of Environmental Petitioners' NEPA-based arguments), 2023 WL 395030, at *3, much as it did in *New York v. NRC*, when it endorsed the NRC's assumption in the Continued Storage Generic EIS that the licensee of an offsite storage facility would be able to employ such a system and that it need not be part of the original license application. 824 F.3d at 1023 (D.C. Cir. 2016); *see also* Continued Storage Generic EIS at 5-2 (assuming that dry transfer system would be built "sometime after" the original construction because "it would not be needed immediately").

And, in any event, the Commission reasonably explained here that a separate licensing action and environmental review would be required if construction of a dry transfer system ultimately becomes necessary. Commission 2020 Order, 91 N.R.C. at 207 (JA____). This conclusion comports with *Don't Waste Michigan* and *New York* and does not reflect a clear error of judgment by the Commission in determining how to fulfill its NEPA obligations. *See Blue Ridge*, 716 F.3d at 195.

### G. Environmental Petitioners demonstrate no error with respect to the evaluation of the disposition of contaminated canisters.

Environmental Petitioners assert that the Commission erred in denying admission of their contention asserting that Holtec's "Start Clean/Stay Clean" philosophy—pursuant to which contaminated, leaking, or otherwise compromised fuel storage canisters would be sent back to the power plant at which they were loaded—presented a danger to the public, to workers, and to the environment. Environmental Petitioners Br. 35-39.

The Commission denied admission of this contention, adopting the reasoning of a prior decision (*Private Fuel Storage, L.L.C.*, CLI-04-22, 60 N.R.C. 125 (2004)), in which it had held that such a policy did not provide a basis to question the analysis underlying the quality assurance program incorporated into the certification for the transportation casks, which served to prevent exposure even in the event of a defective canister and had been the subject of notice-and-comment rulemaking. Commission 2020 Order, 91 N.R.C. at 207-08 (JA____) (noting that the Environmental Petitioners had failed to proffer factual or expert testimony supporting a credible scenario in

which spent fuel would leave a reactor in a damaged form, how it could be damaged in an accident, and how the "sequestration sleeve" incorporated into the facility design would be insufficient to guard against exposure). Environmental Petitioners provide no basis to question this judgment.

Nor are Environmental Petitioners saved by their assertions that the agency's environmental analysis was required to identify the impacts of transportation back to reactor sites under 10 C.F.R. § 71.47(b), which permits transportation of a damaged canister with exposures exceeding the limits in § 71.47(a) "if certain additional conditions are met." Environmental Petitioners Br. 36. Environmental Petitioners failed to advance a credible and adequately supported challenge to the determination that these conditions would, in the technical judgment of the NRC, provide reasonable assurance that the hazards about which they complain will not be experienced. *See Private Fuel Storage, L.L.C.*, 60 N.R.C. at 138-39 & n.53 (recognizing the NRC's longstanding generic determination that the use of licensed transportation casks "is sufficient to prevent the leakage of any radioactive materials" from a damaged canister and declining to admit

contention based on impacts of hazards that intervenor speculated might be experienced on return trip to spent fuel generator); *New York*, 824 F.3d at 1021 (agency is entitled to presume compliance with regulatory obligations in assessing environmental impacts).

Finally, Environmental Petitioners are simply incorrect when they again assert (Br. 37-39) that the Continued Storage Rule did not contemplate a facility without a dry transfer system. As noted in Section III.F *supra*, the agency's analysis, affirmed by this Court in *New York v. NRC*, did contemplate such a system and expressly noted that such a system was not immediately necessary and would be constructed, if needed, at a later date. And this Court rejected the same arguments when Environmental Petitioners raised them in *Don't Waste Michigan,* 2023 WL 395030, at *3.

### H. The Commission reasonably and properly disclosed transportation routes.

Environmental Petitioners lastly assert that Holtec inadequately disclosed possible transportation routes for spent fuel shipments to the facility and that the Commission's ruling affirming the Licensing Board's rejection of this argument was "legally unsatisfactory." Environmental Petitioners Br. 43. But Environmental Petitioners

merely repeat the arguments they made before the Licensing Board and the Commission, and to this Court in *Don't Waste Michigan*—arguments that both agency bodies and this Court have rejected. They fail to explain how the Commission's decision to uphold the Licensing Board's rejection of their arguments was unreasonable.

First, Environmental Petitioners assert that Holtec inadequately disclosed transportation routes in the Environmental Report by depicting three representative routes rather than "detailed disclosures of the likely rail routes," Environmental Petitioners Br. 45, suggesting that Holtec needed to analyze "all anticipated rail routes from all commercial nuclear power reactors," *id.* at 40. But the Commission, in upholding the Licensing Board, determined that using representative routes in the Environmental Report to evaluate potential environmental impacts was a "well-established regulatory approach" given the uncertainty of actual, future transportation routes to the facility, and in any case was an issue outside the scope of the licensing proceeding because the actual transportation routes must be approved in a separate future process. Commission 2020 Order, 91 N.R.C. at 209 (JA____).

Environmental Petitioners fail to explain how that conclusion constitutes reversible error. In fact, they decline at all to challenge the validity of the representative-route approach as a means of environmental analysis in uncertain circumstances, arguing merely that the uncertainty of the eventual routes is being exaggerated. Environmental Petitioners Br. 43. This claim, however, fails to support a conclusion that a representative-route approach is insufficient for NEPA purposes: Environmental Petitioners point to nothing in the text of either NEPA or the NRC's regulations that requires an assessment of every possible transportation route from every commercial nuclear power plant. And that is because no such requirement exists. Moreover, as both the Commission and the Licensing Board explained, the NRC reviews and approves spent nuclear fuel transportation routes as part of a *separate* process with the U.S. Department of Transportation and other parties, including appropriate State and Tribal officials. Commission 2020 Order, 91 N.R.C. at 209 (JA____); Licensing Board 2019 Order, 89 N.R.C. at 446 (JA__).

This Court previously rejected a similar argument concerning transportation routes raised by the same Environmental Petitioners—

among other NEPA contentions the Court dismissed—in *Don't Waste Michigan*, 2023 WL 395030, at *3. Environmental Petitioners' attempts to revive an argument rejected by the Commission and the Licensing Board—and by this Court in *Don't Waste Michigan*—fail again for the same reasons.

Second, Environmental Petitioners assert that Holtec's analysis of the three representative routes amounted to segmentation of the project's environmental analysis in violation of NEPA. Environmental Petitioners Br. 43-44. The Commission declined to consider the argument because Environmental Petitioners had failed to raise it before the Licensing Board. *See* Commission 2020 Order, 91 N.R.C. at 209 n.262 (citing prior Commission authority and noting that the argument failed to account for the evaluation of transportation impacts in Holtec's Environmental Report, a conclusion Environmental Petitioners do not contest here).

Because Environmental Petitioners forfeited their segmentation argument by failing to assert it first before the Licensing Board, this Court should likewise decline to consider it. *See Vermont Dep't of Pub. Serv.*, 684 F.3d at 157. And even if the Court were to consider the

argument on the merits, it should reject it, just as it did a virtually identical argument in *Don't Waste Michigan*, where, as noted above, the Court dismissed many similar NEPA-related contentions. *Don't Waste Michigan*, 2023 WL 395030, at *3; *see* Brief of Environmental Petitioners at 9, *Don't Waste Michigan v. NRC*, No. 21-1048, Document #1958831 ("Separating transportation analysis from storage creates segmentation."); *id.* at 33 ("By effectively segmenting or excluding identification and analysis of transportation matters from the EIS, the NRC Staff is predetermining the outcome of the NEPA stage of ISP's application.").

* * *

In short, the Commission reasonably determined that Environmental Petitioners' contentions were inadmissible, primarily because they were based upon a misunderstanding of the license application, did not provide a factual basis to contest the conclusions in the Environmental Report, or were procedurally improper challenges to rules that the agency adopted through notice-and-comment rulemaking and that have survived judicial review. And Environmental Petitioners present no basis to question the agency's considered judgment, rooted in

technical expertise and upheld by this Court in *Don't Waste Michigan*, in determining how best to perform an environmental review.

**CONCLUSION**

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

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

1. This document complies with the Court's order of August 10, 2023, because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), it contains 16,468 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook font.

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