ORAL ARGUMENT NOT SCHEDULED

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

D.C. Cir. No. 20-1187
(Consolidated with Nos. 21-1225, 21-1104, and 21-1147)

BEYOND NUCLEAR, INC., *et al*.
Petitioners,

v.

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

HOLTEC INTERNATIONAL,
Intervenor

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

PETITIONER BEYOND NUCLEAR'S FINAL OPENING BRIEF

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January 22, 2024

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rules 15(c)(3) and 28(a)(1), counsel for Petitioner Beyond Nuclear, Inc. ("Beyond Nuclear") certifies as follows:

1. Parties, Intervenors, and Amici Curiae.

Parties. The petitioner in case No. 20-1187 is Beyond Nuclear. On June 23, 2020, the Court consolidated case No. 20-1225 with case No. 20-1187. Petitioners in case No. 20-1225 are Don't Waste Michigan, Citizens for Alternatives to Chemical Contamination, San Luis Obispo Mothers for Peace, Nuclear Energy Information Service, Citizens' Environmental Coalition, and Nuclear Issues Study Group (collectively, "Don't Waste Michigan, et al.").

On April 21, 2021, the Court consolidated case No. 21-1104 with case Nos. 20-1187 and 20-1225. The petitioner in case No. 21-1104 is the Sierra Club.

On June 29, 2021, the Court consolidated case No. 21-1147 with case Nos. 20-1187, 20-1225, and 21-1104. The petitioners in case No. 21-1147 are Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners.

Respondents are United States Nuclear Regulatory Commission ("NRC") and the United States of America.

Intervenors and Amicus Curiae. On October 8, 2020, the court admitted Holtec International ("Holtec") as an intervenor.

2. Rulings Under Review.

Petitioner Beyond Nuclear seeks review of two NRC orders in *Holtec International* (Consolidated Interim Storage Facility) (NRC Docket No. 72-1051):

- Order issued on October 29, 2018 ("2018 Order")[1], and
- Memorandum and Order CLI-20-04, issued on April 23, 2020 ("CLI-20- 04").

3. Related Cases.

In *Don't Waste Michigan v. U.S. Nuclear Regul. Comm'n*, No. 21-1048, 2023 WL 395030 (D.C. Cir. Jan. 25, 2023), this Court decided a case against Beyond Nuclear on review of NRC orders issued in the licensing proceeding for Interim Storage Partners, L.L.C.'s ("Interim Storage Partners'") consolidated interim storage facility for storage of spent nuclear fuel. The case involved a similar fact pattern and similar legal issues to Beyond Nuclear's appeal of NRC decisions in the licensing proceeding for Holtec's consolidated interim storage facility. It also involved review of the NRC's 2018 Order, which was common to both licensing proceedings. In *Don't Waste Michigan,* as in the instant case, Beyond Nuclear asserted that NRC's issuance of a license for construction and

[1] The 2018 Order was also issued in *Interim Storage Partners, L.L.C.* (Consolidated Interim Storage Facility), Docket No. 72-1050.

operation of a facility to store spent nuclear fuel violated the Nuclear Waste Policy Act and the Administrative Procedure Act ("APA").

In reaching a decision in *Don't Waste Michigan,* the Court did not address the asserted Nuclear Waste Policy Act and APA violations, but dismissed Beyond Nuclear's petition for review on the ground that Beyond Nuclear had failed to amend its hearing request to address a change in Interim Storage Partners' license application. 2023 WL 395030, at *2. In this case, by contrast, Beyond Nuclear timely made the requisite amendment to its hearing request.

NRC's issuance of a license to Interim Storage Partners was also challenged in two other circuits:

- In *New Mexico ex rel. Balderas v. U.S. Nuclear Regulatory Comm'n*, No. 21-9593, the Tenth Circuit of the U.S. Court of Appeals granted a motion to dismiss for lack of subject matter jurisdiction on February 10, 2023.
- In *Texas v. U.S. Nuclear Regulatory Comm'n,* 78 F.4th 287 (5th Cir. 2023), the Fifth Circuit of the U.S. Court of Appeals reversed and vacated the license issued by NRC to Interim Storage Partners. The Fifth Circuit held that the Atomic Energy Act does not authorize NRC to license away-from-reactor spent fuel storage facilities, like the Holtec facility at issue in this case.

NRC's issuance of a license to Holtec has also been challenged in the Fifth Circuit by Fasken Land and Minerals, Limited and Permian Basin Land and Royalty Owners. *Fasken Land and Minerals v. Nuclear Reg. Comm'n,* Docket No. 23-60377.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Judicial Authorities

U.S. Constitution

Statutes

Legislative History

Regulations

Administrative Decisions

Federal Register Notices

Proposed Legislation

Miscellaneous

GLOSSARY

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

Act	Nuclear Waste Policy Act of 1982
APA	Administrative Procedure Act
Board	Atomic Safety and Licensing Board
DOE	U.S. Department of Energy
Holtec	Holtec International
JA	Joint Appendix
ISP	Interim Storage Partners, LLC
NRC	U.S. Nuclear Regulatory Commission
Petitioner	Beyond Nuclear, Inc.

JURISDICTIONAL STATEMENT

Pursuant to 42 U.S.C. § 2239(b), 28 U.S.C. § 2342(4), 42 U.S.C. § 10139(a)(1)(B), and 5 U.S.C. § 702, this Court has jurisdiction over the petition filed by Beyond Nuclear, Inc. ("Petitioner") for review of final decisions by the U.S. Nuclear Regulatory Commission ("NRC") in a licensing proceeding for a nuclear waste storage facility.

Petitioner seeks review of NRC's final decision refusing to grant Petitioner a hearing and denying Petitioner's claims. *Holtec International,* CLI-20-4, 91 N.R.C. 167, 173-76 (2020) ("*Holtec Decision*") (JA0676, 0682-85). Petitioner also seeks review of NRC's initial procedural ruling denying Petitioner's motion to dismiss the proceeding. *Order, Holtec International and Interim Storage Partners LLC*, (Oct. 29, 2018) ("*2018 Order*") (JA0392).[1]

Petitioner's petition for review was timely filed under 28 U.S.C. § 2344.

STATUTES AND REGULATIONS

Relevant statutes and regulations are included in an addendum.

[1] While Petitioner had sought and been refused immediate judicial review of the *2018 Order* in No. 18-1340, it has now been rendered reviewable by NRC's issuance of a final decision denying all of Petitioner's claims. *Massachusetts v. United States Nuclear Regulatory Com.*, 924 F.2d 311, 323 (D.C. Cir. 1991) (holding reviewable "preliminary, intermediate or procedural rulings" in the same proceeding).

ISSUES PRESENTED FOR REVIEW

1. Did NRC violate the Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10101, *et seq.* (the "Act"), and the Administrative Procedure Act, 5 U.S.C. §§ 706(2)(A), (C) (the "APA"), when it refused to terminate a licensing proceeding for an unlawful application to store federally-owned nuclear waste at a private facility, at the expense of the U.S. Department of Energy ("DOE"), and prior to the opening of a permanent repository?
2. Did NRC violate the Nuclear Waste Policy Act and the APA when it refused to grant Petitioner a hearing, denied Petitioner's claims, and approved a license application that permitted private storage of federally-owned nuclear waste, at DOE's expense, and prior to the opening of a permanent repository?

STATEMENT OF THE CASE

Petitioner challenges NRC's refusal to terminate the licensing proceeding and deny an application by Holtec International ("Holtec") for a license to store a large quantity of nuclear waste generated by commercial nuclear reactors (often called "spent fuel") at its facility in southeastern New Mexico (the "Facility").[2] As

[2] Holtec sought NRC approval for initial storage of 8,680 metric tons of spent fuel, but ultimately planned to increase the capacity to 173,600 metric tons. 83 Fed. Reg. 12,034 (Mar. 19, 2018) (JA0048). This quantity is nearly double the nation's current inventory of spent fuel and over double the capacity of the now-cancelled

described throughout Holtec's license application, ownership and financial responsibility for the spent fuel could rest with DOE.[3]

By considering and then approving provisions in Holtec's license application that would allow Holtec to privately store federally-owned spent fuel at DOE's expense, NRC violated three key prohibitions and limitations in the Nuclear Waste Policy Act: the prohibition against federal assumption of ownership of privately generated spent fuel until a repository has opened, the prohibition against transferring spent fuel storage costs from private reactor licensees to the federal government, and the limitation that only DOE may be licensed to operate a facility for interim storage of federally-owned spent fuel. NRC may not disregard the unambiguous mandates of Congress, and therefore its Holtec licensing decisions must be reversed, vacated, and declared unlawful.

Yucca Mountain repository. Beyond Nuclear Motion to Dismiss Licensing Proceedings ("Motion to Dismiss") at 13 (Sept. 14, 2018) (JA0202).

[3] *See, e.g.,* Safety Analysis Report, Table 1.0.2 (providing that construction of the Facility "will be undertaken only after a definitive agreement with the prospective user/payer for storing the used fuel (USDOE and/or a nuclear plant owner) at [the Facility] has been established") (JA0037); Holtec's Financial Assurance and Project Life Cycle Cost Estimates, Rev. 0 at 3 ("Financial Assurance") (providing that "as a matter of financial prudence, Holtec will require the necessary user agreements in place (from the USDOE and/or the nuclear plant owners)") (JA0046); and Environmental Report, Rev. 3 at 1-1, 3-104 (Jan. 17, 2019) (providing that either DOE or private companies will be responsible for transportation to and ownership of the spent fuel at the Facility) (JA0400, 0409).

STATUTORY AND FACTUAL BACKGROUND

I. DEVELOPMENT OF FEDERAL LAW FOR SPENT FUEL STORAGE AND DISPOSAL

A. NRC Safety Regulations

In 1980, NRC promulgated its first set of safety regulations for spent fuel storage at reactor sites and "away-from reactor" sites. 45 Fed. Reg. 74,693 (Nov. 12, 1980). The regulations authorized licensing of private companies and DOE. *Id.* at 74,699–700 (10 C.F.R. §§ 72.2, 72.3(p) (1980)).

The regulations also required license applicants, including DOE, to demonstrate their financial qualifications to build, operate, and decommission spent fuel storage facilities. *Id.* at 74,703 (10 C.F.R. §§ 72.31(a)(6), (10) (1980)). That would change with the passage of the Nuclear Waste Policy Act. *See* Section I.C. below.

B. Nuclear Waste Policy Act

In 1982, Congress passed the Act to address the "national problem" posed by the growing inventory of spent fuel at reactor sites. *Bullcreek v. NRC,* 359 F.3d 536, 538 (D.C. Cir. 2004).

1. Permanent disposal in a federal repository: Congress's priority

The Act's primary purpose was to provide for permanent disposal of spent fuel in a federal repository. 42 U.S.C. § 10131(b). *See also* Subtitle A, 42 U.S.C.

§§ 10131–45. It required DOE to build and operate the repository, licensed by NRC. 42 U.S.C. §§ 10134(b), (d).

The Act prohibited transfer of title of spent fuel from reactor licensees to DOE until DOE opened its repository and was ready to receive the waste. 42 U.S.C. § 10222(a)(5)(A). The eventual transfer of title would not include transfer of financial responsibility, however. Instead, the Act required reactor licensees to bear the costs of building and operating the repository, through contributions to a federal Nuclear Waste Fund. 42 U.S.C. §§ 10131(a)(4), 10222.

2. Limited federal storage

The Act also contained two programs for federal storage of spent fuel, Subtitle C, 42 U.S.C. §§ 10161–69 (Monitored Retrievable Storage), and Subtitle B, 42 U.S.C. §§ 10151–57 (Interim Storage). Congress strictly limited these programs out of concern that federal spent fuel storage "would detract from efforts to develop a permanent repository, would lead to increased transportation of fuel, and would lead to utilities' avoiding taking initiative to solve their own spent fuel storage problems." *Private Fuel Storage,* 56 N.R.C. 390, 404 (2002) (citing 128 Cong. Rec. 28,032-33 (1982)), *aff'd, Bullcreek,* 359 F.3d 536.[4]

[4] *See also* 128 Cong. Rec. 28,037 (1982) ("Here is the problem: We will never have a permanent repository if the utilities do not have a need for one.") (Rep. Markey).

Thus, Congress permitted only DOE to build and operate Monitored Retrievable Storage facilities, and only after DOE submitted to Congress a "proposal" that included design elements, cost estimates, and a set of alternative sites. 42 U.S.C. § 10161(b). Similarly, only DOE could build or operate Interim Storage facilities. 42 U.S.C. § 10151(b)(2). Congress further required reactor licensees to cover the cost of Monitored Retrievable Storage facilities, 42 U.S.C. §§ 10161(a)(4), (b)(2)(B), and Interim Storage facilities, 42 U.S.C. § 10156.

Finally, for Monitored Retrievable Storage, Congress made no exception to the Act's prohibition against DOE assumption of title to spent fuel before a repository opened. 42 U.S.C. § 10222(a)(5)(A). Even construction of a Monitored Retrievable Storage facility required Congressional approval and could not commence until NRC had licensed a repository. 42 U.S.C. §§ 10161(b), 10168(d)(1).

The Act's only exception to the prohibition against federal ownership of spent fuel prior to the opening of a repository was for the emergency Interim Storage program, which sunset on January 1, 1990. 42 U.S.C. § 10156(a)(1). Under this now-defunct program, reactor licensees could transfer no more than 1,900 metric tons of spent fuel to DOE, by demonstrating an urgent lack of onsite storage capacity. 42 U.S.C. §§ 10155(a), (b).[5]

[5] NRC never adopted regulations concerning the Interim Storage program.

C. Revised NRC Safety Regulations

In 1988, responding to passage of the Nuclear Waste Policy Act, NRC amended its safety regulations to add federal Monitored Retrievable Storage. 53 Fed. Reg. 31,651-01, 31,654 (Aug. 19, 1988). For the first time, based on DOE's presumed access to the Nuclear Waste Fund, the amended regulations excused DOE from demonstrating its financial qualifications to operate its own storage facilities or possession of sufficient funds to complete decommissioning. *Id.* (10 C.F.R. §§ 72.40(a)(6), (10) (1988)).[6]

Pursuant to these regulations implementing the Nuclear Waste Policy Act, the only type of away-from-reactor facility for storage of federally-owned spent fuel that NRC may license is a federally-owned and operated, Congressionally-approved Monitored Retrievable Storage facility.[7]

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[6] For commercial applicants seeking to store privately-owned spent fuel, the regulations continued to require a demonstration of financial qualifications and adequacy of decommissioning funding.

[7] While there is universal agreement that the Nuclear Waste Policy Act prohibits *private facilities* from storing *federally-owned* waste, whether the Atomic Energy Act authorizes *private facilities* to store *privately-owned* waste is less clear. *Compare Texas v. U.S. Nuclear Regul. Comm'n,* 78 F.4th 827, 831 (5th Cir. 2023) (holding that the Atomic Energy Act does not provide NRC with authority to "issue licenses for private parties to store spent nuclear fuel away-from-the-reactor," regardless of who owns the waste) *with Bullcreek*, 359 F.3d at 542 (presuming the Atomic Energy Act allows NRC to license private facilities to store privately-owned waste).

D. President's Blue Ribbon Commission

In 2012, a presidential Blue Ribbon Commission recommended a new spent fuel disposal program, including consolidated storage of federally-owned spent fuel prior to opening of a repository. Motion to Dismiss at 14 (citing Blue Ribbon Commission on America's Nuclear Future, *Report to the Secretary of Energy* (2012)) (JA0203). DOE endorsed the recommendations. *Id.* at 15 (citing *Strategy for the Management and Disposal of Used Nuclear Fuel and High-Level Radioactive Waste* (2013)) (JA0204). But both DOE and the Blue Ribbon Commission recognized that federal legislation was necessary before the recommendations could be implemented. *Id.* at 14–15 (JA0203-04). To date, Congress has not acted on the recommendations, and it has repeatedly declined to enact amendments to the Nuclear Waste Policy Act.[8]

[8] *See, e.g.*, Nuclear Waste Informed Consent Act, S. 541, 117th Cong. (2021); Nuclear Waste Task Force Act of 2021, S. 2871, 117th Cong. (2021); Nuclear Waste Task Force Act of 2021, H.R. 5401, 117th Cong. (2021); Nuclear Waste Informed Consent Act, H.R. 1524, 117th Cong. (2021); STORE Nuclear Fuel Act of 2019, H.R. 3136, 116th Cong. (2019); Nuclear Waste Informed Consent Act, H.R. 1544, 116th Cong. (2019); Nuclear Waste Policy Amendments Act of 2019, H.R. 2699, 116th Cong. (2019); Nuclear Waste Administration Act of 2019, S. 1234, 116th Cong. (2019); Nuclear Waste Informed Consent Act, S. 649, 116th Cong. (2019); Interim Consolidated Storage Act of 2017, H.R. 474, 115th Cong. (2017); Removing Nuclear Waste from our Communities Act of 2017, H.R. 4442, 115th Cong. (2017); Nuclear Waste Policy Amendments Act of 2018, H.R. 3053, 115th Cong. (2017); Interim Consolidated Storage Act of 2016, H.R. 4745, 114th Cong. (2016); Interim Consolidated Storage Act of 2015, H.R. 3643, 114th Cong. (2015); Nuclear Waste Administration Act of 2015, S. 854, 114th Cong. (2015);

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Holtec and Interim Storage Partners License Applications

On March 30, 2017, Holtec applied to NRC for a license to construct and operate the Facility. 83 Fed. Reg. 32,919 (July 16, 2018) (JA0052). Holtec stated that it did not plan to begin construction until after it "successfully enters into a contract for storage with the U.S. Department of Energy (DOE)." Holtec Environmental Report, Rev. 0 at 1-1 (March 30, 2017) (JA0003). It also assumed that "DOE would be responsible for transporting [spent nuclear fuel] from existing commercial nuclear power reactor storage facilities to the [Holtec] Facility." *Id*. at 3-104. Thus, Holtec's entire operation depended on the assumption that DOE would take responsibility for the spent fuel that would be transported to the Facility and stored there.[9]

Nuclear Waste Administration Act of 2013, S. 1240, 113th Cong. (2013); Nuclear Waste Administration Act of 2012, S. 3469, 112th Cong. (2012).

[9] In other parts of the application, Holtec more equivocally proposed that "either" DOE "or" private businesses would own the spent fuel. *See, e.g.,* Safety Analysis Report, Table 1.0.2 (JA0037); Financial Assurances, Rev. 0 at 3 (JA0046); and Proposed License Condition 17 (JA0040). Yet, Holtec did not retract or qualify the statements in the Environmental Report that spent fuel ownership by DOE was a prerequisite for the project to go forward. *See* Motion to Dismiss at 16 n.4 (JA0205).

Shortly after Holtec filed its license application, Interim Storage Partners applied to NRC to license a similar facility in Texas. *See* Motion to Dismiss at 17–18 (JA0206-07); 83 Fed. Reg. 44,070 (Aug. 29, 2018).

B. Administrative Challenges and Denials

1. Motion to dismiss Holtec and Interim Storage Partners licensing proceedings

In 2018, responding to the hearing notices on the Holtec and Interim Storage Partners license applications, Petitioner moved the Commission to terminate the licensing proceedings because the "central premise" of the proposed licenses – that DOE will be responsible for spent fuel during transportation and storage at the facilities – violated the Nuclear Waste Policy Act's prohibition against DOE assumption of title to spent fuel unless and until a permanent repository has opened. Motion to Dismiss at 19–20 (JA0208-09).

Rather than ruling on Petitioner's motion, the Commission instructed the Atomic Safety and Licensing Board ("Board") to consider Petitioner's claims in the individual licensing proceedings for the facilities. *2018 Order* at 3 (JA0394).

2. Holtec licensing proceeding

In a hearing request and "contention" in the Holtec licensing proceeding, Petitioner reiterated the claim of its Motion to Dismiss. Holtec responded by changing the Environmental Report's assumption that DOE would own the Holtec-stored spent fuel to a stipulation that "either DOE or private entities" would own

the fuel. Environmental Report, Rev. 3 at 1-1, 3-104 (Jan. 17, 2019) (JA0400, 0409). As a result, all parts of Holtec's license application now contained "either-or" language regarding DOE and private ownership of spent fuel. *See supra* note 3.

Petitioner amended its contention accordingly and asserted:

> Language in Rev. 3 of Holtec's Environmental Report, which presents federal ownership as a possible alternative to private ownership of spent fuel, does not render the application lawful. As long as the federal government is listed as a potential owner of the spent fuel, the application violates the [Nuclear Waste Policy Act].

See Holtec Int'l, LBP-19-4, 89 N.R.C. 353, 377 (2019) ("*Holtec Board Decision"*) (JA0460).

In ruling on Petitioner's hearing request, the Board found that Petitioner had properly amended its contention, but it refused to hear Petitioner's claim. *Id.* at 377, 380 (JA0463). Noting the parties' universal agreement that Holtec may not lawfully contract with DOE to take title to private companies' spent nuclear fuel, and making the assumption that Holtec and DOE would act with "regularity" and decline to undertake such contracts under current law, the Board found "no dispute that warrants devoting agency resources to further legal briefing or to an evidentiary hearing." *Id.* at 381–82 and n. 168 (JA0464-65). Holtec could "enter into lawful customer contracts today," and wait to contract with "additional" customers "if and when [such contracts] become lawful in the future." *Id*.

Under the circumstances, the Board declared that it would be "useless" to require Holtec "to file a new or amended application for its storage facility" and for NRC to provide "a fresh opportunity to request a hearing" in the event Congress were to amend the Nuclear Waste Policy Act. *Id.* at 382 (JA0465).

3. Commission decision

On review, the Commission acknowledged that "it would be illegal under [the Act] for DOE to take title to the spent nuclear fuel at this time." *Holtec Decision,* 91 N.R.C. at 174 (JA0683). Nevertheless, the Commission affirmed the Board, concluding that the license was lawful because it "would not violate the [Act] by transferring title to the fuel, nor would it authorize Holtec or DOE to enter into storage contracts." *Id.* at 176 (JA0685).[10] Focusing on the provision for private ownership of spent fuel, the Commission concluded that the Act "does not prohibit a nuclear power plant licensee from transferring spent fuel to another private entity." *Id*.

The Commission also affirmed a similar Board decision in the ISP license proceeding in *Interim Storage Partners, L.L.C.,* 92 N.R.C. 463, 467–69 (2019) ("*ISP Decision*").

[10] *But see Holtec Board Decision,* 89 N.R.C. at 382 (the license would "permit" Holtec to enter into contracts with DOE if they become lawful in the future) (JA0465).

C. Appeal of *Holtec Decision*

On June 4, 2020, Petitioner sought review of the *Holtec Decision* in No. 20-1187. The appeal was held in abeyance until completion of the Holtec licensing proceeding. *Beyond Nuclear v. Nuclear Reg. Comm'n* (D.C. Cir. Oct. 8, 2020) (order).

D. Petition for Review of *ISP Decision*

Petitioner sought review of the *ISP Decision* in *Don't Waste Michigan , et al. v. NRC,* No. 21-1048. In an unpublished decision issued on January 25, 2023, this Court denied review, finding "no error" in NRC's dismissal of Petitioner's contention. 2023 WL 395030, at *2. By contending that "the central premise of ISP's application" was DOE's responsibility for the spent fuel to be transported to and stored at the proposed interim facility, the Court concluded Petitioner had "ignored the proposed license's plain text, which requires ISP to obtain contracts with either DOE *or* private entities, as the title-holders of spent fuel." *Id. See also id.,* n.3 (faulting Petitioner for failing to contend that "the mere mention of the possibility of contracting with DOE renders ISP's license application unlawful").[11]

[11] In contrast, in the Holtec proceeding, Petitioner timely amended its contention to address the private ownership option. *See supra* at page 11 and *Holtec Board Decision*, 89 N.R.C. at 380 (JA0463).

E. Issuance of Holtec License

On May 9, 2023, NRC licensed the Holtec Facility, permitting storage of either DOE or privately owned waste. *See* 88 Fed. Reg. 30,801 (May 12, 2023) (JA1094).

SUMMARY OF THE ARGUMENT

The primary goal of the Nuclear Waste Policy Act is to provide for the siting, construction, and operation by DOE of a permanent geologic repository where dangerous spent fuel can be placed indefinitely, at the smallest possible risk to humankind. *See* 42 U.S.C. § 10131. The Act contains significant and unambiguous prohibitions to ensure completion of a repository is not undermined by DOE's premature adoption of ownership of spent fuel at interim storage facilities. *Private Fuel Storage,* 56 N.R.C. at 404. Key among these prohibitions, the Act forbids DOE from taking responsibility for spent fuel generated by private reactors before a federal repository for permanent disposal of the waste becomes operational. 42 U.S.C. §§ 10131(a)(5), 10222(a)(5)(A), 10143. Further, the Act prohibits NRC from licensing any entity but DOE to build and operate a facility for storage of federally-owned spent fuel. It also precludes NRC from assigning spent fuel storage costs to DOE, instead giving the generators of spent fuel "the primary responsibility to provide for, and … to pay the costs of, the interim storage of such waste and spent fuel." *Id.* at §§ 10131(a)(5), 10151(a)(1).

By refusing to dismiss the Holtec proceeding and by approving Holtec's unlawful license application, NRC violated all three of these prohibitions, thereby violating the APA. 5 U.S.C. §§ 706(2)(A), (C) (prohibiting decisions "not in accordance with law" or "in excess of statutory authority"). NRC's exceedance of its statutory authority also violated the constitutional separation of powers doctrine. And NRC's attempts to legitimate its actions by relying on the judicial presumption of regularity and the inclusion of lawful alternatives in the license application do not cure these violations.

Accordingly, this Court should hold that NRC violated the Nuclear Waste Policy Act and APA, reverse and vacate NRC's licensing decisions, and declare that – unless and until the Act is amended – NRC may not approve a license application that allows for the storage of DOE-owned waste.

PETITIONER'S STANDING

Petitioner's Docketing Statement and attached standing declarations and affirmations by Petitioner's members Daniel C. Berry III, Elizabeth Berry, Keli Hatley, Margo Smith, and Gene Harbaugh demonstrate Petitioner's standing to bring this petition. Those members live and/or work within a few miles of the radioactive spent fuel that would be shipped to and stored at Holtec's Facility. In the proceeding below, based on Keli Hatley's residence and activities within one mile of the Facility, the Board found that Petitioner had standing. *Holtec Board*

Ruling, 89 N.R.C. at 365–66 (JA0448-49). The Board's conclusion, which was not challenged on administrative appeal, is consistent with *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1265–66 and 1278–80 (D.C. Cir. 2004).

ARGUMENT

I. STANDARD OF REVIEW

While courts "almost always accord some deference to an agency's statutory construction," the APA requires "*de novo* review of all questions of law." *Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413, 1423 n.12 (D.C. Cir. 1983). *See also Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014) (internal quotations omitted) ("Traditionally, decisions on questions of law are reviewable de novo, decisions on questions of fact are reviewable for clear error, and decisions on matters of discretion are reviewable for abuse of discretion."); *Kisor v. Wilkie,* 139 S.Ct. 2400, 2433 (2019) (Gorsuch, J., concurring in judgment) (internal quotations omitted) ("commentators in administrative law have generally acknowledged that Section 706 [of the APA] seems to require de novo review on questions of law").

There is no issue of statutory construction before this Court that warrants deference. Indeed, all parties agree that the Nuclear Waste Policy Act expressly prohibits DOE ownership of spent fuel at the Holtec Facility. Whether NRC can nevertheless approve a license application that permits such ownership in direct

contravention of Congress's unambiguous mandates is a question of law that this Court should review *de novo*. *See Ind. Mich. Power Co. v. DOE,* 88 F.3d 1272, 1274 (D.C. Cir. 1996) (if "Congress has spoken unambiguously to the question at hand," the court "must follow that language and give it effect") (internal citations and quotations omitted).

II. NRC'S CONSIDERATION AND APPROVAL OF HOLTEC'S LICENSE APPLICATION VIOLATED THE NUCLEAR WASTE POLICY ACT AND THE APA

A. NRC violated the Act's Plain Language and Intent

By considering and then approving Holtec's license application, NRC flouted the plain language of the Nuclear Waste Policy Act in three significant respects. First, while 42 U.S.C. § 10222(a)(5)(A) expressly prohibits federal ownership of spent fuel before a repository is operational, Holtec's license application, as approved by NRC, provides that either DOE *or* private licensees could own the spent fuel during storage. *See supra,* note 3. Second, while 42 U.S.C. § 10168(b) authorizes NRC to license only DOE to site, build, and operate a facility for storage of federally-owned spent fuel, NRC has allowed Holtec, a private company, to carry out those actions. *See id.* Third, while 42 U.S.C. § 10161(a)(4) mandates that reactor licensees bear the cost of spent fuel storage, Holtec's license allows those costs to shift to DOE. *See, e.g.*, Safety Analysis Report, Table 1.0.2 (describing DOE as a "user/payer") (JA0037).

Furthermore, NRC's actions violate the "statutory scheme" of the Nuclear Waste Policy Act. *Indiana Mich. Power Co.,* 88 F.3d at 1275. The Act is designed to ensure the completion of a repository by limiting federal interim storage, and thereby precluding reactor licensees from "avoiding taking initiative to solve their own spent fuel storage problems." *Private Fuel Storage,* 56 N.R.C. at 404. NRC's decision to "proceed on the premise of the wholesale reversal" of the Act's scheme is "flatly unreasonable." *Nat'l. Ass'n of Regulatory Util. Comm'rs v. United States DOE,* 736 F.3d. 517, 520 (D.C. Cir. 2013).

Accordingly, NRC's decisions must be rejected as "not in accordance with law," "in excess of statutory jurisdiction, authority, or limitations," and "short of statutory right." 5 U.S.C. §§ 706(2)(A), (C).

B. The Presumption of Regularity Does Not Excuse NRC's Unlawful Conduct

While conceding that Holtec's license application contained terms that violated the Nuclear Waste Policy Act, NRC rationalized that DOE could be presumed to comply with the Act as currently written and not enter into the unlawful contracts permitted by the license, under the judicial presumption of regularity. *Holtec Decision,* 91 N.R.C. at 175 (citing *United States v. Armstrong,* 517 U.S. 456, 464 (1996) and *United States v. Chemical Foundation, Inc.,* 272 U.S. 1, 14–15 (1926)).

But the issue before this Court is the legality of NRC's actions, not DOE's. The presumption of regularity provides NRC no protection from the APA's prohibition of actions contrary to law. *See also Natural Resources Defense Council v. U.S. EPA,* 822 F.2d 104, 111 (D.C. Cir. 1987) (presumption of regularity does not apply to actions that are "not in accordance with law"); *Nat'l Archives & Records Admin. v. Favish,* 541 U.S. 157, 174 (2004) (presumption of regularity does not apply where there is "clear evidence" of "Government impropriety"). NRC cannot issue a license that permits Holtec to enter into contracts with DOE that are currently unlawful. 91 N.R.C. at 176 (JA0685).

In any event, the presumption of regularity applies "generally" to the official conduct of the entire "Government," including both DOE and NRC. *United States Dep't of State v. Ray,* 502 U.S. 164, 179 (1991). The presumption would become meaningless if one government agency could excuse its own admittedly unlawful conduct by assuming that another agency will refuse to follow suit. *Armstrong* and *Chemical Foundation* do not hold otherwise.

C. The Inclusion of a Lawful Alternative Does Not Excuse NRC's Unlawful Conduct

Nor is NRC shielded from the APA by the "either-or" language in the license application that allows Holtec to contract with either private customers or DOE. *See supra* note 3. Courts have long recognized that unlawful provisions must be severed, whether they appear in federal statutes, *Barr v. American Association*

of Political Consultants, 140 S.Ct. 2335, 2350 (2020); regulations, *K Mart Corp. v. Cartier*, 486 U.S. 281, 294 (1988); or contracts, Restatement (Second) of Contracts 184(1) (1981). Although courts may grapple with how to sever an unlawful provision while keeping the remaining lawful provisions intact (*see, e.g., Barr,* 140 S.Ct. at 2352), no court has held that these lawful provisions somehow rescue the unlawful ones. Instead, all proceed on the seemingly obvious premise that the unlawful provisions must be removed. The Holtec license application is no different: the addition of lawful provisions does not excuse the unlawful provisions described in the application, and those unlawful provisions must be "set aside." 5 U.S.C. § 706(2).

III. NRC'S CONSIDERATION AND APPROVAL OF HOLTEC'S LICENSE APPLICATION VIOLATED THE CONSTITUTIONAL SEPARATION OF POWERS DOCTRINE

As this Court has recognized, "allowing agencies to ignore statutory mandates and prohibitions based on agency speculation about future congressional action" would "gravely upset the balance of powers between the Branches and represent a major and unwarranted expansion of the Executive's power at the expense of Congress." *In re Aiken Cnty.,* 725 F.3d 255, 260 (D.C. Cir. 2013). In *Aiken Cnty.,* NRC refused to process DOE's license application for the Yucca Mountain repository as required by the Nuclear Waste Policy Act, based on a "political prognostication" that Congress would not provide future funding to

"complete the licensing process." *Id.* This Court rejected NRC's approach, warning that allowing the agency to "simply defy[] a law enacted by Congress" would have "serious implications for our constitutional structure." *Id.* at 266–7.

Here, similar to *Aiken Cnty.,* NRC approved the Holtec license application, based on the "hope" that a future Congress will abandon the Nuclear Waste Policy Act's prohibitions and thereby legitimate the option of contracting with DOE. *Holtec Decision,* 91 N.R.C. at 176 (JA0685). This "hope" is premised on NRC's speculation that Congress will reverse the statutory scheme of the Act, which prevents reactor licensees from foisting their responsibility for spent fuel onto the federal government before a permanent repository has opened. *See Private Fuel Storage,* 56 N.R.C. at 404. The separation of powers doctrine precludes NRC from relying on such "political prognostications" about future Congressional actions to issue a license that "defies" both the text and the underlying purpose of the Act as currently enacted. *Aiken Cnty.,* 725 F.3d at 260, 266.

And NRC's actions have "serious implications for our constitutional structure." *Id.* at 267. NRC impermissibly weakened Congressional authority by transferring to Holtec a significant set of property rights that will persist into the future: the rights to choose a site, build, and operate a storage facility, and take possession of federally-owned spent fuel there. Congress, if it amends the Act, will have to either affirm or negate those property rights. But the separation of powers

doctrine requires NRC to respond to Congressional decisions, not the other way around.

Finally, by licensing Holtec to store federally-owned spent fuel at a private facility and agreeing that Holtec will not need to re-apply for a license if Congress changes the law, NRC effectively exchanged its statutory role of regulator for the role of Holtec's political and economic tactician. If NRC is allowed to use this anticipatory licensing decision to weight the political process, it will "gravely upset the balance of power" between itself and Congress. *Aiken Cnty.,* 725 F.3d at 260-61. Requiring a new licensing proceeding for Holtec's storage of DOE-owned waste, when and if the Act is amended, is therefore not a "useless act" as characterized by the Board, 89 N.R.C. at 382, but a necessary one mandated by "basic constitutional principles." *Aiken Cnty.,* 725 F.3d at 386.

CONCLUSION AND REQUEST FOR RELIEF

By considering and then approving Holtec's license application, NRC has violated both the plain language and purpose of the Nuclear Waste Policy Act. Therefore, as required by the APA, the court should "hold unlawful" and "set aside" NRC's decisions, reverse and vacate them, and declare that – unless and until Congress amends the Act – NRC cannot approve a license application that allows for private storage of DOE-owned waste. 5 U.S.C. § 706(2).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure Rule 32(a)(7)(C) and Circuit Rule 32(a)(2)(C), I certify that the attached Final Opening Brief is proportionately spaced, has a typeface of Times New Roman, 14 points, and contains 4,977 words. This figure includes footnotes and citations, but excludes the Cover Page, Table of Contents, Table of Authorities, signature blocks, Certificate of Compliance, Certificate as to Parties, Rulings, and Related Cases, Addendum of Statutes, Rules, and Regulations, and Standing Addendum. I have relied on Microsoft Word's calculation feature for this calculation.

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