No. 25-

IN THE

Supreme Court of the United States

BEYOND NUCLEAR, INC.,

Petitioner,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION AND THE UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX VOLUME II OF II
(Pages 317a-423a)

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APPENDIX F — MOTION BEFORE THE UNITED STATES OF AMERICA NUCLEAR REGULATORY COMMISSION AND ERRATA, DATED SEPTEMBER 18, 2018

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

Docket No. 72-1051

IN THE MATTER OF: HOLTEC INTERNATIONAL

(HI-STORE CONSOLIDATED
INTERIM STORAGE FACILITY)

Docket No. 72-1050

IN THE MATTER OF: INTERIM STORAGE PARTNERS

(WCS CONSOLIDATED
INTERIM STORAGE FACILITY)

September 14, 2018

BEYOND NUCLEAR, INC.'S MOTION TO DISMISS LICENSING PROCEEDINGS FOR HI-STORE CONSOLIDATED INTERIM STORAGE FACILITY AND WCS CONSOLIDATED INTERIM STORAGE FACILITY FOR VIOLATION OF THE NUCLEAR WASTE POLICY ACT

[TABLES INTENTIONALLY OMITTED]

Appendix F

I. INTRODUCTION

Pursuant to the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. § 10101, *et seq.* ("NWPA") and the Administrative Procedure Act, 5 U.S.C. §§ 706(2)(A) and (C), Beyond Nuclear, Inc. ("Beyond Nuclear") hereby requests that the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") dismiss the above-captioned applications by Holtec International ("Holtec") and Interim Storage Partners, L.L.P. ("ISP") to build and operate centralized interim spent fuel storage facilities ("CISF") in New Mexico and Texas, respectively.[1] The proceedings must be dismissed because the central premise of both Holtec's and ISP's applications – that the U.S. Department of Energy ("DOE") will be responsible for the spent fuel that is transported to and stored at the proposed interim facilities – violates the NWPA. Under the NWPA, the DOE is precluded from taking title to spent fuel unless and until a permanent repository has opened. 42 U.S.C. §§ 10222(a)(5)(A), 10143.

By even considering these unlawful applications, the NRC impermissibly allows Holtec and ISP to undermine longstanding Congressional policy, established in the NWPA, that ownership of and liability for spent fuel should remain with private licensees until a federal repository becomes available for permanent disposal. By

1. These applications were noticed at 83 Fed. Reg. 32,919 (July 16, 2018) ("Holtec Hearing Notice") and 83 Fed. Reg. 44,070 (Aug. 29, 2018) ("ISP Hearing Notice"). Holtec's proposed CISF is referred to as "Holtec CISF" and ISP's proposed CISF is referred to as "WCS CISF."

conducting these licensing proceedings, the NRC also unfairly subjects Beyond Nuclear and its members to the costly and unnecessary expenses of challenging the applications that cannot be lawfully approved.

Finally, the fact that NRC is entertaining these unlawful license applications gives them undeserved legitimacy in the eyes of the public, giving rise to general public anticipation that Holtec and ISP may be allowed to store thousands of tons of highly radioactive waste at the proposed CISFs for decades. Beyond Nuclear respectfully submits that this public perception will unnecessarily depress the property values of Beyond Nuclear members who reside and own property in the vicinity.

II. THE ISSUES RAISED BY THIS MOTION LIE OUTSIDE THE SCOPE OF THE PENDING LICENSING PROCEEDINGS AND THEREFORE SHOULD BE CONSIDERED IN A SEPARATE PROCEEDING

While Beyond Nuclear has submitted this Motion in the NRC's dockets for the Holtec and ISP license applications (Nos. 72-1050 and 72-1051, respectively), Beyond Nuclear does not seek consideration of the Motion in either of the licensing proceedings that has been noticed in the Federal Register. Holtec Hearing Notice, 83 Fed. Reg. 32,919; ISP Hearing Notice, 83 Fed. Reg. 44,070. The scope of those proceedings is limited to the question of whether the applications satisfy the Atomic Energy Act ("AEA"), the National Environmental Policy Act ("NEPA"), and NRC's regulations for implementation of

those statutes. 10 C.F.R. §§ 72.40, 51.101. The question posed in this Motion, *i.e.,* whether consideration of Holtec's and ISP's license applications is permitted by the NWPA, a separate statute, can be answered without consideration of the AEA and NEPA. Therefore the Commission should establish a separate proceeding for consideration of this Motion.[2]

III. BEYOND NUCLEAR HAS STANDING TO BRING THIS MOTION

As set forth below, Beyond Nuclear has standing to bring this Motion as a representative of its members. *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 342 (1977). Beyond Nuclear is a nonprofit, nonpartisan membership organization that aims to educate and activate the public about the connections between nuclear power and nuclear weapons and the need to abolish both to protect public health and safety, prevent environmental harms, and safeguard our future. Beyond Nuclear advocates for an end to the production of nuclear waste and for securing the existing reactor waste in hardened

2. In an abundance of caution, Beyond Nuclear has submitted a hearing request and contentions in the Holtec licensing proceeding and anticipates submitting a hearing request and contentions in the ISP licensing proceeding. Beyond Nuclear's contentions assert the same NWPA claims as are asserted in this Motion. Beyond Nuclear's hearing requests will preserve these claims in the event that the Commission and/or a reviewing court holds that the licensing proceedings for consideration of the Holtec and ISP applications constitute the only venues in which the NRC will consider whether these applications violate the NWPA.

on-site storage until it can be permanently disposed of in a safe, sound, and suitable underground repository. For almost ten years, Beyond Nuclear has worked toward its mission by regularly intervening in NRC licensing, relicensing, and other proceedings related to irradiated nuclear fuel matters. Based on the following, as well as the additional interests included in members' declarations, *see* Exhibits 01-08, Beyond Nuclear demonstrates that its members fulfill the standing requirements and have authorized Beyond Nuclear to represent their interests. Accordingly, Beyond Nuclear has standing to request NRC dismiss the Holtec and ISP applications.

A. Beyond Nuclear's Standing is Established through Radiological Injury

Beyond Nuclear's members are largely concerned with radiological injury. To establish standing, the injury alleged need not be large: even minor radiological exposures, within regulatory limits, resulting from a proposed license activity can be sufficient. *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 417 (2001), *reversed on other grounds*, CLI-02-24, 56 NRC 335 (2002). In *Yankee Atomic Elec. Co.*, for example, the Licensing Board found standing because the Board could not "rule out" the potential for "some, even if minor, public exposures" from the decommissioning process to members of the petitioner organizations who lived within ten miles of the site, recreated along waterways, and regularly used roads that potentially would be used to transport waste. (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61,

69-70, *aff'd,* CLI-96-7, 43 NRC 235, 246-48 (1996). *See also Armed Forces Radiobiology Research Inst.* (Cobalt-60 Storage Facility), ALAB-682, 16 NRC 150, 154 (1982) (quoting *Duke Power Co. v. Carolina Environmental Study Group,* 438 U.S. 59, 74 (1978)) ("[T]he emission of non-natural radiation into appellees' environment would also seem a direct and present injury, given our generalized concern about exposure to radiation and the apprehension flowing from the uncertainty about the health and genetic consequences of even small emissions like those concededly emitted by nuclear power plants.").

The NRC recognizes two legal frameworks for analyzing standing based on radiological injury: traditional standing and the proximity presumption. *U.S. Army Installation Command* (Schofield Barracks, Oahu, Hawaii, & Pohakuloa Training Area, Island of Hawaii, Hawaii), LBP-10-4, 71 NRC 216, 228 (2010). Beyond Nuclear has standing pursuant to both frameworks.

B. Beyond Nuclear Has Standing Pursuant to Traditional Standing Doctrine

To establish standing through traditional means, the NRC applies judicial concepts of standing, *i.e.,* injury-in-fact, causation, and redressability. *Pac. Gas & Electric Co.* (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation) LBP-07-14, 56 NRC 413, 426 (2002).

Beyond Nuclear establishes standing through traditional means by virtue of the injuries to its members who live and travel on or along routes that Holtec and

ISP plan to transport spent nuclear fuel. Members will be injured primarily from radiologic exposure received during normal transportation operations. *See* WASH-1238, Environmental Survey of Transportation of Radioactive Materials To and From Nuclear Power Plants (Dec. 1972) (NRC found that a person who spends three minutes at an average distance of three feet from loaded truck or car might receive a dose of as much of 1.3 mrem); Environmental Report on the HI-STORE CIS FACILITY at 4-32 (Report No. HI-2167521) (Dec. 2017) (using dose rate of 10 mrem/hour at a distance of 6.5 feet for transportation radiation impact analysis) (hereinafter "Holtec Environmental Report"); WCS Environmental Report at 4-13 (using dose rate of 0.1 mSv per hour at 2 meters for transportation radiation impact analysis). For example, the Licensing Board in *Duke Cogema Stone & Webster* found that "unwanted doses of ionizing radiation" from shipments of nuclear fuel transported "over the same public highways the Petitioners' members travel" established standing because "incident-free shipping of plutonium provides a dose of ionizing radiation, albeit small, to anyone next to the transport vehicle and a minor exposure to radiation, even one within regulatory limits, is sufficient to state an injury in fact." LBP-01-35, 54 NRC at 417.

There is also a risk of radiologic injury to Beyond Nuclear's members from an accident involving shipments of spent nuclear fuel being transported to the CISFs. *See e.g.,* Holtec Environmental Report at 4-34 (the application analyzes "a spectrum of accidents that ranged from high-probability accidents of low severity and consequences

to severe accidents with radiological consequences"); WCS Environmental Report at 4-15 (noting that rail casks could release radioactivity in "exceptionally severe accidents."). There is a higher likelihood of an accident involving spent nuclear fuel near the CISFs because the transportation infrastructure in those areas is already unsafe and impacted from the oil and gas boom. *See e.g., New Mexico GOP Governor Hopeful: Toll Roads for Oil Traffic*, Associated Press, KTBS (Aug. 21, 2018), https://www.ktbs.com/news/business/new-mexico-gop-governor-hopeful-toll-roads-for-oil- traffic/article_e8f4a10a-2542-5a9a-b64e-d0e6448c7bc8.html.

Further, Beyond Nuclear's members' interest in and right to travel will also be injured because they will either not know which route is safest to avoid radiological injury or they will be unable to avoid unsafe routes because of the limited highways in the area. *See Duke Cogema Stone & Webster*, LBP-01-35, 54 NRC at 415.

Holtec plans to transport spent nuclear fuel to the Holtec CISF on the Burlington Northern Santa Fe Carlsbad Subdivision railroad. Holtec Environmental Report at 2-4, 3-105, 4-30. This railroad travels through Roswell, New Mexico, south to Carlsbad, New Mexico, and then travels east toward the Holtec site, along which it parallels Highway 62/180 for 20 miles at a distance of 100 to 500 feet. Holtec may also transport the spent nuclear fuel the final 3.8 miles to the Holtec CISF by truck. Holtec Environmental Report at 4-33. Beyond Nuclear members who live or travel on roads that cross or parallel the Burlington Northern Santa Fe Carlsbad

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Subdivision railroad will be exposed to small doses of unwanted radiation during the normal transportation of spent nuclear fuel to the Holtec Facility and a higher likelihood of an accident involving spent nuclear fuel. Their interest in travel will be affected if they wish to avoid these injuries. Thus, Beyond Nuclear has standing to request dismissal of the Holtec application through members:

- Danny Berry who regularly travels on roads and highways around the Holtec CISF, including Highway 62/180 where it parallels the Burlington Northern Santa Fe Carlsbad Subdivision railroad. *See* Exhibit 01.

- Keli Hatley and Margo Smith, who regularly travel on Highway 62/180 where it parallels the Burlington Northern Santa Fe Carlsbad Subdivision railroad, regularly travel other roads in the area on which Holtec may transport spent nuclear fuel, and regularly travel on Laguna Road/Country Road 55 which will have to be moved to avoid the Holtec CISF. *See* Exhibits 03 and 05.

- Nick King, who lives within 450 yards of one Burlington Northern Santa Fe Carlsbad Subdivision railroad, 800 yards of a second Burlington Northern Santa Fe Carlsbad Subdivision railroad, and within one mile of a railyard at which the spent nuclear fuel shipments may stop for extended periods. *See* Exhibit 04.

- Gene Harbaugh, who lives within 250 yards of a Burlington Northern Santa Fe Carlsbad Subdivision railroad and within 500 yards of a railyard at which the spent nuclear fuel shipments may stop for extended periods. *See* Exhibit 08.

- Jimi Gadzia, who lives within 900 yards of the Burlington Northern Santa Fe Carlsbad Subdivision railroad and whose frequent travel in Roswell causes her to regularly travel along and over this railroad. *See* Exhibit 02.

ISP also plans to transport spent nuclear fuel to the WCS CISF by rail. ISP plans to use the Texas and New Mexico Railway between Monahan, Texas, and Eunice, New Mexico. WCS Environmental Report at 4-8. This railroad parallels Highway 18 within a few hundred feet for approximately 40 miles. Beyond Nuclear members who live or travel on roads that cross or parallel the Texas and New Mexico Railway will be exposed to small doses of unwanted radiation during the normal transportation of spent nuclear fuel to the WCS Facility and a higher likelihood of an accident involving spent nuclear fuel. Their interest in travel will be affected if they wish to avoid these injuries. Thus, Beyond Nuclear has standing to request dismissal of the ISP application through members:

- Rose Gardner and D.K. Boyd, who regularly travel on roads and highways around the WCS CISF, including Highway 18 where it parallels the Texas and New Mexico Railway. *See* Exhibits 06 and 07.

Beyond Nuclear also establishes standing through traditional means by virtue of adverse impacts to its members' property values. *See Kelley v. Selin*, 42 F.3d 1501, 1509–10 (6th Cir. 1995) ("Petitioners are clearly asserting a threatened injury. The injury can be fairly traced to respondents' actions since petitioners allege that it is the storage of spent nuclear fuels in the VSC–24 cask that has the potential to interrupt enjoyment of their lakefront property and to diminish its value. Finally, a decision in their favor could redress the threatened harm."); *see also Louisiana Energy Servs., L.P.* (Claiborne Enrichment Ctr.), CLI-98-3, 47 NRC 77, 108-109 (1998). Because of public perception and anticipation, individuals are hesitant to move close to a nuclear facility or the transportation route for spent nuclear fuel, which leads to depressed property values near these sites. Close proximity to nuclear facilities and transportation routes for spent nuclear fuel may decrease property values as soon as a nuclear facility is licensed. Thus, Beyond Nuclear has standing to request dismissal of the Holtec application through members:

- Margo Smith and Keli Hatley, whose homes and property are located within one to seven miles from the Holtec CISF and each of their livelihoods is directly connected to the value of the Smith Ranch, which shares a fence line with the Holtec CISF. *See* Exhibits 05 and 03.

- Daniel Berry, whose home and property is located within 11 miles of the Holtec CISF and who owns

ranchland located within three to 15 miles of the Holtec CISF. *See* Exhibit 01.

- Gene Harbaugh, whose home and property is located within 250 yards of a Burlington Northern Santa Fe Carlsbad Subdivison railroad and 500 yards of the railyard that Holtec will use to transport spent nuclear fuel to the Holtec CISF. *See* Exhibit 08.

- Nick King, whose home and property is located within 450 yards of one Burlington Northern Santa Fe Carlsbad Subdivision railroad, within 800 yards of a second Burlington Northern Santa Fe Carlsbad Subdivision railroad, and within one mile of a railyard that Holtec will use to transport spent nuclear fuel to the Holtec CISF. *See* Exhibit 04.

- Jimi Gadzia, whose home and property is located within 900 yards of the Burlington Northern Santa Fe Carlsbad Subdivision railroad that Holtec may use to transport spent nuclear fuel to the Holtec CISF. *See* Exhibit 02.

Beyond Nuclear also has standing to request dismissal of the ISP application through members:

- Rose Gardner, whose home and property are located within seven miles of the WCS CISF. *See* Exhibit 06.

- D.K. Boyd, whose property is four miles from the WCS CISF at the nearest point. *See* Exhibit 07.

C. Beyond Nuclear Has Standing Pursuant to the Proximity Presumption

NRC has also applied an alternative to establishing standing based on the proximity presumption. *Tennessee Valley Auth.* (Sequoyah Nuclear Plant, Units 1 & 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-14, 56 NRC 15, 3 (2002) ("This so-called proximity or geographical presumption 'presumes a petitioner has standing to intervene without the need specifically to plead injury, causation, and redressability…' "); *Armed Forces Radiobiology Research Inst.*, ALAB–682, 16 NRC at 154 (The "proximity to a large source of radioactive material establishes petitioner's interest."). Where the "nature of the proposed action and the significance of the radioactive source" create an "obvious potential for offsite consequences," the NRC applies a presumption of standing to individuals residing, owning property, or having frequent and regular contacts within the radius of those potential offsite consequences. *Consumers Energy Co.* (Big Rock Point Indep. Spent Fuel Storage Installation), CLI-07-19, 65 NRC 423, 426 (2007) (quoting *Exelon Generation Co. LLC & PSEG Nuclear, LLC* (Peach Bottom Atomic Power Station, Units 2 & 3), CLI-05-26, 62 NRC 577, 580-581 (2005)); s*ee also Kelley v. Selin*, 42 F.3d 1501 (6th Cir. 1995).

The determination of the radius "beyond which . . . there is no longer an 'obvious potential for offsite consequences'" is made on a case-by-case basis. *Exelon Generation Co. LLC & PSEG Nuclear, LLC*, CLI-05-26, 62 NRC at 580-81. Licensing Boards have found standing based on proximity to spent nuclear fuel ranging

from 4,000 feet to 17 miles. *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142 (1997); *Pac. Gas & Elec. Co.*, LBP-02-23, 56 NRC at 428. The standard for assessing the potential for offsite consequences is whether the consequences are plausible, not whether consequences are probable or likely. *Cfc Logistics, Inc.*, LBP-03-20, 58 NRC 311, 320 (2003), *citing Ga. Inst. of Tech.* (Georgia Tech Research Reactor) CLI-95-12, 42 NRC 111 (1995) (Commission found standing based on a "plausible scenario, albeit a highly unlikely one, in which three independent redundant safety systems—all designed to function under normal circumstances—could simultaneously fail in a research reactor.").

The potential for offsite consequences from both the Holtec CISF and WCS CISF is "obvious" due to the characteristics and quantity of spent nuclear fuel Holtec and ISP plan to consolidate at the CISFs. Spent fuel is and will remain highly radioactive and dangerous to humans for hundreds of thousands of years. *Nuclear Energy Institute v. EPA,* 373 F.3d 1251, 1257 (D.C. Cir. 2004). Holtec proposes to store an astronomical quantity of this extremely dangerous and long-lived radioactive waste — up to 173,600 MTU, more than twice the total amount of commercially generated spent nuclear fuel existing in the entire United States today. *See infra,* Section V.A. For its part, ISP plans to store 40,000 MTU of spent nuclear fuel at the WCS CISF — a quantity that is more than half of the spent nuclear fuel existing in the United States. WCS Environmental Report at 4-9. As discussed in the Blue Ribbon Commission's Report (for more detail, *see infra*

Section V.A.), the *only* acceptable means for separating this dangerous material from the environment for the long-term is disposal, not interim storage. Blue Ribbon Commission on America's Nuclear Future, Report to the Secretary at xi (Jan. 2012) (ML120970375) ("BRC Report") ("The conclusion that disposal is needed and that deep geologic disposal is the scientifically preferred approach has been reached by every expert panel that has looked at the issue and by every other country that is pursuing a nuclear waste management program."). Further, Holtec and ISP each acknowledge at least one plausible scenario that would result in off-site consequences from storage of spent nuclear fuel at both CISFs. HI-STORE CIS Safety Analysis Report at 8-5 – 8-6 (Report No. HI-2167374) (Mar. 27, 2017) (safety analysis explains that a criticality accident is possible due to a flooded canister) (hereinafter "Holtec SAR"); WCS Safety Analysis Report at 12-2 ("Analyses are provided for a range of hypothetical accidents, including those with the potential to result in a total effective dose equivalent of greater than 5 Rem outside the owner controlled area or the sum of the deep-dose equivalent specified in 10 CFR 72.106.").

Thus, Beyond Nuclear has standing to request dismissal of the Holtec and ISP applications based on the proximity presumption, through members who own property nearby and have frequent and regular contacts within the radius of potential obvious offsite consequences from the Holtec CISF and the WCS CISF, including:

- Keli Hatley, who lives one mile from the Holtec CISF. *See* Exhibit 03. Ms. Hatley often spends

time with family approximately two miles from the Holtec CISF and ranches her cattle up to the fence line of the Holtec CISF. *Id.* Ms. Hatley and her children drive most days over a section of the Laguna Road/Country Road 55 that currently travels across the Holtec site and will have to be moved if the CISF is built. *Id.*

- Margo Smith, who lives seven miles from the Holtec CISF. *See* Exhibit 05. Ms. Smith regularly spends time within approximately two miles of the Holtec CISF, ranching and visiting her two daughters' homes. *Id.*

- Daniel Berry, who owns property within three to fifteen miles of the Holtec CISF. *See* Exhibit 01. Mr. Berry also lives and works on this land, and regularly drives on Highway 62/180 near the Holtec CISF. *Id.*

- Jimi Gadzia, who owns mineral rights within ten to 16 miles of the Holtec CISF. *See* Exhibit 02.

- Rose Gardner, whose home and work are located within seven miles of the WCS CISF. *See* Exhibit 06. Ms. Gardner also visits family who live approximately five miles from the WCS CISF. *Id.*

- D.K. Boyd, whose property is four miles from the WCS CISF at the nearest point. *See* Exhibit 07.

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IV. STATUTORY FRAMEWORK

A. Nuclear Waste Policy Act

The NWPA is Congress' "comprehensive scheme for the interim storage and permanent disposal of high-level radioactive waste generated by civilian nuclear power plants." *Ind. Mich. Power Co. v. DOE*, 88 F.3d 1272, 1273 (D.C. Cir. 1996). The NWPA establishes distinct roles for the federal government and spent fuel generators with respect to the storage and disposal of spent fuel. The "Federal Government has the responsibility to provide for the permanent disposal of … spent nuclear fuel" but "the generators and owners of … spent nuclear fuel have the primary responsibility to provide for, and the responsibility to pay the costs of, the interim storage of … spent fuel until such … spent fuel is accepted by the Secretary of Energy." 42 U.S.C. § 10131. Thus, Section 111 of the NWPA specifically provides that the federal government will not take title to spent fuel until it has opened a repository. 42 U.S.C. § 10131(a)(5).

B. Administrative Procedure Act

The Administrative Procedure Act prohibits, and requires reviewing courts to hold unlawful and set aside, federal agency action that is "not in accordance with law," or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. §§ 706(2)(A), (C). These prohibitions have prevented other agencies from ignoring the mandates of the NWPA. For example, after the Yucca Mountain project was abandoned, the

DOE determined it need not revise the annual fee nuclear power producers must pay pursuant to the NWPA to cover the costs of nuclear waste disposal. *Nat'l Ass'n of Regulatory Util. Comm'rs v. U.S. Dep't of Energy*, 736 F.3d 517, 519-520 (D.C. Cir. 2013). The D.C. Circuit struck that decision down as "contrary to law." *Id.* In striking similarity with Holtec's and ISP's assumptions discussed in detail below, DOE premised its determination on an assumption that a temporary storage facility could be constructed *without* NRC first issuing a license for the construction of a permanent facility. *Id.* Of course, the NWPA requires that precondition. The Court thus held that while "it is one thing to anticipate minor statutory additions to fill gaps," it is "quite another to proceed on the premise of a wholesale reversal of a statutory scheme. The latter is flatly unreasonable." *Id.*

V. FACTUAL BACKGROUND

A. History of Spent Fuel Storage and Policy in the U.S.

While the NWPA calls for construction of a repository for disposal of spent fuel, no repository has been licensed or built to date. Therefore, a significant quantity of spent fuel has accumulated at reactor sites. The spent fuel is stored in water-filled fuel storage pools and dry storage casks. NUREG-2157, Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel at 2-11 (Sept. 2014) ("Continued Storage GEIS"). As of 2011, approximately 67,500 MT of spent fuel had accumulated at commercial nuclear power plants, with the inventory

growing by about 2,000 MT per year. Continued Storage GEIS at 2 –11. This inventory of stored spent fuel is now greater than the Congressionally imposed limit on the capacity of the Yucca Mountain repository of 70,000 MT. 42 U.S.C. § 10134(d).

Despite the increasing quantity of spent fuel stored at reactor sites, the NRC has concluded that onsite spent fuel storage poses no significant environmental risks, even for an indefinite storage period. Continued Storage GEIS at xlvii – xlviii.[3] Consistent with the GEIS, neither ISP nor Holtec has argued that spent fuel would pose less of a radiological risk if it were transported to an away-from reactor storage site.

Under Section 302 of the NWPA, 42 U.S.C. § 10222, reactor licensees were required to pay into a Nuclear Waste Fund for construction of a repository. When the repository failed to materialize, licensees began to recover contract damages for the purpose of covering the cost of continuing to store spent fuel at their reactor sites. *See, e.g.*, *Maine Yankee Atomic Power Co. v. United States*, 225 F.3d 1336, 1341–42 (Fed. Cir. 2000); *see also Nat'l Ass'n of Regulatory Util. Comm'rs,* 736 F.3d at 520; *Ind. Michigan Power Co.,* 88 F.3d at 1276-77 (finding that DOE's obligation under Section 302(a)(5)(B) of the NWPA to start disposing of spent nuclear fuel by a set date was not limited by the lack of a repository that Section

3. The only exceptions to the NRC's finding of "small" environmental impacts related to the potentially "large" adverse impacts to historic and cultural resources, and "moderate" environmental impacts by related nonradioactive waste. *Id.*

302(a)(5)(A) required prior to DOE taking title; only the remedy the courts could provide for DOE's failure to start disposing was limited). Contract damage lawsuits under the NWPA are now commonplace, and the DOE pays damages on a cyclical basis to reactor licensees. *See, e.g.*, *Nat'l Ass'n of Regulatory Util. Comm'rs*, 736 F.3d at 520.

In 1987, Congress amended the NWPA by directing DOE to narrow the focus of its search for a repository site to a single location, Yucca Mountain in Nevada. But after two decades passed without significant progress, the DOE announced in 2009 that it no longer considered Yucca Mountain a viable option for a final repository and announced plans to withdraw its license application for the site. President Obama thereafter created the Blue Ribbon Commission on America's Nuclear Future ("BRC").

In 2012, the BRC issued a set of recommendations for managing spent nuclear fuel, including that the U.S. government pursue consolidated interim storage of spent fuel, as part of an integrated program for spent fuel disposal. BRC Report at 40. The BRC cautioned that "a program to establish consolidated storage will succeed only in the context of a parallel disposal program that is effective, focused, and making discernable progress in the eyes of key stakeholders and the public." *Id.* A "robust repository program . . . will be as important to the success of a consolidated storage program as the consolidated storage program will be to the success of a disposal program," and therefore "[p]rogress on both fronts is needed." *Id.* The BRC also recognized that federal legislation would be needed before construction of a consolidated storage facility could begin. *Id.* at 41.

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In January 2013, in response to the BRC Report, the DOE released *Strategy for the Management and Disposal of Used Nuclear Fuel and High-Level Radioactive Waste* (ML13011A138) ("DOE Strategy") to provide "a basis for the Administration to work with Congress to design and implement a program to meet the government's obligation to take title to and permanently dispose of used nuclear fuel and high-level radioactive waste." *Id.* at 3. The DOE endorsed the BRC's recommendation that the government should pursue consolidated interim storage of spent fuel, but recognized that:

> The NWPA currently constrains the development of a storage facility by limiting the start of construction of such a facility until after the Nuclear Regulatory Commission (NRC) has issued a license for construction of a repository. This restriction has effectively eliminated the possibility of having an interim storage facility as an integral component of a waste management system.

Id. at 5-6. With respect to the issue of transferring ownership of spent fuel to the DOE during transportation, the DOE Strategy also states:

> [T]he Department is proceeding with planning activities for the development of transportation capabilities and storage facilities to facilitate the acceptance of used nuclear fuel at a pilot interim storage facility within the next 10 years and later at a larger consolidated interim

> storage facility. The Administration will undertake the transportation planning and acquisition activities necessary to initiate this process with the intent to transfer them to a separate organizational entity *if and when it is authorized by Congress and in operation.*

Id. at 6-7 (emphasis added). Thus, both the BRC and the DOE recognized that an interim spent fuel storage facility entailing U.S. government ownership of spent fuel could not be built or operated without authorizing legislation by the U.S. Congress.

B. Holtec License Application for the Holtec CISF

On March 30, 2017, Holtec filed an application to the NRC for construction and operation of the proposed Holtec CISF in Lea County, New Mexico. Holtec Hearing Notice, 62 Fed. Reg. 13,802. The proposed Holtec CISF would "initially store 500 canisters or 8,680 metric tons of uranium in the CISF and eventually store up to 10,000 canisters in the CISF." *Id.* Ultimately, Holtec proposes to store a total quantity of 173,600 MTUs of spent fuel, over twice the capacity limit of the Yucca Mountain repository. Holtec SAR, Table 1.0.1 at 1-4. Holtec proposes to operate the facility for as long as 120 years (40-year license term plus 80 years of extensions). Holtec Environmental Report at 1-1.

In its license application, Holtec proposes to build and manage the Holtec CISF as a private company. Holtec SAR at 1-1. Nevertheless, Holtec's Environmental Report

reveals that Holtec does not plan to begin construction of the facility until "after Holtec successfully enters into a contract for storage with the U.S. Department of Energy (DOE)." Holtec Environmental Report at 1-1. Holtec also assumes that ownership of spent fuel will be transferred to the DOE *before* it is shipped to the CISF. *See* Holtec Environmental Report at 3-104 ("DOE would be responsible for transporting SNF from existing commercial nuclear power reactor storage facilities to the CIS Facility."). Thus, as demonstrated by Holtec's Environmental Report, Holtec's entire operation depends on the assumption that DOE will take responsibility for the spent fuel that is transported to the CISF and stored there.[4]

C. ISP License Application for WCS CISF

Like Holtec, ISP has applied for a license to build and operate a CISF, in Andrews County, Texas. ISF

4. In various parts of its application, Holtec asserts that ownership or liability may rest with "either" licensees or the DOE. *See, e.g.,* HI-STORE CIS Facility Financial Assurance and Project Life Cycle Cost Estimates, Rev. 0 (Report No. HI-2177593) at 3 ("Additionally, as a matter of financial prudence, Holtec will require the necessary user agreements in place from the USDOE and/or the nuclear plant owners.") But these disclaimers are meaningless in light of the crucial fact that Holtec does not intend to begin construction of the facility until DOE has taken title to spent fuel and assumed responsibility for transporting it to the facility. The suggestion that DOE would transfer spent fuel *back to licensees* is absurd, given that the NWPA anticipates that spent reactor fuel is ultimately destined for federal ownership and disposal in a repository. *See* Section IV.A, *supra*

Hearing Notice, 83 Fed. Reg. 44,070 (Aug. 29, 2018). The proposed WCS CISF site is approximately 40 miles from the proposed Holtec CISF site. The WCS CISF would house a total of 40,000 MTU of spent fuel over a period of 60 years. WCS Environmental Report, Rev. 2 at 1-1 .

Like Holtec, ISP assumes federal ownership of the spent fuel to be shipped to and stored at the proposed WCS CISF. And like Holtec, ISP attempts to avoid the legal implications of that assumption by claiming a possibility that spent fuel ownership will rest with private licensees.

The first application for a centralized interim spent fuel storage facility at the WCS site in Texas was filed by Waste Control Specialists L.L.C. on April 28, 2016. *See* Waste Control Specialists LLC's Consolidated Interim Spent Fuel Storage Facility Project, License Application; docketing and opportunity to request a hearing and to petition for leave to intervene, 82 Fed. Reg. 8,773 (Jan. 30, 2017). WCS candidly asserted that "[t]he U.S. Department of Energy (DOE) will be contractually responsible for taking title of the spent fuel at the commercial reactor sites and transporting the spent fuel to the CISF, by rail." WCS License Application, Rev. 0 at 101. Furthermore, the application stated that "WCS shall not receive [spent nuclear fuel] until such a contract with the DOE is provided to the NRC as a condition of the license." *Id.* at 1-6.

In 2017, WCS asked the NRC to suspend its review of its application. Then, in 2018, ISP formed as a new joint venture between WCS and Orano CIS, L.L.C., and submitted a revised application. 83 Fed. Reg. at 44,070-

71. In all aspects where WCS' application had previously referred to the DOE's responsibility for spent fuel at the proposed facility, ISP now substituted the phrase "the U.S. Department of Energy (DOE) *or other holders of the title to SNF at commercial nuclear power facilities (SNF Title Holder(s))*." *See id.* ISP added this information without any comment, explanation, or evidence as to why it now thinks "other holders" would be willing to retain title to the waste during transportation and storage.

Thus, for instance, the License Application states:

> The U.S. Department of Energy (DOE) *or other holders of the title to SNF at commercial nuclear power facilities (SNF Title Holder(s)) will hold title to the SNF during transportation to and from and while in storage at the CISF.*

WCS License Application at 1-1 – 1-2 (emphasis in original). Similarly, it states: "The funding for constructing the CISF is expected to be primarily through future contracts for storage of SNF with the DOE *or other SNF Title Holder(s)." Id.* at 1-6 (emphasis in original). And:

> *ISP* will obtain funds to operate the CISF pursuant to future contracts with the DOE *or other SNF Title Holder(s). ISP* shall not receive SNF until such a contract with the DOE *or other SNF Title Holder(s)* is provided to the NRC as a condition of the license.

Id. at 1-7 (emphasis in original).

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ISP also seeks an exemption from the NRC's regulations for financial assurance for decommissioning, based on federal ownership of the spent fuel. WCS License Application at 1-7. The application asserts that if it fails to have a contract with DOE, it will obtain a surety bond for private owners, but again the assertion is *pro forma*:

> *ISP seeks this exemption for the case where the* DOE will be contractually responsible for taking title of SNF prior to transport and while it is placed into interim storage at the CISF. The NRC has recognized that a contract by the DOE specifically guaranteeing that funds will be made available to decommission equipment, facilities, and land is an equivalent financial assurance instrument that may be relied upon and that will save tax payers in a manner that is in the public interest.

WCS License Application at 1-9. *See also* WCS Environmental Report at 3-5 (emphasis in original) ("The DOE *or the SNF Title Holder(s)* would be responsible for transporting spent nuclear fuel (SNF) from existing commercial nuclear power reactors to the CISF. SNF would be transported to the CISF by rail"); WCS Environmental Report at 7-15 (emphasis in original) (asserting that "*ISP* expects to enter into a contract(s) with DOE *or the SNF Title Holder(s)* that will provide the funding for facility construction, operation, and decommissioning.").

Thus, both Holtec and ISP rely on the assumption that the DOE will take responsibility for spent fuel during transportation and storage at their sites. And both Holtec and ISP also seek to legitimate their assumptions by citing the BRC Report and the DOE Strategy. Holtec Environmental Report at 1-3, WCS Environmental Report at 1-3. While they hedge this assumption by referring to the possibility of private ownership, such meaningless and unsupported references serve as nothing more than fig leaves over the essential premise of their proposals – that these facilities will be built *only* if DOE owns the waste.

VI. ARGUMENT: THE NRC MAY NOT ISSUE LICENSES TO HOLTEC AND ISP BECAUSE THEY ASSUME FEDERAL OWNERSHIP OF SPENT FUEL DURING STORAGE AND TRANSPORTATION IN VIOLATION OF THE NWPA.

The NRC must dismiss Holtec's and ISP's license applications because the key condition of both applications — federal acquisition of title to commercially-generated spent fuel prior to the opening of a permanent repository — is contrary to the NWPA, which precludes licensees from transferring title of spent fuel to the DOE until a repository has opened. *Indiana Mich. Power Co.,* 88 F.3d at 1273 (holding that DOE's obligation to take title to spent fuel does not begin until a repository is opened.). Until such time as a repository opens and the DOE takes title to spent fuel, "[t]he generators and owners of high-level radioactive waste and spent nuclear fuel have the primary responsibility to provide for, and the

responsibility to pay the costs of, the interim storage of such waste and spent fuel." 42 U.S.C. § 10131. *See also* 42 U.S.C. § 10143 (providing that "[d]elivery, and acceptance by the Secretary [of Energy], of any high-level radioactive waste or spent nuclear fuel *for a repository* . . . shall constitute a transfer to the Secretary of title to such waste or spent fuel" (emphasis added)); 42 U.S.C. § 10222(a)(5)(A) (providing that DOE will "take title" to spent fuel *only* "following commencement of operation of a repository").[5] There is no dispute that a final repository is not operational, let alone even licensed.

Thus, the NWPA establishes a clear sequential order for transference of title, possession, and physical movement of spent fuel: DOE may only transport spent nuclear fuel *subsequent to* taking title to the spent fuel, and DOE may only take title after a repository is operational. Given that no spent fuel repository has opened, the NWPA precludes DOE from taking title to the spent fuel, and thereby also precludes it from having any responsibility

5. The language of 42 U.S.C. § 10222(a)(5)(A) is memorialized in the Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste, 10 C.F.R. § 961.11 ("This contract applies to the delivery by Purchaser to DOE of SNF … acceptance of title by DOE to such SNF … , subsequent transportation, and disposal of such SNF" and "The terms of this contract shall be from the date of execution until such time as DOE has accepted, transported from the Purchaser's site(s) and disposed of all SNF…"). *See also* 10 C.F.R. § 961.1 ("This part establishes the contractual terms and conditions under which the Department of Energy (DOE) will make available nuclear waste disposal services … DOE will take title to, transport, and dispose of spent nuclear fuel …").

for the transportation of the spent fuel between a reactor storage facility and an interim storage facility.[6]

By assuming that DOE will take title to the spent fuel to be stored at the CISFs, Holtec and ISP flout the clearly stated limitations of the NWPA and federal government policy of giving spent fuel generators the "responsibility" of coming up with "their own interim storage solutions." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02- 29, 56 NRC 390, 404-06 (2002). Taking responsibility for spent fuel logically includes all obligations incident to the ownership of spent fuel, such as financing the cost of building and maintaining a facility to safely house the spent fuel, and liability for operational problems and accidents.

Notably, in *Private Fuel Storage,* the Commission concluded that the NWPA did not preclude it from licensing a private away-from-reactor spent fuel storage facility. 56 NRC at 405-06. But that decision concerned only privately-owned waste. The Commission has never asserted that in licensing a private spent fuel storage facility, it could ignore the NWPA's prohibition against transfer of title of spent fuel to the federal government in the absence of a repository. Thus the NWPA contains no current provision that would allow DOE to assume title

6. As discussed above in note 7, under the statutory scheme of the NWPA and as a practical matter, DOE would never take title for transportation and return it to licensees.

and responsibility for the spent fuel to be stored at the proposed Holtec CISF or the WCS CISF.[7]

While both Holtec and ISP claim to rely on the BRC Report and DOE Strategy for support of their bids for NRC licensing of their proposed operations, neither document countenances their actions. As discussed above in Section V.A, the BRC explicitly stated that initiatives for consolidated interim storage of spent fuel should come from the U.S. government, should be integrated with an active spent fuel disposal program, and should be allowed by federal legislation. Given the federal government's abandonment of its repository siting program for

7. The *only* NWPA provision that allows transfer of title to spent fuel from commercial licensees to the DOE, prior to the opening of a repository, is the emergency "Interim Storage Program" found in Subtitle B of the NWPA. *But the Interim Storage Program expired in 1990.* And the program also imposed extreme requirements that are not met here. For instance, the Interim Storage Program limited the amount of spent fuel that could be transferred to the DOE to only 1,900 MT. 42 U.S.C. §§10151(b)(2), 10155(a)(1). In contrast, both the Holtec and ISP seek to initially store over 5,000 MT of spent fuel, and Holtec would eventually store over 173,000 MT. Moreover, before transferring that stopgap quantity of spent fuel to DOE, a reactor licensee was required to persuade the NRC that a lack of adequate spent fuel storage capacity at an operating nuclear reactor would jeopardize "the continued, orderly operation" of the reactor. 42 U.S.C. § 10151(a)(3). Finally, the Interim Storage Program required that spent fuel must be stored at a public facility, not a private facility. 42 U.S.C. § 10151(b)(2). None of those circumstances exist here, and thus the Program's requirements could not be satisfied even if it were still available.

Yucca Mountain, there is no active spent fuel disposal program with which Holtec's and ISP's proposals could be integrated. Furthermore, the DOE Strategy also acknowledged that consolidated interim storage could not go forward with federal ownership of spent fuel without Congressional authorization.

Accordingly, the NWPA precludes the DOE from taking title to commercial spent fuel for storage at Holtec and ISP's proposed facilities. And by the same token, the Administrative Procedure Act precludes the NRC from acting "contrary to law" or "in excess of statutory authority" by issuing a license premised on a wholesale reversal of the statutory scheme established by the NWPA. 5 U.S.C. §§ 706(2)(A), 706(2)(C).

VII. CONCLUSION

Given the fundamental incompatibility of Holtec's and ISP's license applications with the NWPA, the NRC has no lawful basis to review the applications. Therefore, the NRC should dismiss the applications and terminate the proceedings opened in the Holtec and ISP Hearing Notices.

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Appendix F

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September 14, 2018

Appendix F

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

Docket No. 72-1051

IN THE MATTER OF: HOLTEC INTERNATIONAL

(HI-STORE CONSOLIDATED
INTERIM STORAGE FACILITY)

Docket No. 72-1050

IN THE MATTER OF: INTERIM STORAGE PARTNERS

(WCS CONSOLIDATED
INTERIM STORAGE FACILITY)

September 18, 2018

ERRATA TO BEYOND NUCLEAR'S, INC.'S MOTION TO DISMISS LICENSING PROCEEDINGS FOR HI-STORE CONSOLIDATED INTERIM STORAGE FACILITY AND WCS CONSOLIDATED INTERIM STORAGE FACILITY FOR VIOLATION OF THE NUCLEAR WASTE POLICY ACT

Petitioner hereby provides a list of errata to their Motion to dismiss, filed in the above captioned proceedings on September 14, 2018.

Appendix F

Page	Para.	Line	
ii		2	Replace "iv" with "iii"
ii		21	Add "Argument:" before "The NRC May…"
iii		5	Replace "13" with "14"
2	2	2	Replace "72-050" with "72-051" and "72-051" with "72-050"
6	3	1	Replace "Danny" with "Daniel"

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APPENDIX G — REQUEST AND PETITION BEFORE THE UNITED STATES OF AMERICA NUCLEAR REGULATORY COMMISSION, DATED SEPTEMBER 14, 2018

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE SECRETARY

Docket No. 72-1051

IN THE MATTER OF: HOLTEC INTERNATIONAL

(HI-STORE CONSOLIDATED
INTERIM STORAGE FACILITY)

September 14, 2018

BEYOND NUCLEAR, INC.'S HEARING REQUEST AND PETITION TO INTERVENE

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.309, Beyond Nuclear, Inc. ("Beyond Nuclear") hereby requests the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") grant a hearing on Holtec International's ("Holtec's") application for a license to build and operate a centralized interim spent fuel storage facility ("CISF") in Lea County, New Mexico. *See* 83 Fed. Reg. 32,919 (July 16, 2018) ("Holtec Hearing Notice").

As discussed in Section II of Beyond Nuclear's attached Motion to Dismiss Licensing Proceedings for

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Hi-Store Consolidated Interim Storage Facility and WCS Consolidated Interim Storage Facility for Violation of the Nuclear Waste Policy Act ("Motion to Dismiss", attached as Exhibit 1 and incorporated herein), Beyond Nuclear does not believe its contention lies within the scope of this licensing proceeding. Beyond Nuclear's contention claims noncompliance by Holtec and the NRC with the Nuclear Waste Policy Act of 1982, as amended ("NWPA"), a statute that is not covered by this licensing proceeding. *See* 10 C.F.R. §§ 72.40, 51.101.

Beyond Nuclear filed its Motion to Dismiss in this docket and Docket No. 72-1050 (Interim Storage Partners ("ISP"), WCS Consolidated Interim Storage Facility), but does to seek consideration of the Motion by the Atomic Safety and Licensing Board in either licensing proceeding. Instead, Beyond Nuclear has asked the NRC Commissioners to consider the Motion in separate dockets dedicated to the Motion to Dismiss. *Id.* Beyond Nuclear is filing its contention in this adjudicatory proceeding in an abundance of caution, to preserve its claims in the event that the Commission and/or a reviewing court holds that the licensing proceeding for consideration of the Holtec application (as well as the ISP application) constitutes the only venue in which the NRC will consider whether the application violates the NWPA.

Appendix G

II. BEYOND NUCLEAR HAS STANDING TO REQUEST A HEARING.[1]

As set forth below, Beyond Nuclear has standing to obtain a hearing on Holtec's license application as a representative of its members. *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 342 (1977). Beyond Nuclear is a nonprofit, nonpartisan membership organization that aims to educate and activate the public about the connections between nuclear power and nuclear weapons and the need to abolish both to protect public health and safety, prevent environmental harms, and safeguard our future. Beyond Nuclear advocates for an end to the production of nuclear waste and for securing the existing reactor waste in hardened on-site storage until it can be permanently disposed of in a safe, sound, and suitable underground repository. For almost ten years, Beyond Nuclear has worked toward its mission by regularly intervening in NRC licensing, relicensing, and other proceedings related to irradiated nuclear fuel matters. Based on the following, as well as the additional interests included in members' declarations, *see* Exhibits 02-07, Beyond Nuclear demonstrates that its members fulfill the standing requirements and have authorized Beyond Nuclear to represent their interests. Accordingly,

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1. Beyond Nuclear notes that this discussion of standing is the same as the discussion of standing in the Motion to Dismiss, including the legal arguments, the identity of the standing declarants who live or travel near the Holtec site and spent nuclear fuel transportation routese, and the content of their declarations. The only difference is that this discussion omits reference to ISP's application for the WCS CISF.

Beyond Nuclear has standing to request NRC dismiss the Holtec application.

A. Beyond Nuclear's Standing is Established through Radiological Injury

Beyond Nuclear's members are largely concerned with radiological injury. To establish standing, the injury alleged need not be large: even minor radiological exposures, within regulatory limits, resulting from a proposed license activity can be sufficient. *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 417 (2001), *reversed on other grounds*, CLI-02-24, 56 NRC 335 (2002). In *Yankee Atomic Elec. Co.*, for example, the Licensing Board found standing because the Board could not "rule out" the potential for "some, even if minor, public exposures" from the decommissioning process to members of the petitioner organizations who lived within ten miles of the site, recreated along waterways, and regularly used roads that potentially would be used to transport waste. (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 69-70, *aff'd,* CLI-96-7, 43 NRC 235, 246-48 (1996). *See also Armed Forces Radiobiology Research Inst.* (Cobalt-60 Storage Facility), ALAB-682, 16 NRC 150, 154 (1982) (quoting *Duke Power Co. v. Carolina Environmental Study Group,* 438 U.S. 59, 74 (1978)) ("[T]he emission of non-natural radiation into appellees' environment would also seem a direct and present injury, given our generalized concern about exposure to radiation and the apprehension flowing from the uncertainty about the

health and genetic consequences of even small emissions like those concededly emitted by nuclear power plants.").

The NRC recognizes two legal frameworks for analyzing standing based on radiological injury: traditional standing and the proximity presumption. *U.S. Army Installation Command* (Schofield Barracks, Oahu, Hawaii, & Pohakuloa Training Area, Island of Hawaii, Hawaii), LBP-10-4, 71 NRC 216, 228 (2010). Beyond Nuclear has standing pursuant to both frameworks.

B. Beyond Nuclear Has Standing Pursuant to Traditional Standing Doctrine

To establish standing through traditional means, the NRC applies judicial concepts of standing, *i.e.,* injury-in-fact, causation, and redressability. *Pac. Gas & Electric Co.* (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation) LBP-07-14, 56 NRC 413, 426 (2002).

Beyond Nuclear establishes standing through traditional means by virtue of the injuries to its members who live and travel on or along routes that Holtec plans to transport spent nuclear fuel. Members will be injured primarily from radiologic exposure received during normal transportation operations. *See* WASH-1238, Environmental Survey of Transportation of Radioactive Materials To and From Nuclear Power Plants (Dec. 1972) (NRC found that a person who spends three minutes at an average distance of three feet from loaded truck or car might receive a dose of as much of 1.3 mrem); Environmental Report on the HI-STORE

CIS FACILITY at 4-32 (Report No. HI-2167521) (Dec. 2017) (using dose rate of 10 mrem/hour at a distance of 6.5 feet for transportation radiation impact analysis) (hereinafter "Holtec Environmental Report"). For example, the Licensing Board in *Duke Cogema Stone & Webster* found that "unwanted doses of ionizing radiation" from shipments of nuclear fuel transported "over the same public highways the Petitioners' members travel" established standing because "incident-free shipping of plutonium provides a dose of ionizing radiation, albeit small, to anyone next to the transport vehicle and a minor exposure to radiation, even one within regulatory limits, is sufficient to state an injury in fact." LBP-01-35, 54 NRC at 417.

There is also a risk of radiologic injury to Beyond Nuclear's members from an accident involving shipments of spent nuclear fuel being transported to the Holtec CISF. *See e.g.,* Holtec Environmental Report at 4-34 (the application analyzes "a spectrum of accidents that ranged from high-probability accidents of low severity and consequences to severe accidents with radiological consequences"). There is a higher likelihood of an accident involving spent nuclear fuel near the CISF because the surrounding transportation infrastructure is already unsafe and impacted from the oil and gas boom. *See e.g., New Mexico GOP Governor Hopeful: Toll Roads for Oil Traffic*, Associated Press, KTBS (Aug. 21, 2018), https://www.ktbs.com/news/business/new-mexico-gop-governor-hopeful-toll-roads-for-oil-traffic/article_e8f4a10a-2542-5a9a-b64e-d0e6448c7bc8.html.

Further, Beyond Nuclear's members' interest in and right to travel will also be injured because they will either not know which route is safest to avoid radiological injury or they will be unable to avoid unsafe routes because of the limited highways in the area. *See Duke Cogema Stone & Webster*, LBP-01-35, 54 NRC at 415.

Holtec plans to transport spent nuclear fuel to the Holtec CISF on the Burlington Northern Santa Fe Carlsbad Subdivision railroad. Holtec Environmental Report at 2-4, 3-105, 4-30. This railroad travels through Roswell, New Mexico, south to Carlsbad, New Mexico, and then travels east toward the Holtec site, along which it parallels Highway 62/180 for 20 miles at a distance of 100 to 500 feet. Holtec may also transport the spent nuclear fuel the final 3.8 miles to the Holtec CISF by truck. Holtec Environmental Report at 4-33. Beyond Nuclear members who live or travel on roads that cross or parallel the Burlington Northern Santa Fe Carlsbad Subdivision railroad will be exposed to small doses of unwanted radiation during the normal transportation of spent nuclear fuel to the Holtec Facility and a higher likelihood of an accident involving spent nuclear fuel. Their interest in travel will be affected if they wish to avoid these injuries. Thus, Beyond Nuclear has standing to request dismissal of the Holtec application through members:

- Danny Berry who regularly travels on roads and highways around the Holtec CISF, including Highway 62/180 where it parallels the Burlington Northern Santa Fe Carlsbad Subdivision railroad. *See* Exhibit 02.

- Keli Hatley (Exhibit 3) and Margo Smith (Exhibit 4), who regularly travel on Highway 62/180 where it parallels the Burlington Northern Santa Fe Carlsbad Subdivision railroad, regularly travel other roads in the area on which Holtec may transport spent nuclear fuel, and regularly travel on Laguna Road/Country Road 55 which will have to be moved to avoid the Holtec CISF.

- Nick King, who lives within 450 yards of one Burlington Northern Santa Fe Carlsbad Subdivision railroad, 800 yards of a second Burlington Northern Santa Fe Carlsbad Subdivision railroad, and within one mile of a railyard at which the spent nuclear fuel shipments may stop for extended periods. *See* Exhibit 05.

- Gene Harbaugh, who lives within 250 yards of a Burlington Northern Santa Fe Carlsbad Subdivision railroad and within 500 yards of a railyard at which the spent nuclear fuel shipments may stop for extended periods. *See* Exhibit 06.

- Jimi Gadzia, who lives within 900 yards of the Burlington Northern Santa Fe Carlsbad Subdivision railroad and whose frequent travel in Roswell causes her to regularly travel along and over this railroad. *See* Exhibit 07.

Beyond Nuclear also establishes standing through traditional means by virtue of adverse impacts to its members' property values. *See Kelley v. Selin*, 42 F.3d

1501, 1509–10 (6th Cir. 1995) ("Petitioners are clearly asserting a threatened injury. The injury can be fairly traced to respondents' actions since petitioners allege that it is the storage of spent nuclear fuels in the VSC–24 cask that has the potential to interrupt enjoyment of their lakefront property and to diminish its value. Finally, a decision in their favor could redress the threatened harm."); *see also Louisiana Energy Servs., L.P.* (Claiborne Enrichment Ctr.), CLI-98-3, 47 NRC 77, 108-109 (1998). Because of public perception and anticipation, individuals are hesitant to move close to a nuclear facility or the transportation route for spent nuclear fuel, which leads to depressed property values near these sites. Close proximity to nuclear facilities and transportation routes for spent nuclear fuel may decrease property values as soon as a nuclear facility is licensed. Thus, Beyond Nuclear has standing to request dismissal of the Holtec application through members:

- Keli Hatley (Exhibit 03) and Margo Smith (Exhibit 04), whose homes and property are located within one to seven miles from the Holtec CISF and each of their livelihoods is directly connected to the value of the Smith Ranch, which shares a fence line with the Holtec CISF.

- Daniel Berry, whose home and property is located within 11 miles of the Holtec CISF and who owns ranchland located within three to 15 miles of the Holtec CISF. *See* Exhibit 02.

- Gene Harbaugh, whose home and property is located within 250 yards of a Burlington Northern Santa Fe Carlsbad Subdivison railroad and 500 yards of the railyard that Holtec will use to transport spent nuclear fuel to the Holtec CISF. *See* Exhibit 06.

- Nick King, whose home and property is located within 450 yards of one Burlington Northern Santa Fe Carlsbad Subdivision railroad, within 800 yards of a second Burlington Northern Santa Fe Carlsbad Subdivision railroad, and within one mile of a railyard that Holtec will use to transport spent nuclear fuel to the Holtec CISF. *See* Exhibit 05.

- Jimi Gadzia, whose home and property is located within 900 yards of the Burlington Northern Santa Fe Carlsbad Subdivision railroad that Holtec may use to transport spent nuclear fuel to the Holtec CISF. *See* Exhibit 07.

C. Beyond Nuclear Has Standing Pursuant to the Proximity Presumption

NRC has also applied an alternative to establishing standing based on the proximity presumption. *Tennessee Valley Auth.* (Sequoyah Nuclear Plant, Units 1 & 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-14, 56 NRC 15, 3 (2002) ("This so-called proximity or geographical presumption 'presumes a petitioner has standing to intervene without the need specifically to plead injury, causation, and redressability…' "); *Armed Forces Radiobiology Research*

Inst., ALAB–682, 16 NRC at 154 (The "proximity to a large source of radioactive material establishes petitioner's interest."). Where the "nature of the proposed action and the significance of the radioactive source" create an "obvious potential for offsite consequences," the NRC applies apresumption of standing to individuals residing, owning property, or having frequent and regular contacts within the radius of those potential offsite consequences. *Consumers Energy Co.* (Big Rock Point Indep. Spent Fuel Storage Installation), CLI-07-19, 65 NRC 423, 426 (2007) (quoting *Exelon Generation Co. LLC & PSEG Nuclear, LLC* (Peach Bottom Atomic Power Station, Units 2 & 3), CLI-05-26, 62 NRC 577, 580-581 (2005)); s*ee also Kelley v. Selin*, 42 F.3d 1501 (6th Cir. 1995).

The determination of the radius "beyond which . . . there is no longer an 'obvious potential for offsite consequences'" is made on a case-by-case basis. *Exelon Generation Co. LLC & PSEG Nuclear, LLC*, CLI-05-26, 62 NRC at 580-81. Licensing Boards have found standing based on proximity to spent nuclear fuel ranging from 4,000 feet to 17 miles. *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142 (1997); *Pac. Gas & Elec. Co.*, LBP-02-23, 56 NRC at 428. The standard for assessing the potential for offsite consequences is whether the consequences are plausible, not whether consequences are probable or likely. *Cfc Logistics, Inc.*, LBP-03-20, 58 NRC 311, 320 (2003), *citing Ga. Inst. of Tech.* (Georgia Tech Research Reactor) CLI-95-12, 42 NRC 111 (1995) (Commission found standing based on a "plausible scenario, albeit a highly unlikely one, in which three independent redundant

safety systems—all designed to function under normal circumstances—could simultaneously fail in a research reactor.").

The potential for offsite consequences from the Holtec CISF is "obvious" due to the characteristics and quantity of spent nuclear fuel Holtec plans to consolidate at the CISF. Spent fuel is and will remain highly radioactive and dangerous to humans for hundreds of thousands of years. *Nuclear Energy Institute v. EPA,* 373 F.3d 1251, 1257 (D.C. Cir. 2004). Holtec proposes to store an astronomical quantity of this extremely dangerous and long-lived radioactive waste — up to 173,600 MTU, more than twice the total amount of commercially generated spent nuclear fuel existing in the entire United States today. *See infra,* Section V.A. As discussed in the Blue Ribbon Commission's Report (for more detail, *see infra* Section V.A.), the *only* acceptable means for separating this dangerous material from the environment for the long-term is disposal, not interim storage. Blue Ribbon Commission on America's Nuclear Future, Report to the Secretary at xi (Jan. 2012) (ML120970375) ("BRC Report") ("The conclusion that disposal is needed and that deep geologic disposal is the scientifically preferred approach has been reached by every expert panel that has looked at the issue and by every other country that is pursuing a nuclear waste management program."). Further, Holtec acknowledges at least one plausible scenario that would result in off-site consequences from storage of spent nuclear fuel at the CISF. HI-STORE CIS Safety Analysis Report at 8-5 – 8-6 (Report No. HI-2167374) (Mar. 27, 2017) (safety analysis explains that a

criticality accident is possible due to a flooded canister) (hereinafter "Holtec SAR").

Thus, Beyond Nuclear has standing to request dismissal of the Holtec application based on the proximity presumption, through members who own property nearby and have frequent and regular contacts within the radius of potential obvious offsite consequences from the Holtec CISF, including:

- Keli Hatley, who lives one mile from the Holtec CISF. *See* Exhibit 03. Ms. Hatley often spends time with family approximately two miles from the Holtec CISF and ranches her cattle up to the fence line of the Holtec CISF. *Id*. Ms. Hatley and her children drive most days over a section of the Laguna Road/Country Road 55 that currently travels across the Holtec site and will have to be moved if the CISF is built. *Id.*

- Margo Smith, who lives seven miles from the Holtec CISF. *See* Exhibit 04. Ms. Smith regularly spends time within approximately two miles of the Holtec CISF, ranching and visiting her two daughters' homes. *Id.*

- Daniel Berry, who owns property within three to fifteen miles of the Holtec CISF. *See* Exhibit 02. Mr. Berry also lives and works on this land, and regularly drives on Highway 62/180 near the Holtec CISF. *Id.*

- Jimi Gadzia, who owns mineral rights within ten to 16 miles of the Holtec CISF. *See* Exhibit 07.

III. CONTENTION

A. Statement of Contention

The NRC must dismiss Holtec's license application and terminate this proceeding because the application violates the NWPA. The proceeding must be dismissed because the central premise of Holtec's application – that the U.S. Department of Energy ("DOE") will be responsible for the spent fuel that is transported to and stored at the proposed interim facilities – violates the NWPA. Under the NWPA, the DOE is precluded from taking title to spent fuel unless and until a permanent repository has opened. 42 U.S.C. §§ 10222(a)(5)(A), 10143.

B. Basis Statement

Beyond Nuclear hereby adopts and incorporates by reference Sections IV and V of the attached Motion to Dismiss (Exhibit 1). The Motion sets forth the facts in Holtec's license application on which Beyond Nuclear relies, and applies the NWPA and the Administrative Procedure Act to those facts.

C. Demonstration that the Contention is Within the Scope of the Proceeding

As discussed above in Section I, Beyond Nuclear does not believe its contention is within the scope of this

proceeding, because NRC regulations establishing the scope of the proceeding do not include the NWPA. *See* 10 C.F.R. §§ 72.40, 51.101. The contention seeks compliance by the Commission with the NWPA and the Administrative Procedure Act, which prohibits the Commission from acting in a manner that is "not in accordance with law," or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. §§ 706(2)(A), (C). *See* Motion to Dismiss, Section IV.B. Nevertheless, as discussed above in Section I, Beyond Nuclear is filing this contention in an abundance of caution.

D. Demonstration that the Contention is Material to the Findings NRC Must Make to renew FPL's operating license

For the same reasons as discussed in Section C above, this contention is not material to the findings that NRC must make in order to issue a license to Holtec. NRC regulations establishing the scope of the proceeding do not include the NWPA. *See* 10 C.F.R. §§ 72.40, 51.101. The contention seeks compliance by the Commission with the NWPA and the Administrative Procedure Act, which prohibits the Commission from acting in a manner that is "not in accordance with law," or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. §§ 706(2)(A), (C). *See* Motion to Dismiss, Section IV.B. Nevertheless, as discussed above in Section I, Beyond Nuclear is filing this contention in an abundance of caution.

E. Concise Statement of the Facts or Expert Opinion Supporting the Contention, Along with Appropriate Citations to Supporting Scientific or Factual Materials

The Motion to Dismiss cites the relevant statements in Holtec's License Application, Environmental Report, and SAR, and applies relevant law to those facts. No expert opinion is required to raise a material dispute with Holtec on the question of law raised by the contention.

IV. CONCLUSION

For the foregoing reasons, Beyond Nuclear's hearing request and petition to intervene should be granted.

Respectfully submitted,

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September 14, 2018

APPENDIX H — PETITION FOR EN BANC REVIEW OR PANEL REHEARING AND ERRATUM IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED OCTOBER 11, 2024

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

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

Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION AND THE UNITED STATES OF AMERICA,

Respondents.

Filed October 11, 2024

PETITION FOR EN BANC REVIEW OR PANEL REHEARING

[TABLES INTENTIONALLY OMITTED]

I. STATEMENT IN SUPPORT OF REHEARING EN BANC

Pursuant to Fed. R. App. P. 35(b)(1)(A), Petitioner seeks rehearing en banc of *Beyond Nuclear, Inc. v.*

Nuclear Regulatory Comm'n, 113 F.4th 956, 964 (D.C. Cir. 2024) (No. 20-1187, decided Aug. 27, 2024) (the "Opinion") because it conflicts with the U.S. Supreme Court's bedrock decision in *Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967) ("*Abbott Labs*") and recent decision in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System,* 144 S.Ct. 2440 (2024) ("*Corner Post*"), both of which concern an issue of exceptional importance – the Administrative Procedure Act's "'basic presumption' that anyone injured by agency action should have access to judicial review." *Corner Post*, 144 S.Ct. at 2459 (quoting *Abbott Labs* 387 U.S. at 140). Accordingly, consideration by the full Court is necessary to secure and maintain uniformity with the Supreme Court's decisions and uphold "our deep-rooted historic tradition that everyone should have his own day in court." *Id.* (internal quotations and citations omitted).

In the Opinion, the panel upheld the U.S. Nuclear Regulatory Commission's ("NRC's" or "Commission's") decision to deny Petitioner a hearing on a license condition that undisputedly violates the Nuclear Waste Policy Act, 42 U.S.C. § 10101, *et seq.* (the "Act") by allowing private storage of federally-owned commercial nuclear reactor waste (also called "spent fuel"). *Beyond Nuclear,* 113 F.4th at 964. While agreeing that the condition violates the law of today, the panel found that the condition was lawfully premised on a "forward-looking" prediction of what the law might be sometime in the future. It reasoned that such a condition is "essential in light of the protracted timelines for securing a license and the need to anticipate changing conditions and regulatory shifts." *Id.*

The panel's decision leaves Petitioner without recourse. Petitioner cannot get a hearing on whether the license condition violates the current Act, because there is no dispute that it does. *See id*. But, if and when Congress amends the Act, Petitioner will have no right to challenge the license condition's consistency with that future law, because the license condition has been approved and upheld, and therefore no further licensing action will be taken by NRC. And petitioner will have no meaningful access to this Court, because the 60-day time limit imposed by the Hobbs Act for seeking review of the Commission's decision to deny a hearing on Holtec's license application will have long since lapsed. *See* 28 U.S.C. § 2344.[1]

Moreover, if Petitioner asks NRC to take enforcement action with respect to the license condition because it does not comply with the amended law, NRC's decision will be discretionary and unreviewable. *Safe Energy Coalition v. U.S. Nuclear Reg. Comm'n,* 866 F.2d 1473, 1477 (D.C. Cir. 1989) (citing *Heckler v. Chaney,* 470 U.S. 821 (1985)). *See also Corner Post*, 144 S.Ct. at 2459, n.9 (explaining that there is no meaningful opportunity for review of decisions entirely within an agency's discretion). As a result, Petitioner will never have its day in court.

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1. NRC denied Petitioner's hearing request on the license, including the contested license condition, on April 23, 2020. JA0676, JA0682-85. Under the Hobbs Act, 28 U.S.C. § 2344, the time for appealing the lawfulness of the license condition expired June 22, 2020.

By approving NRC's incorporation into the license of a facially unlawful condition, the Opinion thus impermissibly departs from the Supreme Court's holdings, which provide:

1) Under the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.,* 5 U.S.C. § 706 *et seq.,* anyone injured by agency action should have access to judicial review (*Abbott Labs*, 387 U.S. at 140; *Corner Post,* 144 S.Ct. at 2459); and

2) "[P]leas of administrative convenience . . . never justify departing from the statute's clear text" (*Corner Post,* 144 S.Ct. at 2458 (internal quotations and citations omitted)).[2]

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2. On October 4, 2024, the Supreme Court granted the petition for certiorari in *Texas v. U.S. Nuclear Reg. Comm'n*, 78 F.4th 827 (5th Cir. 2023), *cert. granted*, No. 23-1300, 2024 WL 4394124 (U.S. Oct. 4, 2024) and will consider whether the Atomic Energy Act, 42 U.S.C. § 2201 *et seq.,* and the Nuclear Waste Policy Act permit NRC to license private entities to temporarily store spent nuclear fuel away from the nuclear-reactor sites where the spent fuel was generated.

While the case concerns the same spent fuel storage facility at issue here, its resolution will not address whether NRC can issue a license with conditions that violate the law. Nevertheless, if the Supreme Court rules that NRC lacked authority to license Holtec's facility, that decision will moot Petitioner's challenge here. Therefore, in an accompanying motion, Petitioner has asked the Court to hold this petition in abeyance pending the Supreme Court's decision.

II. FACTUAL AND PROCEDURAL BACKGROUND

In the proceeding below, Petitioner challenged 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 spent fuel generated by commercial nuclear reactors at its facility in southeastern New Mexico. In violation of the Nuclear Waste Policy Act, the proposed license included a condition that listed the federal government as a possible "user/payer" of Holtec's storage services. Pet. Final Opening Br. at 3 n. 3 (citing JA0037, JA0046, JA0400, JA0409). Petitioner contended that the license condition was unlawful because the Act prohibits the transfer of ownership of spent fuel from private commercial reactor licensees to the federal government (*i.e.,* the U.S. Department of Energy ("DOE")) unless and until a permanent repository has been licensed and is operating. Pet. Final Opening Br. at 14, 17 (citing 42 U.S.C. § 10222(a)(5)(A)). Petitioner also contended that the license condition violated 42 U.S.C. § 10168(b) (prohibiting NRC from licensing any entity other than DOE to site, build, and operate a facility for storage of federally-owned spent fuel) and 42 U.S.C. § 10161(a)(4) (mandating that reactor licensees bear the cost of spent fuel storage at federal sites rather than DOE). *Id.* at 17.

No party disputed Petitioner's claims. And in denying Petitioner a hearing, the NRC Commissioners agreed that "it would be illegal under [the Act] for the DOE to take title to the spent nuclear fuel at this time." JA0683. Nevertheless, the Commission refused to sever the license provision. Instead, it approved the entire license because

Holtec "sought a license for the lawful storage of privately owned spent fuel, and *only the conditional storage* of DOE-titled fuel if such storage became lawful." *Beyond Nuclear,* 113 F.4th at 964 (citing *In re Holtec Int'l,* 91 N.R.C. 167, 176 (Apr. 23, 2020)) (emphasis added).

Petitioner sought review from this Court on the ground that the Administrative Procedure Act and the U.S. Constitution required the lawfulness of the license condition be judged under the law of today, not some speculative law of the future. Further, because all parties agreed the license condition was unlawful under the Nuclear Waste Policy Act, Petitioners asked the Court to either vacate, reverse, and declare unlawful the Commission's decision; or to sever the unlawful license condition.

The panel issued its Opinion on August 27, 2024, upholding the license condition and finding:

> [T]he NRC's regulations explicitly permit licensees to include forward-looking terms, such as approval of an action upon the satisfaction of some condition. 10 C.F.R. § 72.44(a); *see also Ogalala Sioux Tribe v. U.S. NRC,* 45 F.4th 291, 304 (D.C. Cir. 2022) (holding a conditional license was lawful). Such conditions are often essential in light of the protracted timelines for securing a license and the need to anticipate changing conditions and regulatory shifts.

Beyond Nuclear, 113 F.4th at 964.[3]

3. The panel also ruled that the license could lawfully include a provision authorizing private storage of privately-owned spent

III. THE PANEL'S OPINION CONFLICTS WITH *ABBOTT LABS* AND *CORNER POST,* TWO DECISIONS OF THE U.S. SUPREME COURT.

Two related holdings in *Abbott Labs* and *Corner Post* fatally undermine the lawfulness of the panel's Opinion in this case.

A. The Opinion is inconsistent with *Abbott Lab's* and *Corner Post's* holdings that under the Administrative Procedure Act a petitioner may not be denied its day in court.

The panel's decision to uphold the illegal license condition contravenes "the [Administrative Procedure Act's] 'basic presumption' that anyone injured by agency action should have access to judicial review." *Corner Post*, 144 S.Ct. at 2459 (quoting *Abbott Labs,* 387 U.S. at 140). Relying on its bedrock decision in *Abbott Labs*, the Supreme Court held – just three months ago – that the Eighth Circuit could not deny a petitioner its "day in court" by refusing to review an unlawful action on grounds related to timeliness. *Corner Post,* 144 S.Ct. at 2459. The Court rejected the Eighth Circuit's interpretation of the statute of limitations that would have barred the petitioners' lawsuit after six years, even though the petitioner's injury occurred after that period expired.[4]

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fuel. *Id.* Petitioner does not dispute that ruling. Instead, this petition challenges only the panel's ruling upholding the license condition for private storage of federally-owned spent fuel.

4. *Corner Post* addresses claims arising under a statute of limitations, 28 U.S.C. 2401(a), *i.e.,* a statute which "creates a time

Here, in violation of *Abbott Labs* and *Corner Post,* the panel denied Petitioner access to this Court to challenge the lawfulness of Holtec's license condition at any time, now or in the future. Under the Hobbs Act, Petitioner could only obtain review of the unlawful license condition by filing an appeal to this Court within 60 days of NRC's decision denying Petitioner's claims. 28 U.S.C. § 2344. But the panel refused to entertain Petitioner's argument that the license condition violates the Nuclear Waste Policy Act. Instead, it found that because the license condition was "forward-looking," it does not matter that the condition violates the Act today. *Beyond Nuclear,* 113 F.4th at 964 (citing 10 C.F.R. § 72.44(a) and quoting *Ogalala Sioux Tribe,* 45 F.4th at 304).

Of course, all license conditions are "forward-looking" in the sense that they allow future conduct by the licensee. The panel failed to recognize that future compliance with license conditions must be capable of administrative verification, without the need for a hearing. *In re Private Fuel Storage, L.L.C.,* 52 N.R.C. 23, 34-35 (Aug. 1, 2000) (insisting that license conditions "be precisely drawn so that the verification of compliance becomes a largely

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limit for suing in a civil case, based on the date when the claim accrued." *Corner Post,* 144 S.Ct. at 2452 (internal quotations omitted). In comparison, Petitioner's claims in this case are limited by the Hobbs Act, a "statute of repose," *i.e.,* a statute which "puts an outer limit on the right to bring a civil action." *Id*. The distinction does not materially affect the policy on which *Corner Post* and *Abbott Labs* rest: that the Courts should avoid application of statutory time limits in a way that unfairly deprives parties of their access to judicial review.

ministerial rather than an adjudicatory act"). It simply is not possible, in 2024, to determine whether the license condition will be permitted under a future law or whether compliance can be verified as a "largely ministerial" act. *Id.*[5]

Indeed, if a future amended Nuclear Waste Policy Act is anything like the current law, verification of Holtec's compliance with the license condition – or whether the license condition is even permitted – may well be too complex to be ministerial. While the license condition provides that the federal government may become a "customer" just like private licensees, *see Beyond Nuclear*, 113 F.4th at 964 (citing with approval the Commission's description of future contracts with DOE merely as "additional customer contracts"), the current Act differentiates between ownership and financial liability. *See, e.g.*, 42 U.S.C. § 10161(a)(4) (mandating that reactor licensees bear the *cost* of spent fuel storage at a federal monitored retrieval facility after *ownership* is transferred to DOE).

If Congress takes the same approach in an amended

5. Nothing in 10 C.F.R. § 72.44(a) or *Ogalala Sioux Tribe* suggests otherwise. Section 72.44(a) merely provides that licenses shall include conditions that "pertain to design, construction and operation." In *Ogalala Sioux Tribe*, this Court upheld NRC's refusal to evaluate the adverse environmental impacts that could occur if the license applicant failed to secure waste disposal contracts required by a license condition. 45 F.4th at 304. The case involved no claim that the license condition itself conflicted with existing law or was based on anticipatory changes in the law. *Id.*

version of the Act, DOE could not be both the "user" (e.g. owner) and the "payer" (e.g. financially liable) of Holtec's services. *See* Pet. Final Opening Br. at 3 n. 3 (listing multiple places in Holtec's license application where DOE is considered to be both the user and payer). Instead, DOE may be the user, but private companies the payers. Disentangling the apportionment of ownership and financial liability may require NRC to make "complex" "legal and factual judgments" before verifying the license condition is either lawful or satisfied. *Private Fuel Storage,* 52 N.R.C. at 34.

By approving Holtec's concededly unlawful license condition based on the notion that it is "forward-looking," the panel thus deprived Petitioner of any opportunity to seek a hearing in which it could challenge the lawfulness of the license condition or whether compliance can easily be verified. Whenever the Act is amended, Holtec will be a license holder, the licensing proceeding will have long since terminated, and Petitioner's opportunity to request a hearing on the license will have expired. *See supra*, n. 1. It will be entirely within NRC's enforcement discretion to assess whether and how the license condition complies with the amended Act's new terms and applicable NRC regulations. And because the NRC's decision (or absence thereof) will entail enforcement or nonenforcement of a previously approved license condition rather than issuance of a license, NRC's enforcement decision will be unreviewable. *Safe Energy Coalition,* 866 F.2d at 1477; *Corner Post*, 144 S.Ct. at 2459, n.9.

In violation of *Corner Post* and the Administrative Procedure Act, the panel's Opinion has thereby set up a

shell game in which Petitioners are too early to challenge the license condition now, and yet they will be too late if they seek to challenge the license condition whenever the law changes. Unless the panel's decision is reversed, this Court will have completely denied Petitioner its "day in court.[6]"

B. The Opinion is inconsistent with *Corner Post's* holding that pleas of administrative convenience never justify departing from the statute's clear text.

In *Corner Post,* the Supreme Court overruled the Eighth Circuit's interpretation of the statute of limitations in 28 U.S.C. § 2401(a) that elevated the administrative benefits of firm deadlines for appealing rulemakings over the plain language of the statute, holding that "pleas of administrative convenience . . . never 'justify departing from the statute's clear text.'" 144 S.Ct. at 2458 (quoting *Niz-Chavez v. Garland,* 593 U.S. 155, 169 (2021) and *Pereira v. Sessions,* 585 U.S. 198, 217 (2018)). The panel's Opinion suffers from the same rejected justification by upholding a concededly unlawful license condition on the ground that "[s]uch conditions are often essential in light of the protracted timelines for securing a license and the need to anticipate changing conditions and regulatory

6. If the Court reverses the panel's decision to uphold the unlawful license condition, Holtec will be allowed to store privately-owned spent fuel, but must reapply for a license to store federally-owned spent fuel if and when the law changes. In that event, Petitioner would have an opportunity, in the licensing proceeding, to challenge the license condition's consistency with the applicable law. *See* Pet. Final Reply Br. at 6.

shifts." *Beyond Nuclear,* 113 F.4th at 964. As recognized in *Corner Post,* the NRC's convenience provides no excuse to disregard the plain terms of the Nuclear Waste Policy Act.

Further, an agency may not hold the public to standards that the agency considers too onerous for itself. *Niz-Chavez,* 593 U.S. at 169 (rejecting an agency's pleas for latitude in completing administrative tasks when the government rarely affords individuals that same latitude). If the NRC finds the protracted licensing process "a chore, it has good company." *See id.* Here, at the same time it sought the convenience of a license condition based on speculation about *future* law, NRC imposed a heavy burden on Petitioner to challenge Holtec's license under *current* law. *See* 10 C.F.R. § 2.309(f)(1)(i) (requiring a hearing request to provide "a specific statement of the issue of law or fact to be raised or controverted"). Indeed, the requirement for "specific" allegations of noncompliance with current law is strict. *See, e.g., In re USEC,* 63 N.R.C. 451, 463-64 (April 3, 2006) (rejecting as "speculative" a hearing request that was based on "[p]otential nuclear nonproliferation initiatives" that "depend upon the actions and decisions of the President, Congress, international organizations, and officials of other nations" and "would require a complete reversal of U.S. energy policy"). If Petitioner must bear the burden of challenging license applications based on the law of today, the agency must be required to issue licenses based on that same law. *See Niz-Chavez,* 593 U.S. at 172 ("If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them.").

Accordingly, by elevating efficiency and convenience

of the administrative process for the NRC over the plain language of the Nuclear Waste Policy Act, the panel ran afoul of *Corner Post.*

IV. STATEMENT IN SUPPORT OF PANEL REHEARING

In the alternative to en banc review, and pursuant to Fed. R. App. P. 40(a)(2), Petitioner requests a panel rehearing to address the material legal errors in the Opinion, for which each point of law is described with particularity above in Section III.

V. CONCLUSION

For the foregoing reasons, Petitioners respectfully request the Court to grant Petitioners' request for rehearing en banc or rehearing by the panel.

Respectfully Submitted,

/s/_____
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/s/_____
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October 11, 2024

Appendix H

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

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

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

Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY
COMMISSION AND THE UNITED STATES OF
AMERICA,

Respondents.

Filed October 17, 2024

PETITIONER'S ERRATUM TO *PETITION FOR EN BANC REVIEW OR PANEL REHEARING* AND *MOTION TO HOLD PETITION IN ABEYANCE*

Petitioner Beyond Nuclear, Inc. ("Petitioner") submits the following erratum to its Petition for En Banc Review or Panel Rehearing ("Petition for En Banc Review") and Motion to Hold Petition in Abeyance ("Motion"), filed October 11, 2024. In its Petition for En Banc Review, Petitioner correctly stated that in reviewing *Texas v. Nuclear Regulatory Comm'n*, 78 F.4th 827 (5th Cir. 2023), *cert. granted*, No. 23-1300, 2024 WL 4394124 (U.S. Oct. 4, 2024), the Supreme Court will consider whether

the Atomic Energy Act, 42 U.S.C. § 2201 *et seq.,* and the Nuclear Waste Policy Act, 42 U.S.C. § 10101 *et seq.,* permit the U.S. Nuclear Regulatory Commission to license private entities to temporarily store spent nuclear fuel away from the nuclear reactors where the spent fuel was generated. Petition for En Banc Review at 3 n.2. But in both the Petition for En Banc Review and the Motion, Petitioner incorrectly identified the company whose license is on review before the Supreme Court.

The owner of the license before the Supreme Court is Interim Storage Partners ("ISP"), not Holtec International ("Holtec") as stated in the Petition for En Banc Review at 3 n.2 and the Motion at 2. The error is not material to the claims of either the Petition or the Motion because the terms of ISP's and Holtec's license conditions are virtually identical.

Respectfully Submitted,

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Counsel for Petitioner

October 17, 2024

APPENDIX I — EXCERPTS OF THE BLUE RIBBON COMMISSION REPORT

* * *

[ix] challenge derives from a federal/state/tribal/local rights dilemma that is far from unique to the nuclear waste issue—no simple formula exists for resolving it. Experience in the United States and in other nations suggests that any attempt to force a top-down, federally mandated solution over the objections of a state or community—far from being more efficient—will take longer, cost more, and have lower odds of ultimate success.

By contrast, the approach we recommend is explicitly adaptive, staged, and consent-based. Based on a review of successful siting processes in the United States and abroad—including most notably the siting of a disposal facility for transuranic radioactive waste, the Waste Isolation Pilot Plant (WIPP) in New Mexico, and recent positive outcomes in Finland, France, Spain and Sweden—we believe this type of approach can provide the flexibility and sustain the public trust and confidence needed to see controversial facilities through to completion.

In practical terms, this means encouraging communities to volunteer to be considered to host a new nuclear waste management facility while also allowing for the waste management organization to approach communities that it believes can meet the siting requirements. Siting processes for waste management facilities should include a flexible and substantial incentive program.

The approach we recommend also recognizes that successful siting decisions are most likely to result from a complex and perhaps extended set of negotiations between the implementing organization and potentially affected state, tribal, and local governments, and other entities. It would be desirable for these negotiations to result in a partnership agreement or some other form of legally enforceable agreement with the organization to ensure that commitments to and by host states, tribes, and communities are upheld. All affected levels of government must have, at a minimum, a meaningful consultative role in important decisions; additionally, both host states and tribes should retain—or where appropriate, be delegated—direct authority over aspects of regulation, permitting, and operations where oversight below the federal level can be exercised effectively and in a way that is helpful in protecting the interests and gaining the confidence of affected communities and citizens. At the same time, host state, tribal and local governments have responsibilities to work productively with the federal government to help advance the national interest.

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

This discussion raises another issue highlighted in numerous comments to the BRC: the question of how to define "consent." The Commission takes the view that

this question ultimately has to be answered by a potential host jurisdiction, using whatever means and timing it sees fit. We believe a good gauge of consent would be the willingness of affected units of government – the host states, tribes, and local communities – to enter into legally binding agreements with the facility operator, where these agreements enable states, tribes, and communities to have confidence that they can protect the interests of their citizens.

All siting processes take time; however, an adaptive, staged approach may seem particularly slow and open-ended. This will be frustrating to stakeholders and to members of the public who are understandably anxious to know when they can expect to see results. The Commission shares this frustration—greater certainty and a quicker resolution would have been our preference also. Experience, however, leads us to conclude that there is no short-cut, and that any

SITING NEW NUCLEAR WASTE MANAGEMENT FACILITIES – GETTING STARTED

First, the Environmental Protection Agency and the Nuclear Regulatory Commission should develop a generic disposal standard and supporting regulatory requirements early in the siting process. Generally applicable regulations are more likely to earn public confidence than site-specific standards. In addition, having a generic standard will support the efficient consideration and examination of multiple sites.

Appendix I

Once the new waste management organization is established it should:

- *Develop a set of basic initial siting criteria* – These criteria will ensure that time is not wasted investigating sites that are clearly unsuitable or inappropriate.
- *Encourage expressions of interest from a large variety of communities that have potentially suitable sites* – As these communities become engaged in the process, the implementing organization must be flexible enough not to force the issue of consent while also being fully prepared to take advantage of promising opportunities when they arise.
- *Establish initial program milestones* – Milestones should be laid out in a mission plan to allow for review by Congress, the Administration, and stakeholders, and to provide verifiable indicators for oversight of the organization's performance.

* * *

[xii] *States to commit, as a matter of policy, to "closing" the nuclear fuel cycle given the large uncertainties that exist about the merits and commercial viability of different fuel cycles and technology options.* Future evaluations of potential alternative fuel cycles must account for linkages among all elements of the fuel cycle (including waste transportation, storage, and disposal) and for broader safety, security, and non-proliferation

concerns. Moreover, all spent fuel reprocessing or recycle options generate waste streams that require a permanent disposal solution. In any event, we believe permanent disposal will very likely also be needed to safely manage at least some portion of the commercial spent fuel inventory even if a closed fuel cycle were adopted.

We recognize that current law establishes Yucca Mountain in Nevada as the site for the first U.S. repository for spent fuel and high-level waste, provided the license application submitted by DOE meets relevant requirements.

The Blue Ribbon Commission was not chartered as a siting commission. Accordingly we have not evaluated Yucca Mountain or any other location as a potential site for the storage or disposal of spent nuclear fuel and high-level waste, nor have we taken a position on the Administration's request to withdraw the license application.[5] We simply note that regardless what happens with Yucca Mountain, the U.S. inventory of spent nuclear fuel will soon exceed the amount that can be legally emplaced at this site until a second repository is in operation. So under current law, the United States will need to find a new disposal site even if Yucca Mountain goes forward. We believe the

5. At the March 25, 2010 meeting of the Blue Ribbon Commission, Secretary of Energy Steven Chu told Commissioners "This is not a siting commission." The same point was reiterated in a February 11, 2011 letter from the Secretary to the BRC Co-Chairmen. Under the Federal Advisory Committee Act, which governs our proceedings, the Department of Energy sets the Commission's agenda.

approach set forth here provides the best strategy for assuring continued progress, regardless of the fate of Yucca Mountain.

5. PROMPT EFFORTS TO DEVELOP ONE OR MORE CONSOLIDATED STORAGE FACILITIES

Safe and secure storage is another critical element of an integrated and flexible national waste management system. Fortunately, experience shows that storage—either at or away from the sites where the waste was generated—can be implemented safely and cost-effectively. Indeed, *a longer period of time in storage offers a number of benefits because it allows the spent fuel to cool while keeping options for future actions open.*

Appendix I

Developing consolidated storage capacity would allow the federal government to begin the orderly transfer of spent fuel from reactor sites to safe and secure centralized facilities independent of the schedule for operating a permanent repository. The arguments in favor of consolidated storage are strongest for "stranded" spent fuel from shutdown plant sites. Stranded fuel should be first in line for transfer to a consolidated facility so that these plant sites can be completely decommissioned and put to other beneficial uses. Looking beyond the issue of today's stranded fuel, the availability of consolidated storage will provide valuable flexibility in the nuclear waste management system that could achieve meaningful cost savings for both ratepayers and taxpayers when a significant number of plants are shut down in the future, can provide back-up storage in the event that spent fuel needs to be moved quickly from a reactor site, and would provide an excellent platform for ongoing R&D to better understand how the storage systems currently in use at both commercial and DOE sites perform over time.

For consolidated storage to be of greatest value to the waste management system, the current rigid legislative restriction that prevents a storage facility developed under the NWPA from operating significantly earlier than a repository should be eliminated. At the same time, efforts to develop consolidated storage must not hamper efforts to move forward with the development of disposal capacity. To allay the concerns of states and communities that a consolidated storage facility might become a *de facto* disposal site, a program to establish consolidated storage must be accompanied by a parallel disposal program that is effective, focused, and making discernible progress in

the eyes of key stakeholders and the public. Progress on both fronts is needed and must be sought without further delay.

Even with timely development of consolidated storage facilities, a large quantity of spent fuel will remain at reactor sites for many decades before it can be accepted by the federal waste management program. Current at-reactor storage practices and safeguards are being scrutinized in light of the lessons that are emerging from Fukushima. In addition, the Commission recommends that the National Academy of

* * *

[29] or its future prospects, all parties should be able to agree that there is little to be gained—and potentially a very high price to be paid—for continued deferral and delay in developing the capability for disposal. Moreover, only by moving forward can some of the key questions and uncertainties about a future disposal path for spent fuel and high-level nuclear waste be identified and resolved.

4.3 OPTIONS FOR DISPOSAL

While several options for disposing of spent fuel and high-level nuclear waste have been considered in the United States and elsewhere, international scientific consensus clearly endorses the conclusion that ***deep geological disposal is the most promising and accepted method currently available for safely isolating spent fuel and high-level radioactive wastes from the environment for very long periods of time***.[52]

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In its deliberations, the Commission focused chiefly on two deep geologic disposal options: disposal in a mined geological formation and disposal in deep boreholes. The former has been the front-running disposal strategy in the United States for more than 50 years; it is also the approach being taken in other countries with spent fuel or HLW disposal programs. (An artist's rendering of the mined geologic disposal concept is shown in figure 12.) By contrast, disposal in deep boreholes may hold promise but this option is less well understood. Further RD&D is needed to fully assess its potential advantages and disadvantages and should be performed in parallel with the development of an updated safety standard (consistent with the new disposal safety standard the Commission recommends for mined geologic repositories).

In a mined geologic repository, wastes would be placed in engineered arrays in conventionally mined cavities deep beneath the earth's surface. The waste itself would be contained in canisters or other packages appropriate to its particular form, chemical content, and radiation intensity. As developed and studied around the world, proposals for geologic disposal also employ the concept of multiple barriers.[53] These include both engineered and geologic barriers that improve confidence that radioactive constituents will not return to the biosphere in biologically significant concentrations. Engineered barriers include the waste form itself, canisters, fillers, overpacking, sleeves, shaft and tunnel seals, and backfill materials. Each of these components may be designed to reduce the likelihood that radioactive material would be released and would be selected on the basis of site-and waste-specific considerations. Geologic barriers include the repository host rock and surrounding rock formations.

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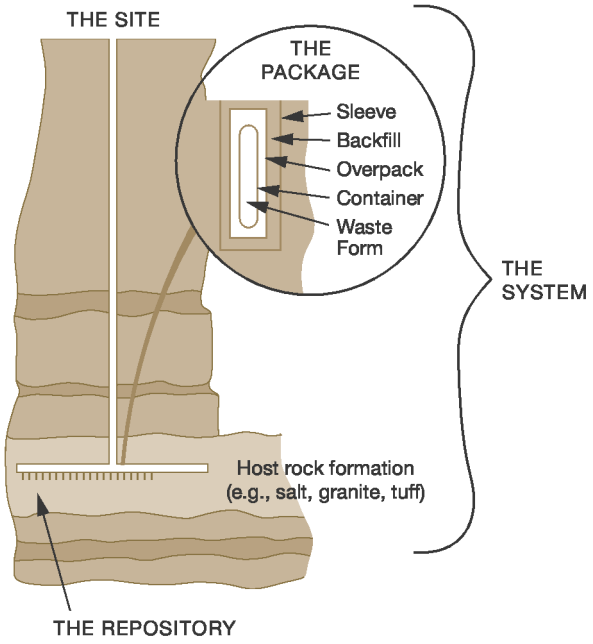
While engineered barriers would be tailored to a specific containment need, geologic barriers would be chosen for their *in-situ* properties with respect to both waste containment and isolation.

FIGURE 12. MINED GEOLOGIC DISPOSAL CONCEPT



Mined geologic disposal will use a system comprised of engineered barriers (the waste package and the mined repository) and naturally occuring barriers (the host rock formation and the chemical and physical properties of the repository site itself) to provide long-term isolation of waste from the biosphere.

Department of Energy

Appendix I

The basic objective or standard of performance for a permanent waste repository was articulated by the IAEA in a 2003 report on the scientific and technical basis for geologic disposal of radioactive wastes: "to provide sufficient isolation, both from human activity and from dynamic natural processes, that eventual releases of radionuclides will be in such low concentrations that they do not pose a hazard to human health and the natural environment."[54]

Decades of research and site investigations in the United States and elsewhere suggest that a wide variety of rock types and geologic environments could—in combination with appropriate repository design—be suitable for achieving this objective. The rock types that have been considered for a deep geologic repository have included bedded and domed rock salts, crystalline rocks (i.e., granite or gneiss), clay, shale, volcanic tuffs, basalt, and various other types of sedimentary rocks.[55]

* * *

[80] TABLE 2. STATUS OF DOE-UTILITY STANDARD CONTRACT LITIGATION (AS OF DECEMBER 2011)[212]

Standard contracts	76
Reactors covered by contracts	118
Cases filed through 2010 • Second-round	78 (12)
Claims	$6.4 billion

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Voluntarily withdrawn	7
Settled	23
Separate settlement agreements	21
Reactors covered by settlements	65
Final judgments • Not appealable • On appeal	24 (13) (11)
Pending before the trial court	24
DOJ trials through 2010	30
Litigation costs through 2010 (Experts and support; no DOJ or DOE staff)	$188 million
DOJ trials expected 2011 through 2012	up to 6
Amount of judgments on appeal	$509 million
Payments for final judgments and settlements to date	$2 billion
Estimated total damages (if acceptance starts in 2020)	$20.8 billion
Estimated increase for each year slippage	Up to $500 million

* * *

[80] a steady stream of lawsuits can be antic ipated until either (a) DOE has accepted enough waste to "catch up" with the amount it should have accepted on the schedule determined by the courts or (b) DOE has negotiated settlements with all contract holders that would allow damages to be paid without further litigation.

The litigation that has already occurred over the federal government's failure to meet its existing waste acceptance obligations has been expensive, time-consuming, not conducive to resolving the current impasse in the nation's nuclear waste management program, and detrimental to the full and open communication among parties needed for integrated planning concerning spent fuel management. Because most of the major recurring issues have been resolved in litigation and the outcomes are now more predictable, moving toward a simplified claims process for the purpose of settling existing lawsuits has been suggested,[213] and since February 2011, the Department of Justice has executed 13 additional settlements resolving claims covering 25 reactors and has authorization to enter another settlement covering four reactors.[214] Settling current and pending lawsuits as quickly as possible would reduce unnecessary litigation costs, make it possible to assess the cost impacts of changing current spent-fuel acceptance priorities more reliably, and facilitate more open communication and coordination between the waste management organization and contract holders. The Commission therefore urges all parties to continue to work to conclude these proceedings in a fair manner, either through settlement agreements or through another process, such as mediation or arbitration, consistent with the precedents set by past court decisions.

* * * *

APPENDIX J — RELEVANT STATUTORY AND REGULATORY PROVISIONS

5 U.S.C. § 706: Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall-

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be-

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Appendix J

28 U.S.C. § 2342: Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of-

(1) all final orders of the Federal Communication Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) all rules, regulations, or final orders of-

(A) the Secretary of Transportation issued pursuant to section 50501, 50502, 56101–56104, or 57109 of title 46 or pursuant to part B or C of subtitle IV, subchapter III of chapter 311, chapter 313, or chapter 315 of title 49; and

(B) the Federal Maritime Commission issued pursuant to section 305,[1] 41304, 41308, or 41309 or chapter 421 or 441 of title 46;

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;

(5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title;

(6) all final orders under section 812 of the Fair Housing Act; and

(7) all final agency actions described in section 20114(c) of title 49.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

Appendix J

28 U.S.C. § 2344: Review of orders; time; notice; contents of petition; service

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of-

(1) the nature of the proceedings as to which review is sought;

(2) the facts on which venue is based;

(3) the grounds on which relief is sought; and

(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

Appendix J

42 U.S.C. § 2099: Prohibitions against issuance of license

The Commission shall not license any person to transfer or deliver, receive possession of or title to, or import into or export from the United States any source material if, in the opinion of the Commission, the issuance of a license to such person for such purpose would be inimical to the common defense and security or the health and safety of the public.

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42 U.S.C. § 2111: Domestic distribution

(a) In general

No person may transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, own, possess, import, or export any byproduct material, except to the extent authorized by this section, section 2112 or section 2114 of this title. The Commission is authorized to issue general or specific licenses to applicants seeking to use byproduct material for research or development purposes, for medical therapy, industrial uses, agricultural uses, or such other useful applications as may be developed. The Commission may distribute, sell, loan, or lease such byproduct material as it owns to qualified applicants with or without charge: *Provided, however*, That, for byproduct material to be distributed by the Commission for a charge, the Commission shall establish prices on such equitable basis as, in the opinion of the Commission, (a) will provide reasonable compensation to the Government for such material, (b) will not discourage the use of such material or the development of sources of supply of such material independent of the Commission, and (c) will encourage research and development. In distributing such material, the Commission shall give preference to applicants proposing to use such material either in the conduct of research and development or in medical therapy. The Commission shall not permit the distribution of any byproduct material to any licensee, and shall recall or order the recall of any distributed material from any licensee, who is not equipped to observe or who fails to observe such safety standards to protect health as may be

established by the Commission or who uses such material in violation of law or regulation of the Commission or in a manner other than as disclosed in the application therefor or approved by the Commission. The Commission is authorized to establish classes of byproduct material and to exempt certain classes or quantities of material or kinds of uses or users from the requirements for a license set forth in this section when it makes a finding that the exemption of such classes or quantities of such material or such kinds of uses or users will not constitute an unreasonable risk to the common defense and security and to the health and safety of the public.

(b) Requirements

(1) In general

Except as provided in paragraph (2), byproduct material, as defined in paragraphs (3) and (4) of section 2014(e) of this title, may only be transferred to and disposed of in a disposal facility that-

(A) is adequate to protect public health and safety; and

(B)(i) is licensed by the Commission; or

(ii) is licensed by a State that has entered into an agreement with the Commission under section 2021(b) of this title, if the licensing requirements of the State are compatible with the licensing requirements of the Commission.

(2) Effect of subsection

Nothing in this subsection affects the authority of any entity to dispose of byproduct material, as defined in paragraphs (3) and (4) of section 2014(e) of this title, at a disposal facility in accordance with any Federal or State solid or hazardous waste law, including the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.).

(c) Treatment as low-level radioactive waste

Byproduct material, as defined in paragraphs (3) and (4) of section 2014(e) of this title, disposed of under this section shall not be considered to be low-level radioactive waste for the purposes of-

(1) section 2 of the Low-Level Radioactive Waste Policy Act (42 U.S.C. 2021b); or

(2) carrying out a compact that is-

(A) entered into in accordance with that Act (42 U.S.C. 2021b et seq.); and

(B) approved by Congress.

Appendix J

42 U.S.C. § 2239: Hearings and judicial review

(a)(1)(A) In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties under sections [1] 2183, 2187, 2236(c) or 2238 of this title, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application under section 2133 or 2134(b) of this title for a construction permit for a facility, and on any application under section 2134(c) of this title for a construction permit for a testing facility. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

(B)(i) Not less than 180 days before the date scheduled for initial loading of fuel into a plant by a licensee that has been issued a combined construction permit and operating license under section 2235(b) of this title, the Commission shall publish in the Federal Register notice of intended operation. That notice shall provide that any person whose interest may be affected by operation of the plant, may within 60 days request the Commission to hold a hearing on whether the facility as constructed complies, or on completion will comply, with the acceptance criteria of the license.

(ii) A request for hearing under clause (i) shall show, prima facie, that one or more of the acceptance criteria in the combined license have not been, or will not be met, and the specific operational consequences of nonconformance that would be contrary to providing reasonable assurance of adequate protection of the public health and safety.

(iii) After receiving a request for a hearing under clause (i), the Commission expeditiously shall either deny or grant the request. If the request is granted, the Commission shall determine, after considering petitioners' prima facie showing and any answers thereto, whether during a period of interim operation, there will be reasonable assurance of adequate protection of the public health and safety. If the Commission determines that there is such reasonable assurance, it shall allow operation during an interim period under the combined license.

(iv) The Commission, in its discretion, shall determine appropriate hearing procedures, whether informal or

formal adjudicatory, for any hearing under clause (i), and shall state its reasons therefor.

(v) The Commission shall, to the maximum possible extent, render a decision on issues raised by the hearing request within 180 days of the publication of the notice provided by clause (i) or the anticipated date for initial loading of fuel into the reactor, whichever is later. Commencement of operation under a combined license is not subject to subparagraph (A).

(2)(A) The Commission may issue and make immediately effective any amendment to an operating license or any amendment to a combined construction and operating license, upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person. Such amendment may be issued and made immediately effective in advance of the holding and completion of any required hearing. In determining under this section whether such amendment involves no significant hazards consideration, the Commission shall consult with the State in which the facility involved is located. In all other respects such amendment shall meet the requirements of this chapter.

(B) The Commission shall periodically (but not less frequently than once every thirty days) publish notice of any amendments issued, or proposed to be issued, as provided in subparagraph (A). Each such notice shall include all amendments issued, or proposed to be issued,

since the date of publication of the last such periodic notice. Such notice shall, with respect to each amendment or proposed amendment (i) identify the facility involved; and (ii) provide a brief description of such amendment. Nothing in this subsection shall be construed to delay the effective date of any amendment.

(C) The Commission shall, during the ninety-day period following the effective date of this paragraph, promulgate regulations establishing (i) standards for determining whether any amendment to an operating license or any amendment to a combined construction and operating license involves no significant hazards consideration; (ii) criteria for providing or, in emergency situations, dispensing with prior notice and reasonable opportunity for public comment on any such determination, which criteria shall take into account the exigency of the need for the amendment involved; and (iii) procedures for consultation on any such determination with the State in which the facility involved is located.

(b) The following Commission actions shall be subject to judicial review in the manner prescribed in chapter 158 of title 28 and chapter 7 of title 5:

(1) Any final order entered in any proceeding of the kind specified in subsection (a).

(2) Any final order allowing or prohibiting a facility to begin operating under a combined construction and operating license.

(3) Any final order establishing by regulation standards to govern the Department of Energy's gaseous diffusion uranium enrichment plants, including any such facilities leased to a corporation established under the USEC Privatization Act [42 U.S.C. 2297h et seq.].

(4) Any final determination under section 2297f(c) of this title relating to whether the gaseous diffusion plants, including any such facilities leased to a corporation established under the USEC Privatization Act [42 U.S.C. 2297h et seq.], are in compliance with the Commission's standards governing the gaseous diffusion plants and all applicable laws.

Appendix J

42 U.S.C. § 10131: Findings and purposes

(a) The Congress finds that-

(1) radioactive waste creates potential risks and requires safe and environmentally acceptable methods of disposal;

(2) a national problem has been created by the accumulation of (A) spent nuclear fuel from nuclear reactors; and (B) radioactive waste from (i) reprocessing of spent nuclear fuel; (ii) activities related to medical research, diagnosis, and treatment; and (iii) other sources;

(3) Federal efforts during the past 30 years to devise a permanent solution to the problems of civilian radioactive waste disposal have not been adequate;

(4) while the Federal Government has the responsibility to provide for the permanent disposal of high-level radioactive waste and such spent nuclear fuel as may be disposed of in order to protect the public health and safety and the environment, the costs of such disposal should be the responsibility of the generators and owners of such waste and spent fuel;

(5) the generators and owners of high-level radioactive waste and spent nuclear fuel have the primary responsibility to provide for, and the responsibility to pay the costs of, the interim storage of such waste and spent fuel until such waste and spent fuel is accepted by the Secretary of Energy in accordance with the provisions of this chapter;

(6) State and public participation in the planning and development of repositories is essential in order to promote public confidence in the safety of disposal of such waste and spent fuel; and

(7) high-level radioactive waste and spent nuclear fuel have become major subjects of public concern, and appropriate precautions must be taken to ensure that such waste and spent fuel do not adversely affect the public health and safety and the environment for this or future generations.

(b) The purposes of this part are-

(1) to establish a schedule for the siting, construction, and operation of repositories that will provide a reasonable assurance that the public and the environment will be adequately protected from the hazards posed by high-level radioactive waste and such spent nuclear fuel as may be disposed of in a repository;

(2) to establish the Federal responsibility, and a definite Federal policy, for the disposal of such waste and spent fuel;

(3) to define the relationship between the Federal Government and the State governments with respect to the disposal of such waste and spent fuel; and

(4) to establish a Nuclear Waste Fund, composed of payments made by the generators and owners of such waste and spent fuel, that will ensure that the costs of carrying out activities relating to the disposal of such waste and spent fuel will be borne by the persons responsible for generating such waste and spent fuel.

Appendix J

42 U.S.C. § 10161: Monitored retrievable storage

(a) Findings

The Congress finds that-

(1) long-term storage of high-level radioactive waste or spent nuclear fuel in monitored retrievable storage facilities is an option for providing safe and reliable management of such waste or spent fuel;

(2) the executive branch and the Congress should proceed as expeditiously as possible to consider fully a proposal for construction of one or more monitored retrievable storage facilities to provide such long-term storage;

(3) the Federal Government has the responsibility to ensure that site-specific designs for such facilities are available as provided in this section;

(4) the generators and owners of the high-level radioactive waste and spent nuclear fuel to be stored in such facilities have the responsibility to pay the costs of the long-term storage of such waste and spent fuel; and

(5) disposal of high-level radioactive waste and spent nuclear fuel in a repository developed under this chapter should proceed regardless of any construction of a monitored retrievable storage facility pursuant to this section.

(b) Submission of proposal by Secretary

(1) On or before June 1, 1985, the Secretary shall complete a detailed study of the need for and feasibility of, and shall submit to the Congress a proposal for, the construction of one or more monitored retrievable storage facilities for high-level radioactive waste and spent nuclear fuel. Each such facility shall be designed-

(A) to accommodate spent nuclear fuel and high-level radioactive waste resulting from civilian nuclear activities;

(B) to permit continuous monitoring, management, and maintenance of such spent fuel and waste for the foreseeable future;

(C) to provide for the ready retrieval of such spent fuel and waste for further processing or disposal; and

(D) to safely store such spent fuel and waste as long as may be necessary by maintaining such facility through appropriate means, including any required replacement of such facility.

(2) Such proposal shall include-

(A) the establishment of a Federal program for the siting, development, construction, and operation of facilities capable of safely storing high-level radioactive waste and spent nuclear fuel, which facilities are to be licensed by the Commission;

(B) a plan for the funding of the construction and operation of such facilities, which plan shall provide that the costs of such activities shall be borne by the generators and owners of the high-level radioactive waste and spent nuclear fuel to be stored in such facilities;

(C) site-specific designs, specifications, and cost estimates sufficient to (i) solicit bids for the construction of the first such facility; (ii) support congressional authorization of the construction of such facility; and (iii) enable completion and operation of such facility as soon as practicable following congressional authorization of such facility; and

(D) a plan for integrating facilities constructed pursuant to this section with other storage and disposal facilities authorized in this chapter.

(3) In formulating such proposal, the Secretary shall consult with the Commission and the Administrator, and shall submit their comments on such proposal to the Congress at the time such proposal is submitted.

(4) The proposal shall include, for the first such facility, at least 3 alternative sites and at least 5 alternative combinations of such proposed sites and facility designs consistent with the criteria of paragraph (1). The Secretary shall recommend the combination among the alternatives that the Secretary deems preferable. The environmental assessment

under subsection (c) shall include a full analysis of the relative advantages and disadvantages of all 5 such alternative combinations of proposed sites and proposed facility designs.

(c) Environmental impact statements

(1) Preparation and submission to the Congress of the proposal required in this section shall not require the preparation of an environmental impact statement under section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The Secretary shall prepare, in accordance with regulations issued by the Secretary implementing such Act [42 U.S.C. 4321 et seq.], an environmental assessment with respect to such proposal. Such environmental assessment shall be based upon available information regarding alternative technologies for the storage of spent nuclear fuel and high-level radioactive waste. The Secretary shall submit such environmental assessment to the Congress at the time such proposal is submitted.

(2) If the Congress by law, after review of the proposal submitted by the Secretary under subsection (b), specifically authorizes construction of a monitored retrievable storage facility, the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) shall apply with respect to construction of such facility, except that any environmental impact statement prepared with respect to such facility shall not be required to consider the need for such facility or any alternative to the design criteria for such facility

set forth in subsection (b)(1).

(d) Licensing

Any facility authorized pursuant to this section shall be subject to licensing under section 5842(3) of this title. In reviewing the application filed by the Secretary for licensing of the first such facility, the Commission may not consider the need for such facility or any alternative to the design criteria for such facility set forth in subsection (b)(1).

(e) Clarification

Nothing in this section limits the consideration of alternative facility designs consistent with the criteria of paragraph (b)(1) in any environmental impact statement, or in any licensing procedure of the Commission, with respect to any monitored, retrievable facility authorized pursuant to this section.

(f) Impact assistance

(1) Upon receipt by the Secretary of congressional authorization to construct a facility described in subsection (b), the Secretary shall commence making annual impact aid payments to appropriate units of general local government in order to mitigate any social or economic impacts resulting from the construction and subsequent operation of any such facility within the jurisdictional boundaries of any such unit.

(2) Payments made available to units of general local government under this subsection shall be-

(A) allocated in a fair and equitable manner, with priority given to units of general local government determined by the Secretary to be most severely affected; and

(B) utilized by units of general local government only for planning, construction, maintenance, and provision of public services related to the siting of such facility.

(3) Such payments shall be subject to such terms and conditions as the Secretary determines are necessary to ensure achievement of the purposes of this subsection. The Secretary shall issue such regulations as may be necessary to carry out the provisions of this subsection.

(4) Such payments shall be made available entirely from funds held in the Nuclear Waste Fund established in section 10222(c) of this title and shall be available only to the extent provided in advance in appropriation Acts.

(5) The Secretary may consult with appropriate units of general local government in advance of commencement of construction of any such facility in an effort to determine the level of payments each such unit is eligible to receive under this subsection.

(g) Limitation

No monitored retrievable storage facility developed pursuant to this section may be constructed in any State in which there is located any site approved for site characterization under section 10132 of this title. The restriction in the preceding sentence shall only apply until such time as the Secretary decides that such candidate site is no longer a candidate site under consideration for development as a repository. Such restriction shall continue to apply to any site selected for construction as a repository.

(h) Participation of States and Indian tribes

Any facility authorized pursuant to this section shall be subject to the provisions of sections 10135, 10136(a), 10136(b), 10136(d), 10137, and 10138 of this title. For purposes of carrying out the provisions of this subsection, any reference in sections 10135 through 10138 of this title to a repository shall be considered to refer to a monitored retrievable storage facility.

Appendix J

42 U.S.C. § 10168: Construction authorization

(a) Environmental impact statement

(1) Once the selection of a site is effective under section 10166 of this title, the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) shall apply with respect to construction of a monitored retrievable storage facility, except that any environmental impact statement prepared with respect to such facility shall not be required to consider the need for such facility or any alternative to the design criteria for such facility set forth in section 10161(b)(1) of this title.

(2) Nothing in this section shall be construed to limit the consideration of alternative facility designs consistent with the criteria described in section 10161(b)(1) of this title in any environmental impact statement, or in any licensing procedure of the Commission, with respect to any monitored retrievable storage facility authorized under section 10162(b) of this title.

(b) Application for construction license

Once the selection of a site for a monitored retrievable storage facility is effective under section 10166 of this title, the Secretary may submit an application to the Commission for a license to construct such a facility as part of an integrated nuclear waste management system and in accordance with the provisions of this section and applicable agreements under this chapter affecting such facility.

Appendix J

(c) Licensing

Any monitored retrievable storage facility authorized pursuant to section 10162(b) of this title shall be subject to licensing under section 5842(3) of this title. In reviewing the application filed by the Secretary for licensing of such facility, the Commission may not consider the need for such facility or any alternative to the design criteria for such facility set forth in section 10161(b)(1) of this title.

(d) Licensing conditions

Any license issued by the Commission for a monitored retrievable storage facility under this section shall provide that-

(1) construction of such facility may not begin until the Commission has issued a license for the construction of a repository under section 10135(d) [1] of this title;

(2) construction of such facility or acceptance of spent nuclear fuel or high-level radioactive waste shall be prohibited during such time as the repository license is revoked by the Commission or construction of the repository ceases;

(3) the quantity of spent nuclear fuel or high-level radioactive waste at the site of such facility at any one time may not exceed 10,000 metric tons of heavy metal until a repository under this chapter first accepts spent nuclear fuel or solidified high-level radioactive waste; and

(4) the quantity of spent nuclear fuel or high-level radioactive waste at the site of such facility at any one time may not exceed 15,000 metric tons of heavy metal.

Appendix J

42 U.S.C. § 10222: Nuclear Waste Fund

(a) Contracts

(1) In the performance of his functions under this chapter, the Secretary is authorized to enter into contracts with any person who generates or holds title to high-level radioactive waste, or spent nuclear fuel, of domestic origin for the acceptance of title, subsequent transportation, and disposal of such waste or spent fuel. Such contracts shall provide for payment to the Secretary of fees pursuant to paragraphs (2) and (3) sufficient to offset expenditures described in subsection (d).

(2) For electricity generated by a civilian nuclear power reactor and sold on or after the date 90 days after January 7, 1983, the fee under paragraph (1) shall be equal to 1.0 mil per kilowatt-hour.

(3) For spent nuclear fuel, or solidified high-level radioactive waste derived from spent nuclear fuel, which fuel was used to generate electricity in a civilian nuclear power reactor prior to the application of the fee under paragraph (2) to such reactor, the Secretary shall, not later than 90 days after January 7, 1983, establish a 1 time fee per kilogram of heavy metal in spent nuclear fuel, or in solidified high-level radioactive waste. Such fee shall be in an amount equivalent to an average charge of 1.0 mil per kilowatt-hour for electricity generated by such spent nuclear fuel, or such solidified high-level waste derived therefrom, to be collected from any person delivering such spent nuclear fuel or high-level waste, pursuant to section

10143 of this title, to the Federal Government. Such fee shall be paid to the Treasury of the United States and shall be deposited in the separate fund established by subsection (c).[1] In paying such a fee, the person delivering spent fuel, or solidified high-level radioactive wastes derived therefrom, to the Federal Government shall have no further financial obligation to the Federal Government for the long-term storage and permanent disposal of such spent fuel, or the solidified high-level radioactive waste derived therefrom.

(4) Not later than 180 days after January 7, 1983, the Secretary shall establish procedures for the collection and payment of the fees established by paragraph (2) and paragraph (3). The Secretary shall annually review the amount of the fees established by paragraphs (2) and (3) above to evaluate whether collection of the fee will provide sufficient revenues to offset the costs as defined in subsection (d) herein. In the event the Secretary determines that either insufficient or excess revenues are being collected, in order to recover the costs incurred by the Federal Government that are specified in subsection (d), the Secretary shall propose an adjustment to the fee to insure full cost recovery. The Secretary shall immediately transmit this proposal for such an adjustment to Congress. The adjusted fee proposed by the Secretary shall be effective after a period of 90 days of continuous session have elapsed following the receipt of such transmittal unless during such 90-day period either House of Congress adopts a resolution disapproving the Secretary's proposed adjustment in accordance with the procedures set forth for congressional review of an energy action under section 6421 of this title.

(5) Contracts entered into under this section shall provide that-

(A) following commencement of operation of a repository, the Secretary shall take title to the high-level radioactive waste or spent nuclear fuel involved as expeditiously as practicable upon the request of the generator or owner of such waste or spent fuel; and

(B) in return for the payment of fees established by this section, the Secretary, beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel involved as provided in this subchapter.[1]

(6) The Secretary shall establish in writing criteria setting forth the terms and conditions under which such disposal services shall be made available.

(b) Advance contracting requirement

(1)(A) The Commission shall not issue or renew a license to any person to use a utilization or production facility under the authority of section 2133 or 2134 of this title unless-

(i) such person has entered into a contract with the Secretary under this section; or

(ii) the Secretary affirms in writing that such person is actively and in good faith negotiating with the Secretary for a contract under this section.