Nos. 23-1300 & 23-1312

IN THE
Supreme Court of the United States

UNITED STATES NUCLEAR REGULATORY COMMISSION AND UNITED STATES OF AMERICA,

AND

INTERIM STORAGE PARTNERS, LLC,
Petitioners,

v.

STATE OF TEXAS, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT FASKEN LAND AND MINERALS, LTD.

ALLAN KANNER
ANNEMIEKE M. TENNIS
KANNER & WHITELEY, L.L.C.
701 Camp Street
New Orleans, LA 70130
(504) 524-5777

MONICA RENEE PERALES
FASKEN LAND AND MINERALS, LTD.
6101 Holiday Hill Road
Midland, TX 79707
(432) 687-1777

DAVID C. FREDERICK
Counsel of Record
SCOTT H. ANGSTREICH
CHRISTOPHER C. GOODNOW
MATTHEW J. WILKINS
RYAN M. FOLIO
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@kellogghansen.com)

January 15, 2025

QUESTIONS PRESENTED

1. Whether the Nuclear Regulatory Commission ("NRC") exceeded its authority under the Atomic Energy Act of 1954 by licensing a private company to store 5,000 metric tons of spent nuclear fuel in the Permian Basin.

2. Whether NRC can insulate its license grant from judicial review under the Hobbs Act by rejecting on the merits objections to its asserted licensing authority and denying intervenor status to indisputably interested persons opposing that license application before the agency.

RULE 29.6 STATEMENT

Respondent Fasken Land and Minerals, Ltd. is a non-governmental corporate party with no parent corporations. Fasken Land and Minerals, Ltd. is a limited partnership organization existing under the laws of Texas. No publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

ADMINISTRATIVE DECISIONS

STATUTES AND REGULATIONS

OTHER MATERIALS

INTRODUCTION

Until the 1970s, the government and the nuclear industry planned to reprocess spent fuel from nuclear reactors. Congress therefore did not specifically address where to store spent fuel until the Nuclear Waste Policy Act of 1982 ("NWPA"). The NWPA's detailed regime for interim storage does not permit private, offsite storage.

Here, the Nuclear Regulatory Commission ("NRC") relied on *pre*-NWPA regulations to license a massive, privately owned interim storage facility far from the reactors that generated the spent fuel. Until this license, essentially all spent fuel has been stored onsite at nuclear reactors. Petitioner ISP's proposed storage facility instead would be in West Texas, far from any reactor and atop the nation's largest hydrocarbon reserves. NRC's licensing process precluded all interested parties except the licensee from fully participating. NRC then contested appellate jurisdiction against those it shut out of the administrative process.

NRC's arbitrary actions are especially problematic given the massive economic and social significance of spent fuel storage plans. When Congress intended to empower NRC to address storage, it did so in the NWPA, which speaks directly to where spent fuel can be stored on an interim basis. But NRC largely ignores that Act. Instead, NRC justifies its power flex from the penumbras and emanations of statutes enacted during an era when no one thought interim storage was needed because spent fuel would be reprocessed.

The Fifth Circuit correctly saw NRC's gambit as a lawless exercise of power in direct contravention of Congress's will. Because the judiciary must check agency actions divorced from statutory authority, that judgment should be affirmed.

STATEMENT

A. Statutory And Regulatory Background

1. The Atomic Energy Act

Congress enacted the Atomic Energy Act of 1954 ("AEA") "to encourage widespread participation in the development and utilization of atomic energy." 42 U.S.C. § 2013(d). Under the AEA, NRC may license private parties to acquire and use nuclear material, including the enriched uranium that fuels nuclear reactors. *See id.* § 2073(a); *id.* § 2014(aa).

Nuclear fuel is "spent" once "it can no longer efficiently produce energy." Blue Ribbon Commission on America's Nuclear Future: Report to the Secretary of Energy 10 (Jan. 2012) ("Blue Ribbon Commission"). "[S]pent fuel[] remain[s] radioactive for thousands of years," *id.* at 14, and "poses a dangerous, long-term health and environmental risk," *New York v. NRC*, 681 F.3d 471, 474 (D.C. Cir. 2012).

From "the early days of the nuclear power industry," utilities and legislators believed spent fuel would be "reprocessed" into "fresh reactor fuel." 40 Fed. Reg. 42,801, 42,801 (Sept. 16, 1975). Those "operating nuclear reactors were largely unconcerned with the storage of spent nuclear fuel." *Idaho v. DOE*, 945 F.2d 295, 298 (9th Cir. 1991). Conventional wisdom held that "spent fuel would be . . . stored in onsite fuel storage pools" for "one year[]" before reprocessing. 40 Fed. Reg. at 42,801.

Consistent with this understanding, the AEA did "not refer explicitly to spent nuclear fuel." *Illinois v. General Elec. Co.*, 683 F.2d 206, 214 (7th Cir. 1982). For several more decades, "[i]t was accepted that spent fuel would be reprocessed." *Idaho*, 945 F.2d at 298.

In 1980, Congress amended the AEA to address spent fuel, but only in limited part, by criminalizing damaging "spent nuclear fuel from" a "utilization facility," *e.g.*, a nuclear power plant. Act of June 30, 1980, Pub. L. No. 96-295, § 204(a), 94 Stat. 780, 787; 42 U.S.C. § 2014(cc). In 1988, Congress finally added "spent nuclear fuel" to the AEA as a defined term that incorporated the same "meaning[] given such term[]" in the NWPA. Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, § 4(b), 102 Stat. 1066, 1069. In 2005, Congress instructed NRC to "establish a system" for the import and export of nuclear materials, including "byproduct materials, source materials, special nuclear materials," and, separately, "spent nuclear fuel." Energy Policy Act of 2005, Pub. L. No. 109-58, § 656(a), 119 Stat. 594, 813-14.

2. The government's response to the reprocessing industry's collapse

"In the mid-70s, . . . the private reprocessing industry collapsed." *Idaho*, 945 F.2d at 298. In 1977, President Carter announced that the United States would stop commercially reprocessing spent fuel entirely. *See* 45 Fed. Reg. 74,693 (Nov. 12, 1980).

a. NRC promulgated new regulations

In September 1978, NRC's Chairman declared that the AEA does "not explicitly authorize regulation of radioactive waste facilities."[1] NRC nonetheless proposed rules regulating storage of spent fuel at "independent spent fuel storage installation[s]." 43 Fed.

---

[1] NRC, *Regulation of Federal Radioactive Waste Activities: Report to Congress on Extending the Nuclear Regulatory Commission's Licensing or Regulatory Authority to Federal Radioactive Waste Storage and Disposal Activities*, NUREG-0527, at G-9 (Sept. 1979), https://www.google.com/books/edition/Regulation_of_Federal_Radioactive_Waste/ERpSAAAAMAAJ?hl=en&gbpv=0.

Reg. 46,309, 46,309 (Oct. 6, 1978). NRC recognized its existing regulations were "largely designed for relatively short-term possession" of nuclear materials "in conjunction with operations involving such materials." *Id.* NRC had no rules "for extended spent fuel storage under static storage conditions involving no operations on such materials." *Id.*

In 1980, NRC issued its final rule. *See* 45 Fed. Reg. 74,693. The rule permitted private parties to seek licenses for "up to 20 years" of "temporary storage" of spent fuel, "with renewal at [NRC's] option." *Id.* at 74,693. NRC stated its rule was issued "[p]ursuant to the Atomic Energy Act of 1954," *id.* at 74,699, but did not explain how any AEA provisions authorized the new rules.

While NRC's 1980 rules purport to "permit[] either" "away-from-reactor" or "at-reactor" private storage, *id.* at 74,696, away-from-reactor storage was rare. Before 1980, only "three facilities for spent fuel storage" had received any kind of license. *Id.* at 74,698. All originally were licensed as reprocessing facilities, then repurposed for storage once reprocessing ended. *Id.* Just one now stores spent fuel – General Electric's reprocessing facility in Morris, Illinois. *See generally* Off. of Nuclear Energy, U.S. Dep't of Energy, *Spent Nuclear Fuel and Reprocessing Waste Inventory* (Dec. 2024) ("*Spent Fuel Inventory*") (listing all spent fuel storage sites and inventory). NRC licensed the Morris facility as a reprocessing (production) facility in 1967, but the reprocessing efforts failed soon after, and NRC then licensed the facility to store the spent fuel that it had received for reprocessing. *See In re General Elec. Co.*, 22 N.R.C. 851 (Nov. 4, 1985); Richard B. Stewart & Jane B. Stewart, *Solving the Spent Nuclear Fuel Impass*e, 21 N.Y.U. Envtl. L.J. 1, 22 n.69 (2014). A

nuclear power reactor is less than one mile from the Morris facility. *See In re General Elec. Co.*, 15 N.R.C. 530, 1982 WL 43396, at *3 (Mar. 2, 1982).

In 1982, NRC renewed GE's license, using the 1980 rules. *See id.* at *1-3. Given the facility's proximity to a nuclear reactor, NRC assessed "the combined radiological impacts from the Morris Operation" and the nearby reactor as a single location. *Id.* at *3. This facility remains "the only non-DOE operated" storage facility "not co-located at a reactor site." *Spent Fuel Inventory* 7.

b. Congress enacted the Nuclear Waste Policy Act, a comprehensive short- and long-term storage plan for spent nuclear fuel

In the 1982 NWPA, Congress responded to the "national problem" resulting from "the accumulation of . . . spent nuclear fuel from nuclear reactors." 42 U.S.C. § 10131(a)(2). The Act comprehensively addressed spent fuel storage.

First, Congress directed that the Department of Energy ("DOE") ultimately would be responsible for taking title to and permanently disposing of the waste. Congress charged DOE with selecting a site and constructing a permanent, government-owned repository for spent fuel. *Id.* §§ 10132, 10134. DOE eventually selected – and Congress endorsed – Yucca Mountain in Nevada for that repository. *See id.* §§ 10134(b), (d), 10172. In 2008, DOE sought authorization from NRC to construct the facility, only to withdraw its application two years later. *See New York v. NRC*, 824 F.3d 1012, 1015 (D.C. Cir. 2016). Now, "there is not even a prospective site for a repository." *Id.*

Second, the NWPA places "primary responsibility" for interim storage of spent fuel on "persons owning

and operating civilian nuclear power reactors." 42 U.S.C. § 10151(a)(1). They must "maximiz[e] . . . storage" at their reactors and "add[] new onsite storage capacity in a timely manner where practical." *Id.* Congress also recognized the federal government's "responsibility" to enable "the effective use of existing storage facilities," including authorizing "needed new storage capacity *at the site* of each civilian nuclear power reactor." *Id.* § 10151(a)(2) (emphasis added).

As fallback, the NWPA permits storing "not more than 1,900 metric tons" of spent fuel "at one or more facilities owned by the Federal Government," *id.* § 10151(b)(2), which can include sites away from nuclear reactors, *see* § 10155(a)(1)(A)-(C). Congress authorized this alternative only for commercial operators that "cannot reasonably provide adequate spent nuclear fuel storage capacity at the site of such reactor." *Id.* § 10151(b)(2). Before using government-owned storage, a commercial operator must exhaust storage "at the site of any . . . civilian nuclear power reactor operated by such person." *Id.* § 10155(b)(1)(A). Operators also must "diligently pursu[e] licensed alternatives to the use of Federal storage capacity," including expanding onsite storage, constructing new onsite storage, or acquiring onsite "modular or mobile . . . storage equipment." *Id.* § 10155(b)(1)(B)(i)-(iii).

The NWPA does not permit private, offsite storage of spent fuel. Congress explained that "nothing in [the NWPA] shall be construed to encourage, authorize, or require the private or Federal use . . . of any storage facility located away from the site of any civilian nuclear power reactor and not owned by the Federal Government." *Id.* § 10155(h).

Consistent with the NWPA, "essentially all" spent fuel "has remained on the generating reactor sites."

Spent Fuel Inventory 10. As of 2022, more than 70 privately owned spent fuel storage sites exist – just one (the Morris facility) is away from a reactor site (by 0.7 miles). *See id.* at 2; *see also id.* at 7.

3. The Hobbs Act

In 1913, Congress enacted the Urgent Deficiencies Act ("UDA"), which allowed judicial review of Interstate Commerce Commission ("ICC") orders. *See* Act of Oct. 22, 1913, ch. 32, § 1, 38 Stat. 208, 219-20. A three-judge district court would hear challenges to ICC orders, *see id.* at 220, in "de novo" trials, *Hearings on H.R. 5487*, 81st Cong. 25, 27 (1950). Congress subsequently used the UDA's judicial-review procedures for other agencies' orders. *See*, *e.g.*, Communications Act of 1934, ch. 652, § 402(a), 48 Stat. 1064, 1093 (FCC); Perishable Agricultural Commodities Act of 1930, ch. 436, §§ 10-11, 46 Stat. 531, 535 (Department of Agriculture).

In 1950, Congress replaced the UDA with the Administrative Orders Review Act (or Hobbs Act). *See* ch. 1189, 64 Stat. 1129 (1950). That Act standardizes judicial review of agency orders for several agencies, including NRC. *See* 28 U.S.C. § 2342(1)-(7). Courts of appeals have "exclusive jurisdiction" to hear challenges to covered orders. *Id.* § 2342. A court's jurisdiction "is invoked by filing a petition" under 28 U.S.C. § 2344. *Id.* Under § 2344, "[a]ny party aggrieved by [a covered] final order may, within 60 days after its entry, file a petition to review the order in the court of appeals."

For NRC orders, the Hobbs Act governs challenges to "final orders . . . made reviewable by" 42 U.S.C. § 2239. *Id.* § 2342(4). Section 2239(a) provides that, "[i]n any proceeding under this chapter, . . . [NRC] 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." 42 U.S.C. § 2239(a)(1)(A). By regulation, NRC enforces additional requirements before admitting prospective intervenors. One must demonstrate a "property, financial or other interest in the proceeding," 10 C.F.R. § 2.309(d)(1)(iii), and "provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact," *id.* § 2.309(f)(1)(vi). NRC also forbids challenges to "NRC rule[s] or regulation[s]," *In re Interim Storage Partners LLC*, 90 N.R.C. 31, 53 (Aug. 23, 2019), unless "application of the rule or regulation . . . would not serve the purposes for which the rule or regulation was adopted," 10 C.F.R. § 2.335(b). Section 2239(b)(1) states that "[a]ny final order entered in any proceeding of the kind specified in subsection (a)" "shall be subject to judicial review in the manner prescribed in" the Hobbs Act.

B. Factual And Procedural Background

1. The Permian Basin

The Permian Basin "covers an area approximately 250 miles wide and 300 miles long" across western Texas and eastern New Mexico, JA64-65, and includes nearly 300,000 active oil and gas wells, JA106. The Permian Basin is "the largest producing oilfield in the world." JA118. It also includes aquifers that provide freshwater to dozens of counties in Texas and New Mexico. JA143-44, 173-74. That water is "used for domestic potable water, stock, irrigation, and commercial purposes." JA144.

2. ISP's application for a license to store spent fuel in the Permian Basin

In April 2016, ISP's predecessor applied for a license to build an above-ground storage facility for 5,000

metric tons of spent fuel in Andrews County, Texas, in the Permian Basin. JA12. The proposed site is more than 300 miles from the nearest nuclear power plant and more than 1,000 miles from most other nuclear reactors in the country. JA242-43 (maps). "Transportation of [spent fuel] to the proposed [site] would be primarily or entirely by rail." JA80. Thus, spent fuel would cross the country by railcar, travelling alongside "oil-field commodities," "crude oil," and "significant agricultural commodities." JA121.

Although the initial request was to store 5,000 metric tons of spent fuel, the plan was eventually to increase that capacity to 40,000 metric tons. JA41-42. The stated purpose for the site was to receive spent fuel from "existing permanently shutdown and/or decommissioned commercial reactors across the U.S.," not to expand overall capacity for storage of spent fuel. JA12-13. In June 2018, ISP submitted a revised application that changed nothing relevant here. JA75.

Even at 5,000 metric tons, ISP's proposed storage facility would be the largest independent storage site for spent fuel in the country. The current largest storage site is the Palo Verde Nuclear Generating Station (an operating reactor), which stores less than 3,000 metric tons of spent fuel. *See Spent Fuel Inventory* B.2.

3. Fasken opposed ISP's license application

Fasken is one of the nation's largest private landowners, with hundreds of thousands of acres in the Permian Basin near ISP's proposed facility. JA64, 186. On its land, Fasken grazes tens of thousands of cattle, operates nearly 2,000 active oil and gas wells, and has residential and commercial real estate developments. Its employees travel daily throughout that land to work cattle and service the wells. Fasken's

business would share roads and railroad lines with the ISP facility. That facility would expose Fasken's employees to radiation, threaten to devalue its land, and disrupt its commercial operations. *See* Fasken Petition and Request for Hearing 2-4 (N.R.C. Oct. 29, 2018).

Fasken objected to ISP's proposed license and sought a hearing under § 2239(a)(1)(A), as a "person whose interest may be affected by [a licensing] proceeding" and who NRC "shall admit . . . as a party to such proceeding."

First, Fasken noted ISP's inability to comprehensively monitor spent fuel canisters for leaks, JA196, and inadequacies in its plans for addressing leaks, which would expose the public to "millions of curies . . . of radioactivity," JA164 (cleaned up). Fasken also explained that there is "no current understanding as to how the now leaking spent fuel would behave," "how long it could be safely contained," or "how a transportation cask could be moved or transported while holding a leaking" canister. *Id.*

Second, Fasken identified potash mining and the Salada Formation, an extensive salt bed located upwind from the proposed facility, which would corrode the above-ground storage canisters, causing leaks. JA155. Risk of corrosion is material because the area including the proposed site frequently "experienc[es] the 'haboob' sandstorm phenomena," which will coat the canisters with corrosive salt and potash. JA194.

Third, the Permian Basin sits above "a highly dense fault network . . . , with some faults showing greater than 45% probability of slip." JA138. An earthquake could cause canisters to leak. JA140. Yet ISP had no

"strategic plan for seismic monitoring" or for addressing "damage from a seismic surface event." JA136.[2]

Fourth, a release would be disastrous for the surrounding area. Any release "would allow cesium to rapidly spread downwind . . . . Once deposited onto a ground surface . . . , the cesium will dissolve into" rainwater "and begin infiltrating into the local water table." JA199. It could disrupt the Permian Basin for centuries. JA198.

Fifth, the proposed site is several hundred miles from even the closest nuclear reactor. JA241-43. NRC, however, evaluated transportation risks only "within a 50-mile buffer." JA238. Fasken explained NRC could not rely on its decades-old transportation risk assessment for Yucca Mountain in Nevada to ensure safety for spent fuel shipped hundreds or thousands of miles to the proposed ISP site in Texas. JA245-46.

NRC recognized Fasken's "proximity to the proposed facility" made it a person whose interest may be affected by the proposed ISP license. *Interim Storage Partners*, 90 N.R.C. at 52 (finding Fasken had "standing"). But after summarily reviewing the merits of Fasken's objections, NRC concluded Fasken did not "proffer[] an admissible contention" raising "a genuine dispute on a material issue," and accordingly denied it intervenor status. *Id.* at 52-53, 109-18.

NRC also denied intervenor status to every other objector, finding their contentions lacked merit.[3] In 2020,

---

[2] In March 2020, a 5.0 magnitude earthquake struck the area. JA179.

[3] NRC initially deemed one Sierra Club objection meritorious, but later reconsidered and denied Sierra Club intervenor status. *See Interim Storage Partners*, 90 N.R.C. at 80; *In re Interim*

NRC again denied Fasken intervenor status after Fasken filed a contention based on newly revealed information in NRC's draft environmental impact statement, which NRC also rejected on the merits. *See In re Interim Storage Partners LLC*, 2021 WL 8087739, at *7-9 (N.R.C. Jan. 29, 2021).[4]

In September 2021, NRC issued a 40-year license to ISP. JA275, 286. Without citing any specific AEA provision, NRC concluded the facility "meets the standards and requirements of the [AEA] . . . and [NRC's] regulations set forth in 10 CFR." JA284. NRC did not address the NWPA.

4. The Fifth Circuit vacated NRC's license grant

Challenges to NRC's license grant were filed in the Fifth, Tenth, and D.C. Circuits. Texas filed first in the Fifth Circuit with Fasken close behind. Three private parties then petitioned in the D.C. Circuit,[5] and New Mexico petitioned in the Tenth Circuit.[6] Each petition challenged the same order granting the license, but NRC filed the administrative record in each circuit

---

Storage Partners LLC, 90 N.R.C. 181, 182 (Nov. 18, 2019); *In re Interim Storage Partners LLC*, 92 N.R.C. 491, 492 (Dec. 17, 2020). NRC never permitted Sierra Club's contention that "any away-from-reactor interim storage facility is necessarily unlawful under the AEA and/or the NWPA," deeming it "an impermissible challenge to NRC regulations that is precluded by 10 C.F.R. § 2.335." *Interim Storage Partners*, 90 N.R.C. at 60.

[4] Fasken and others petitioned for review of the intervention denials. The D.C. Circuit held that NRC "acted reasonably" in concluding they had not proffered admissible contentions. *Don't Waste Michigan v. NRC,* 2023 WL 395030, at *2 (D.C. Cir. Jan. 25, 2023) (per curiam).

[5] *See* Nos. 21-1227, 21-1230, 21-1231 (D.C. Cir.).

[6] *See* No. 21-9593 (10th Cir.).

and did not seek to transfer the later-filed petitions to the Fifth Circuit. *But see* 28 U.S.C. § 2346 ("the agency shall file . . . the record on review as provided by section 2112"); *id.* § 2112(a)(1) (governing filing of administrative record when multiple petitions in different circuits challenge the same order).

Although the Fifth Circuit cases were filed first, that court was last to rule. The D.C. and Tenth Circuits declined to reach the merits, concluding they lacked jurisdiction under the Hobbs Act. They interpreted the Act to permit only NRC-approved intervenors to petition for review. *See Don't Waste Michigan,* 2023 WL 395030, at *3; *New Mexico ex rel. Balderas v. NRC*, 59 F.4th 1112, 1115 (10th Cir. 2023).

The Fifth Circuit, however, upheld jurisdiction and vacated the license. App. 2a. On jurisdiction, the court observed that, under "the fairest reading of the Hobbs Act," Fasken and Texas are "part[ies] aggrieved" because they participated in the agency proceedings. App. 17a-18a. Ultimately, the court concluded it had jurisdiction because NRC acted *ultra vires* and in violation of express limitations on its authority. App. 18a-20a.

On the merits, the court held the AEA does not authorize NRC "to issue licenses for private parties to store spent nuclear fuel away-from-the-reactor." App. 2a. Although the AEA grants "authority to issue licenses for the possession of . . . constituent materials of spent nuclear fuel," "none" of the allowed purposes for such licenses "encompass[es] storage or disposal of . . . spent nuclear fuel." App. 21a-22a. The court also held the NWPA "creates a comprehensive statutory scheme for addressing spent nuclear fuel" that "limits temporary storage to private at-the-reactor storage or at federal sites." App. 29a. Accordingly, the NWPA

"doesn't permit" NRC "to license a private, away-from-reactor storage facility for spent nuclear fuel." *Id.*

The Fifth Circuit denied rehearing en banc. App. 31a. Judge Jones's concurrence with five other judges grounded the panel's exercise of jurisdiction on "two bases": "these petitioners are parties aggrieved, and the NRC has acted *ultra vires*." App. 33a. "The bottom line for Hobbs Act 'party aggrieved' status," Judge Jones explained, "is to participate in agency proceedings, which both Fasken and Texas did." App. 38a. Judge Jones also clarified that Fifth Circuit decisions recognizing the *ultra vires* rule postdate the Hobbs Act and that this Court and other courts of appeals recognize a similar rule in various contexts. App. 41a-43a.[7]

SUMMARY OF ARGUMENT

I. The Fifth Circuit correctly held NRC lacks authority to license private, offsite storage of spent fuel.

A. The NWPA creates a comprehensive regime for interim storage of spent fuel that does not permit private, offsite storage. Owners of nuclear power reactors are responsible for providing interim storage of spent fuel *at their reactor sites*. If onsite storage space is insufficient, the NWPA directs the federal government (not private actors) to provide limited overflow capacity, but only if no more onsite storage is forthcoming. Of all possible means of providing overflow storage, the NWPA forbids just one – private, offsite storage. NRC therefore lacked authority to license the ISP facility.

---

[7] NRC has licensed a second, even larger facility in the Permian Basin, to be operated by Holtec International. *See* Pet. App. 3a-8a, No. 23-1341. The Fifth Circuit vacated the Holtec license because it was "materially identical" to ISP's license. *Id.* at 2a. Holtec and the government have filed certiorari petitions, which are pending. *See* Nos. 23-1341, 23-1352.

B. Petitioners' efforts to limit the NWPA's scope are unpersuasive. The NWPA did not presume the validity of prior NRC rules permitting offsite storage. Those rules and the NWPA are diametrically opposed – the rules permit private, offsite storage whereas the NWPA specifically forbids it. Indeed, NRC's interpretation of its regulations renders the NWPA's entire interim storage regime nugatory. The NWPA specifically endorses certain NRC regulations, but the offsite-storage regulations are not among them.

C. The AEA also does not authorize NRC to license private, offsite storage of spent fuel.

Although the AEA contains provisions explicitly addressing spent fuel, none authorizes its storage. Nor does NRC's authority to license productive uses of source, special nuclear, and byproduct materials add up to authority to license storage of spent fuel. The AEA's plain text and structure reveal that spent fuel is more than these three materials combined, so authority to license uses of each material does not constitute authority to license uses of spent fuel. In addition, storage is not an authorized use of those materials; indeed, storage is not a "use" at all because stored spent fuel is not productively employed, as NRC's regulations recognize.

D. Petitioners' remaining arguments for inferring authority to license private, offsite storage of spent fuel in the AEA fail. The need to temporarily hold spent fuel in support of other, expressly authorized activities (like reprocessing) is not the same thing as storage, which involves holding spent fuel with no further use in mind.

Petitioners also overstate NRC's history of interpreting the AEA to authorize private, offsite storage. NRC did not claim such authority until 1975, two decades after Congress enacted the AEA, and did not

identify what statutory purposes they purported to fulfill until this litigation. Even then, NRC almost never exercised this authority. In the nearly 50 years between NRC's claiming this authority and its granting ISP's license, NRC licensed only four private, offsite storage facilities, just one of which ever was built.

II. The Fifth Circuit correctly ruled NRC could not shield its order from appellate review by denying obviously aggrieved parties intervenor status.

A. Fasken is a "party aggrieved" entitled to petition for review of NRC's license grant under the Hobbs Act. Read together, the AEA and the Hobbs Act create a permissive framework for judicial review: the AEA requires NRC to "admit . . . as a party" "any person whose interest may be affected by [a] proceeding" and who "request[s]" a hearing, 42 U.S.C. § 2239(a)(1)(A); and the Hobbs Act, in turn, allows "[a]ny party aggrieved" to petition for review, 28 U.S.C. § 2344. Fasken amply meets these statutory requirements because it requested a hearing, the proposed facility threatens its business interests, and it was aggrieved by NRC's license grant. NRC's and ISP's counter – that Fasken tried and failed to intervene in the proceeding – misses the point. The AEA and the Hobbs Act do not make intervention under NRC's rules a prerequisite to judicial review, and NRC lacks authority to add impediments to judicial review through regulation.

B. The Fifth Circuit properly exercised jurisdiction because NRC acted *ultra vires*. Judicial-review statutes, like the Hobbs Act, presumptively do not bar preexisting modes of review. American courts long have exercised jurisdiction to review *ultra vires* agency action – indeed, this Court blessed such review both before and after the Hobbs Act became law.

ARGUMENT

I. NRC LACKS AUTHORITY TO LICENSE PRIVATELY OWNED, AWAY-FROM-REACTOR STORAGE FOR SPENT NUCLEAR FUEL

A. NRC's Assertion Of Authority Contradicts Congress's Comprehensive Program For Storing Spent Nuclear Fuel

1. The NWPA creates a detailed program for storing spent nuclear fuel that excludes private, offsite storage

Congress has addressed where to store spent fuel on an interim basis: onsite at privately owned nuclear reactors. Congress also has addressed where to store spent fuel on an interim basis if those reactor sites run out of space: at federally owned storage facilities until more onsite capacity is ready. NRC therefore lacks statutory authority to license ISP's private, offsite storage.

The NWPA's interim storage plan is codified at 42 U.S.C. §§ 10151-10157, in a part of the U.S. Code titled "Interim Storage Program." Congress began by making critical "find[ing]s" and articulating "purposes" of the Interim Storage Program. Congress found that reactor operators bear the "responsibility for providing interim storage of spent nuclear fuel . . . at the site of each civilian nuclear power reactor" and that "the Federal Government has the responsibility to provide" overflow "capacity for interim storage of spent nuclear fuel" when there is not "adequate storage capacity at the sites of such reactors." 42 U.S.C. § 10151(a)(1), (a)(3).

Congress articulated two corresponding purposes. The first encourages use of existing storage capacity and addition of new storage capacity for spent fuel "at the site of each civilian nuclear power reactor." *Id.*

§ 10151(b)(1). The second creates "a federally owned and operated system for the interim storage of spent nuclear fuel . . . to prevent disruptions in the orderly operation of any civilian nuclear power reactor that cannot reasonably provide adequate spent nuclear fuel storage capacity at the site of such reactor." *Id.* § 10151(b)(2).

Congress then enacted substantive provisions to implement those findings and purposes, confirming that interim storage of spent fuel is to occur onsite at civilian nuclear power reactors, or at federally owned locations (which can be offsite) as a backup. Congress repeatedly directed DOE and NRC to maximize the use of onsite storage capacity and did not authorize private, offsite storage.

- § 10152: DOE and NRC "*shall* . . . encourage and expedite the effective use of available storage, and necessary additional storage, *at the site* of each civilian nuclear power reactor" (emphases added).
- § 10153: NRC "*shall* . . . establish procedures for the licensing of" approved storage technology "for use *at the site* of any civilian nuclear power reactor" (same).
- § 10154: NRC "*shall*" follow prescribed procedures when considering applications "to expand the spent fuel storage capacity *at the site* of a civilian nuclear power reactor" (same).

Congress also recognized that the supply of spent fuel could at times exceed such storage capacity. In that situation, the NWPA permits storing excess fuel in federally owned facilities until additional onsite storage becomes available: DOE "shall provide . . . not more than 1,900 metric tons of capacity for the storage of spent nuclear fuel." *Id.* § 10155(a)(1). Owners of

spent fuel may use this excess storage capacity "only if" several conditions are met. First, using the federally owned storage capacity must be necessary "to ensure the continued orderly operation of" the nuclear reactor generating the spent fuel. *Id.* § 10155(b)(1)(A). Second, storage "cannot reasonably be provided" at the site of that reactor "or at the site of any other civilian nuclear power reactor" owned by the same person. *Id.* Third, additional onsite "capacity cannot be made available in a timely manner." *Id.* Fourth, the reactor owner must be "diligently pursuing licensed alternatives" to expand storage capacity "at the site of any civilian nuclear power reactor" for future spent fuel storage needs. *Id.* § 10155(b)(1)(B).

These conditions reaffirm Congress's express requirement for onsite spent fuel storage. Congress authorized federal overflow capacity only when existing onsite storage is insufficient and more onsite storage is not forthcoming.

In addition, § 10155 is the *only* authorization Congress provides for offsite interim storage of spent fuel. And *offsite* storage in a *federally* owned facility is only one of three options Congress gave DOE. *See id.* § 10155(a)(1)(A). The other two options involve additional *onsite* storage. First, DOE may provide "modular or mobile spent nuclear fuel storage equipment . . . at the site of any civilian nuclear power reactor." *Id.* § 10155(a)(1)(B). Second, DOE may construct new "storage capacity at any site of a civilian nuclear power reactor." *Id.* § 10155(a)(1)(C).

While the NWPA specifically permits these methods of providing surplus storage, it specifically forbids just one – private, offsite storage facilities: "nothing in [the NWPA] shall be construed to encourage, authorize, or require the private or Federal use . . . of any storage facility located away from the site of any

civilian nuclear power reactor and not owned by the Federal Government." *Id.* § 10155(h). Congress elsewhere has not expressly provided for private, offsite storage.

2. NRC's asserted authority flouts the NWPA's Interim Storage Program

Petitioners do not contend the NWPA authorizes ISP's license and for good reason. ISP's license undermines the statutory purposes and requirements of the NWPA's Interim Storage Program.

The NWPA requires NRC to encourage using currently available onsite storage capacity for spent fuel. *See* 42 U.S.C. §§ 10151(b)(1), 10152. But the ISP facility would do the opposite – transfer spent fuel from existing onsite storage to a private, offsite location. JA13, 90.

The NWPA also directs NRC to promote adding new onsite storage capacity for spent fuel. *See* 42 U.S.C. §§ 10151(b)(1), 10152. ISP's facility, however, would do the opposite. Providing a private, offsite facility for (purportedly) interim storage of a large portion of the nation's spent fuel will *discourage* creating new onsite storage capacity. It also will discourage construction of a permanent repository, contrary to Congress's design. *See NARUC v. DOE*, 736 F.3d 517, 519 (D.C. Cir. 2013) (NWPA "is obviously designed to prevent [DOE] from delaying the construction of . . . the permanent facility while using temporary facilities"); Blue Ribbon Commission xii (recognizing "efforts to develop consolidated storage" could "hamper efforts to move forward with the development of [permanent] disposal capacity").

The NWPA requires DOE to create a federally owned and operated system of interim storage with up to 1,900 metric tons of capacity. *See* 42 U.S.C.

§§ 10151(b)(1)-(2), 10155(a)(1). But the ISP facility would be privately owned and operated and have a capacity of 5,000 (and possibly up to 40,000) metric tons.

B. Petitioners Misinterpret The NWPA

Unable to fit the license within the NWPA, NRC and ISP claim that law is irrelevant. Their arguments contradict the NWPA's plain text and structure.

1. Petitioners argue (NRC Br. 42; ISP Br. 40-41) the NWPA assumes the validity of NRC's 1980 rules allowing private, offsite storage of spent fuel. But when Congress wanted to endorse NRC's existing rules in the NWPA, it did so expressly. For example, in instructing NRC to devise new licensing procedures for new storage technologies, Congress said it did "not preclude the licensing, *under any applicable procedures or rules of [NRC] in effect prior to such establishment*, of any technology for the storage of civilian spent nuclear fuel *at the site of* any civilian nuclear power reactor." 42 U.S.C. § 10153 (emphasis added). The NWPA's enactment of a regime different from NRC's recently asserted authority to license off-site storage therefore reflects Congress's disapproval, not confirmation.

2. Petitioners' argument (NRC Br. 43; ISP Br. 41-42) that the NWPA does not repeal the AEA (and NRC's 1980 rules) because repeal by implication is disfavored also fails.

First, the AEA did not empower NRC to license private, offsite storage facilities. No AEA provision expressly authorizes such storage facilities. *See infra* pp. 24-26. Thus, the AEA conferred no relevant authority that the NWPA could repeal, implicitly or otherwise.

Second, even if the AEA could be interpreted to imply that NRC may license such storage facilities (it does not, *see infra* pp. 26-34), that implication would not trigger the presumption against implied repeal. While "[r]epeal by implication of an express statutory text is one thing[,] . . . repeal by implication of a legal disposition implied by a statutory text is something else." *United States v. Fausto*, 484 U.S. 439, 453 (1988). We "presume[] that Congress will specifically address language on the statute books that it wishes to change." *Id.* Not so when mere implications, rather than express statutory provisions, are involved. The "task of reconciling many laws enacted over time, and getting them to make sense in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute," especially "where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (cleaned up). In such cases, the "specific policy embodied in a later federal statute" – the NWPA's specific regime for interim storage of spent fuel – "should control our construction of the earlier statute" – the AEA's (alleged) general authorization to license uses of combinations of nuclear materials – "even though it has not been expressly amended." *Id.* (same).

Third, in any event, the NWPA satisfies the criteria for implied repeal. "Where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one." *Posadas v. National City Bank of New York*, 296 U.S. 497, 503 (1936) (quoted in Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 328 (2012) ("*Reading Law*")).

Reading the AEA to grant NRC unfettered authority to license private, offsite storage facilities irreconcilably conflicts with the NWPA's provisions for maximizing onsite storage, with limited federal storage (which need not be offsite) as a fallback. "[N]othing in" the NWPA should "be construed to . . . authorize . . . any storage facility located away from the site of any civilian nuclear power reactor and not owned by the Federal Government." 42 U.S.C. § 10155(h). NRC and ISP thus read the AEA to permit what the NWPA prohibits. As the later-enacted statute, the NWPA wins that fight.

3. Contrary to petitioners' claims (NRC Br. 15, 42-43; ISP Br. 42), the NWPA does confer relevant new licensing authority. The NWPA grants NRC new authority to license construction of a permanent repository for the nation's spent fuel. *See* 42 U.S.C. § 10134(d) (NRC "shall consider an application for a construction authorization for all or part of a [permanent] repository" and "shall issue a final decision approving or disapproving the issuance of a construction authorization"). The NWPA also grants NRC new authority to license "any [storage] technology approved . . . for use at the site of any civilian nuclear power reactor." *Id.* § 10153. These new grants of licensing authority were necessary because, while the AEA granted NRC power to license production facilities (like reprocessing plants) and utilization facilities (like nuclear power reactors), it granted no authority to license any other types of facilities (like storage or disposal). *See id.* §§ 2131-2134. The NWPA thus affirmatively grants power to license new types of facilities and storage technologies not addressed in the AEA. It is not a set of precatory recommendations on how NRC could use its preexisting AEA powers.

4. ISP argues (at 42) the NWPA concerns "permanent *disposal* . . . by DOE, not *temporary possession* . . . by private parties." But the NWPA gives "civilian" (i.e., private) reactor owners "the primary responsibility for providing interim storage" (i.e., temporary possession). 42 U.S.C. § 10151(a)(1).

C. The AEA Does Not Authorize NRC To License Offsite Storage For Spent Fuel

NRC and ISP defend the license by relying on implied authority they assert emanates from the AEA. Given the NWPA's provisions expressly addressing the question presented, that assertion of implicit power fails. The AEA nowhere comes close to the explicit authorization needed to warrant congressional sanction of NRC's action.

1. The AEA's explicit provisions concerning spent nuclear fuel do not authorize storage licenses

No AEA provision grants NRC express authority to issue a license for storing spent fuel. Indeed, Congress did not amend the AEA to add "spent nuclear fuel" as a defined term until 1988 – six years *after* the NWPA's enactment.[8] Although the AEA *now* addresses specific aspects of, and activities involving, spent fuel,[9] it

---

[8] Price-Anderson Amendments Act § 4(b), 102 Stat. 1069 (codified in part at 42 U.S.C. § 2014(ee)).

[9] *See* 42 U.S.C. §§ 2021b(9)(A)(i) (provisions governing low-level nuclear waste do not apply to spent nuclear fuel), 2065(c)(3) (DOE is responsible for spent nuclear fuel used to generate a certain medical isotope), 2160(f) (largely prohibiting DOE from accepting spent nuclear fuel from other countries), 2210h(a)(2)(B) (exempting spent nuclear fuel from certain export, import, transfer, and tracking requirements), 2210i (requiring manifests for transfers of spent nuclear fuel pursuant to export and import licenses), 2284(a)(3) (creating criminal penalties for actions that damage spent nuclear fuel).

nowhere authorizes NRC to license private, offsite storage facilities for spent fuel. The only support NRC and ISP can muster are AEA provisions that do not expressly reference spent fuel. *See infra* pp. 26-34.

The lack of affirmative authorization to license private, offsite storage of spent fuel should end this case. *See West Virginia v. EPA*, 597 U.S. 697, 723 (2022) ("[a]gencies have only those powers given to them by Congress").

Express congressional authorization is necessary here because where to store the nation's spent fuel is a major question with tremendous "economic and political significance." *Brown & Williamson*, 529 U.S. at 159-60. Economically, the ISP facility concededly implicates more than $600 million of value to the nuclear industry, which itself contributes more than $60 billion in economic value annually. ISP Br. 3; NEI Br. 6, 15. The license also raises the potentially disastrous economic consequences of a radiation leak in the Permian Basin, which produces 50% of domestic hydrocarbons (JA145) worth hundreds of millions of dollars daily.

Politically, the NWPA recognized that "spent nuclear fuel from nuclear reactors" is "a national problem" that "ha[s] become [a] major subject[] of public concern." 42 U.S.C. § 10131(a)(2), (7). The agency proceedings drew public comments from States, counties, and cities; Native American tribes; environmental groups; industry groups; transportation groups; chambers of commerce; and thousands of individuals. NRC received more than 2,500 unique comments from the public on the draft Environmental Impact Statement.[10] And spent fuel still "poses a dangerous, long-

[10] *See* https://www.nrc.gov/docs/ML2120/ML21209A955.pdf.

term health and environmental risk," so the question of where to store it will remain politically salient for decades to come. *New York*, 681 F.3d at 474.

Given the economic and political importance of spent-nuclear-fuel storage (which neither NRC nor ISP seriously disputes), this Court should expect Congress to speak clearly on the subject. Congress did so in the NWPA by creating an explicit, detailed program for interim storage of spent fuel.

2. NRC's authority to license source, special nuclear, and byproduct materials does not add up to authority to license spent fuel storage

Petitioners erroneously claim (NRC Br. 32-35; ISP Br. 29-32) NRC has authority to license storage facilities for spent fuel because the AEA authorizes licenses for possession and transfer of *some* of spent fuel's constituent parts – source, special nuclear, and byproduct material.

a. Congress did not define "spent nuclear fuel" in the AEA as "a combination of source, special nuclear, and byproduct materials." Instead, Congress defined "spent nuclear fuel" to include characteristics not found in definitions of source, special nuclear, and byproduct material. For example, spent fuel must "ha[ve] been withdrawn from a nuclear reactor." 42 U.S.C. § 10101(23) (NWPA) (incorporated by reference in 42 U.S.C. § 2014(ee) (AEA)). It also must not have undergone "reprocessing." *Id.* So spent fuel is not simply the sum of source, special nuclear, and byproduct material, and the sum of NRC's licensing power for those materials is not the power to license spent fuel. *See Pulsifer v. United States*, 601 U.S. 124, 149 (2024) ("In a given statute, the same term usually has the same meaning and different terms usually have different meanings.").

NRC's own definition of spent fuel reinforces this point. In 1980, NRC defined spent fuel as "irradiated nuclear fuel that has *undergone at least one year's decay* since being used as a source of energy in a power reactor. Spent fuel includes the special nuclear material, byproduct material, source material, *and other radioactive materials associated with fuel assemblies*." 45 Fed. Reg. at 74,700-01 (emphases added). NRC's current definition still has this language (plus additional requirements added in subsequent years). *See* 10 C.F.R. § 72.3. NRC thus has understood since before the NWPA that spent fuel includes other materials besides source, special nuclear, and byproduct material, and that spent fuel has properties none of those constituent materials possesses individually or together.

Treating spent fuel as the combination of source, special nuclear, and byproduct materials also violates the canon against surplusage by rendering "spent nuclear fuel" superfluous in some later-enacted AEA sections. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (Court is "reluctant to treat statutory terms as surplusage in any setting") (cleaned up); *see also Reading Law* 174-79. For example, 42 U.S.C. § 2210i empowers NRC to ensure that "byproduct materials, source materials, special nuclear materials, high-level radioactive waste, *spent nuclear fuel*, transuranic waste, and low-level nuclear waste" transferred in the United States "pursuant to an import or export license . . . are accompanied by a manifest" (emphasis added). If spent fuel were merely the combination of source, special nuclear, and byproduct materials, then "spent nuclear fuel" would be superfluous here.

b. Petitioners' assertion (NRC Br. 32; ISP Br. 29-30) that authority to license source, special nuclear,

and byproduct material adds up to authority to license spent fuel also ignores the AEA's history and context.

Long-term storage of spent fuel was a non-starter when Congress passed the AEA in 1954. The commonly held belief "accepted reprocessing as the only" way to deal with spent fuel; "storage was neither recommended nor considered" by Congress. *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 826 F.2d 239, 246 (4th Cir. 1987); *see also supra* pp. 2-3.

The original AEA therefore said nothing about "spent nuclear fuel" or how to store it. Indeed, in asserting that NRC always has understood the AEA to empower it to license spent fuel storage, petitioners point to nothing pre-dating the 1970s – when the nuclear fuel reprocessing industry already had begun to collapse. Before that collapse, the government had no plans for how to store spent fuel beyond the limited storage incidental to reprocessing. *See* 40 Fed. Reg. at 42,802. That historical context refutes the notion that Congress implicitly granted NRC power to store spent fuel in 1954.

Petitioners' argument also renders meaningless Congress's 1988 decision not to create a separate licensing regime for spent fuel in the AEA. From its inception, the AEA has given each type of nuclear material its own Chapter. *See* Pub. L. No. 83-703, ch. 6, 68 Stat. 919, 929-32 (special nuclear material); *id.*, ch. 7, 68 Stat. 932-35 (source material); *id.*, ch. 8, 68 Stat. 935 (byproduct material). Each Chapter includes a licensing regime specific to that type of nuclear material. *See* 42 U.S.C. §§ 2073 (special nuclear material), 2093 (source material), 2111 (byproduct material).

By contrast, when Congress added the term "spent nuclear fuel" and related provisions to the AEA in

1988, Congress did not add the term "spent nuclear fuel" to any of the existing licensing regimes for those other nuclear materials. Those omissions are intentional and meaningful – because Congress had addressed storage in the NWPA. The *Russello* principle of express inclusion and omission thus fits to a tee. *Russello v. United States*, 464 U.S. 16, 23 (1983). Had Congress intended to authorize NRC to issue licenses for spent fuel, it would have done so expressly as in the other licensing regimes. *See id.*

ISP's reliance (at 29-30) on 42 U.S.C. § 2201(b) fares no better. That section gives NRC authority to "establish" rules governing "the possession and use of special nuclear material, source material, and byproduct material . . . to promote" defense, security, health, and safety. But again, those materials do not add up to spent fuel. And the purpose of ISP's license is "to return [decommissioned reactor sites] to greenfield status," not to promote defense, security, health, or safety. JA90.

3. Interim spent fuel storage facilities do not satisfy the AEA's licensing regimes for source, special nuclear, or byproduct materials

Even if the AEA's grant of authority to license possession of source, special nuclear, and byproduct material somehow added up to authority to license spent fuel, NRC still would need to show that *storage* (in any location) satisfies all three licensing regimes to prevail. Yet NRC cannot satisfy one of the regimes, much less all three.

Neither petitioner argues that storage of spent fuel satisfies any enumerated purpose for licensing source, special nuclear, or byproduct materials. Nor could they. For both special nuclear and source material,

those purposes are (1) conducting "research and development" into their useful applications, (2) for use in "medical therapy," and (3) for use in enrichment facilities and nuclear reactors. 42 U.S.C. §§ 2073(a)(1)-(3), 2093(a)(1)-(3). For byproduct material, those purposes are (1) "research or development purposes," (2) "medical therapy," (3) "industrial uses," and (4) "agricultural uses." *Id.* § 2111(a). Spent fuel in storage is not used in "research and development," "medical therapy," enrichment facilities, or nuclear reactors, or for "industrial uses" or "agricultural uses." The point of storage is to keep spent fuel from any use at all.

Petitioners instead argue that spent fuel storage is a permissible "other" purpose under each of the three licensing regimes. *Id.* §§ 2073(a)(4), 2093(a)(4), 2111(a). But these "other" clauses must be interpreted to authorize licenses only for purposes "similar in nature to those [purposes] enumerated by the preceding specific words." *Yates v. United States*, 574 U.S. 528, 545 (2015) (plurality); *see also id.* ("*ejusdem generis*[] counsels: Where general words follow specific words in a statutory enumeration, the general words are usually construed to embrace only objects similar in nature to those objects enumerated by the preceding words.") (cleaned up). Here, "other uses" and "other useful applications" mean uses similar to research and development, medical therapy, and agricultural applications, and use in enrichment facilities and nuclear reactors. The common thread linking those enumerated uses is putting the nuclear material to an active, productive use. Storage, however, is not a productive use or application of spent fuel; it is prolonged non-use.

ISP is incorrect (at 35) that the list of purposes in these sections is too short to apply *ejusdem generis*. A

statutory list need include just "two or more things," which these do, to apply the canon. *Reading Law* 199; *see also Yates*, 574 U.S. at 544-45 (plurality) (applying canon to list consisting of "a record, document, or other object").

4. NRC's remaining arguments about the "other" clauses are unpersuasive

a. NRC argues that storage of spent fuel is a permitted "other use" for special nuclear material because temporary, private, offsite storage allegedly will enable reactors to "continue operating or . . . be safely decommissioned" and thereby "'encourage widespread participation in the development and utilization of atomic energy for peaceful purposes.'" Br. 33 (quoting 42 U.S.C. § 2013(d)); *accord* ISP Br. 30-31. But the NWPA explicitly created an interim storage program to enable the continued operation of civilian nuclear power reactors. That program expands *onsite* storage and, if such storage is unavailable, potential offsite storage in *government-owned-and-operated* storage facilities until reactor operators can build more onsite storage. *See* 42 U.S.C. §§ 10151-10155. NRC may disagree with (but not disregard) Congress's policy choice. Decommissioning nuclear power plants is the opposite of "the development and utilization of atomic energy." *Id.* § 2013(d).

NRC's assertion (at 33) that the ISP facility will enable reactors to continue operating by making more storage space available also is inaccurate. The facility's stated purpose is to "provide temporary storage of [spent fuel] for decommissioned shutdown sites in order to return the land to greenfield status." JA90. The ISP facility simply shifts storage capacity (and spent fuel) from one site to another.

b. NRC argues spent fuel storage is a permissible "other use" as "'an aid to . . . industry.'" Br. 34-35 (quoting 42 U.S.C. § 2093(a)(4)). But storage is not a "use." "Use" means "[a]ct of employing anything, or state of being employed; application; employment." *Webster's New International Dictionary of the English Language* 2806 (2d ed. 1957). Spent fuel in storage is neither applied nor employed to any end, which NRC acknowledged as early as 1980. *See* 43 Fed. Reg. at 46,309 (noting that "spent fuel storage under static storage conditions *involv[es] no operations on such materials*") (emphasis added).

c. NRC also argues (at 33-34) that storage is "similar in type" to research and development, medical uses, and use in a nuclear power reactor because "the spent fuel stored . . . results from" those activities. But by that logic, a garbage dump is "similar in type" to almost all human activities, as garbage results from them. Petitioners make a hash of Congress's chosen language.

d. "[A]mbiguous statutory text" that provides "a merely plausible textual basis for [an] agency action" is not enough to sustain agency claims to authority over major questions. *West Virginia*, 597 U.S. at 723. NRC's claimed AEA authority fails every indicator of textual clarity (*contra* NRC Br. 48-49; ISP Br. 38-39).

First, NRC's reading of the "other" clauses enables it "to adopt a regulatory program that Congress ha[s] conspicuously . . . declined to enact itself." *West Virginia*, 597 U.S. at 724. Congress considered and rejected the possibility of using private, offsite facilities for interim storage in the NWPA. *See* 42 U.S.C. § 10155(h); *supra* pp. 19-20. NRC's own assessment of policy cannot override Congress's. *See West Virginia*, 597 U.S. at 723.

Second, NRC derived its licensing power from "the vague language of [three] ancillary provision[s] of" the AEA. *Id.* at 724. Such stitch work provides, at best, an ambiguous and "merely plausible" textual basis for NRC's action. *Id.* at 723.

Third, NRC's "'discover[y] in a long-extant statute [of] an unheralded power'" to license private, offsite storage facilities, *id.* at 724 (quoting *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014)), is regulatory authority in search of statutory justification. Not until 1980 – more than 25 years after the AEA's enactment and prompted by President Carter's "deferral of reprocessing of spent fuel in April 1977" – did NRC first promulgate rules for licensing private, offsite storage facilities. 45 Fed. Reg. at 74,693. And in taking that action, NRC identified no specific statutory language authorizing it. *See id.*

D. Petitioners' Remaining Arguments Are Unpersuasive

1. The AEA does not implicitly authorize licensing of spent-nuclear-fuel storage

a. NRC argues (at 32) the Court must imply a power to store spent fuel because "storage is a practical necessity in order for licensed persons to" "transfer, deliver, acquire, possess, own, receive possession or title to, import, or export" nuclear materials. Even if temporarily holding spent fuel is necessary, that is not *storage*; it is holding the spent fuel until ready for another productive use. That's not what NRC licensed. Here, storage in the ISP facility is not *part of* any other activity. It's the end goal, not an incident to some other, authorized use. *See* 43 Fed. Reg. at 46,309 ("extended spent fuel storage . . . involv[es] no operations on such materials").

b. NRC further argues (at 41) the AEA must authorize *onsite* storage because Congress would not give NRC authority to license activities that *create* spent fuel without also giving authority to license the *possession* of spent fuel. This argument is flawed.

First, this case concerns offsite storage, not onsite storage. So even if AEA has implied authority to license limited onsite interim storage, that would not justify NRC's ISP offsite license.

Second, because Congress *did* give NRC authority to license the storage of spent fuel *in the NWPA*, its previous inaction is irrelevant. Again, before the spent-fuel-reprocessing industry collapsed in the 1970s, the plan was to reprocess spent fuel, not store it. Confronted with a new and unexpected challenge, Congress enacted a new law. That law blessed previous onsite storage efforts, instructed NRC to authorize additional onsite storage, and disclaimed the use of offsite storage.

c. NRC also argues (at 36-37) that its "licensing authority for facilities reinforces" its argument because the AEA "does not require a facilities license for any other type of facility" – like storage – "that houses nuclear fuel." The AEA authorizes NRC to issue licenses for just two types of facilities: production facilities (like reprocessing plants) and utilization facilities (like nuclear power reactors). *See* 42 U.S.C. §§ 2131-2134. This does not mean other types of facilities require no license; it means NRC lacks authority (under the AEA) to license any other type of facility, including stand-alone storage facilities. NRC's contrary assertion violates both the rule that "[a]gencies have only those powers given to them by Congress," *West Virginia*, 597 U.S. at 723, and the omitted-case canon, *see Reading Law* 93-94.

2. NRC's past practice and regulations do not support its claims to authority

NRC argues (at 38-39) its "consistent interpretation" and application "of the [AEA] confirms that the Act authorizes [NRC] to license the offsite storage of spent fuel." This argument fails.

First, NRC's current AEA interpretation is not long-standing because NRC never previously attempted to explain the statutory bases or purposes of interim storage. In 1975, NRC first claimed "the discretion to deal with issues of" where and how to store spent fuel. 40 Fed. Reg. at 42,802. NRC cited no source for that discretion at all, much less any AEA section. Then, when NRC in 1980 promulgated regulations for licensing offsite interim storage, it made no attempt to justify those regulations as conforming to the AEA's text. Instead, NRC said only that its new rules were "issued under the Atomic Energy Act of 1954," with no explanation of which AEA sections authorized which regulations or why. 45 Fed. Reg. at 74,699. In 2003, NRC claimed authority to license interim storage under the combined authority of 42 U.S.C. §§ 2073, 2093, and 2111 specifically. *See* NRC Br. 5, *Bullcreek v. NRC*, Nos. 03-1018 & 03-1022, 2003 WL 25588879 (D.C. Cir. Oct. 1, 2003). But NRC still did not explain what statutory purposes that storage supposedly fulfilled. So NRC's efforts to justify its authority using the AEA's actual text are of recent provenance.

Second, NRC barely has used its wrongfully claimed authority. NRC acknowledges (at 6) it has licensed just four private, offsite storage facilities since claiming such authority 45 years ago. Of those four, two (ISP and Holtec) are the subjects of active litigation in this Court, another (Private Fuel Storage in Utah) never was built, and just one (the Morris facility, originally licensed and built *before* 1980 as a

reprocessing facility, not a storage facility) ever was built.

The remaining "offsite" storage petitioners now claim exists, *see* NRC Br. 5-6, 39; ISP Br. 32 (claiming "at least a dozen" offsite facilities), is actually onsite storage – as DOE's spent fuel inventory report acknowledges. *Spent Fuel Inventory* 7-8 (listing 25 "shutdown reactors . . . with [spent fuel] remaining *onsite*" and describing the Morris facility as "the *only* non-DOE operated, NRC licensed pool storage facility that is not co-located at a reactor site") (emphases added).

The ISP facility's scale also is unprecedented. The facility would hold at least 5,000 – and potentially up to 40,000 – metric tons of spent fuel. No spent fuel storage sites of that scale exist in this country. Just the initial 5,000 metric tons would make the ISP facility the largest single deposit of spent fuel in the country. By comparison, the Morris facility – the only private, offsite storage facility in the country – held just 674 metric tons of spent fuel as of 2021. *See id.* at F.3.

Third, even if NRC consistently had claimed and exercised authority to license private, offsite storage facilities (it did not), an old and oft-repeated error is still error. For example, the Federal Trade Commission claimed for decades it had power to receive "equitable monetary relief" under § 13(b) of its organic statute, 15 U.S.C. § 53(b). *AMG Cap. Mgmt., LLC v. FTC*, 593 U.S. 67, 70, 72-74, 81-82 (2021). It had issued regulatory guidance explicitly claiming that power and "use[d] § 13(b) to win equitable monetary relief directly in court with great frequency" since "the late 1970s." *Id.* at 73-74. Nevertheless, this Court unanimously held that § 13(b) does not authorize the

FTC to receive equitable monetary relief. *Id.* at 70. That holding applies here.[11]

II. THE FIFTH CIRCUIT HAD JURISDICTION

A. Fasken Is A "Party Aggrieved" Under The Hobbs Act

1. Fasken satisfied statutory judicial-review requirements

The Hobbs Act permits "[a]ny party aggrieved by [a] final order" of NRC to petition for review. 28 U.S.C. § 2344. The AEA states NRC "shall admit . . . as a party" to a licensing proceeding "any person whose interest may be affected by the proceeding" and who "request[s]" a hearing. 42 U.S.C. § 2239(a)(1)(A).

Under that language, Fasken is a "party aggrieved" entitled to seek judicial review. Fasken's interest will be affected by ISP's license. *See supra* pp. 10-11. NRC so found, and no party disputes that finding. *See Interim Storage Partners*, 90 N.R.C. at 52. Petitioners acknowledge Fasken requested a hearing. *See* NRC Br. 9; ISP Br. 11.

The AEA and the Hobbs Act require nothing more. *See* 42 U.S.C. § 2239(a)(1)(A) ("shall admit . . . as a party"); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (the word "shall" "creates an obligation impervious to [agency] discretion"). And NRC's license grant "aggrieved" Fasken. App. 33a ("[T]here's no question that Fasken . . . is 'aggrieved.'") (Jones, J.).

---

[11] The D.C. Circuit's contrary holding in *Bullcreek v. NRC*, 359 F.3d 536 (2004), is unpersuasive. That decision assumed without analysis that the AEA authorized NRC to license private, offsite storage (it does not) and focused on whether § 10155(h) alone (rather than the NWPA's Interim Storage Program as a whole) overcame that assumed authority.

2. The Fifth Circuit properly rejected petitioners' atextual arguments

Petitioners argue NRC's decision not to grant Fasken status as an intervenor – because it disagreed with Fasken's objections on the merits – sufficed to deny it "party" status. NRC Br. 27. That confuses intervention under NRC regulations with party status under the AEA and the Hobbs Act. NRC's intervention rules (adopted 35 years after the AEA) require that an intervenor "propose[] at least one admissible contention that meets the requirements of paragraph (f) of this section" – including, for example, that NRC agree the contention raises "a material issue of law or fact." 10 C.F.R. § 2.309(a), (f)(1)(vi).

NRC's attempt to interpose a substantive hurdle to party status lacks statutory support: the AEA requires only that a person demonstrate its interest would be affected and request a hearing to become a party; the Hobbs Act imposes no additional requirements. *See PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 588 U.S. 1, 26 (2019) (Kavanaugh, J., concurring in the judgment) ("[T]here is certainly no basis to interpret a *silent* statute as achieving that extraordinary close-the-courthouse-door outcome."). These statutes' clarity means "the judicial inquiry is complete." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003) (cleaned up).

The Fifth Circuit properly concluded the only requirements for party status are statutory: affected interests and participation. It reasoned that Fasken's geographical proximity to the proposed site meant the license would affect Fasken's interests. App. 12a. It then ruled that "the plain text of the Hobbs Act requires only that a petitioner have participated – in some way – in the agency proceedings, which . . . Fasken did." App. 17a. The Fifth Circuit thus rejected

the "extra-textual" argument that intervention is an "additional requirement[]" for party status. App. 18a. As Judge Jones separately wrote, "the breadth of NRC's statutory charge to allow 'affected persons' to be made 'parties'" makes it "paradoxical to resort to the Hobbs Act to disable Fasken . . . from judicial review." App. 35a.

3. Text, precedent, and purpose confirm the Fifth Circuit's interpretation

a. Hobbs Act § 2348 supports Fasken. It governs intervention in Hobbs Act proceedings and distinguishes a "party in interest in the proceeding before the agency whose interests will be affected" from others "whose interests are affected by the order of the agency." 28 U.S.C. § 2348. The former may intervene by "motion and as of right," while the latter "may intervene," but not as of right. *Id.* Congress's use of the expansive phrase "party in interest" confirms Fasken's rights. A "party in interest" encompasses all "entities that are potentially concerned with or affected by a proceeding." *Truck Ins. Exch. v. Kaiser Gypsum Co.*, 144 S. Ct. 1414, 1424 (2024). That holding confirms the breadth of those the Hobbs Act considers a party.[12] It does not support NRC's effort to erect the agency's intervention rules as a barrier to party status; the AEA compels the agency to accept interested parties that request a hearing.[13]

---

[12] *See also* U.S. Amicus Br. 13, *Truck Ins.*, No. 22-1079 (U.S. Dec. 14, 2023) (arguing "party in interest" "is *broad* and refers to *a participant* in an action or affair that is concerned with or affected by its potential effects") (emphases added).

[13] NRC cites (at 19) *Alabama Power Co. v. FCC*, which is inapposite. There, the court dismissed a petition for lack of jurisdiction because the petitioner did not participate at the agency and its only interest was the case's "potential effect as a precedent." 311 F.3d 1357, 1367 n.17 (11th Cir. 2002).

Public meaning does not support petitioners' position. The three dictionaries NRC cites (at 17) confirm participation as the touchstone for party status. The only dictionary definition of "[p]arty aggrieved" encompasses Fasken. *See Party*, *Black's Law Dictionary* 1278 (4th ed. 1951) (defining "[p]arty aggrieved" as "one whose right has been directly and injuriously affected by action of court"). *Black's* says that definition applies "[u]nder statutes permitting any party aggrieved to appeal." *Id.* And while the dictionary defines "party" to mean "he or they by or against whom a suit is brought," the dictionary cautions that "'[p]arty' is not restricted to strict meaning of plaintiff or defendant in a lawsuit" and instead can be "defined as one concerned in or privy to a matter." *Id.* The second dictionary NRC cites defines "party" as "[o]ne who takes part, *participates*, or is concerned in some action or affair; *a participator*; an accessory." 7 *The Oxford English Dictionary* 515 (1933) (emphases added). By contrast, the definition NRC cites applies only if there are "two sides in some proceeding, as the litigants in an action at law." *Id.* That definition does not apply: unlike lawsuits in court, or complaint and enforcement proceedings before administrative agencies – which principally affect only plaintiffs and defendants – a licensing proceeding affects a wide range of interested parties. *Cf. Comuni-Centre Broad., Inc. v. FCC*, 856 F.2d 1551, 1555 (D.C. Cir. 1988) (unlike "a bipolar civil action in a district court," a "licensing case has the interest of the public as its focus"). The third dictionary is similar: it defines "party" as a "participant," and NRC's definition applies only to lawsuits. *The Random*

House Dictionary of the English Language 1052-53 (1967).[14]

b. NRC's extra-textual intervention requirement lacks supporting precedent. One case it cites (at 30) – *National Parks Conservation Association v. FERC*, 6 F.4th 1044 (9th Cir. 2021) – did not involve a Hobbs Act agency. Another – *Don't Waste Michigan*, 2023 WL 395030, at *3 – held without explanation that denial of intervention undermined party status. In *Water Transportation Association v. ICC*, the D.C. Circuit held an interested person *was* a "party." *See* 819 F.2d 1189, 1192 (D.C. Cir. 1987). And in *Ohio Nuclear-Free Network v. NRC*, the interested person did not even try to intervene. *See* 53 F.4th 236, 239 (D.C. Cir. 2022).

c. Finally, NRC's use of intervention rules to preclude appellate review is arbitrary. NRC cursorily addressed Fasken's merits arguments in denying it intervenor status. That arbitrary approach allows NRC to shortchange the merits, analyzing them summarily without a complete record and controlling "the courthouse door." App. 33a-34a (Jones, J., concurring in the denial of rehearing en banc); *cf. Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 739 (1985) ("Congress decided on the scope of judicial review . . . solely by reference to the subject matter of [NRC] action and not by reference to the procedural particulars of [NRC] action."); *Massachusetts v. NRC*, 878 F.2d 1516, 1520 (1st Cir. 1989) ("NRC cannot now claim that by refusing to grant the Commonwealth's

---

[14] NRC's other cases are irrelevant because they define "party" in a lawsuit, not a licensing proceeding. *See Smith v. Bayer Corp.*, 564 U.S. 299, 313 (2011); *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 932-33 (2009); *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam); *United States ex rel. Louisiana v. Jack*, 244 U.S. 397, 402 (1917).

requests to become a party, the NRC's decisions are beyond review."). This Court instead rejects "conflat[ing] the merits of an objection with the threshold party in interest inquiry." *Truck Ins.*, 144 S. Ct. at 1427.

By contrast, limiting judicial review to parties that both have an interest and participated in the proceeding (whether by requesting a hearing or otherwise) supports sound agency and judicial decision making. "The point of the Hobbs Act is to force parties who want to challenge agency orders via facial, pre-enforcement challenges to do so promptly and to do so in a court of appeals." *PDR Network*, 588 U.S. at 13 (Kavanaugh, J., concurring in the judgment). That purpose is met whenever people with affected interests participate in the agency proceeding and – when the agency rejects their views – sue timely in a federal appeals court. Fasken did that by requesting a hearing to protect its interests and timely petitioning the Fifth Circuit for review.

4. Petitioners' remaining arguments fail

Petitioners seem to concede participation unlocks party status. NRC (at 18) defines "party" as "*a participator*" (emphasis added) and conceded (at Pet. 12) that "[t]he courts of appeals (including the Fifth Circuit) have accordingly concluded that . . . actual[] participat[ion] in the agency proceeding" suffices for party status. ISP states that, "to pursue judicial review under the statute, a person must *either* be a 'party' to the agency proceeding, *or at least have attempted to become a 'party' to those proceedings*." Br. 10 (emphases added). Fasken participated in NRC proceedings in the AEA-prescribed manner, so the Fifth Circuit had jurisdiction to entertain Fasken's petition even on ISP's view.

That Fasken could (and did) appeal the denial of its intervention motion is irrelevant. Success on that

appeal might have entitled Fasken to intervene and participate more before NRC, but the AEA and the Hobbs Act require neither. Nor does it matter that Fasken did not distinguish party status and intervention in that appeal or in Fifth Circuit proceedings. Party status goes to the Court's subject-matter jurisdiction; such arguments "can never be forfeited or waived." *United States v. Cotton*, 535 U.S. 625, 630 (2002).

Finally, it hardly helps NRC (at 18) that the Administrative Procedure Act ("APA") refers to adversely affected or aggrieved "*person[s]*" rather than parties. 5 U.S.C. § 702 (emphasis added). Fasken's request for a hearing and demonstration of its interest in the license make it a "party aggrieved" and distinguish it from someone who ignored the agency proceedings entirely before seeking judicial review. *Simmons v. ICC* does not help NRC, either. *See* NRC Br. 18 (citing 716 F.2d 40, 43 (D.C. Cir. 1983) (Scalia, J.)). Its statement that the Hobbs Act refers "to a party before the agency, not a party to the judicial proceeding," 716 F.2d at 43, leaves unanswered the question *who* was a party before the agency, which is the question here.

The Court need go no further. Judge Jones explained that the panel's exercise of jurisdiction rested on "two bases of authority": "these petitioners are parties aggrieved, and the NRC has acted *ultra vires*." App. 33a. The *ultra vires* ground was not required.

B. Jurisdiction Exists To Review *Ultra Vires* Agency Action

1. American courts long have exercised jurisdiction to review *ultra vires* action

The Fifth Circuit did not err in upholding jurisdiction because NRC acted *ultra vires*.

Judicial-review statutes like the Hobbs Act presumptively do not bar preexisting modes of review.[15] In *Abbott Laboratories v. Gardner*, this Court "survey[ed]" its "[e]arly cases" and concluded "that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." 387 U.S. 136, 139-40 (1967). Applying that principle, the Court held the Food, Drug, and Cosmetic Act's "specific review provisions . . . were designed to give *an additional remedy* and not to cut down more traditional channels of review." *Id.* at 142 (emphasis added); *see also PDR Network*, 588 U.S. at 16 (Kavanaugh, J., concurring in the judgment) (*Abbott Laboratories* is a "landmark decision").

American courts long have recognized that persons can challenge agency actions taken without and contrary to their statutory authority, even if they did not participate in proceedings before the agency. For example, in *Skinner & Eddy Corp. v. United States*, this Court upheld jurisdiction "to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before" the ICC, if the "contention is that the commission has exceeded its statutory powers." 249 U.S. 557, 562-63 (1919). Similarly, in *Edward Hines Yellow Pine Trustee v. United States*, the Court stated that persons could challenge the ICC's orders if they are "alleged to be in excess of the [ICC's] power" and "subject[] [the plaintiffs] to legal injury, actual or threatened." 263 U.S. 143, 147-48 (1923).

---

[15] NRC's argument (at 16) that "[t]here is no textual basis for the Fifth Circuit's . . . ultra vires exception to th[e] party-aggrieved requirement" is misplaced. The question is whether the Hobbs Act abrogated all preexisting modes of review.

2. The Hobbs Act does not abolish traditional *ultra vires* review

Enacted in 1950, the Hobbs Act "does not manifest a congressional purpose to eliminate judicial review" of *ultra vires* agency action. *Abbott Labs.*, 387 U.S. at 144. The Act gives the federal appeals courts (other than the Federal Circuit) "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of," certain agency orders. 28 U.S.C. § 2342. But that exclusivity provision establishes only that challenges to those orders must occur in an appellate venue. Likewise, § 2344's requirement that parties aggrieved must petition for review "within 60 days after" an order is entered limits the time within which persons may sue but leaves claims substantively unaffected.

Finally, decisions immediately after the Hobbs Act suggest the *ultra vires* rule survives. For example, in *Leedom v. Kyne*, this Court said it will not "lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." 358 U.S. 184, 190 (1958). It held federal district courts have jurisdiction if an agency acts "in excess of its delegated powers *and* contrary to a specific [statutory] prohibition." *Id.* at 188 (emphasis added). That principle applies here. NRC's license grant exceeded its delegated powers under the AEA and the NWPA. The Fifth Circuit's exercise of jurisdiction thus fits under *Leedom*. *See American Trucking Ass'ns, Inc. v. ICC*, 673 F.2d 82, 85 n.4 (5th Cir. 1982) (per curiam) ("a person may appeal an agency action even if not a party to the original agency proceeding . . . if the agency action is attacked as exceeding [its] power"); *accord Wales Transp., Inc. v. ICC*, 728 F.2d 774, 776 n.1 (5th Cir. 1984).

Board of Governors v. MCorp Financial, Inc., 502 U.S. 32 (1991), is not to the contrary. There, the Court declined to exercise jurisdiction under *Leedom* because (1) the relevant statute gave the party challenging agency action "a meaningful and adequate means" to do so, and (2) "Congress ha[d] spoken clearly and directly" that other ways to challenge agency action were precluded. *Id.* at 43-44. Here, both factors favor exercising jurisdiction. "[NRC's] interpretation of the [AEA and the Hobbs Act] would wholly deprive [Fasken] of a meaningful and adequate means of vindicating its statutory rights" because NRC denied intervention to *all* interested persons. *Id.* Those Acts do not support empowering NRC to insulate its decisions from judicial review.

3. Petitioners' criticisms of the *ultra vires* rule are unfounded

Petitioners' efforts to limit judicial review fail.

a. In *FCC v. ITT World Communications, Inc.*, 466 U.S. 463 (1984), and *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987) – which NRC cites (at 20) to undermine the *ultra vires* rule – the agencies did not argue that *no court* had the power to review its orders. Rather, in *ITT World*, this Court held a district court lacked jurisdiction to enjoin the agency's action as *ultra vires* in part *because* appellate review was "[t]he appropriate procedure for obtaining judicial review." 466 U.S. at 468. Similarly, in *Brotherhood*, the Court premised its analysis on the availability of "appeal[] to the courts *directly* after" agency action. 482 U.S. at 279. NRC misreads *Brotherhood* (at 20) to mean the Court "refused to adopt a[n] . . . exception to the [Hobbs] Act's 60-day filing window." The Court did not address that issue because those appeals were timely. *See* 482 U.S. at 277.

b. Several of petitioners' other criticisms of the *ultra vires* rule also are speculative. NRC (at 21) and ISP (at 27) argue the rule allows non-parties to obtain appellate review. But Fasken *was* a party to NRC's proceeding. It did not "intentionally eschew[] available agency procedures for becoming a party." ISP Br. 27. Nor was NRC "deprive[d] . . . of the ability to respond to [Fasken's] arguments." NRC Br. 21. "Fasken's multiple attempts formally to intervene" or to reopen the record "were repeatedly rebuffed by the agency," App. 33a (Jones, J.), and the agency did so only after summarily rejecting the merits of Fasken's contentions. This case, therefore, does not involve the *ultra vires* rule empowering a person "to skip the administrative proceeding and then ambush the agency" in court. NRC Br. 21.

NRC's next argument (at 22) – that the *ultra vires* exception threatens to swallow the party-aggrieved rule because *ultra vires* "may be a synonym for 'wrong'" – is "hyperbol[ic]" and speculative as well. App. 43a (Jones, J.). As Judge Jones explained, the exception requires that the agency acted not only without authority, but also in violation of express limitations on its authority. *Id.* That rule is neither "obscure" nor "indeterminate." NRC Br. 22. It applies here because NRC acted without AEA authority in granting the license and did so in violation of express limitations on NRC's authority under the NWPA. By contrast, in other cases, the Fifth Circuit repeatedly has found the *ultra vires* principle inapplicable. *See Merchants Fast Motor Lines, Inc. v. ICC*, 5 F.3d 911, 922 (5th Cir. 1993); *Baros v. Texas Mexican Ry. Co.*, 400 F.3d 228, 238 n.24 (5th Cir. 2005); *see also Wales Transp.*, 728 F.2d at 776 n.1 (*ultra vires* rule did not change outcome because one petitioner "as to all

claims . . . participated in the original agency proceeding").

c. Petitioners' remaining criticisms of the *ultra vires* rule lack merit. NRC's argument (at 20-21) the *ultra vires* rule is "untethered to the norms that govern litigation in court" rests on a false equivalence between "agency adjudication" and "district court case[s]." While a non-party to a district-court case cannot appeal it, the same is not necessarily true for agency adjudication. As NRC acknowledges (at 18), the APA expressly allows interested persons to challenge adverse agency action. That includes agency adjudication. *See Radiofone, Inc. v. FCC*, 759 F.2d 936, 938-39 (D.C. Cir. 1985) ("Standing to challenge agency adjudications is of course more expansive than standing to appeal lower court judgments, in that not only the losing party before the agency but even . . . other persons with interests adverse to the winning party[] may often sue.").

As for ISP, its reliance (at 19) on *Bowles v. Russell*, 551 U.S. 205 (2007), is misplaced. *Bowles* held courts may not create equitable exceptions to jurisdictional requirements. *See id.* at 214. The *ultra vires* rule is not an "exception" to the Hobbs Act because it preexisted the Act. *See* App. 42a (Jones, J.). Under *Abbott Laboratories*, the rule governs unless superseded by statute.

CONCLUSION

The court of appeal's judgment should be affirmed.

Respectfully submitted,

ALLAN KANNER
ANNEMIEKE M. TENNIS
KANNER & WHITELEY, L.L.C.
701 Camp Street
New Orleans, LA 70130
(504) 524-5777

MONICA RENEE PERALES
FASKEN LAND AND
MINERALS, LTD.
6101 Holiday Hill Road
Midland, TX 79707
(432) 687-1777

DAVID C. FREDERICK
Counsel of Record
SCOTT H. ANGSTREICH
CHRISTOPHER C. GOODNOW
MATTHEW J. WILKINS
RYAN M. FOLIO
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@kellogghansen.com

January 15, 2025

ADDENDUM

TABLE OF CONTENTS

STATUTES AND REGULATIONS INVOLVED

Relevant provisions of the Atomic Energy Act of 1954, Pub. L. No. 83-703, 68 Stat. 919 (42 U.S.C. § 2011 *et seq.*):

1. Excerpt from Table of Contents for Pub. L. No. 83-703:

* * * "

2. 42 U.S.C. § 2014 provides in relevant part:

§ 2014. Definitions

The intent of Congress in the definitions as given in this section should be construed from the words or phrases used in the definitions. As used in this chapter:

* * *

(aa) The term "special nuclear material" means (1) plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Commission, pursuant to the provisions of section 2071 of this title, determines to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material.

* * *

(cc) The term "utilization facility" means (1) any equipment or device, except an atomic weapon, determined by rule of the Commission to be capable of making use of special nuclear material in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public, or peculiarly adapted for making use of atomic energy in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public; or (2) any important component part especially designed for such equipment or device as determined by the Commission.

* * *

(ee) HIGH-LEVEL RADIOACTIVE WASTE; SPENT NUCLEAR FUEL.—The terms "high-level radioactive

waste" and "spent nuclear fuel" have the meanings given such terms in section 10101 of this title.

* * *

3. 42 U.S.C. § 2073 provides in relevant part:

§ 2073. Domestic distribution of special nuclear material

(a) Licenses

The Commission is authorized (i) to issue licenses to transfer or receive in interstate commerce, transfer, deliver, acquire, possess, own, receive possession of or title to, import, or export under the terms of an agreement for cooperation arranged pursuant to section 2153 of this title, special nuclear material, (ii) to make special nuclear material available for the period of the license, and, (iii) to distribute special nuclear material within the United States to qualified applicants requesting such material—

(1) for the conduct of research and development activities of the types specified in section 2051 of this title;

(2) for use in the conduct of research and development activities or in medical therapy under a license issued pursuant to section 2134 of this title;

(3) for use under a license issued pursuant to section 2133 of this title;

(4) for such other uses as the Commission determines to be appropriate to carry out the purposes of this chapter.

* * *

4. 42 U.S.C. § 2093 provides in relevant part:

§ 2093. Domestic distribution of source material

(a) License

The Commission is authorized to issue licenses for and to distribute source material within the United States to qualified applicants requesting such material—

(1) for the conduct of research and development activities of the types specified in section 2051 of this title;

(2) for use in the conduct of research and development activities or in medical therapy under a license issued pursuant to section 2134 of this title;

(3) for use under a license issued pursuant to section 2133 of this title; or

(4) for any other use approved by the Commission as an aid to science or industry.

* * *

5. 42 U.S.C. § 2111 provides in relevant part:

§ 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.

* * *

6. 42 U.S.C. § 2131 provides:

§ 2131. License required

It shall be unlawful, except as provided in section 2121 of this title, for any person within the United States to transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, use, import, or export any utilization or production facility except under and in accordance with a license issued by the Commission pursuant to section 2133 or 2134 of this title.

7. 42 U.S.C. § 2132 provides:

§ 2132. Utilization and production facilities for industrial or commercial purposes

(a) Issuance of licenses

Except as provided in subsections (b) and (c), or otherwise specifically authorized by law, any license hereafter issued for a utilization or production facility for industrial or commercial purposes shall be issued pursuant to section 2133 of this title.

(b) Facilities constructed or operated under section 2134(b)

Any license hereafter issued for a utilization or production facility for industrial or commercial purposes, the construction or operation of which was licensed pursuant to section 2134(b) of this title prior to enactment into law of this subsection, shall be issued under section 2134(b) of this title.

(c) Cooperative Power Reactor Demonstration facilities

Any license for a utilization or production facility for industrial or commercial purposes constructed or

operated under an arrangement with the Commission entered into under the Cooperative Power Reactor Demonstration Program shall, except as otherwise specifically required by applicable law, be issued under section 2134(b) of this title.

8. 42 U.S.C. § 2133 provides in relevant part:

§ 2133. Commercial licenses

(a) Conditions

The Commission is authorized to issue licenses to persons applying therefor to transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, use, import, or export under the terms of an agreement for cooperation arranged pursuant to section 2153 of this title, utilization or production facilities for industrial or commercial purposes. Such licenses shall be issued in accordance with the provisions of subchapter XV and subject to such conditions as the Commission may by rule or regulation establish to effectuate the purposes and provisions of this chapter.

* * *

9. 42 U.S.C. § 2134 provides:

§ 2134. Medical, industrial, and commercial licenses

(a) Medical therapy

The Commission is authorized to issue licenses to persons applying therefor for utilization facilities for use in medical therapy. In issuing such licenses the Commission is directed to permit the widest amount

of effective medical therapy possible with the amount of special nuclear material available for such purposes and to impose the minimum amount of regulation consistent with its obligations under this chapter to promote the common defense and security and to protect the health and safety of the public.

(b) Industrial and commercial purposes

As provided for in subsection (b) or (c) of section 2132 of this title, or where specifically authorized by law, the Commission is authorized to issue licenses under this subsection to persons applying therefor for utilization and production facilities for industrial and commercial purposes. In issuing licenses under this subsection, the Commission shall impose the minimum amount of such regulations and terms of license as will permit the Commission to fulfill its obligations under this chapter.

(c) Research and development activities

(1) In general

Subject to paragraphs (2) and (3), the Commission is authorized to issue licenses to persons applying therefor for utilization and production facilities useful in the conduct of research and development activities of the types specified in section 2051 of this title.

(2) Regulation

The Commission is directed to impose only such minimum amount of regulation of the licensee as the Commission finds will permit the Commission to fulfill its obligations under this chapter to promote the common defense and security and to protect the health and safety of the public and will permit the conduct of widespread and diverse research and development.

(3) Limitation on utilization facilities

The Commission may issue a license under this section for a utilization facility useful in the conduct of research and development activities of the types specified in section 2051 of this title if—

(A) not more than 75 percent of the annual costs to the licensee of owning and operating the facility are devoted to the sale, other than for research and development or education and training, of—

(i) nonenergy services;

(ii) energy; or

(iii) a combination of nonenergy services and energy; and

(B) not more than 50 percent of the annual costs to the licensee of owning and operating the facility are devoted to the sale of energy.

(d) Limitations

No license under this section may be given to any person for activities which are not under or within the jurisdiction of the United States, except for the export of production or utilization facilities under terms of an agreement for cooperation arranged pursuant to section 2153 of this title or except under the provisions of section 2139 of this title. No license may be issued to any corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government. In any event, no license may be issued to any person within the United States if, in the opinion of the Commission, the issuance of a license to such person would be inimical to the common defense and security or to the health and safety of the public.

10. 42 U.S.C. § 2210i provides:

§ 2210i. Secure transfer of nuclear materials

(a) The Commission shall establish a system to ensure that materials described in subsection (b), when transferred or received in the United States by any party pursuant to an import or export license issued pursuant to this chapter, are accompanied by a manifest describing the type and amount of materials being transferred or received. Each individual receiving or accompanying the transfer of such materials shall be subject to a security background check conducted by appropriate Federal entities.

(b) Except as otherwise provided by the Commission by regulation, the materials referred to in subsection (a) are byproduct materials, source materials, special nuclear materials, high-level radioactive waste, spent nuclear fuel, transuranic waste, and low-level radioactive waste (as defined in section 10101(16) of this title).

11. 42 U.S.C. § 2239 provides:

§ 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 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.

Relevant provisions of the Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425, 96 Stat. 2201 (42 U.S.C. § 10101 *et seq.*):

1. Excerpt from Table of Contents for Pub. L. No. 97-425:

SHORT TITLE AND TABLE OF CONTENTS

SECTION 1. This Act may be cited as the "Nuclear Waste Policy Act of 1982".

TABLE OF CONTENTS

* * *

2. 42 U.S.C. § 10101 provides in relevant part:

§ 10101. Definitions

For purposes of this chapter:

* * *

(23) The term "spent nuclear fuel" means fuel that has been withdrawn from a nuclear reactor following irradiation, the constituent elements of which have not been separated by reprocessing.

* * *

3. 42 U.S.C. § 10131 provides:

§ 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.

4. 42 U.S.C. § 10151 provides:

§ 10151. Findings and purposes

(a) The Congress finds that—

(1) the persons owning and operating civilian nuclear power reactors have the primary responsibility for providing interim storage of spent nuclear fuel from such reactors, by maximizing, to the extent practical, the effective use of existing storage facilities at the site of each civilian nuclear power reactor, and by adding new onsite storage capacity in a timely manner where practical;

(2) the Federal Government has the responsibility to encourage and expedite the effective use of existing storage facilities and the addition of needed new storage capacity at the site of each civilian nuclear power reactor; and

(3) the Federal Government has the responsibility to provide, in accordance with the provisions of this part, not more than 1,900 metric tons of capacity for interim storage of spent nuclear fuel for civilian nuclear power reactors that cannot reasonably provide adequate storage capacity at the sites of such reactors when needed to assure the continued, orderly operation of such reactors.

(b) The purposes of this part are—

(1) to provide for the utilization of available spent nuclear fuel pools at the site of each civilian nuclear power reactor to the extent practical and the addition of new spent nuclear fuel storage capacity where practical at the site of such reactor; and

(2) to provide, in accordance with the provisions of this part, for the establishment of a federally owned and operated system for the interim storage of spent nuclear fuel at one or more facilities owned by the Federal Government with not more than 1,900 metric tons of capacity to prevent disruptions in the orderly operation of any civilian nuclear power reactor that cannot reasonably provide adequate spent nuclear fuel storage capacity at the site of such reactor when needed.

5. 42 U.S.C. § 10152 provides:

§ 10152. Available capacity for interim storage of spent nuclear fuel

The Secretary, the Commission, and other authorized Federal officials shall each take such actions as such official considers necessary to encourage and expedite the effective use of available storage, and necessary additional storage, at the site of each civilian nuclear power reactor consistent with—

(1) the protection of the public health and safety, and the environment;

(2) economic considerations;

(3) continued operation of such reactor;

(4) any applicable provisions of law; and

(5) the views of the population surrounding such reactor.

6. 42 U.S.C. § 10153 provides:

§ 10153. Interim at-reactor storage

The Commission shall, by rule, establish procedures for the licensing of any technology approved by the Commission under section 10198(a) of this title for

use at the site of any civilian nuclear power reactor. The establishment of such procedures shall not preclude the licensing, under any applicable procedures or rules of the Commission in effect prior to such establishment, of any technology for the storage of civilian spent nuclear fuel at the site of any civilian nuclear power reactor.

7. 42 U.S.C. § 10154 provides:

§ 10154. Licensing of facility expansions and transshipments

(a) Oral argument

In any Commission hearing under section 189 of the Atomic Energy Act of 1954 (42 U.S.C. 2239) on an application for a license, or for an amendment to an existing license, filed after January 7, 1983, to expand the spent nuclear fuel storage capacity at the site of a civilian nuclear power reactor, through the use of high-density fuel storage racks, fuel rod compaction, the transshipment of spent nuclear fuel to another civilian nuclear power reactor within the same utility system, the construction of additional spent nuclear fuel pool capacity or dry storage capacity, or by other means, the Commission shall, at the request of any party, provide an opportunity for oral argument with respect to any matter which the Commission determines to be in controversy among the parties. The oral argument shall be preceded by such discovery procedures as the rules of the Commission shall provide. The Commission shall require each party, including the Commission staff, to submit in written form, at the time of the oral argument, a summary of the facts, data, and arguments upon which such party proposes to rely that are known at such time to

such party. Only facts and data in the form of sworn testimony or written submission may be relied upon by the parties during oral argument. Of the materials that may be submitted by the parties during oral argument, the Commission shall only consider those facts and data that are submitted in the form of sworn testimony or written submission.

(b) Adjudicatory hearing

(1) At the conclusion of any oral argument under subsection (a), the Commission shall designate any disputed question of fact, together with any remaining questions of law, for resolution in an adjudicatory hearing only if it determines that—

(A) there is a genuine and substantial dispute of fact which can only be resolved with sufficient accuracy by the introduction of evidence in an adjudicatory hearing; and

(B) the decision of the Commission is likely to depend in whole or in part on the resolution of such dispute.

(2) In making a determination under this subsection, the Commission—

(A) shall designate in writing the specific facts that are in genuine and substantial dispute, the reason why the decision of the agency is likely to depend on the resolution of such facts, and the reason why an adjudicatory hearing is likely to resolve the dispute; and

(B) shall not consider—

(i) any issue relating to the design, construction, or operation of any civilian nuclear power reactor already licensed to operate at such site, or any civilian nuclear power reactor for which a

construction permit has been granted at such site, unless the Commission determines that any such issue substantially affects the design, construction, or operation of the facility or activity for which such license application, authorization, or amendment is being considered; or

(ii) any siting or design issue fully considered and decided by the Commission in connection with the issuance of a construction permit or operating license for a civilian nuclear power reactor at such site, unless (I) such issue results from any revision of siting or design criteria by the Commission following such decision; and (II) the Commission determines that such issue substantially affects the design, construction, or operation of the facility or activity for which such license application, authorization, or amendment is being considered.

(3) The provisions of paragraph (2)(B) shall apply only with respect to licenses, authorizations, or amendments to licenses or authorizations, applied for under the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.) before December 31, 2005.

(4) The provisions of this section shall not apply to the first application for a license or license amendment received by the Commission to expand onsite spent fuel storage capacity by the use of a new technology not previously approved for use at any nuclear powerplant by the Commission.

(c) Judicial review

No court shall hold unlawful or set aside a decision of the Commission in any proceeding described in subsection (a) because of a failure by the Commission to use a particular procedure pursuant to this section unless—

(1) an objection to the procedure used was presented to the Commission in a timely fashion or there are extraordinary circumstances that excuse the failure to present a timely objection; and

(2) the court finds that such failure has precluded a fair consideration and informed resolution of a significant issue of the proceeding taken as a whole.

8. 42 U.S.C. § 10155 provides in relevant part:

§ 10155. Storage of spent nuclear fuel

(a) Storage capacity

(1) Subject to section 10107 of this title, the Secretary shall provide, in accordance with paragraph (5), not more than 1,900 metric tons of capacity for the storage of spent nuclear fuel from civilian nuclear power reactors. Such storage capacity shall be provided through any one or more of the following methods, used in any combination determined by the Secretary to be appropriate:

(A) use of available capacity at one or more facilities owned by the Federal Government on January 7, 1983, including the modification and expansion of any such facilities, if the Commission determines that such use will adequately protect the public health and safety, except that such use shall not—

(i) render such facilities subject to licensing under the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.) or the Energy Reorganization Act of 1974 (42 U.S.C. 5801 et seq.); or

(ii) except as provided in subsection (c) 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)), such facility is already being used, or has previously been used, for such storage or for any similar purpose.

(B) acquisition of any modular or mobile spent nuclear fuel storage equipment, including spent nuclear fuel storage casks, and provision of such equipment, to any person generating or holding title to spent nuclear fuel, at the site of any civilian nuclear power reactor operated by such person or at any site owned by the Federal Government on January 7, 1983;

(C) construction of storage capacity at any site of a civilian nuclear power reactor.

(2) Storage capacity authorized by paragraph (1) shall not be provided at any Federal or non-Federal site within which there is a candidate site for a repository. 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.

(3) In selecting methods of providing storage capacity under paragraph (1), the Secretary shall consider the timeliness of the availability of each such method and shall seek to minimize the transportation of spent nuclear fuel, the public health and safety impacts, and the costs of providing such storage capacity.

(4) In providing storage capacity through any method described in paragraph (1), the Secretary shall comply with any applicable requirements for licensing or authorization of such method, except as provided in paragraph (1)(A)(i).

(5) The Secretary shall ensure that storage capacity is made available under paragraph (1) when needed, as determined on the basis of the storage needs specified in contracts entered into under section 10156(a)

of this title, and shall accept upon request any spent nuclear fuel as covered under such contracts.

(6) For purposes of paragraph (1)(A), the term "facility" means any building or structure.

(b) Contracts

(1) Subject to the capacity limitation established in subsections (a)(1) and (d), the Secretary shall offer to enter into, and may enter into, contracts under section 10156(a) of this title with any person generating or owning spent nuclear fuel for purposes of providing storage capacity for such spent fuel under this section only if the Commission determines that—

(A) adequate storage capacity to ensure the continued orderly operation of the civilian nuclear power reactor at which such spent nuclear fuel is generated cannot reasonably be provided by the person owning and operating such reactor at such site, or at the site of any other civilian nuclear power reactor operated by such person, and such capacity cannot be made available in a timely manner through any method described in subparagraph (B); and

(B) such person is diligently pursuing licensed alternatives to the use of Federal storage capacity for the storage of spent nuclear fuel expected to be generated by such person in the future, including—

(i) expansion of storage facilities at the site of any civilian nuclear power reactor operated by such person;

(ii) construction of new or additional storage facilities at the site of any civilian nuclear power reactor operated by such person;

(iii) acquisition of modular or mobile spent nuclear fuel storage equipment, including spent

nuclear fuel storage casks, for use at the site of any civilian nuclear power reactor operated by such person; and

(iv) transshipment to another civilian nuclear power reactor owned by such person.

(2) In making the determination described in paragraph (1)(A), the Commission shall ensure maintenance of a full core reserve storage capability at the site of the civilian nuclear power reactor involved unless the Commission determines that maintenance of such capability is not necessary for the continued orderly operation of such reactor.

(3) The Commission shall complete the determinations required in paragraph (1) with respect to any request for storage capacity not later than 6 months after receipt of such request by the Commission.

* * *

(d) Review of sites and State participation

* * *

(6)(A) Upon deciding to provide an aggregate of 300 or more metric tons of storage capacity under subsection (a)(1) at any one site, the Secretary shall notify the Governor and legislature of the State where such site is located, or the governing body of the Indian tribe in whose reservation such site is located, as the case may be, of such decision. During the 60-day period following receipt of notification by the Secretary of his decision to provide an aggregate of 300 or more metric tons of storage capacity at any one site, the Governor or legislature of the State in which such site is located, or the governing body of the affected Indian tribe where such site is located, as the case may be, may disapprove the provision of 300 or more metric tons of storage capacity at the site involved and

submit to the Congress a notice of such disapproval. A notice of disapproval shall be considered to be submitted to the Congress on the date of the transmittal of such notice of disapproval to the Speaker of the House and the President pro tempore of the Senate. Such notice of disapproval shall be accompanied by a statement of reasons explaining why the provision of such storage capacity at such site was disapproved by such Governor or legislature or the governing body of such Indian tribe.

(B) Unless otherwise provided by State law, the Governor or legislature of each State shall have authority to submit a notice of disapproval to the Congress under subparagraph (A). In any case in which State law provides for submission of any such notice of disapproval by any other person or entity, any reference in this part to the Governor or legislature of such State shall be considered to refer instead to such other person or entity.

(C) The authority of the Governor and legislature of each State under this paragraph shall not be applicable with respect to any site located on a reservation.

(D) If any notice of disapproval is submitted to the Congress under subparagraph (A), the proposed provision of 300 or more metric tons of storage capacity at the site involved shall be disapproved unless, during the first period of 90 calendar days of continuous session of the Congress following the date of the receipt by the Congress of such notice of disapproval, the Congress passes a resolution approving such proposed provision of storage capacity in accordance with the procedures established in this paragraph and subsections (d) through (f) of section 10135 of this title and such resolution thereafter becomes law. For purposes of this paragraph, the term "resolution" means

a joint resolution of either House of the Congress, the matter after the resolving clause of which is as follows: "That there hereby is approved the provision of 300 or more metric tons of spent nuclear fuel storage capacity at the site located at _____, with respect to which a notice of disapproval was submitted by _____ on _____." . The first blank space in such resolution shall be filled with the geographic location of the site involved; the second blank space in such resolution shall be filled with the designation of the State Governor and legislature or affected Indian tribe governing body submitting the notice of disapproval involved; and the last blank space in such resolution shall be filled with the date of submission of such notice of disapproval.

(E) For purposes of the consideration of any resolution described in subparagraph (D), each reference in subsections (d) and (e) of section 10135 of this title to a resolution of repository siting approval shall be considered to refer to the resolution described in such subparagraph.

(7) As used in this section, the term "affected Tribal Council" means the governing body of any Indian tribe within whose reservation boundaries there is located a potentially acceptable site for interim storage capacity of spent nuclear fuel from civilian nuclear power reactors, or within whose boundaries a site for such capacity is selected by the Secretary, or whose federally defined possessory or usage rights to other lands outside of the reservation's boundaries arising out of congressionally ratified treaties, as determined by the Secretary of the Interior pursuant to a petition filed with him by the appropriate governmental officials of such tribe, may be substantially and adversely

affected by the establishment of any such storage capacity.

* * *

(h) Application

Notwithstanding any other provision of law, nothing in this chapter shall be construed to encourage, authorize, or require the private or Federal use, purchase, lease, or other acquisition of any storage facility located away from the site of any civilian nuclear power reactor and not owned by the Federal Government on January 7, 1983.

* * *

9. 42 U.S.C. § 10172 provides:

§ 10172. Selection of Yucca Mountain site

(a) In general

(1) The Secretary shall provide for an orderly phase-out of site specific activities at all candidate sites other than the Yucca Mountain site.

(2) The Secretary shall terminate all site specific activities (other than reclamation activities) at all candidate sites, other than the Yucca Mountain site, within 90 days after December 22, 1987.

(b) Eligibility to enter into benefits agreement

Effective on December 22, 1987, the State of Nevada shall be eligible to enter into a benefits agreement with the Secretary under section 10173 of this title.

Relevant provisions of the Administrative Orders Review Act, ch. 1189, 64 Stat. 1129 (1950) (28 U.S.C. § 2341 *et seq.*) (Hobbs Act):

1. 28 U.S.C. § 2342 provides:

§ 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, 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.

2. 28 U.S.C. § 2344 provides:

§ 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.

3. 28 U.S.C. § 2348 provides:

§ 2348. Representation in proceeding; intervention

The Attorney General is responsible for and has control of the interests of the Government in all court proceedings under this chapter. The agency, and any party in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review the order. Communities, associations, corporations, firms, and individuals, whose interests are affected by the order of the agency, may intervene in any proceeding to review the order. The Attorney General may not dispose of or discontinue the proceeding to review over the objection of any party or intervenor, but any intervenor may prosecute, defend, or continue the proceeding unaffected by the action or inaction of the Attorney General.

Relevant provisions of Title 10 of the Code of Federal Regulations:

1. 10 C.F.R. § 2.309 provides in relevant part:

§ 2.309 Hearing requests, petitions to intervene, requirements for standing, and contentions.

(a) ***General requirements.*** Any person whose interest may be affected by a proceeding and who desires to participate as a party must file a written request for hearing and a specification of the contentions which the person seeks to have litigated in the hearing. In a proceeding under 10 CFR 52.103, the Commission, acting as the presiding officer, will grant the request if it determines that the requestor has standing under the provisions of paragraph (d) of this section and has proposed at least one admissible contention that meets the requirements of paragraph (f) of this section. For all other proceedings, except as provided in paragraph (e) of this section, the Commission, presiding officer, or the Atomic Safety and Licensing Board designated to rule on the request for hearing and/or petition for leave to intervene, will grant the request/petition if it determines that the requestor/petitioner has standing under the provisions of paragraph (d) of this section and has proposed at least one admissible contention that meets the requirements of paragraph (f) of this section. In ruling on the request for hearing/petition to intervene submitted by petitioners seeking to intervene in the proceeding on the HLW repository, the Commission, the presiding officer, or the Atomic Safety and Licensing Board shall also consider any failure of the petitioner to participate as a potential party in the pre-license application phase under subpart J of this part in addition to the factors in paragraph (d) of this section. If a request for

hearing or petition to intervene is filed in response to any notice of hearing or opportunity for hearing, the applicant/licensee shall be deemed to be a party.

* * *

(d) ***Standing.***

(1) General requirements. A request for hearing or petition for leave to intervene must state:

(i) The name, address and telephone number of the requestor or petitioner;

(ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;

(iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; and

(iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest.

(2) Rulings. In ruling on a request for hearing or petition for leave to intervene, the Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on such requests must determine, among other things, whether the petitioner has an interest affected by the proceeding considering the factors enumerated in paragraph (d)(1) of this section.

(3) Standing in enforcement proceedings. In enforcement proceedings, the licensee or other person against whom the action is taken shall have standing.

* * *

(f) Contentions.

(1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:

(i) Provide a specific statement of the issue of law or fact to be raised or controverted, provided further, that the issue of law or fact to be raised in a request for hearing under 10 CFR 52.103(b) must be directed at demonstrating that one or more of the acceptance criteria in the combined license have not been, or will not be met, and that the specific operational consequences of nonconformance would be contrary to providing reasonable assurance of adequate protection of the public health and safety;

(ii) Provide a brief explanation of the basis for the contention;

(iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

(iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;

(v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;

(vi) In a proceeding other than one under 10 CFR 52.103, provide sufficient information to

show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief; and

(vii) In a proceeding under 10 CFR 52.103(b), the information must be sufficient, and include supporting information showing, prima facie, that one or more of the acceptance criteria in the combined license have not been, or will not be met, and that the specific operational consequences of nonconformance would be contrary to providing reasonable assurance of adequate protection of the public health and safety. This information must include the specific portion of the report required by 10 CFR 52.99(c) which the requestor believes is inaccurate, incorrect, and/or incomplete (i.e., fails to contain the necessary information required by § 52.99(c)). If the requestor identifies a specific portion of the § 52.99(c) report as incomplete and the requestor contends that the incomplete portion prevents the requestor from making the necessary prima facie showing, then the requestor must explain why this deficiency prevents the requestor from making the prima facie showing.

* * *

2. 10 C.F.R. § 2.335 provides in relevant part:

§ 2.335 Consideration of Commission rules and regulations in adjudicatory proceedings.

* * *

(b) A participant to an adjudicatory proceeding subject to this part may petition that the application of a specified Commission rule or regulation or any provision thereof, of the type described in paragraph (a) of this section, be waived or an exception be made for the particular proceeding. The sole ground for petition of waiver or exception is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted. The petition must be accompanied by an affidavit that identifies the specific aspect or aspects of the subject matter of the proceeding as to which the application of the rule or regulation (or provision of it) would not serve the purposes for which the rule or regulation was adopted. The affidavit must state with particularity the special circumstances alleged to justify the waiver or exception requested. Any other participant may file a response by counter-affidavit or otherwise.

* * *

3. 10 C.F.R. § 72.3 provides in relevant part:

§ 72.3 Definitions.

As used in this part:

* * *

Spent nuclear fuel or *Spent fuel* means fuel that has been withdrawn from a nuclear reactor following irradiation, has undergone at least one year's decay since being used as a source of energy in a power reactor, and has not been chemically separated into its constituent elements by reprocessing. Spent fuel includes the special nuclear material, byproduct material, source material, and other radioactive materials associated with fuel assemblies.

* * *