

IN THE
Supreme Court of the United States

UNITED STATES NUCLEAR REGULATORY COMMISSION, ET AL.,
Petitioners,

v.

FASKEN LAND AND MINERALS, LTD., ET AL.,
Respondents,

AND

HOLTEC INTERNATIONAL,
Petitioner,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION, ET AL.,
Respondents.

**On Petitions for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit**

**BRIEF IN OPPOSITION FOR RESPONDENT
FASKEN LAND AND MINERALS, LTD.**

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QUESTIONS PRESENTED

The Nuclear Regulatory Commission licensed Holtec International, a private company, to consolidate and store spent nuclear fuel in a facility located within the Permian Basin, the highest-producing oil field in the United States. The proposed site borders two watersheds that cover nearly all of Texas and New Mexico and faces risks of natural disasters (tornadoes, flooding, and earthquakes) and security threats, including terrorism.

The Fifth Circuit vacated the license in a short, non-precedential opinion. The court recognized that an earlier decision – *Texas v. NRC*, 78 F.4th 827 (2023), *reh'g denied*, 95 F.4th 935 (5th Cir. 2024), in which it vacated a materially identical license in a materially identical procedural posture – dictated that outcome. *Texas* is the subject of two pending petitions for a writ of certiorari, Nos. 23-1300 and 23-1312 (filed June 12, 2024). The petitions here present the same two questions as those petitions:

1. Whether the Commission has authority to issue the license under the Atomic Energy Act of 1954 or the Nuclear Waste Policy Act of 1982.
2. Whether, if the Commission lacks statutory authority to issue the license, it nonetheless can insulate its license grant from judicial review by denying the applications of indisputably interested persons seeking to oppose that license 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.

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INTRODUCTION

Petitioner Nuclear Regulatory Commission (“Commission”) approved a license for petitioner Holtec International (“Holtec”) to store thousands of tons of spent nuclear fuel on private property in the largest, most productive oil basin in the nation – far from the nearest nuclear reactor, but near population and natural-resource zones. The Fifth Circuit vacated that license in an unpublished order because it already had vacated a materially identical license in a materially identical procedural posture. *See Texas v. NRC*, 78 F.4th 827 (2023), *reh’g denied*, 95 F.4th 935 (5th Cir. 2024).

These petitions present the same questions, in nearly the same factual circumstances, as the petitions seeking review of that Fifth Circuit decision (Nos. 23-1300 and 23-1312). The Court should deny these petitions for the same reasons Fasken explained in its opposition to those petitions. But if the Court grants either of those earlier-filed petitions, then Fasken agrees with the Commission that the Court should hold these petitions and then dispose of them as appropriate in light of its decision in *Texas*.

STATEMENT

A. Statutory And Regulatory Background

1. The Atomic Energy Act

Congress passed the Atomic Energy Act of 1954 (“AEA”) “to encourage widespread participation in the development and utilization of atomic energy.” 42 U.S.C. § 2013(a), (d). Congress empowered the Atomic Energy Commission “to license the transfer, delivery, receipt, acquisition, possession and use of nuclear materials.” *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 207 (1983).

Nuclear materials come in three types: source material, byproduct material, and special nuclear material. *See* 42 U.S.C. § 2014(e), (z), (aa). Source material means uranium and other radioactive elements and ores. *See id.* § 2014(z). Special nuclear material could be used to make a nuclear weapon. *See id.* § 2014(aa). Byproduct material is radioactive through exposure to source or special nuclear material. *See id.* § 2014(e).

The AEA creates a separate licensing regime for each type of nuclear material. *See id.* §§ 2073 (special nuclear material), 2093 (source material), 2111 (byproduct material). In each, Congress carefully constrained the activities for which the Commission may grant licenses, listing purposes a licensed use must fulfill. Licenses for source material or special nuclear material must serve one of the following purposes:

- (1) conducting research and development into useful applications of nuclear materials,
- (2) use in medical therapies,
- (3) use in enrichment facilities and nuclear reactors, or
- (4) “other uses.”

Id. §§ 2073(a)(1)-(4), 2093(a)(1)-(4). Licenses for by-product material must serve one of these purposes:

- (1) “research or development purposes,”
- (2) “medical therapy,”
- (3) “industrial uses,”
- (4) “agricultural uses,” or
- (5) “other useful applications.”

Id. § 2111(a).

This case involves spent nuclear fuel. The AEA “does not refer explicitly to spent nuclear fuel.”

Illinois v. General Elec. Co., 683 F.2d 206, 214 (7th Cir. 1982). But source, byproduct, and special nuclear material are constituent parts of spent nuclear fuel. See *In re Private Fuel Storage, L.L.C.*, 56 N.R.C. 390, 396 (Dec. 18, 2002). The Commission maintains (at 3) that licenses involving spent nuclear fuel are lawful if they satisfy all three licensing regimes.

2. The Nuclear Waste Policy Act

Nuclear reactors create spent nuclear fuel, which “poses a dangerous, long-term health and environmental risk” and “remain[s] dangerous for time spans seemingly beyond human comprehension.” *New York v. NRC*, 681 F.3d 471, 474 (D.C. Cir. 2012).

When Congress enacted the AEA, government and industry officials believed “that the spent fuel would be reprocessed to make new fuel.” *Illinois*, 683 F.2d at 208; see also *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 826 F.2d 239, 246 (4th Cir. 1987) (“Government and industry accepted reprocessing as the only practical method of disposing spent fuel”). In reprocessing, the uranium and plutonium in spent nuclear fuel are separated from the remaining waste products and converted again into usable nuclear fuel. See Int’l Atomic Energy Agency, *Getting to the Core of the Nuclear Fuel Cycle* (Jan. 1, 2012), https://www.iaea.org/sites/default/files/18/10/nuclear_fuelcycle.pdf.

In the 1970s, however, the nuclear fuel “reprocessing industry collapsed,” and with it the nation’s plan for spent nuclear fuel. *Idaho v. U.S. Dep’t of Energy*, 945 F.2d 295, 298 (9th Cir. 1991). In response, Congress enacted the Nuclear Waste Policy Act of 1982 (“NWPA”), which directs where to store spent nuclear fuel (1) permanently and (2) temporarily until a permanent repository exists.

Congress mandated that the Department of Energy (“DOE”) select a site for and construct a permanent, government-owned repository for the country’s spent nuclear fuel. *See* 42 U.S.C. § 10134(b), (d). DOE eventually selected Yucca Mountain as that site. *See id.* § 10172.

Congress determined that “the primary responsibility for providing interim storage of spent nuclear fuel” lay with “the persons owning and operating civilian nuclear power reactors.” *Id.* § 10151(a)(1). Therefore, spent nuclear fuel must be stored “*at the site* of each civilian nuclear power reactor” where possible. *Id.* § 10151(b)(1) (emphasis added). Otherwise, spent nuclear fuel must be stored in “*federally owned and operated*” storage facilities with no more than “1,900 metric tons of capacity.” *Id.* § 10151(b)(2) (emphasis added).

The NWPA also protects States in which DOE wants to store spent nuclear fuel because it empowers them to veto storage sites with capacities of 300 or more metric tons by submitting “a notice of disapproval to the Congress.” *Id.* § 10155(d)(6)(B). Any site subject to a notice of disapproval “shall be disapproved unless . . . Congress passes a resolution approving such proposed provision of storage capacity” over the State’s veto. *Id.* § 10155(d)(6)(D).

The NWPA contains no provisions specifically addressing privately owned, away-from-reactor storage. Congress is considering a bill that would amend the NWPA to allow for large “Federal consolidated storage facilities . . . to provide interim storage as needed for spent nuclear fuel.” S. 4927, 118th Cong. § 312(b) (2024).

B. Factual And Procedural Background

1. This case involves a Commission-issued license for privately owned, away-from-reactor interim storage.

In March 2017, Holtec applied for a license from the Commission to build and operate a storage facility for 500 canisters (approximately 8,680 metric tons) of spent nuclear fuel in Lea County, New Mexico.¹ Holtec plans to eventually store up to 10,000 canisters at the site.² All spent nuclear fuel stored at the site would need to be shipped hundreds, if not thousands, of miles from its current temporary storage site.

The proposed site poses numerous proximity risks. Mere miles separate it from dozens of active oil and gas wells, agricultural lands, and residents of southeastern New Mexico. Because only one highway and rail line serve the site, anyone using them could come close to spent nuclear fuel traveling to or from the site. Finally, the site sits atop an aquifer and near the borders of two watersheds that serve Texas and New Mexico.

The site faces numerous natural safety risks, including frequent earthquakes, sinkholes, extreme heat, dust storms, hailstorms, and tornadoes. Any of those events could damage the storage facility (or the vehicles transporting spent nuclear fuel to or from it) and cause radiation to contaminate the environment.

¹ Holtec Int'l HI-STORE CIS (Consolidated Interim Storage Facility) License Application (Mar. 30, 2017), <https://www.nrc.gov/docs/ML1711/ML17115A418.pdf>.

² See NRC News, *NRC Issues License to Holtec International for Consolidated Spent Nuclear Fuel Interim Storage Facility in New Mexico* (May 9, 2023), <https://www.nrc.gov/cdn/doc-collection-news/2023/23-031.pdf>.

In 2018, the Commission invited interested persons to seek leave to intervene in a hearing on the application. See Notice, *Holtec International's HI-STORE Consolidated Interim Storage Facility for Interim Storage of Spent Nuclear Fuel*, 83 Fed. Reg. 32,919, 32,920-21 (July 16, 2018).

Fasken timely sought to intervene. Fasken is one of the largest private landowners in the United States, with hundreds of thousands of acres of land in the Permian Basin. That includes land just miles from the site, which the Commission recognizes faces risks of radiation leaks.³ On its land, Fasken raises tens of thousands of cattle, operates nearly two thousand active oil and gas wells, and has various residential and commercial real estate developments. Its employees travel daily throughout that land to work cattle and service those wells. And it does business using the same roads and railroad line that the licensed storage facility would have used.

The Commission denied Fasken's motion to intervene. The AEA states that the Commission "*shall admit* any [interested] person as a party" to a licensing proceeding. 42 U.S.C. § 2239(a)(1)(A) (emphasis added). But the Commission's intervention rules require an interested party not only to show standing, but also to proffer a "contention" that the Commission concludes on the merits is admissible. 10 C.F.R. § 2.309(d), (f). The Atomic Safety and Licensing Board agreed that Fasken "ha[d] demonstrated standing," but nonetheless denied leave to intervene because it decided that Fasken had not "proffered its own admissible contention." *Holtec Int'l*, 89 N.R.C. at 369, 453.

³ The Commission has recognized Fasken's proximity to potential radiation leaks. See *In re Holtec Int'l (HI-STORE Consol. Interim Storage Facility)*, 89 N.R.C. 353, 369 (May 7, 2019).

The Commission, addressing and rejecting the merits of Fasken's contention, affirmed the denial. *See In re Holtec Int'l (HI-STORE Consol. Interim Storage Facility)*, 91 N.R.C. 167, 173-76 (Apr. 23, 2020). The Commission also rejected every other motion to intervene, finding them to lack merit. *See id.* at 210-11.

In August 2019, while the appeal of the denial of its motion to intervene was pending, Fasken sought leave to add new contentions based on new developments. In April 2021, the Commission rejected Fasken's effort, again rejecting Fasken's contentions on their merits. *See In re Holtec Int'l (HI-STORE Consol. Interim Storage Facility)*, 93 N.R.C. 215, 226-27, 230 (Apr. 28, 2021).

Fasken and others then timely petitioned the D.C. Circuit for review of the intervention denials.⁴ The D.C. Circuit held oral argument on those petitions in March 2024, but has yet to issue a decision. *See Beyond Nuclear, Inc. v. NRC*, No. 20-1187 (D.C. Cir.).

Meanwhile, on May 9, 2023, the Commission issued the license.

2. Fasken timely petitioned for review of the license in the Fifth Circuit. *See Fasken Land & Minerals, Ltd. v. NRC*, No. 23-60377, Dkt. 1 (5th Cir. July 11, 2023). No other entity petitioned for review of the license in any court. The Commission moved to dismiss the petition for lack of jurisdiction or, in the alternative, to exercise discretionary authority to transfer Fasken's petition to the D.C. Circuit. *See id.*, Dkt. 18-1 (July 28, 2023).

While Fasken's petition and the Commission's motion were pending, the Fifth Circuit decided *Texas v. NRC*, 78 F.4th 827 (5th Cir. 2023), *petitions for cert.*

⁴ *See* Nos. 20-1187, 20-1225, 21-1104, 21-1147 (D.C. Cir.).

pending, Nos. 23-1300 & 23-1312 (filed June 12, 2024). There, Texas and Fasken had challenged “a materially identical license” the Commission had issued to Interim Storage Partners, LLC (the “ISP license”) “in a materially identical procedural posture.” NRC App. 2a. The Fifth Circuit vacated the ISP license. *See Texas*, 78 F.4th at 831. The court held that the AEA does not authorize the Commission “to issue licenses for private parties to store spent nuclear fuel away-from-the reactor.” *Id.*

The panel found jurisdiction to consider both Fasken’s and Texas’s challenges to the license grant: under “the fairest reading of the Hobbs Act,” Fasken and Texas are “part[ies] aggrieved” because they participated in the agency proceedings. *Id.* at 839. But the panel ultimately determined that the Commission acted *ultra vires* – that is, without authority and in violation of express limitations on its authority. *Id.*

On the merits, the panel reasoned that, although the AEA “confers on the Commission the authority to issue licenses for the possession of . . . constituent materials of spent nuclear fuel,” “none” of the allowed purposes “encompass[es] storage or disposal of . . . spent nuclear fuel.” *Id.* at 840. The panel rejected the Commission’s reliance on earlier D.C. and Tenth Circuit cases, explaining that both courts merely assumed (without deciding) that the AEA authorized the Commission to issue that license.

Next, the panel held that the NWPA did not authorize such licenses. *Id.* at 844. That Act “create[d] a comprehensive statutory scheme for addressing spent nuclear fuel” that “limits temporary storage to private at-the-reactor storage or at federal sites.” *Id.* at 843-44. It “doesn’t permit” “the Commission to license a

private, away-from-reactor storage facility for spent nuclear fuel.” *Id.* at 844.

The Fifth Circuit denied rehearing en banc. *Texas v. NRC*, 95 F.4th 935 (5th Cir. 2024). Judge Jones’s concurrence – joined by Judges Smith, Elrod, Ho, Engelhardt, and Wilson – grounded the panel’s exercise of jurisdiction on “two bases of authority”: “these petitioners are parties aggrieved, and the NRC has acted *ultra vires*.” *Id.* at 936.

Judge Jones noted that, because “Fasken’s multiple attempts formally to intervene were repeatedly rebuffed by the agency,” accepting the Commission’s arguments would allow it to “control[] the courthouse door.” *Id.* Such a holding not only would violate the strong presumption that agency actions are subject to judicial review, but “also seems particularly unlikely in a legal world where deference to agency interpretations of law, e.g., in *Auer*[*v. Robbins*, 519 U.S. 452 (1997),] and *Chevron*[*U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)], is under increasing scrutiny.” *Id.*

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. *Id.* at 940. She rebutted the criticism that *ultra vires* means merely that the agency “got it wrong.” *Id.* Instead, “the term literally refers to being ‘outside’ the agency’s power, *i.e.*, in defiance of the limits placed by Congress in the agency’s governing statute or the Constitution.” *Id.* at 940-41.

Judge Higginson dissented (joined by Judges Graves, Douglas, and Ramirez), disputing Judge Jones’s arguments regarding jurisdiction. *Id.* at 941-44. No judge on the Fifth Circuit questioned the

panel's conclusion that the AEA and the NWPA did not authorize the Commission to grant the license.

Both the Commission and ISP have petitioned this Court for certiorari in *Texas*. See Nos. 23-1300 & 23-1312 (filed June 12, 2024).

3. After the Fifth Circuit denied rehearing en banc in *Texas*, the Fifth Circuit issued an unpublished decision vacating the Holtec license. The court noted that the parties to this case had agreed that this case “involve[s] a materially identical license in a materially identical posture and that . . . the panel’s consideration of this case will be controlled by *Texas v. NRC*.” NRC App. 2a (cleaned up). The court agreed that “*Texas v. NRC* dictates the outcome here” and therefore granted Fasken’s petition, dismissed as moot the Commission’s motion to transfer the petition to the D.C. Circuit, and vacated the Holtec license. *Id.*

The Commission and Holtec each filed a petition for a writ of certiorari, both of which raise the same questions as the Commission and ISP petitions in *Texas*. The Commission, therefore, requests that the Court *hold* the petitions for certiorari in this case pending the Court’s disposition of *Texas*. NRC Pet. 8

REASONS FOR DENYING THE PETITIONS

The Court should deny the petitions for a writ of certiorari. These cases present the same questions as, and nearly identical factual circumstances to, *NRC v. Texas*, No. 23-1300 (filed June 12, 2024), and *Interim Storage Partners, LLC v. Texas*, No. 23-1312 (filed June 12, 2024). Fasken filed an opposition to the petitions for a writ of certiorari in those cases on August 21, 2024. The Court should deny these petitions for the same reasons explained in that opposition. Alternatively, if the Court grants either or both of the petitions involving the ISP license, Fasken

agrees with the Commission that the Court should hold these petitions pending the decision in *Texas* and then dispose of these petitions as appropriate in light of that decision.

CONCLUSION

The petitions for a writ of certiorari should be denied. Alternatively, the petitions should be held pending this Court's disposition of *NRC v. Texas*, No. 23-1300, and *Interim Storage Partners, LLC v. Texas*, No. 23-1312, and then disposed of as appropriate.

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