

No.

In the Supreme Court of the United States

UNITED STATES NUCLEAR REGULATORY COMMISSION,
ET AL., PETITIONERS

v.

FASKEN LAND AND MINERALS, LTD., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

ELIZABETH B. PRELOGAR
*Solicitor General
Counsel of Record*

TODD KIM
Assistant Attorney General

MALCOLM L. STEWART
Deputy Solicitor General

NICOLE FRAZER REAVES
*Assistant to the Solicitor
General*

JENNIFER S. NEUMANN

MICHAEL T. GRAY

JUSTIN D. HEMINGER
Attorneys

*Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217*

BROOKE P. CLARK
General Counsel
ANDREW P. AVERBACH
*Solicitor
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555*

QUESTIONS PRESENTED

1. Whether the Hobbs Act, 28 U.S.C. 2341 *et seq.*, which authorizes a “party aggrieved” by an agency’s “final order” to petition for review in a court of appeals, 28 U.S.C. 2344, allows nonparties to obtain review of claims asserting that an agency order exceeds the agency’s statutory authority.

2. Whether the Atomic Energy Act of 1954, 42 U.S.C. 2011 *et seq.*, and the Nuclear Waste Policy Act of 1982, 42 U.S.C. 10101 *et seq.*, permit the Nuclear Regulatory Commission to license private entities to temporarily store spent nuclear fuel away from the nuclear-reactor sites where the spent fuel was generated.

PARTIES TO THE PROCEEDING

Petitioners were the respondents in the court of appeals. They are the United States Nuclear Regulatory Commission and the United States of America.

Respondents include the petitioners in the court of appeals. They are Fasken Land and Minerals, Limited, and Permian Basin Land and Royalty Owners. Respondents also include Holtec International, an intervenor-respondent in the court of appeals.

RELATED PROCEEDINGS

United States Court of Appeals (5th Cir.):

Fasken Land and Minerals v. Nuclear Regulatory Commission, No. 23-60377 (Mar. 27, 2024)

United States Court of Appeals (D.C. Cir.):

Beyond Nuclear, Inc. v. Nuclear Regulatory Commission, Nos. 20-1187, 20-1225, 21-1104, 21-1147 (argued Mar. 5, 2024)

TABLE OF CONTENTS

	Page
Opinion below.....	1
Jurisdiction.....	1
Statutory and regulatory provisions involved	2
Statement:	
A. Legal background	2
B. Factual and procedural background	6
Reasons for granting the petition	8
Conclusion	8
Appendix A — Court of appeals opinion (Mar. 27, 2024)	1a
Appendix B — Holtec license for independent storage of spent nuclear fuel and high-level radioactive waste (May 9, 2023)	3a
Appendix C — Statutory and regulatory provisions	9a

TABLE OF AUTHORITIES

Cases:

<i>Dairyland Power Coop. v. United States</i> , 645 F.3d 1363 (Fed. Cir. 2011).....	4
<i>Energy Nw. v. United States</i> , 641 F.3d 1300 (Fed. Cir. 2011).....	4
<i>General Elec. Co., In re</i> , 15 N.R.C. 530 (1982)	4
<i>Holtec Int’l, In re</i> :	
91 N.R.C. 167 (2020).....	6
93 N.R.C. 215 (2021).....	6
<i>Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n</i> , 461 U.S. 190 (1983).....	2, 3
<i>Texas v. Nuclear Regulatory Commission</i> :	
78 F.4th 827 (5th Cir. 2023), petitions for cert. pending, Nos. 23-1300 and 23-1312 (filed June 12, 2024).....	6, 7
95 F.4th 935 (5th Cir. 2024)	7

IV

Statutes and regulations:	Page
Atomic Energy Act of 1954, 42 U.S.C. 2011 <i>et seq.</i>	2
42 U.S.C. 2013(a)	2
42 U.S.C. 2013(b)	2
42 U.S.C. 2013(d)	2
42 U.S.C. 2014(e)	2
42 U.S.C. 2014(z)	2
42 U.S.C. 2014(aa)	2
42 U.S.C. 2073(a)	2, 10a
42 U.S.C. 2092	2, 16a
42 U.S.C. 2093(a)	2, 16a
42 U.S.C. 2111(a)	2, 18a
42 U.S.C. 2133	2
42 U.S.C. 2134	2
42 U.S.C. 2201(b)	3
42 U.S.C. 2201(h)	3
42 U.S.C. 2239(a)(1)(A)	5, 20a
42 U.S.C. 2239(b)(1)	5, 21a
Hobbs Act, 28 U.S.C. 2341 <i>et seq.</i>	5
28 U.S.C. 2342	5
28 U.S.C. 2342(4)	5
28 U.S.C. 2343	6, 9a
28 U.S.C. 2344	5, 6, 9a
Nuclear Waste Policy Act of 1982,	
42 U.S.C. 10101 <i>et seq.</i>	3
42 U.S.C. 10131-10145	4
42 U.S.C. 10151-10157	4
42 U.S.C. 10155(h)	4, 25a
10 C.F.R.:	
Pt. 2:	
Section 2.309(a)	5, 26a
Section 2.309(d)	5, 29a

V

Regulations—Continued:	Page
Section 2.309(f)	5, 31a
Section 2.309(f)(1)(vi)	5, 32a
Pt. 72	3
Section 72.3.....	3

Miscellaneous:

45 Fed. Reg. 74,693 (Nov. 12, 1980)	3
56 Fed. Reg. 57,539 (Nov. 12, 1991)	4
71 Fed. Reg. 10,068 (Feb. 28, 2006)	4
83 Fed. Reg. 32,919 (July 16, 2018).....	6
88 Fed. Reg. 30,801 (May 12, 2023)	6
Nuclear Regulatory Commission, <i>U.S. Independent Spent Fuel Storage Installations (ISFSI)</i> (Apr. 22, 2021), https://www.nrc.gov/docs/ML2111/ ML21116A041.pdf	4

In the Supreme Court of the United States

No.

UNITED STATES NUCLEAR REGULATORY COMMISSION,
ET AL., PETITIONERS

v.

FASKEN LAND AND MINERALS, LTD., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States Nuclear Regulatory Commission and the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-2a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 27, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350(a).

**STATUTORY AND REGULATORY
PROVISIONS INVOLVED**

Relevant statutory and regulatory provisions are reproduced in the appendix. App., *infra*, 9a-35a.

STATEMENT

A. Legal Background

1. a. Congress enacted the Atomic Energy Act of 1954, 42 U.S.C. 2011 *et seq.*, to “encourage[] the private sector” to develop “atomic energy for peaceful purposes under a program of federal regulation and licensing.” *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 207 (1983); see 42 U.S.C. 2013(a), (b), and (d). As amended, the Act generally prohibits certain activities absent a license issued by the Nuclear Regulatory Commission (Commission), while authorizing the Commission to license such activities as long as they comply with the Commission’s health, safety, common defense, and security standards. The Act authorizes the Commission to issue licenses to possess three types of nuclear material: (1) “source material,” such as natural uranium, 42 U.S.C. 2092; see 42 U.S.C. 2093(a); (2) “special nuclear material,” such as enriched uranium and plutonium, that can be used to sustain nuclear fission, 42 U.S.C. 2073(a); and (3) “by-product material,” which includes other radioactive material produced by nuclear fission, 42 U.S.C. 2111(a). See 42 U.S.C. 2014(e), (z), and (aa) (defining those terms). Licenses under those three provisions are known as “materials licenses.”*

* Congress has separately authorized the Commission to issue “facilities licenses,” which are necessary for private entities to own or operate facilities, including nuclear-power reactors, that produce or utilize nuclear material. See 42 U.S.C. 2133, 2134.

Once fuel in a nuclear reactor is no longer useful, it must be removed from the reactor and cooled in a spent-fuel pool for as long as five years, after which it can either remain in the pool or be placed into “dry” storage. Such spent nuclear fuel consists of source material, special nuclear material, and byproduct material. See 10 C.F.R. 72.3. To possess any amount of spent nuclear fuel, an individual or entity must obtain from the Commission a materials license to possess each of its components. The Commission can issue a single license authorizing the possession of all three components. See 42 U.S.C. 2201(h).

The Commission is authorized to “establish by rule, regulation, or order, such standards and instructions to govern the possession and use of” those three components “as the Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property.” 42 U.S.C. 2201(b). In the 1970s, the Commission recognized that the nuclear-power industry would need more space to temporarily store spent fuel. 45 Fed. Reg. 74,693, 74,693 (Nov. 12, 1980). In 1980, following notice-and-comment rulemaking, see *ibid.*, the Commission issued regulations that establish licensing requirements for interim storage of spent fuel, including “dry” storage as an alternative to pool storage, both at and away from the site of the nuclear-reactor facility where the fuel was generated. See 10 C.F.R. Pt. 72; see also *Pacific Gas & Elec. Co.*, 461 U.S. at 217 (noting those regulations).

b. Two years later, Congress enacted the Nuclear Waste Policy Act of 1982 (Policy Act), 42 U.S.C. 10101 *et seq.* The Policy Act created a program for the federal government to establish a deep geologic repository to

permanently dispose of spent fuel from commercial nuclear reactors. See 42 U.S.C. 10131-10145. The Policy Act also directed the Department of Energy to provide limited interim storage of spent fuel if certain conditions were met. See 42 U.S.C. 10151-10157. The Policy Act further provided that, “[n]otwithstanding any other provision of law, nothing in” the Act “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.” 42 U.S.C. 10155(h). The Policy Act did not modify the Atomic Energy Act provisions that authorized the Commission to license temporary possession of spent nuclear fuel, nor did it disturb the Commission’s 1980 regulations.

c. In the four decades since Congress enacted the Policy Act, the Commission has issued materials licenses for spent-fuel storage installations both at, and away from, reactor sites. See, e.g., *In re General Elec. Co.*, 15 N.R.C. 530 (1982) (offsite); 71 Fed. Reg. 10,068 (Feb. 28, 2006) (offsite); 56 Fed. Reg. 57,539 (Nov. 12, 1991) (storage at decommissioning reactor); see also Nuclear Regulatory Commission, *U.S. Independent Spent Fuel Storage Installations (ISFSI)* (Apr. 22, 2021) (map of spent-fuel storage installations), <https://www.nrc.gov/docs/ML2111/ML21116A041.pdf>. Temporary storage of spent fuel remains necessary to facilitate ongoing operation of nuclear reactors and the decommissioning of retired reactors. See, e.g., *Energy Nw. v. United States*, 641 F.3d 1300, 1303-1304 (Fed. Cir. 2011) (storage facility that allowed continued generation of power); *Dairyland Power Coop. v. United*

States, 645 F.3d 1363, 1367-1368 (Fed. Cir. 2011) (storage facility necessary to complete decommissioning).

2. When adjudicating a request for a license to store spent nuclear fuel, “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.” 42 U.S.C. 2239(a)(1)(A). Under the Commission’s regulations, leave to intervene will be granted if a person “provide[s] sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact” and satisfies other requirements. 10 C.F.R. 2.309(f)(1)(vi); see 10 C.F.R. 2.309(a), (d), and (f).

3. The Hobbs Act, 28 U.S.C. 2341 *et seq.*, vests the courts of appeals with exclusive jurisdiction to review (among other things) any “final order” of the Commission “entered in any proceeding” “granting, suspending, revoking, or amending” a “license.” 42 U.S.C. 2239(a)(1)(A) and (b)(1); see 28 U.S.C. 2342(4). The Hobbs Act also gives the courts of appeals exclusive jurisdiction to review final orders and rules issued by many other federal agencies, including the Federal Communications Commission, the Department of Agriculture, the Department of Transportation, the Federal Maritime Commission, and the Surface Transportation Board. 28 U.S.C. 2342.

The Hobbs Act specifies that “[j]urisdiction is invoked by filing a petition as provided by section 2344 of this title.” 28 U.S.C. 2342. Section 2344, in turn, provides that “[a]ny party aggrieved by the final order” of a Hobbs Act agency “may, within 60 days after its entry, file a petition to review the order” in the court of appeals for “the judicial circuit in which the petitioner resides or

has its principal office, or” the D.C. Circuit. 28 U.S.C. 2343, 2344.

B. Factual And Procedural Background

1. In 2018, the Commission gave public notice that Holtec International had applied for a license to store spent nuclear fuel in Lea County, New Mexico, away from any reactor. 83 Fed. Reg. 32,919 (July 16, 2018). The notice explained that interested persons could request a hearing and seek leave to intervene as parties to the proceeding. *Id.* at 32,920-32,921.

Several groups, including respondents Fasken Land and Minerals, Limited, and Permian Basin Land and Royalty Owners (collectively, Fasken), sought to intervene as parties. The Commission denied those intervention requests, and it issued the license in May 2023. 88 Fed. Reg. 30,801, 30,801-30,802 (May 12, 2023); see *In re Holtec Int’l*, 93 N.R.C. 215 (2021); *In re Holtec Int’l*, 91 N.R.C. 167 (2020).

2. Fasken pursued litigation related to Holtec’s license in two courts of appeals. First, Fasken and other putative intervenors petitioned in the D.C. Circuit for review of the Commission’s orders denying their requests to intervene. See *Beyond Nuclear, Inc. v. Nuclear Regulatory Commission*, No. 20-1187 (argued Mar. 5, 2024). The D.C. Circuit held argument in March 2024, and it has not yet issued a decision.

Second, Fasken petitioned for review of the license itself in the Fifth Circuit.

3. While that petition was pending, another Fifth Circuit panel issued its decision in *Texas v. Nuclear Regulatory Commission*, 78 F.4th 827 (5th Cir. 2023), petitions for cert. pending, Nos. 23-1300 and 23-1312 (filed June 12, 2024). *Texas* involved another Commission license for the temporary offsite storage of spent

nuclear fuel. *Id.* at 831, 833-835. Nonparties to the administrative proceeding—including Fasken, which was also denied leave to intervene in that proceeding—filed petitions for review of the license. *Id.* at 834. The court in *Texas* held that it could review the putative intervenors’ claim that the Commission had exceeded its statutory authority, based on a judge-made ultra vires exception to the Hobbs Act’s party-aggrieved limitation. *Id.* at 837-840. The court further held that the Atomic Energy Act does not authorize the Commission to license temporary offsite storage of spent nuclear fuel, and that the Policy Act separately bars such licenses. *Id.* at 840-844.

The Fifth Circuit denied the government’s petition for rehearing en banc by a 9-7 vote. *Texas v. Nuclear Regulatory Commission*, 95 F.4th 935 (2024). The government and the licensee in *Texas* have filed petitions for writs of certiorari. See *Nuclear Regulatory Commission v. Texas*, No. 23-1300 (filed June 12, 2024); *Interim Storage Partners, LLC v. Texas*, No. 23-1312 (filed June 12, 2024).

4. After the Fifth Circuit denied en banc rehearing in *Texas*, the panel in this case issued an unpublished, per curiam decision vacating Holtec’s license. App., *infra*, 1a-2a. The court found that “[t]he parties, correctly, agree that *Texas v. NRC* involved a ‘materially identical license in a materially identical procedural posture,’” and that “‘the panel’s consideration of this case [is] controlled by *Texas v. NRC*.’” *Id.* at 2a (brackets omitted; emphases altered). The court then granted Fasken’s petition for review and vacated Holtec’s license, explaining that the Fifth Circuit’s “holding in *Texas v. NRC* dictates the outcome here.” *Ibid.*

REASONS FOR GRANTING THE PETITION

This case presents the questions (1) whether the Hobbs Act's party-aggrieved requirement is subject to a judge-made ultra vires exception, and (2) whether the Commission is authorized to license private entities to temporarily store spent nuclear fuel away from the nuclear-reactor sites where the spent fuel was generated. The government has filed a petition for a writ of certiorari in *Nuclear Regulatory Commission v. Texas*, No. 23-1300 (filed June 12, 2024), seeking this Court's review of those two questions, see Pet. at I, *Texas, supra* (No. 23-1300). The Court should therefore hold this petition pending the Court's disposition of the petition in *Texas*. If the Court grants that petition, it should continue to hold this petition pending the decision in *Texas* and then dispose of this petition as appropriate in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of *Nuclear Regulatory Commission v. Texas*, No. 23-1300 (filed June 12, 2024), and then disposed of as appropriate.

Respectfully submitted.

BROOKE P. CLARK
General Counsel
ANDREW P. AVERBACH
Solicitor
U.S. Nuclear Regulatory
Commission

ELIZABETH B. PRELOGAR
Solicitor General
TODD KIM
Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
NICOLE FRAZER REAVES
Assistant to the Solicitor
General
JENNIFER S. NEUMANN
MICHAEL T. GRAY
JUSTIN D. HEMINGER
Attorneys

JUNE 2024

APPENDIX

TABLE OF CONTENTS

	Page
Appendix A — Court of appeals opinion (Mar. 27, 2024).....	1a
Appendix B — Holtec license for independent storage of spent nuclear fuel and high-level radioactive waste (May 9, 2023)	3a
Appendix C — Statutory and regulatory provisions:	
28 U.S.C. 2343	9a
28 U.S.C. 2344.....	9a
28 U.S.C. 2348.....	10a
42 U.S.C. 2073.....	10a
42 U.S.C. 2092.....	16a
42 U.S.C. 2093.....	16a
42 U.S.C. 2111.....	18a
42 U.S.C. 2239(a)(1)(A) and (b)	20a
42 U.S.C. 10151.....	22a
42 U.S.C. 10155(a) and (h)	23a
10 C.F.R. 2.309 (a)-(f), (h).....	26a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-60377

Summary Calendar

FASKEN LAND AND MINERALS, LIMITED; PERMIAN
BASIN LAND AND ROYALTY OWNERS, PETITIONERS

v.

NUCLEAR REGULATORY COMMISSION; UNITED
STATES OF AMERICA, RESPONDENTS

[Filed: Mar. 27, 2024]

Appeal from the Nuclear Regulatory Commission
Agency No. 72-1051

Before JONES, ELROD, and WILSON, *Circuit Judges*.

PER CURIAM:*

In September 2021 the Nuclear Regulatory Commission (NRC) issued a license to Interim Storage Partners, LLC, to establish a facility to store nuclear waste temporarily in Andrews County, Texas. *See Texas v. Nuclear Regul. Comm'n*, 78 F.4th 827, 833–35 (5th Cir. 2023) [hereinafter *Texas v. NRC*], *reh'g en banc denied*, 2024 WL 1108700 (5th Cir. Mar. 14, 2024). Texas, Fasken Land and Minerals, Ltd., (Fasken), and Per-

* This opinion is not designated for publication. *See* 5th Cir. R. 47.5.

mian Basin Land and Royalty Owners (PBLRO) petitioned this court to set aside that license. *Id.* at 834-35. In that appeal, a panel of this court first held that Fasken and PBLRO had standing under the Constitution and the Hobbs Act to challenge the NRC’s actions. *Id.* at 835-40. It then held that the NRC lacked statutory authority to issue the license. *Id.* at 840-44. Accordingly, this court granted the petitions for review and vacated the license. *Id.* at 844. The NRC filed a petition for rehearing *en banc* on October 24, 2023, which this court denied on March 14, 2024. *See Texas v. Nuclear Regul. Comm’n*, No. 21-60743, --- F.4th ----, 2024 WL 1108700 (5th Cir. Mar. 14, 2024).

Shortly before the panel issued its opinion in *Texas v. NRC*, Fasken and PBLRO filed the petition for review at issue in this case. They challenge a different license issued by the NRC in May 2023 to Holtec International to establish a facility to store nuclear waste in Lea County, New Mexico. The parties, correctly, agree that *Texas v. NRC* involved a “materially identical license in a materially identical procedural posture” and that “absent the [c]ourt granting rehearing *en banc* in *Texas v. NRC* . . . , the panel’s consideration of this case will be controlled by [*Texas v. NRC*].” Because this court’s holding in *Texas v. NRC* dictates the outcome here, we GRANT Fasken’s and PBLRO’s petition for review and VACATE the Holtec license. The NRC’s motion to transfer the petition for review to the United States Court of Appeals for the District of Columbia Circuit is DENIED AS MOOT.

APPENDIX B**LICENSE FOR INDEPENDENT STORAGE OF SPENT
NUCLEAR FUEL AND HIGH-LEVEL RADIOACTIVE
WASTE**

Pursuant to the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974 (Public Law 93-438), and Title 10, Code of Federal Regulations, Chapter 1, Part 72, and in reliance on statements and representations heretofore made by the licensee, a license is hereby issued authorizing the licensee to receive, acquire, and possess the power reactor spent fuel and other radioactive materials associated with spent fuel storage designated below; to use such material for the purpose(s) and at the place(s) designated below; and to deliver or transfer such material to persons authorized to receive it in accordance with the regulations of the applicable Part(s). This license shall be deemed to contain the conditions specified in Section 183 of the Atomic Energy Act of 1954, as amended, and is subject to all applicable rules, regulations, and orders of the Nuclear Regulatory Commission now or hereafter in effect and to any conditions specified herein.

This license is conditioned upon fulfilling the requirements of 10 CFR Part 72, as applicable, the attached Appendix A (Technical Specifications), and the conditions specified below.

Licensee

1. Holtec International
2. Holtec Technology Center
1 Holtec Blvd
Camden, NJ 08104

3. License No. SNM-2516
Amendment No. 0
4. Expiration Date May 9, 2063
5. Docket or Reference No. 72-1051
6. Byproduct, Source and /or Special Nuclear Material
 - A. Spent nuclear fuel elements from commercial nuclear utilities licensed pursuant to 10 CFR Part 50 and associated radioactive materials related to the receipt, transfer, and storage of that spent nuclear fuel.
7. Chemical and/or Physical Form
 - A. Undamaged fuel assemblies, damaged fuel assemblies, and fuel debris, as allowed by Certificate of Compliance No. 1040, Amendments 0, 1, and 2, for the HI-STORM UMAX Canister Storage System, and described in Paragraph 9 below.
8. Maximum Amount That Licensee May Possess at Any One Time Under This License
 - A. 8,680 Metric Tons of Uranium (500 loaded canisters) in the form of undamaged fuel assemblies, damaged fuel assemblies, and fuel debris.
9. Authorized Use: The material identified in 6.A and 7.A above is authorized for receipt, possession, storage, and transfer in the HI-STORE Consolidated Interim Storage (CIS) Facility, as described in the HI-STORE CIS Facility Final Safety Analysis Report (FSAR). Storage is authorized only in casks designed in accordance with Certificate of

Compliance No. 1040, Amendments 0, 1, and 2, for the HI-STORM UMAX Canister Storage System.

10. Authorized Place of Use: The licensed material is to be received, possessed, transferred, and stored at the HI-STORE CIS Facility located in Lea County, New Mexico.
11. The Technical Specifications contained in the Appendix attached hereto are incorporated into the license. The licensee shall operate the HI-STORE CIS Facility in accordance with the Technical Specifications in the Appendix.
12. The design, construction, and operation of the HI-STORE CIS Facility shall be accomplished in accordance with the NRC's regulations specified in Title 10 of the Code of Federal Regulations. All commitments to applicable Commission Regulatory Guides and to applicable engineering and construction codes shall be met.
13. The licensee shall follow the "Holtec International & Eddy Lea Energy Alliance (ELEA) Underground Consolidated Interim Storage Facility—Emergency Response Plan," HI-2177535, Revision 5, dated November 17, 2022, and as further supplemented and revised in accordance with 10 CFR 72.44(f).
14. The licensee shall:
 - (1) follow the "Holtec International & Eddy Lea Energy Alliance (ELEA) Underground Consolidated Interim Storage Facility—Physical Security Plan," HI-2177559, Revision 3, dated March 2, 2020, as it may be further

amended under the provisions of 10 CFR 72.44(e) and 72.186;

- (2) follow the “Holtec International & Eddy Lea Energy Alliance (ELEA) Underground Consolidated Interim Storage Facility—Safeguards Contingency Plan,” HI-2177560, Revision 3, dated March 2, 2020, as it may be further amended under the provisions of 10 CFR 72.44(e) and 72.186; and
 - (3) follow the “Holtec International & Eddy Lea Energy Alliance (ELEA) CISF Security Training and Qualification Plan,” HI-2177561, Revision 2, dated March 30, 2019, as it may be further amended under the provisions of 10 CFR 72.44(e) and 72.186.
 - (4) follow the “Additional Security Measures for the Physical Protection of Dry Independent Spent Fuel Storage Installations,” dated September 28, 2007.
 - (5) follow the “Additional Security Measures for Access Authorization and Fingerprinting at Independent Spent Fuel Storage Installations,” dated February 4, 2016.
15. In accordance with 10 CFR 72.22, the construction program will be undertaken only after a definitive agreement with the prospective customer for storing the used fuel at the HI-STORE CIS Facility has been established. Construction of any additional capacity beyond the initial capacity of 500 canisters shall commence only after funding is fully committed that is adequate to construct such additional capacity.

16. The licensee shall:
 - (1) include in its service contracts provisions requiring customers to retain title to the spent fuel stored, and allocating legal and financial liability among the licensee and the customers;
 - (2) include in its service contracts provisions requiring customers to provide periodically credit information, and, where necessary, additional financial assurances such as guarantees, prepayment, or payment bond;
 - (3) include in its service contracts a provision requiring the licensee not to terminate its license prior to furnishing the spent fuel storage services covered by the service contract.
17. The licensee shall submit a Startup Plan to the NRC at least 90 days prior to receipt and storage of spent fuel at the HI-STORE CIS Facility.
18. The licensee shall have insurance coverage as specified in “Holtec International & Eddy Lea Energy Alliance (ELEA) Underground CISF—Financial Assurance & Project Life Cycle Cost Estimates,” HI-2177593, Revision 2, effective 30 days before first fuel arrival.
19. Prior to receipt of the material identified in sections 6.A and 7.A of this license, the Licensee shall have a decommissioning financial assurance instrument, in a form of one or more of the methods described in 10 CFR 72.30(e), reflecting the current decommissioning cost estimate.

8a

20. This license is effective as of the date of issuance shown below.

FOR THE NUCLEAR REGULATORY
COMMISSION

/s/ SHANA R. HELTON [5/9/23]
SHANA R. HELTON, Director
Division of Fuel Management
Office of Nuclear Material
Safety and Safeguards

Date of Issuance: May 9, 2023

Attachment: Appendix A—Technical Specifications
for the HI-STORE Consolidated Interim Storage (CIS)
Facility

APPENDIX C

1. 28 U.S.C. 2343 provides:

Venue

The venue of a proceeding under this chapter is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit.

2. 28 U.S.C. 2344 provides:

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:

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.

4. 42 U.S.C. 2073 provides:

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.

(b) Minimum criteria for licenses

The Commission shall establish, by rule, minimum criteria for the issuance of specific or general licenses for the distribution of special nuclear material depending upon the degree of importance to the common defense and security or to the health and safety of the public of—

- (1) the physical characteristics of the special nuclear material to be distributed;
- (2) the quantities of special nuclear material to be distributed; and
- (3) the intended use of the special nuclear material to be distributed.

(c) Manner of distribution; charges for material sold; agreements; charges for material leased

(1) The Commission may distribute special nuclear material licensed under this section by sale, lease, lease with option to buy, or grant: *Provided, however,* That unless otherwise authorized by law, the Commission shall not after December 31, 1970, distribute special nuclear material except by sale to any person who possesses or operates a utilization facility under a license issued pursuant to section 2133 or 2134(b) of this title for use in the course of activities under such license; nor shall the Commission permit any such person after June 30, 1973, to continue leasing for use in the course of such activities special nuclear material previously leased to such person by the Commission.

(2) The Commission shall establish reasonable sales prices for the special nuclear material licensed and distributed by sale under this section. Such sales prices shall be established on a nondiscriminatory basis which, in the opinion of the Commission, will provide reasonable compensation to the Government for such special nuclear material.

(3) The Commission is authorized to enter into agreements with licensees for such period of time as the Commission may deem necessary or desirable to distribute to such licensees such quantities of special nuclear material as may be necessary for the conduct of the licensed activity. In such agreements, the Commission may agree to repurchase any special nuclear material licensed and distributed by sale which is not consumed in the course of the licensed activity, or any uranium remaining after irradiation of such special nuclear material, at a repurchase price not to exceed the Commis-

sion's sale price for comparable special nuclear material or uranium in effect at the time of delivery of such material to the Commission.

(4) The Commission may make a reasonable charge, determined pursuant to this section, for the use of special nuclear material licensed and distributed by lease under subsection (a)(1), (2) or (4) and shall make a reasonable charge determined pursuant to this section for the use of special nuclear material licensed and distributed by lease under subsection (a)(3). The Commission shall establish criteria in writing for the determination of whether special nuclear material will be distributed by grant and for the determination of whether a charge will be made for the use of special nuclear material licensed and distributed by lease under subsection (a)(1), (2) or (4), considering, among other things, whether the licensee is a nonprofit or eleemosynary institution and the purposes for which the special nuclear material will be used.

(d) Determination of charges

In determining the reasonable charge to be made by the Commission for the use of special nuclear material distributed by lease to licensees of utilization or production facilities licensed pursuant to section 2133 or 2134 of this title, in addition to consideration of the cost thereof, the Commission shall take into consideration—

- (1) the use to be made of the special nuclear material;
- (2) the extent to which the use of the special nuclear material will advance the development of the peaceful uses of atomic energy;

(3) the energy value of the special nuclear material in the particular use for which the license is issued;

(4) whether the special nuclear material is to be used in facilities licensed pursuant to section 2133 or 2134 of this title. In this respect, the Commission shall, insofar as practicable, make uniform, nondiscriminatory charges for the use of special nuclear material distributed to facilities licensed pursuant to section 2133 of this title; and

(5) with respect to special nuclear material consumed in a facility licensed pursuant to section 2133 of this title, the Commission shall make a further charge equivalent to the sale price for similar special nuclear material established by the Commission in accordance with subsection (c)(2), and the Commission may make such a charge with respect to such material consumed in a facility licensed pursuant to section 2134 of this title.

(e) License conditions

Each license issued pursuant to this section shall contain and be subject to the following conditions—

(1) Repealed. Pub. L. 88-489, § 8, Aug. 26, 1964, 78 Stat. 604.

(2) no right to the special nuclear material shall be conferred by the license except as defined by the license;

(3) neither the license nor any right under the license shall be assigned or otherwise transferred in violation of the provisions of this chapter;

(4) all special nuclear material shall be subject to the right of recapture or control reserved by section 2138 of this title and to all other provisions of this chapter;

(5) no special nuclear material may be used in any utilization or production facility except in accordance with the provisions of this chapter;

(6) special nuclear material shall be distributed only on terms, as may be established by rule of the Commission, such that no user will be permitted to construct an atomic weapon;

(7) special nuclear material shall be distributed only pursuant to such safety standards as may be established by rule of the Commission to protect health and to minimize danger to life or property; and

(8) except to the extent that the indemnification and limitation of liability provisions of section 2210 of this title apply, the licensee will hold the United States and the Commission harmless from any damages resulting from the use or possession of special nuclear material by the licensee.

(f) Distribution for independent research and development activities

The Commission is directed to distribute within the United States sufficient special nuclear material to permit the conduct of widespread independent research and development activities to the maximum extent practicable. In the event that applications for special nuclear material exceed the amount available for distribution, preference shall be given to those activities which are most likely, in the opinion of the Commission, to contribute to basic research, to the development of peace-

time uses of atomic energy, or to the economic and military strength of the Nation.

5. 42 U.S.C. 2092 provides:

License requirements for transfers

Unless authorized by a general or specific license issued by the Commission which the Commission is authorized to issue, no person may transfer or receive in interstate commerce, transfer, deliver, receive possession of or title to, or import into or export from the United States any source material after removal from its place of deposit in nature, except that licenses shall not be required for quantities of source material which, in the opinion of the Commission, are unimportant.

6. 42 U.S.C. 2093 provides:

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.

(b) Minimum criteria for licenses

The Commission shall establish, by rule, minimum criteria for the issuance of specific or general licenses for the distribution of source material depending upon the degree of importance to the common defense and security or to the health and safety of the public of—

- (1) the physical characteristics of the source material to be distributed;
- (2) the quantities of source material to be distributed; and
- (3) the intended use of the source material to be distributed.

(c) Determination of charges

The Commission may make a reasonable charge determined pursuant to section 2201(m) of this title for the source material licensed and distributed under subsection (a)(1), (a)(2), or (a)(4) and shall make a reasonable charge determined pursuant to section 2201(m) of this title, for the source material licensed and distributed under subsection (a)(3). The Commission shall establish criteria in writing for the determination of whether a charge will be made for the source material licensed and distributed under subsection (a)(1), (a)(2), or (a)(4), considering, among other things, whether the licensee is a nonprofit or eleemosynary institution and the purposes for which the source material will be used.

7. 42 U.S.C. 2111 provides:

Domestic distribution

(a) In general

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

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

(b) Requirements

(1) In general

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

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

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

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

(2) Effect of subsection

Nothing in this subsection affects the authority of any entity to dispose of byproduct material, as defined in paragraphs (3) and (4) of section 2014(e) of this title, at a disposal facility in accordance with any Federal or State solid or hazardous waste law, includ-

ing the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.).

(c) Treatment as low-level radioactive waste

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

- (1) section 2 of the Low-Level Radioactive Waste Policy Act (42 U.S.C. 2021b); or
- (2) carrying out a compact that is—
 - (A) entered into in accordance with that Act (42 U.S.C. 2021b et seq.); and
 - (B) approved by Congress.

8. 42 U.S.C. 2239 provides in pertinent part:

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

[†] So in original. Probably should be “section”.

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) 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 estab-

lished 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.

9. 42 U.S.C. 10151 provides:

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 pro-

vide 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.

10. 42 U.S.C. 10155 provides in pertinent part:

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)), such¹ facility is already being used, or has previously been used, for such storage or for any similar purpose.²

(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.

¹ So in original. Probably should be preceded by “if”.

² So in original. The period should probably be a semicolon.

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.

* * * * *

(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.

* * * * *

11. 10 C.F.R. 2.309 provides in pertinent part:

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.

(b) *Timing.* Unless specified elsewhere in this chapter or otherwise provided by the Commission, the request or petition and the list of contentions must be filed as follows:

(1) In proceedings for the direct or indirect transfer of control of an NRC license when the transfer requires prior approval of the NRC under the Commission's regulations, governing statute, or pursuant to a license condition, twenty (20) days from the date of publication of the notice in the FEDERAL REGISTER.

(2) In proceedings for the initial authorization to construct a high-level radioactive waste geologic repository, and the initial licensee to receive and process high level radioactive waste at a geological repository operations area, thirty (30) days from the date of publication of the notice in the FEDERAL REGISTER.

(3) In proceedings for which a FEDERAL REGISTER notice of agency action is published (other than a proceeding covered by paragraphs (b)(1) or (b)(2) of this section), not later than:

(i) The time specified in any notice of hearing or notice of proposed action or as provided by the presiding officer or the Atomic Safety and Licensing Board designated to rule on the request and/or petition, which may not be less than sixty (60) days from the date of publication of the notice in the FEDERAL REGISTER; or

(ii) If no period is specified, sixty (60) days from the date of publication of the notice.

(4) In proceedings for which a FEDERAL REGISTER notice of agency action is not published, not later than the latest of:

(i) Sixty (60) days after publication of notice on the NRC Web site at <http://www.nrc.gov/public-involve/major-actions.html>, or

(ii) Sixty (60) days after the requestor receives actual notice of a pending application, but not more than sixty (60) days after agency action on the application.

(c) *Filings after the deadline; submission of hearing request, intervention petition, or motion for leave to file new or amended contentions—(1) Determination by presiding officer.* Hearing requests, intervention petitions, and motions for leave to file new or amended contentions filed after the deadline in paragraph (b) of this section will not be entertained absent a determination by the presiding officer that a participant has demonstrated good cause by showing that:

(i) The information upon which the filing is based was not previously available;

(ii) The information upon which the filing is based is materially different from information previously available; and

(iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.

(2) *Applicability of §§ 2.307 and 2.323.* (i) Section 2.307 applies to requests to change a filing deadline (requested before or after that deadline has passed) based on reasons not related to the substance of the filing.

(ii) Section 2.323 does not apply to hearing requests, intervention petitions, or motions for leave to file new or

amended contentions filed after the deadline in paragraph (b) of this section.

(3) *New petitioner.* A hearing request or intervention petition filed after the deadline in paragraph (b) of this section must include a specification of contentions if the petitioner seeks admission as a party, and must also demonstrate that the petitioner meets the applicable standing and contention admissibility requirements in paragraphs (d) and (f) of this section.

(4) *Party or participant.* A new or amended contention filed by a party or participant to the proceeding must also meet the applicable contention admissibility requirements in paragraph (f) of this section. If the party or participant has already satisfied the requirements for standing under paragraph (d) of this section in the same proceeding in which the new or amended contentions are filed, it does not need to do so again.

(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.

(e) *Discretionary Intervention.* The presiding officer may consider a request for discretionary intervention when at least one requestor/petitioner has established standing and at least one admissible contention has been admitted so that a hearing will be held. A requestor/petitioner may request that his or her petition be granted as a matter of discretion in the event that the petitioner is determined to lack standing to intervene as a matter of right under paragraph (d)(1) of this section. Accordingly, in addition to addressing the factors in paragraph (d)(1) of this section, a petitioner who wishes to seek intervention as a matter of discretion in the event it is determined that standing as a matter of right is not demonstrated shall address the following factors in his/her initial petition, which the Commission, the presiding officer or the Atomic Safety and Licensing Board will consider and balance:

(1) Factors weighing in favor of allowing intervention—

(i) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record;

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

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

(2) Factors weighing against allowing intervention

(i) The availability of other means whereby the requestor's/petitioner's interest will be protected;

(ii) The extent to which the requestor's/petitioner's interest will be represented by existing parties; and

(iii) The extent to which the requestor's/petitioner's participation will inappropriately broaden the issues or delay the proceeding.

(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) Contentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner. On issues arising under the National Environmental Policy Act, participants shall file contentions based on the applicant's environmental report. Participants may file new or amended environmental contentions after the deadline in paragraph (b) of this section (e.g., based on a draft or final NRC environmental impact statement, environmental assessment, or any supplements to these documents) if the contention complies with the requirements in paragraph (c) of this section.

(3) If two or more requestors/petitioners seek to co-sponsor a contention, the requestors/petitioners shall jointly designate a representative who shall have the authority to act for the requestors/petitioners with respect to that contention. If a requestor/petitioner seeks to adopt the contention of another sponsoring requestor/petitioner, the requestor/petitioner who seeks to adopt the contention must either agree that the spon-

soring requestor/petitioner shall act as the representative with respect to that contention, or jointly designate with the sponsoring requestor/petitioner a representative who shall have the authority to act for the requestors/petitioners with respect to that contention.

* * * * *

(h) *Requirements applicable to States, local governmental bodies, and Federally-recognized Indian Tribes seeking party status.* (1) If a State, local governmental body (county, municipality or other subdivision), or Federally-recognized Indian Tribe seeks to participate as a party in a proceeding, it must submit a request for hearing or a petition to intervene containing at least one admissible contention, and must designate a single representative for the hearing. If a request for hearing or petition to intervene is granted, the Commission, the presiding officer or the Atomic Safety and Licensing Board ruling on the request will admit as a party to the proceeding a single designated representative of the State, a single designated representative for each local governmental body (county, municipality or other subdivision), and a single designated representative for each Federally-recognized Indian Tribe. Where a State's constitution provides that both the Governor and another State official or State governmental body may represent the interests of the State in a proceeding, the Governor and the other State official/ government body will be considered separate participants.

(2) If the proceeding pertains to a production or utilization facility (as defined in § 50.2 of this chapter) located within the boundaries of the State, local governmental body, or Federally-recognized Indian Tribe

seeking to participate as a party, no further demonstration of standing is required. If the production or utilization facility is not located within the boundaries of the State, local governmental body, or Federally-recognized Indian Tribe seeking to participate as a party, the State, local governmental body, or Federally-recognized Indian Tribe also must demonstrate standing.

(3) In any proceeding on an application for a construction authorization for a high-level radioactive waste repository at a geologic repository operations area under parts 60 or 63 of this chapter, or an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area under parts 60 or 63 of this chapter, the Commission shall permit intervention by the State and local governmental body (county, municipality or other subdivision) in which such an area is located and by any affected Federally-recognized Indian Tribe as defined in parts 60 or 63 of this chapter if the requirements of paragraph (f) of this section are satisfied with respect to at least one contention. All other petitions for intervention in any such proceeding must be reviewed under the provisions of paragraphs (a) through (f) of this section.

* * * * *