No. 21-60743

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS; GREG ABBOTT, GOVERNOR OF TEXAS; and
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY,
Petitioners,

v.

NUCLEAR REGULATORY COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

On Petition for Review of Action by the
Nuclear Regulatory Commission

RESPONDENTS' MOTION TO DISMISS

TODD KIM
Assistant Attorney General
JUSTIN D. HEMINGER
Attorney
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
justin.heminger@usdoj.gov
(202) 514-5442

ANDREW P. AVERBACH
Solicitor
Office of the General Counsel
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852
andrew.averbach@nrc.gov
(301) 415-1956

CERTIFICATE OF INTERESTED PERSONS

Case No. 21-60743

STATE OF TEXAS; GREG ABBOTT, GOVERNOR OF TEXAS; and
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY,
Petitioners,
v.

NUCLEAR REGULATORY COMMISSION and
UNITED STATES OF AMERICA*,*
Respondents.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Circuit Rule 28.2. have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Petitioners

   a. State of Texas

   b. Greg Abbott, Governor of Texas

   c. Texas Commission on Environmental Quality

2. Counsel for Petitioners

   a. Michael Abrams

   b. Henry Carl Myers

3. Respondents

   a. United States Nuclear Regulatory Commission

   b. United States of America

4. Counsel for Respondents

   a. Andrew P. Averbach, U.S. Nuclear Regulatory Commission

   b. Todd Kim, U.S. Department of Justice

   c. Jennifer Scheller Neumann, U.S. Department of Justice

   d. Justin Heminger, U.S. Department of Justice

5. Respondent-Intervenor

   a. Interim Storage Partners, LLC

   b. Orano CIS, LLC

   c. Orano USA, LLC

   d. Orano SA, owned by government of France, Mitsubishi, and Japan Nuclear Fuel

   e. Waste Control Specialists, LLC

   f. Fermi Holdings, Inc.

   g. J.F. Lehman & Co.

6. Counsel for Respondent-Intervenor

   a. Brad Fagg, Morgan, Lewis & Bockius LLP

/s/ Andrew P. Averbach
Andrew P. Averbach
Counsel for Respondent
U.S. Nuclear Regulatory Commission

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

GLOSSARY viii

INTRODUCTION 1

BACKGROUND 2

I. Statutory and regulatory framework 2

A. The role of the NRC in licensing facilities 2

B. Avenues for participation in NRC's licensing proceedings 3

II. Factual Background 5

A. Interim Storage Partners' application for a license 5

B. Texas's failure to participate in the adjudicatory proceedings 8

ARGUMENT 11

I. Dismissal is required because Texas was never a "party" before the NRC. 11

II. Texas's comments on the draft Environmental Impact Statement and correspondence with the agency's Chairman did not make it a "party" to the agency proceeding. 16

CONCLUSION 20

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 27(D)

TABLE OF AUTHORITIES

Judicial Decisions

ACA Int'l v. FCC,
885 F.3d 687 (D.C. Cir. 2018)..11, 13, 14, 17

American Trucking Ass'ns v. ICC,
673 F.2d 82 (5th Cir. 1982)..12, 14

Baros v. Texas Mexican R.R. Co.,
400 F.3d 228 (5th Cir. 2005)..14

Boivin v. U.S. Airways, Inc.,
446 F.3d 148 (D.C. Cir. 2006)..20

Bullcreek v. NRC,
359 F.3d 536 (D.C. Cir. 2004)..3, 12

In re Chicago, Milwaukee, St. Paul & Pac. R.R.,
799 F.2d 317 (7th Cir. 1986)..12, 15

Erie-Niagara Rail Steering Comm. v. STB,
167 F.3d 111 (2d Cir. 1999)..14

Fleming v. U.S. Dep't of Agric.,
987 F.3d 1093 (D.C. Cir. 2021)..13, 14

Gage v. AEC,
479 F.2d 1214 (D.C. Cir. 1973)..12, 14, 18

McGee v. United States,
402 U.S. 479 (1971)..20

Merchants Fast Motor Lines, Inc. v. ICC,
5 F.3d 911 (5th Cir. 1993)..15

Nat'l Ass'n of State Util. Consumer Advocates v. FCC,
457 F.3d 1238 (11th Cir. 2006)..15

NRDC v. NRC,
823 F.3d 641 (D.C. Cir. 2016)....................19

Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n,
461 U.S. 190, 207 (1983) 3

Prof'l Reactor Operator Soc'y v. NRC,
939 F.2d 1047 (D.C. Cir. 1991)....................12

Reytblatt v. NRC,
105 F.3d 715 (D.C. Cir. 1997)....................17

Simmons v. ICC,
716 F.2d 40 (D.C. Cir. 1983)....................12

Steere Tank Lines, Inc. v. ICC,
675 F.2d 763 (5th Cir. 1982) 20

Texas v. United States,
749 F.2d 1144 (5th Cir. 1985) 13

Union of Concerned Scientists v. NRC,
735 F.2d 1437 (D.C. Cir. 1984)....................3

Vermont Dep't of Pub. S. v. United States,
684 F.3d 149 (D.C. Cir. 2012)....................13, 20

Wales Transp., Inc. v. ICC,
728 F.2d 774 (5th Cir. 1984) 12, 14

Water Transp. Ass'n v. ICC,
819 F.2d 1189 (D.C. Cir. 1987)....................18

Statutes

28 U.S.C. § 2342 ....1, 5, 11

28 U.S.C. § 2344 ....5, 11, 20

42 U.S.C. § 2239 ....3, 5, 11

42 U.S.C. § 2241 7

42 U.S.C. § 5841 ....2, 11

Regulations

10 C.F.R. Part 2...4, 18, 20

10 C.F.R. § 2.302 16

10 C.F.R. § 2.309 ....4, 6, 7, 15, 18, 19

10 C.F.R. § 2.311 19

10 C.F.R. § 2.315 ....4, 8

10 C.F.R. § 2.1213 10

10 C.F.R. Part 72..3

Federal Register

Interim Storage Partners, LLC; WCS Consolidated Interim Storage Facility; Issuance of Materials License and Record of Decision,
86 Fed. Reg. 51,926 (Sept. 17, 2021) ....

Interim Storage Partners Waste Control Specialists Consolidated Interim Storage Facility,
83 Fed. Reg. 44,070 (Aug. 29, 2018), *corrected*,
83 Fed. Reg. 44,680 (Aug. 31, 2018) ....

Adjudicatory Decisions of Nuclear Regulatory Commission

Commission Decisions

Interim Storage Partners LLC,
CLI-20-13 (Dec. 4, 2020) 8

Interim Storage Partners LLC,
CLI-20-14 (Dec. 17, 2020) 8

Interim Storage Partners LLC,
CLI-20-15 (Dec. 17, 2020) 8

Interim Storage Partners LLC,
CLI-21-09 (June 22, 2021) 8

Licensing Board Decisions

Interim Storage Partners LLC,
LBP-19-07 (Aug. 23, 2019) 8

Interim Storage Partners LLC,
LBP-19-09 (Nov. 18, 2019) 8

Interim Storage Partners LLC,
LBP-19-11 (Dec. 13, 2019) 8

Interim Storage Partners LLC,
LBP-21-02 (Jan. 29, 2021) 8

GLOSSARY

AEA	Atomic Energy Act of 1954
ICC	Interstate Commerce Commission
ISP	Interim Storage Partners, L.L.C.
NEPA	National Environmental Policy Act
NRC	Nuclear Regulatory Commission
NWPA	Nuclear Waste Policy Act
TCEQ	Texas Commission on Environmental Quality

The U.S. Nuclear Regulatory Commission ("NRC" or "Commission"[1]) and the United States of America (together, "Respondents") jointly move to dismiss the Petition for Review filed by Petitioners State of Texas; the Governor of Texas, Greg Abbott; and the Texas Commission on Environmental Quality (together, "Texas"). Counsel for Respondents have contacted all parties to this action concerning this motion. Respondent-Intervenor Interim Storage Partners LLC ("ISP") supports dismissal but will not be filing a response; Petitioners oppose this motion and will file a response.

INTRODUCTION

Pursuant to the Atomic Energy Act of 1954 ("AEA") and the Hobbs Act, only a "party aggrieved" by a final order entered in a proceeding described in AEA § 189 may obtain judicial review in the federal courts of appeals. *See* 42 U.S.C. § 2239(a)(1)(A), (b)(1); 28 U.S.C. §§ 2342(4), 2344. The courts of appeals, including this Court, have consistently held that the "party aggrieved" requirement means that a petitioner must have been a party to the underlying agency proceeding, or at least sought to have become a party to the agency proceeding, in order to obtain judicial review under Hobbs Act.

---

[1] We use the term "NRC" to refer to the agency as a whole, and the term "Commission" to refer to the collegial body that oversees the agency.

Texas challenges the NRC's final order in a licensing proceeding. Yet Texas was never a "party," and it never sought to become a "party," to the NRC licensing proceeding that led to the final order. Instead of seeking an administrative hearing on the application for a license—which it is entitled to seek under the AEA and the NRC's implementing procedural regulations—Texas instead submitted two sets of comments on the draft Environmental Impact Statement for the facility and wrote a letter to the NRC's Chairman. Under the NRC's comprehensive rules of adjudicatory procedure, this correspondence did not make Texas a "party" to the licensing proceeding or constitute a request for a hearing. Thus, the Court should dismiss the Petition for Review, either for lack of jurisdiction or for failure to exhaust a mandatory statutory requirement.

BACKGROUND

I. Statutory and regulatory framework

A. The role of the NRC in licensing facilities

The NRC is an independent regulatory commission created by Congress. *See* Energy Reorganization Act of 1974, 42 U.S.C. § 5841. In accordance with the AEA, 42 U.S.C. §§ 2011-2297h-13, the agency licenses and regulates civilian use of radioactive materials.

Along with regulating the construction and operation of nuclear power plants, the NRC licenses and regulates the storage of high-level nuclear waste and,

in particular, spent nuclear fuel (i.e., fuel that is still radioactive but is no longer useful in the production of electricity) before its ultimate disposal. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 207 (1983); *see also Bullcreek v. NRC*, 359 F.3d 536, 538-39 (D.C. Cir. 1984) ("[I]t has long been recognized that the AEA confers on the NRC authority to license and regulate the storage and disposal of such fuel."). The NRC's regulations provide for the issuance of licenses for facilities, located either at the sites of nuclear power plants or at separate locations, for the storage of spent fuel. 10 C.F.R. Part 72; *see generally* NUREG-2157, Final Report, Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel, at G-1 to G-2 (Sept. 2014) (explaining the regulatory framework governing the issuance of licenses to operate both on-site and off-site spent fuel storage facilities), *available at* https://www.nrc.gov/docs/ML1419/ML14196A105.pdf.

B. Avenues for participation in NRC's licensing proceedings

In the AEA, Congress provided interested persons with an opportunity to intervene in NRC licensing proceedings and to object to the issuance of a license. Specifically, AEA Section 189 enables a person to request a hearing before the agency challenging the legal or factual basis for the agency's licensing decision. *See* 42 U.S.C. § 2239(a)(1).

Hearings are governed by the NRC's regulations. *See* 10 C.F.R. Part 2. To be "admitted" as a party to a licensing proceeding, an intervenor must, among other things, establish administrative standing and submit at least one "contention" setting forth an issue of law or fact to be controverted. *See* 10 C.F.R. § 2.309(d), (f)(1). Even if a state or local government does not separately seek admission as a party, it is afforded by regulation a reasonable opportunity to participate in a hearing initiated by another intervenor. *Id.* § 2.315(c).

A hearing is available with respect to issues that are material to the agency's licensing decision. *Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 144 (D.C. Cir. 1984). This includes compliance not only with the AEA and the NRC's regulations, but also other statutes governing the agency's issuance of a license. Thus, intervenors may challenge the NRC's compliance with the National Environmental Policy Act ("NEPA") by filing contentions relating to the sufficiency of the analysis in the environmental report that a license applicant must prepare or the environmental impact statement (or in some cases, environmental assessment) that the agency prepares. *See* 10 C.F.R. § 2.309(f)(2).

If an intervenor does not obtain the relief that it requests through the hearing process, the AEA provides that the party can seek judicial review of the agency's final order in the United States Court of Appeals for the circuit in which the proposed facility is located or in the United States Court of Appeals for the District

of Columbia Circuit. 42 U.S.C. § 2239(b) (specifying that the courts of appeals must review the agency's decision in accordance with the Administrative Procedure Act and the Hobbs Act); *see also* 28 U.S.C. § 2342. A party seeking review of a final order issued by the NRC following a hearing must file a petition for review in the court of appeals within 60 days after entry of the final order being challenged. 28 U.S.C. § 2344.

II. Factual Background

A. Interim Storage Partners' application for a license

The agency action that is the subject of this Petition for Review is the NRC's issuance of a license on September 13, 2021. The license authorizes ISP to operate a facility, known as a consolidated interim storage facility, to store spent nuclear fuel in Andrews County, Texas. *See* Interim Storage Partners, LLC; WCS Consolidated Interim Storage Facility; Issuance of Materials License and Record of Decision, 86 Fed. Reg. 51,926 (Sept. 17, 2021) (issuing Materials License No. SNM-2515). Texas's Petition for Review references not only the license, but also documents issued by the agency contemporaneously (or nearly contemporaneously) with the license, including the NRC Staff's Final Safety Evaluation Report, which documents the agency's conclusions related to the safety of the proposed facility; and the agency's Record of Decision, which documents

the agency's environmental analysis and its preparation of an Environmental Impact Statement for the facility.

The NRC's issuance of a license for the facility was the last step in a process that spanned several years and included numerous adjudicatory challenges by parties other than Texas. In July 2018, ISP filed a license application with the NRC. *See generally* Interim Storage Partners Waste Control Specialists Consolidated Interim Storage Facility, 83 Fed. Reg. 44,070 (Aug. 29, 2018), *corrected*, 83 Fed. Reg. 44,680 (Aug. 31, 2018). The NRC provided public notice of the license application in the Federal Register and explicitly stated that interested persons had the opportunity to request a hearing and petition for leave to intervene as a party to the proceedings in accordance with the AEA. *See id*. at 44,070. The notice expressly invoked the requirements of 10 C.F.R. § 2.309(d) ("[T]he petition should specifically explain the reasons why intervention should be permitted with particular reference to . . . the nature of the petitioner's right under the Act to be made a party to the proceeding . . . . ") and 10 C.F.R. § 2.309(f) ("[T]he petition must also set forth the specific contentions which the petitioner seeks to have litigated in the proceeding."). 83 Fed. Reg. at 44,071. The notice further explained that "[t]hose permitted to intervene become parties to the proceeding." *Id*. Finally, the notice specifically invited governmental units to participate as parties to the proceeding: "A State, local governmental body,

Federally-recognized Indian Tribe, or agency thereof, may submit a petition to the Commission to participate as a party under 10 [C.F.R. §] 2.309(h)(1)." *Id.*

In September 2018, two entities lodged with the Commission "motions to dismiss" the ISP application. *See* Exhibit 1. The motions contended that the NRC's consideration of the applications violated the Nuclear Waste Policy Act ("NWPA"). *See id*. The Commission denied the motions, explaining that the agency's rules do not provide for the filing of motions to dismiss license applications, but it referred the underlying arguments about the NWPA to the Commission's Atomic Safety and Licensing Board ("Licensing Board"),[2] which had convened to adjudicate hearing requests that had already been filed. *Id*. One of the entities that filed a motion to dismiss, Beyond Nuclear, appealed the Commission's order to the U.S. Court of Appeals for the D.C. Circuit, which dismissed the petition because the order did not constitute a final order reviewable under the Hobbs Act. Exhibit 2.

Meanwhile, the Licensing Board considered the contentions filed by the two entities, as well as by several other organizations, largely based on the NWPA and NEPA. This administrative process led to four decisions by the Licensing Board

---

[2] The Licensing Board is a panel of administrative judges, appointed by the Commission, that is authorized by Section 191 of the AEA to conduct hearings. 42 U.S.C. § 2241.

resolving contentions and motions to submit amended contentions, and seven separate appeals to the Commission from those Licensing Board decisions.[3] The Commission issued four orders resolving those appeals,[4] and the organizations filed four petitions for review of those decisions in the D.C. Circuit, which consolidated the petitions.[5] Briefing on those petitions is expected to take place during the first half of 2022.

B. Texas's failure to participate in the adjudicatory proceedings

Unlike the petitioners litigating issues concerning the ISP license in the D.C. Circuit, Texas did not attempt to obtain party status by requesting a hearing on any contention. Nor did it seek to as an interested governmental unit in the adjudicatory proceedings initiated by others. *See* 10 C.F.R. 2.315(c).

---

[3] *Interim Storage Partners LLC*, LBP-19-07 (Aug. 23, 2019); *Interim Storage Partners LLC*, LBP-19-09 (Nov. 18, 2019); *Interim Storage Partners LLC*, LBP-19-11 (Dec. 13, 2019); *Interim Storage Partners LLC*, LBP-21-02 (Jan. 29, 2021). Decisions of the NRC's Licensing Board are available at https://www.nrc.gov/reading-rm/doc-collections/aslbp/orders/.

[4] *Interim Storage Partners LLC*, CLI-20-13 (Dec. 4, 2020); *Interim Storage Partners LLC*, CLI-20-14 (Dec. 17, 2020); *Interim Storage Partners LLC*, CLI-20-15 (Dec. 17, 2020); *Interim Storage Partners LLC*, CLI-21-09 (June 22, 2021). Decisions of the Commission are available at https://www.nrc.gov/reading-rm/doc-collections/commission/orders/.

[5] *Don't Waste Michigan v. NRC*, D.C. Cir. No. 21-1048 (consolidated with *Sierra Club v. NRC*, D.C. Cir. No. 21-1055; *Beyond Nuclear* v. *NRC*, D.C. Cir. No. 21-1056; and *Fasken Land and Minerals, Ltd. v. NRC*, D.C. Cir. No. 21-1179).

Outside the adjudicatory process, however, Texas did make its views known to the agency. Both the Texas Commission on Environmental Quality ("TCEQ") and Governor Abbott submitted comments on the draft Environmental Impact Statement that the NRC prepared. In November 2020,TCEQ submitted a comment indicating that it had "significant policy concerns as they pertain to the adjacent low-level radioactive waste disposal facility" and that the proposed facility "has unprecedented implications as it has created significant unease with the public." Exhibit 3. TCEQ nonetheless acknowledged that it had "no regulatory authority over the licensing of this proposed consolidated interim storage facility, [and that such] authority resides with the federal government, specifically the Nuclear Regulatory Commission." *Id.* Later that same month, Governor Abbott submitted a three-page letter to the NRC as a comment on the draft Environmental Impact Statement, which concluded, "In light of the grave risks associated with the proposed ISP facility, the absence of a permanent geologic repository, and the importance of the Permian Basin to the country's energy security and economy, I respectfully and emphatically request that the NRC deny ISP's license

application." Exhibit 4. The NRC responded to these comments in its Final Environmental Impact Statement.[6]

On September 10, 2021, Governor Abbott wrote a letter to the Chairman of the NRC, Christopher Hanson, asserting that the proposed facility was illegal under a Texas statute that had been passed the day before. Exhibit 5. Neither the Governor, nor Texas, nor TCEQ sought to raise a contention related to this statute or sought a stay of the issuance of the license through the agency's adjudicatory process.[7] Three days later, on September 13, 2021, the agency issued the license to ISP.

---

[6] The final Environmental Impact Statement for the ISP facility is available at https://www.nrc.gov/docs/ML2120/ML21209A955.pdf. Responses to the comments are set forth in Appendix D. Governor Abbott is designated as commenter 193; TCEQ is designated as commenter 194.

[7] Under the procedures applicable to the ISP licensing proceeding, a party may seek to stay the effectiveness of a decision, such as the issuance of a license, by the NRC Staff. *See* 10 C.F.R. § 2.1213.

ARGUMENT

I. Dismissal is required because Texas was never a "party" before the NRC.

Texas's failure to seek a hearing before the NRC requires dismissal of the Petition for Review, either as a matter of jurisdiction or because "aggrieved party" status is a mandatory, statutory prerequisite to obtaining judicial review.

The Hobbs Act vests exclusive jurisdiction in the federal courts of appeals to review and determine the validity of certain agency actions. 28 U.S.C. § 2342. With respect to the NRC,[8] this includes all "final orders" that are made reviewable by Section 189 of the AEA, including final orders for the "granting, suspending, revoking or amending of any license." *Id.* § 2342(4); 42 U.S.C. § 2239(a)(1)(A), (b)(1). The Hobbs Act provides that any "party aggrieved" by such an order—and only such a party—may file a petition for review in the federal courts of appeals within 60 days of entry of the final order. *See* 28 U.S.C. § 2344.

The courts of appeals, including this Court, have "consistently held" that the "party aggrieved" language in the Hobbs Act, 28 U.S.C. § 2344, "requires that petitioners have been parties to the underlying agency proceedings." *ACA Int'l v.*

---

[8] The Hobbs Act still refers to final orders of the "Atomic Energy Commission," the NRC's predecessor. The Energy Reorganization Act of 1974 abolished the Atomic Energy Commission and transferred all licensing and related regulatory functions to the newly created NRC. 42 U.S.C. § 5841(a), (f).

FCC, 885 F.3d 687, 711 (D.C. Cir. 2018) (citing *Simmons v. Interstate Commerce Comm'n*, 716 F.2d 40 (D.C. Cir. 1983)); *Wales Transp., Inc. v. ICC,* 728 F.2d 774, 776 n.1 (5th Cir. 1984) (citing *American Trucking Ass'ns v. ICC*, 673 F.2d 82, 84 (5th Cir. 1982) (per curiam) ("To be an aggrieved party, one must have participated in the agency proceeding under review.")). The Hobbs Act "limits review to petitions filed by parties, and that is that." *In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 799 F.2d 317, 334-35 (7th Cir. 1986).

In the context of the AEA, "participating in the appropriate and available administrative procedure" is the "statutorily prescribed prerequisite" to invocation of the Court's jurisdiction, and petitioners who were never "parties" (or who never sought to become "parties") to the underlying AEA proceeding cannot obtain judicial review under the Hobbs Act. *Gage v. AEC*, 479 F.2d 1214, 1217-18 (D.C. Cir. 1973), *cited in Wales Transp.*, 728 F.2d at 776 n.1; *see also Bullcreek v. NRC*, 359 F.3d 536, 540 (D.C. Cir. 2004) ("The Hobbs Act requires that a party participate in the underlying agency proceeding . . . ."); *Prof'l Reactor Operator Soc. v. NRC*, 939 F.2d 1047, 1049 n.1 (D.C. Cir. 1991) (petitioners who did not participate in NRC rulemaking proceeding were not "parties aggrieved").

Texas was never a "party" to the licensing proceeding, and never sought to become a "party" under the NRC's rules of adjudicatory procedure, and thus it is jurisdictionally barred from challenging the NRC's action. And even if this Court

were to determine that dismissal of the Petition for Review is not required as a matter of its jurisdiction,[9] the same result is nonetheless required as a matter of "non-jurisdictional, mandatory exhaustion." The recent decision in *Fleming v. U.S. Department of Agriculture*, 987 F.3d 1093 (D.C. Cir. 2021), explained the difference between "jurisdictional exhaustion," which a court must enforce regardless of whether it is raised by a party, and "non-jurisdictional, mandatory exhaustion," which constitutes an affirmative defense that, once raised by the government, must be enforced. *Id.* at 1098-99 (citing *Ross v. Blake*, 136 S. Ct. 1859, 1857 (2016); *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs*, 558 U.S.

---

[9] In *Vermont Department of Public Service v. United States*, 684 F.3d 149, 156 (D.C. Cir. 2012), the D.C Circuit stated that the language of the Hobbs Act does not impose a jurisdictional exhaustion requirement, albeit in a different context—issue exhaustion. In that case, which concerned the renewal of a nuclear power plant license, the petitioners had in fact sought an administrative hearing before the NRC and pursued judicial review after its conclusion. However, the petitioners raised a claim before the court that had never been raised before the agency. The court held that, although the Hobbs Act did not state in "clear, unequivocal terms" that consideration of the new claim was statutorily barred, the discretionary doctrine of "non-jurisdictional exhaustion" nonetheless warranted denial of the petition for review. *Id.* at 157-60. Because *Vermont Department of Public Service* only addresses whether there are jurisdictional boundaries on what claims a "party aggrieved" can raise in federal court, it remains fully consistent with the determination in *ACA Int'l*, 885 F.3d at 711, that "party aggrieved" status constitutes a jurisdictional requirement. *Cf. Texas v. United States*, 749 F.2d 1144, 1146 (5th Cir. 1985) (observing that the Hobbs Act "provides that a party aggrieved . . . must file a petition for judicial review within sixty days" and observing that this "limitation is jurisdictional and cannot be judicially altered or expanded").

67, 82 (2009); and *Jones v. Bock*, 549 U.S. 199, 212 (2007)). Since participation as a "party" in the underlying agency proceedings is a statutory prerequisite to judicial review under the Hobbs Act, *Wales Transp.*, 728 F.2d at 776 n.1; *ACA Int'l*, 885 F.3d at 711; *Gage*, 479 F.2d at 1217, the Court must dismiss this Petition for Review, given that Federal Respondents have raised this mandatory requirement at the earliest possible stage. *Fleming*, 987 F.3d at 1099.

Finally, any attempt by Texas to seek an exception to the aggrieved party requirement should be rejected. When addressing review of orders by the Interstate Commerce Commission ("ICC") under the Hobbs Act, this Court in dicta identified "two rare instances a person may appeal an agency action even if not a party to the original agency proceeding": (1) "if the agency action is 'attacked as exceeding the power of the Commission'"; or (2) "if a person, not a party to the agency proceeding, challenges the constitutionality of the statute conferring authority on the agency." *American Trucking*, 673 F.2d at 85 n.4. As this Court later observed, that exception has been "squarely rejected by some of [the Court's] sister circuits." *Baros v. Texas Mexican R.R. Co.*, 400 F.3d 228, 238 n.24 (5th Cir. 2005); *see Erie-Niagara Rail Steering Comm. v. STB*, 167 F.3d 111, 112 (2d Cir. 1999) (noting that in *American Trucking*, "the statement is dictum and rests upon the pre-1975 cases cited above, without any acknowledgement of the intervening change in governing procedure," and that *Wales Transportation* "simply cites the

first"); *In re Chicago*, 799 F.2d at 334-35 (rejecting *American Trucking*); *Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 457 F.3d 1238, 1249 (11th Cir. 2006) (declining to follow *American Trucking*).

At a minimum, this Court appears to have only considered this exception in the context of reviewing ICC orders. And even as to ICC orders, this Court has held that the "*Wales* [or *American Trucking*] exception to the requirement that one seeking review must be an aggrieved party is exceedingly narrow." *Merchants Fast Motor Lines, Inc. v. ICC*, 5 F.3d 911, 922 (5th Cir. 1993). Indeed, this Court held that the exception did not apply to a challenge to the ICC's authority when "the ICC has authority to determine its own jurisdiction, i.e. whether the transportation at issue is interstate in character." *Id.* at 922. So here. The NRC's authority to issue the ISP facility license is being challenged in the D.C. Circuit by petitioners who did properly exhaust their administration remedies, and who asserted before the agency that issuance of a license to ISP would violate the NWPA. Having failed to follow the administrative exhaustion required by Congress, Texas cannot evade the plain requirements in the Hobbs Act and AEA.

II. Texas's comments on the draft Environmental Impact Statement and correspondence with the agency's Chairman did not make it a "party" to the agency proceeding.

Nor can it reasonably be asserted that Texas's correspondence with the NRC, whether in the form of comments on the Draft Environmental Impact Statement or correspondence to the NRC Chairman from Governor Abbott, conferred upon it "party" status or constituted a request for "party" status. With respect to the issuance of licenses, NRC regulations are clear—anyone "whose interest may be affected by a proceeding *and who desires to participate as a party* must file a written request for hearing" that satisfies the NRC's admissibility requirements. 10 C.F.R. § 2.309(a) (emphasis added). There is no dispute that neither the State of Texas, the Governor, nor TCEQ filed such a request.

To be sure, the Texas Petitioners did correspond with the Commission by providing comments on the draft Environmental Impact Statement and through direct correspondence with the Chairman of the NRC. But the NRC did not treat these forms of correspondence as a request for an AEA Section 189 hearing, and for good reason. The correspondence made no mention of such a request, made no reference to the admissibility requirements in 10 C.F.R. § 2.309, and was not submitted through the NRC's E-Filing system for adjudicatory hearings (*see* 10 C.F.R. § 2.302). The NRC treated the communications for what they were: correspondence from interested stakeholders and comments on the draft

Environmental Impact Statement issued by the agency (to which it responded in the final Environmental Impact Statement), not hearing requests filed under the NRC's rules of procedure. And the Texas Petitioners never suggested otherwise before the agency.

Further, in other contexts merely "submitting comments" or otherwise making a "full presentation of views to the agency" may confer "party aggrieved" status on litigants whose positions are then later rejected. *See ACA Int'l*, 885 F.3d at 711 (commenting in support of a petition filed by another party is sufficient to obtain "party aggrieved" status). But "[t]he degree of participation necessary to achieve party status varies according to the formality with which the proceeding was conducted." *Water Transport Ass'n v. ICC*, 819 F.2d 1189, 1192 (D.C. Cir. 1987). As a result, this less formal process—where merely providing comments or correspondence to an agency is sufficient to confer party status for purposes of judicial review— is reserved for "agency proceedings that do *not* require intervention as a prerequisite to participation." *ACA Int'l*, 885 F.3d at 711 (emphasis added).[10] And in AEA Section 189 proceedings for the issuance of a

---

[10] Thus, submission of comments is sufficient to confer "party aggrieved" status in an NRC *rulemaking* proceeding that is reviewable under the Hobbs Act. *Reytblatt v. NRC*, 105 F.3d 715, 720 (D.C. Cir. 1997). Submission of comments, rather than

license (where, as here, an opportunity for a hearing in accordance with the procedures set forth in 10 C.F.R. Part 2 is available), "participating in the appropriate and available administrative procedure"—that is, submitting a request for a hearing—is a "statutorily prescribed prerequisite." *Gage,* 479 F.2d at 1217; *see also Water Transp. Ass'n v. ICC*, 819 F.2d 1189, 1192 (D.C. Cir. 1987) (judicial review of the outcome of agency proceeding will be denied to those who did not seek to intervene when intervention "is prerequisite to participation"). Because the ISP licensing proceeding is an AEA Section 189 proceeding, Texas's informal correspondence was insufficient to give it status as a party aggrieved.

Nor can Texas reasonably claim ignorance of this statutory requirement. The NRC informed the public at large in no uncertain terms that the way to intervene in the ISP licensing proceeding—and to become a "party" capable of seeking judicial review of the agency's licensing decision—was to submit a request for a hearing. *See, e.g.,* 83 Fed. Reg. at 44,071 (explaining that intervenors

---

formal intervention, is the means by which members of the public participate in informal rulemaking. This is distinguishable from a licensing proceeding in which an adjudicatory hearing is available and NRC regulations specify the mechanism through which outsiders can obtain "party" status. *See* 10 C.F.R. § 2.309(a) ("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." (emphasis added)).

seeking to participate should submit a hearing request containing admissible contentions and that "[t]hose permitted to intervene become parties to the proceeding."). If Texas was concerned with the consistency of the license application with the AEA or other applicable law or with the scope of the NRC's environmental review under NEPA, it could have sought a hearing on those bases. *See* 10 C.F.R. § 2.309(f)(2). And had it sought a hearing, as did the four other groups of petitioners who are litigating ISP-related issues before the D.C. Circuit, the "final order" concluding that proceeding would have been reviewable in this Court or in the D.C. Circuit.[11]

But Texas did not follow the path that Congress forged and that the D.C. Circuit petitioners travelled. Instead, it has brought a judicial challenge to the NRC's issuance of the ISP license without establishing the prerequisite agency adjudicatory record through the Atomic Safety and Licensing Board or the Commission. This is not what Congress envisioned when it channeled judicial review of NRC licensing decisions through the adjudicatory opportunity it provided via Section 189 of the AEA. This Court should not countenance an

---

[11] Even if Texas were denied a hearing request (e.g., failure to propose an admissible contention), such a denial would have been appealable to the Commission (10 C.F.R. § 2.311(c)), and that outcome reviewable in this Court under the Hobbs Act. *See, e.g.*, *NRDC v. NRC*, 823 F.3d 641 (D.C. Cir. 2016) (reviewing the NRC's denial of a hearing request).

attempt to "sidestep the administrative process," *McGee v. United States*, 402 U.S. 479, 483 (1971); *Steere Tank Lines, Inc. v. ICC*, 675 F.2d 763, 767 (5th Cir. 1982), or encourage the "flouting" or "disregard" of agency procedures by litigants who voluntarily bypass or choose not to exhaust mandatory administrative remedies. *See Boivin v. U.S. Airways, Inc.*, 446 F.3d 148, 155 (D.C. Cir. 2006); *Vermont Dep't of Pub. Serv.*, 684 F.3d at 157-58. The Texas Petitioners' failure to seek a hearing under the NRC's rules of procedure in 10 C.F.R. Part 2 necessitates dismissal of the Petition for Review.

CONCLUSION

Petitioners are not "parties aggrieved" within the meaning of 28 U.S.C. § 2344 because they failed to seek a hearing before the NRC prior to filing the Petition for Review in this Court. As such, Respondents respectfully request that this Court dismiss the Petition for Review, either for lack of jurisdiction or failure to exhaust a mandatory statutory requirement.

Respectfully submitted,

/s/ Justin D. Heminger
TODD KIM
Assistant Attorney General
JUSTIN D. HEMINGER
Attorney
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
justin.heminger@usdoj.gov
(202) 514-5442

/s/ Andrew P. Averbach
ANDREW P. AVERBACH
Solicitor
Office of the General Counsel
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852
andrew.averbach@nrc.gov
(301) 415-1956

November 4, 2021

CERTIFICATE OF SERVICE

I certify that on November 4, 2021, I served a copy of RESPONDENTS' MOTION TO DISMISS upon counsel for the parties in this action by filing the document electronically through the CM/ECF system. This method of service is calculated to serve counsel at the following e-mail addresses:

Michael Abrams
Michael.Abrams@oag.texas.gov, hollis.duncan@oag.texas.gov, katrina.shanks@oag.texas.gov

Henry Carl Myers
carl.myers@oag.texas.gov, david.laurent@oag.texas.gov, laura.courtney@oag.texas.gov

Justin Heminger
justin.heminger@usdoj.gov; efile_app.enrd@usdoj.gov

Arnold Bradley Fagg
brad.fagg@morganlewis.com

/s/ Andrew P. Averbach
Andrew P. Averbach

Counsel for Respondent
U.S. Nuclear Regulatory Commission

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 27(D)

I certify that this filing complies with the requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this filing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 4,616 words, excluding the parts of the of the filing exempted under Fed. R. App. P. 32(f), according to the count of Microsoft Word.

/s/ Andrew P. Averbach
Andrew P. Averbach

Counsel for Respondent
U.S. Nuclear Regulatory Commission

EXHIBIT 1

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matters of	
HOLTEC INTERNATIONAL	Docket No. 72-1051
(HI-STORE Consolidated Interim Storage Facility)	
INTERIM STORAGE PARTNERS LLC	Docket No. 72-1050
(WCS Consolidated Interim Storage Facility)	

ORDER

On July 16, 2018, the NRC provided notice in the *Federal Register* of Holtec International's application to construct and operate a consolidated interim storage facility for spent nuclear fuel.[1] Separately, on August 29, 2018, the NRC provided notice in the *Federal Register* of Interim Storage Partners' application to construct and operate a consolidated interim storage facility for spent nuclear fuel.[2]

On September 14, 2018, Beyond Nuclear, Fasken Land and Minerals, and Permian Basin Land and Royalty Owners filed motions to dismiss both the Holtec and Interim Storage Partners applications.[3] These groups argue that the NRC cannot, as a threshold matter, issue

[1] Holtec International HI-STORE Consolidated Interim Storage Facility for Interim Storage of Spent Nuclear Fuel, 83 Fed. Reg. 32,919 (July 16, 2018).

[2] Interim Storage Partner's Waste Control Specialists Consolidated Interim Storage Facility, 83 Fed. Reg. 44,070 (Aug. 29, 2018), corrected, 83 Fed. Reg. 44,608 (Aug. 31, 2018) (noting that the correct deadline to file intervention petitions is October 29, 2018). Interim Storage Partners is a joint venture of Orano USA and Waste Control Specialists.

[3] Beyond Nuclear filed its own motion to dismiss. *Beyond Nuclear, Inc.'s Motion to Dismiss Licensing Proceedings for Hi-Store Consolidated Interim Storage Facility and WCS Consolidated Interim Storage Facility for Violation of the Nuclear Waste Policy Act* (Sept. 14,

licenses to Holtec or Interim Storage Partners because both applications are contrary to the Nuclear Waste Policy Act (NWPA). Specifically, the groups argue that both applications contemplate the storage of Department of Energy-titled spent fuel in violation of various NWPA provisions.

The NRC's regulations allow interested persons to file petitions to intervene and requests for hearing in which they can raise concerns regarding a particular license application. These regulations do not, however, provide for the filing of threshold "motions to dismiss" a license application; instead, interested persons must file petitions to intervene and be granted a hearing. I therefore deny both motions to dismiss on procedural grounds, without prejudice to the underlying merits of the legal arguments embedded within the motions.

Beyond Nuclear also filed hearing petitions in the Holtec and Interim Storage Partners proceedings that incorporated by reference the NWPA arguments that it raised in its motion to dismiss and identified those arguments as proposed contentions.[4] I am separately referring these hearing requests—as well as other hearing requests challenging the applications—to the Atomic Safety and Licensing Board Panel (ASLBP) for the establishment of a Board to consider *all* hearing requests in accordance with the hearing procedures set forth in 10 C.F.R. §2.309. And, in accordance with 10 C.F.R. § 2.346(i), I am referring the motion from Fasken Land and

---

2018) (ADAMS Accession No. ML18257A318). Fasken Land and Minerals joined with Permian Basin Land and Royalty Owners to file a motion to dismiss that is substantially similar to Beyond Nuclear's motion. *Motion of Fasken Land and Minerals and Permian Basin Land and Royalty Owners to Dismiss Licensing Proceedings for Hi-Store Consolidated Interim Storage Facility and WCS Consolidated Interim Storage Facility* (Sept. 14, 2018) (ML18257A330). Both the NRC Staff and respective applicants filed oppositions to the motions, and Beyond Nuclear, Fasken Land and Minerals, and Permian Basin Land and Royalty Owners then filed replies.

[4] *Beyond Nuclear, Inc.'s Hearing Request and Petition to Intervene* (Sept. 14, 2018) (ML18257A324) (Holtec docket); *Beyond Nuclear, Inc.'s Hearing Request and Petition to Intervene* (Oct. 3, 2018) (ML18276A242) (Interim Storage Partners docket). Fasken Land and Minerals and Permian Basin Land and Royalty Owners have not filed related hearing petitions in either docket.

Minerals and Permian Basin Land and Royalty Owners to the ASLBP for consideration under § 2.309.

This Order is issued under my authority in 10 C.F.R. § 2.346(c), (g), (i), and (j).

IT IS SO ORDERED.

For the Commission

NRC SEAL **/RA/**

____
Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 29th day of October 2018

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
INTERIM STORAGE PARTNERS LLC	)	Docket No. 72-1050-ISFSI
	)	
(WCS Consolidated Interim Storage Facility)	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Order of the Secretary** have been served upon the following persons by the Electronic Information Exchange:

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
Washington, DC 20555-0001

E. Roy Hawkens
Chief Administrative Judge
E-mail: roy.hawkens@nrc.gov

Joseph McManus, Law Clerk
E-mail: joseph.mcmanus@nrc.gov

U.S. Nuclear Regulatory Commission
Office of Commission Appellate Adjudication
Mail Stop: O16-B33
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop: O16-B33
Washington, DC 20555-0001
Hearing Docket
E-mail: Hearing.Docket@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop - O-14A44
Washington, DC 20555-0001
Patrick Moulding, Esq.
Mauri Lemoncelli, Esq.
Sara Kirkwood, Esq.
Emily Monteith, Esq.
Alana Wase, Esq.
Joe Gillespie, Esq.
Thomas Steinfeldt
E-mail: patrick.moulding@nrc.gov
mauri.lemoncelli@nrc.gov
sara.kirkwood@nrc.gov
emily.monteith@nrc.gov
alana.wase@nrc.gov
joe.gillespie@nrc.gov
thomas.steinfeldt@nrc.gov

Docket No. 72-1050-ISFSI
Order of the Secretary

Counsel for Beyond Nuclear

Diane Curran, Esq.
Harmon, Curran, Spielberg and Eisenberg
1725 DeSales Street NW, Suite 500
Washington, DC 20036
E-mail: dcurran@harmoncurran.com

Mindy Goldstein, Esq.
Caroline Reiser, Esq.
Emory University School of Law
Turner Environmental Law Clinic
1301 Clifton Road
Atlanta, GA 30322
E-mail: magolds@emory.edu
caroline.j.reiser@emory.edu

Diane D'Arrigo
Nuclear Information and
Resource Service (NIRS)
6930 Carroll Avenue
Suite 340
Takoma Park, MD 20912
Email: dianed@nirs.org

Chris Hebner, Esq.
City of San Antonio, TX
P.O. Box 839966
San Antonio, TX 78283
E-mail: chris.hebner@sanantonio.gov

Counsel for Fasken Land and Oil and
Permian Basin Land and Royalty Owners
Robert V. Eye Law Office, L.L.C.
Robert Eye, Esq.
Timothy Laughlin
4840 Bob Billings Parkway, Suite 1010
Lawrence, KS 66049
E-mail: bob@kauffmaneye.com
tijay1300@gmail.com

Karen D. Hadden
Executive Director,
Sustainable Energy and
Economic Development (SEED) Coalition
605 Carismatic Lane
Austin, TX 78748
E-mail: karendhadden@gmail.com

Counsel for Interim Storage Partners LLC
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue NW
Washington, DC 20004
Stephen Burdick, Esq.
Timothy Matthews, Esq.
Ryan Lighty, Esq.
Paul Bessette, Esq.
E-mail: stephen.burdick@morganlewis.com
timothy.matthews@morganlewis.com
ryan.lighty@morganlewis.com
paul.bessette@morganlewis.com

Wallace Taylor
Counsel for Sierra Club
118 3rd Avenue SE
Suite 326
Cedar Rapids, IA
E-mail: wtaylorlaw@aol.com

[Original signed by Herald M. Speiser]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 29th day of October, 2018

EXHIBIT 2

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1340 **September Term, 2018**

NRC-72-1050
NRC-72-1051

Filed On: June 13, 2019

Beyond Nuclear, Inc.,

Petitioner

v.

U.S. Nuclear Regulatory Commission and
United States of America,

Respondents

Holtec International and Interim Storage
Partners LLC,
Intervenors

BEFORE: Pillard, Katsas, and Rao, Circuit Judges

ORDER

Upon consideration of the motion to dismiss, the response thereto, the reply, and the Rule 28(j) letters; and the motion to hold in abeyance, the response thereto, and the reply, it is

ORDERED that the motion to dismiss be granted. This court lacks jurisdiction to review the Nuclear Regulatory Commission's October 29, 2018 order denying without prejudice petitioner's motion to dismiss, and referring petitioner's petitions to intervene and hearing requests to the Atomic Safety and Licensing Board, because the order is not a final order of the Commission. See 28 U.S.C. § 2342(4) (granting courts of appeals exclusive jurisdiction over "all final orders of the [Nuclear Regulatory Commission]," including final orders in licensing proceedings). Because the order merely directs petitioner to raise its arguments within ongoing administrative proceedings, it does not "mark the consummation of the agency's decisionmaking process," Bennett v. Spear, 520 U.S. 154, 178 (1997), and does not "impose[] an obligation, den[y] a right, or fix[] some legal relationship," Blue Ridge Envtl. Def. League v. Nuclear Regulatory Comm'n, 668 F.3d 747, 753 (D.C. Cir. 2012) (internal quotation

marks and citation omitted). To the extent petitioner argues that the order is final because it requires petitioner to participate in administrative proceedings that it alleges are invalid, "[i]t is firmly established that agency action is not final merely because it has the effect of requiring a party to participate in an agency proceeding." Aluminum Co. of America v. United States, 790 F.2d 938, 941 (D.C. Cir. 1986).

Finally, because the administrative proceedings are ongoing, and petitioners acknowledge that those proceedings may resolve the dispute underlying this petition, the petition is not ripe for judicial review. See Am. Petroleum Inst. v. EPA, 683 F.3d 382, 386 (D.C. Cir. 2012) ("In the context of agency decision making, letting the administrative process run its course before binding parties to a judicial decision prevents courts from entangling themselves in abstract disagreements over administrative policies, and protects the agencies from judicial interference in an ongoing decision-making process.") (internal quotation marks, citation, and alterations omitted). It is

FURTHER ORDERED that the motion to hold in abeyance be denied.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

EXHIBIT 3

SUNI Review Complete
Template=ADM-013
E-RIDS=ADM-03
ADD: James Park

Comment (62)
Publication Date 5/8/2020
CITATION 85 FR 27447
PMD-07201051

PUBLIC SUBMISSION

As of: 11/4/20 9:14 AM
Received: November 03, 2020
Status: Pending_Post
Tracking No. kh2-ioec-pk6q
Comments Due: November 03, 2020
Submission Type: Web

Docket: NRC-2016-0231
Waste Control Specialists LLC's Consolidated Interim Spent Fuel Storage Facility Project

Comment On: NRC-2016-0231-0317
Interim Storage Partners Consolidated Interim Storage Facility Project

Document: NRC-2016-0231-DRAFT-0373
Comment on FR Doc # 2020-09795

Submitter Information

Email: chikaodi.agumadu@tceq.texas.gov
Government Agency Type: State
Government Agency: TCEQ

General Comment

On behalf of TCEQ, please find our comments regarding the Notice by the Nuclear Regulatory Commission: Interim Storage Partners Consolidated Interim Storage Facility Project.

If you have any questions concerning the enclosed comments, please contact Mr. Brad Broussard of the Radioactive Materials Division, at (512)239-6380, or at brad.broussard@tceq.texas.gov.

Thank you,

Chikaodi Agumadu
Texas Commission on Environmental Quality
Intergovernmental Relations Division

Attachments

NRC Comments_11032020

Jon Niermann, *Chairman*
Emily Lindley, *Commissioner*
Bobby Janecka, *Commissioner*
Toby Baker, *Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

November 3, 2020

Office of Administration
Mail Stop: TWFN-7-A60M
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
ATTN: Program Management, Announcements and Editing Staff

Subject: Draft Environmental Impact Statement for Interim Storage Partners License Application to Construct and Operate a Consolidated Interim Storage Facility for Spent Nuclear Fuel and Greater-Than Class C Waste (Docket ID NRC-2016-0231)

Dear Office of Administration Staff:

The Texas Commission on Environmental Quality appreciates the opportunity to comment on the U.S. Nuclear Regulatory Commission Draft Environmental Impact Statement (EIS) for Interim Storage Partners' License Application to Construct and Operate a Consolidated Interim Storage Facility for Spent Nuclear Fuel and Greater-Than Class C Waste. Enclosed please find the TCEQ's detailed comments relating to the NRC's draft EIS referenced above. If you have any questions concerning the enclosed comments, please contact Mr. Brad Broussard of the Radioactive Materials Division, at (512) 239-6380, or at brad.broussard@tceq.texas.gov.

Sincerely,

Toby Baker
Executive Director
Texas Commission on Environmental Quality

AF/bb

Texas Commission on Environmental Quality (TCEQ) Comments on the U.S. Nuclear Regulatory Commission (NRC) Draft Environmental Impact Statement (EIS) for Interim Storage Partners (ISP's) License Application to Construct and Operate a Consolidated Interim Storage Facility (CISF) for Spent Nuclear Fuel (SNF) and Greater-Than Class C (GTCC) Waste (Docket ID NRC-2016-0231)

General Comments

The Texas Commission on Environmental Quality (TCEQ) is a unique Texas stakeholder as we have subject matter expertise, but no regulatory authority over the licensing of this proposed consolidated interim storage facility (CISF). This authority resides with the federal government, specifically the Nuclear Regulatory Commission (NRC).

The TCEQ has significant policy concerns as they pertain to the adjacent low-level radioactive waste disposal facility. The CISF proposal has unprecedented implications as it has created significant unease with the public. Continuing with this licensing action jeopardizes public consent and presents significant challenges as we carry out our responsibility to regulate the low-level radioactive waste disposal facility.

Specific Comments

1. **Page 2-2, Line 4** – The EIS states “In its license application, ISP has requested that NRC license the proposed CISF to operate for a period of 40 years (ISP, 2020). ISP stated that it may seek to renew the license for an additional 20 years, for a total 60-year operating life (ISP, 2020). Renewal of the license beyond an initial 40 years would require ISP to submit a license renewal request, which would be subject to an NRC safety and environmental review at that time.”

   Comment: The TCEQ understands that the initial licensing period for a CISF is 40 years with the ability for an additional renewal period of 40 years. Based on the requirements in 10 Code of Federal Regulations (CFR) Part 72, the applicant is only required to provide technical and design analyses for the term of the license being requested. Because 10 CFR Part 72 appears to only allow one 40-year license renewal term, how will the NRC ensure that interim storage does not extend beyond the second 40-year license term, or in this case a 20-year term? Since the U.S. Department of Energy has been unsuccessful in developing a permanent geologic repository, the TCEQ is concerned that a CISF in Texas will become the permanent solution for dispositioning the nation’s spent nuclear fuel (SNF).

2. **Page 2-2, Line 9** – The EIS states “By the end of the license term of the proposed CISF, the NRC staff expects that the SNF stored at the proposed facility would have been shipped to a permanent geologic repository. This expectation of repository availability is consistent with the NRC’s analysis in Appendix B of NUREG–2157, “Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel,” (NRC, 2014). In that analysis, the NRC concluded that the reasonable period for the development of a repository is approximately 25 to 35 years (i.e., the repository is available by 2048) based on experience in licensing similarly complex

facilities in the United States and national and international experience with repositories already in progress (NRC, 2014).

Comment: The NRC did not address an alternative or contingency for stored SNF in the event that a permanent geologic repository is not developed and licensed at the end of a CISF license term. The assumption is speculative and may result in the State of Texas becoming the permanent solution for disposition of SNF.

3. **Page 2-2, Line 36** – The EIS states "The Federal Waste Disposal Facility. This facility serves the U.S. Department of Energy 36 (DOE) and is also authorized to dispose Class A, B, and C LLRW and Mixed Low-Level Waste (MLLW) under Texas Radioactive Materials License No. R04100, Amendment No. 30 (TCEQ, 2016a)."

   Comment: The Federal Waste Disposal Facility is authorized to receive both LLRW and MLLW. The MLLW is authorized by both Radioactive Material License R04100 and Hazardous Waste Permit No. 50397. The TCEQ respectfully suggests revising to add the hazardous waste permit number.

4. **Page 2-7 line 10** - "Southeastern" does not match the location of Phase 1 on Figure 2.2-5.

   Comment: Suggest revising location to match Figure 2.2-5.

5. **Page 2-10 line 16** - Description of rail car movement in "Rail Sidetrack" paragraph does not match Figure 2.2-1 and Figure. 2.2-5.

   Comment: Suggest revising paragraph to match Figures 2.2-1 and 2.2-5.

6. **Page 4-22 line 36** - Reference to "town of Deaf Smith, Texas" should be "county of Deaf Smith, Texas."

   Comment: Suggest revising reference to read county instead of city.

EXHIBIT 4

SUNI Review Complete
Template=ADM-013
E-RIDS=ADM-03
ADD: James Park

Comment (60)
Publication Date 5/8/2020
CITATION 85 FR 27447
PMD-07201051

PUBLIC SUBMISSION

As of: 11/4/20 9:04 AM
Received: November 03, 2020
Status: Pending_Post
Tracking No. kh2-godn-18tm
Comments Due: November 03, 2020
Submission Type: Web

Docket: NRC-2016-0231
Waste Control Specialists LLC's Consolidated Interim Spent Fuel Storage Facility Project

Comment On: NRC-2016-0231-0317
Interim Storage Partners Consolidated Interim Storage Facility Project

Document: NRC-2016-0231-DRAFT-0371
Comment on FR Doc # 2020-09795

Submitter Information

Email: james.sullivan@gov.texas.gov
Government Agency Type: State
Government Agency: Office of the Governor of Texas

General Comment

On behalf of Governor Abbott, I hereby submit the attached comment in Docket ID NRC-2016-0231.

James P. Sullivan
Deputy General Counsel
Office of the Governor of Texas
1100 San Jacinto Boulevard, Fourth Floor
Austin, Texas 78701

Attachments

NRC Comment of Governor Abbott

GOVERNOR GREG ABBOTT

November 3, 2020

Office of Administration
Mail Stop TWFN-7-A60M
U.S. Nuclear Regulatory Commission (NRC)
Washington, D.C. 20555-0001
ATTN: Program Management, Announcements, and Editing Staff

Re: Interim Storage Partners (ISP) Consolidated Interim Storage Facility Project, Docket ID NRC-2016-0231

Dear Office of Administration Staff:

As Governor of Texas, I strongly oppose ISP's application for a license to construct and operate a consolidated interim storage facility in Andrews County, Texas. Having consulted with numerous state agencies, including the Texas Department of Public Safety, the Texas Commission on Environmental Quality, and the Texas Department of Transportation, I urge the NRC to deny ISP's license application.

If ISP's license application were approved, its proposed facility would store spent nuclear fuel and Greater-Than-Class-C waste, both of which present a greater radiological risk than Texas is prepared to allow. This deadly radioactive waste — up to 40,000 metric tons of uranium — would sit right on the surface of the facility in dry cask storage systems. Spent nuclear fuel is so dangerous that it belongs in a deep geologic repository, not on a concrete pad above ground in Andrews County. *See, e.g.*, 42 U.S.C. § 10101(18); *Nevada v. DOE*, 457 F.3d 78, 81 (D.C. Cir. 2006). This location could not be worse for storing ultra-hazardous radioactive waste.

Andrews County lies within the Permian Basin Region, which has surpassed Saudi Arabia's Ghawar Field as the largest producing oilfield in the world. There are approximately 250,000 active oil-and-gas wells in Texas's portion of the Permian Basin. In 2019, oil production in the Permian Basin exceeded 1.5 billion barrels, and the oil-and-gas industry directly employed 87,603 individuals in the region. Also in 2019, the Permian Basin was responsible for $9 billion in severance taxes and royalties to the State of Texas. In 2018, the Permian Basin produced more than 30 percent of total U.S. crude oil and contained more than 40 percent of proved oil reserves. In short, the Permian Basin is a significant economic and natural resource for the entire country.

The proposed ISP facility imperils America's energy security because it would be a prime target for attacks by terrorists, saboteurs, and other enemies. Spent nuclear fuel is currently scattered across the country at various reactor sites and storage installations. Piling it up on the surface of the Permian

Basin, as ISP seeks to do, would allow a terrorist with a bomb or a hijacked aircraft to cause a major radioactive release that could travel hundreds of miles on the region's high winds. Such an attack would be uniquely catastrophic because, on top of the tragic loss of human life, it would disrupt the country's energy supply by shutting down the world's largest producing oilfield. The Permian Basin is already a target for America's enemies, and granting ISP's license application would paint an even bigger bullseye.

Under the National Environmental Policy Act of 1969, the NRC has an obligation to consider the environmental effects of a terrorist attack on the proposed ISP facility. *See Mothers for Peace v. NRC*, 449 F.3d 1016, 1028–35 (9th Cir. 2006); *but see N.J. Dep't of Envtl. Prot. v. NRC*, 561 F.3d 132, 136–43 (3d Cir. 2009) (creating circuit split on issue); *New York v. NRC*, 589 F.3d 551, 554 n.1 (2d Cir. 2009) (per curiam) (avoiding circuit split because "the NRC did sufficiently take into account acts of terrorism"). Perhaps recognizing as much, the NRC addressed the risk of terrorism in section 4.19 of its Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel. *See* 10 C.F.R. § 51.23 (cross-referencing NUREG-2157). The Generic Environmental Impact Statement determined (at page 4-97) that terrorism's "environmental risk is SMALL" during the period beyond a facility's license term. *But see* 42 U.S.C. § 2210e (reflecting Congress's judgment that the risk of a terrorist attack on a nuclear facility warrants the NRC's careful attention).

Now, in sections 1.4.4 and 5.1.3 of the Draft Environmental Impact Statement for the license application in Andrews County, the NRC apparently seeks to apply its generic terrorism determination to ISP. The proposed ISP facility, however, would be a uniquely provocative target: The probability of a terrorist attack is higher than for a generic reactor site, because the consequences are higher when a terrorist can disrupt the country's energy supply with a major radioactive release. So the Generic Environmental Impact Statement does not adequately assess terrorism risk as to ISP in particular, while the Draft Environmental Impact Statement does not speak to that issue at all. Indeed, the word "terrorism" appears just once, in a mere citation, in the Draft Environmental Impact Statement (at page 2-31).

Although the Draft Environmental Impact Statement repeatedly refers to ISP's construction and operation of a "consolidated *interim* storage facility," it would be naïve to believe the highlighted word. ISP's application seeks a 40-year license, with the possibility of a 20-year renewal. The Draft Environmental Impact Statement simply assumes (at pages xix, 1-3, 2-2, 8-1, 9-16) that a permanent geologic repository will be developed and licensed before those 60 years are up, without addressing any contingency for the spent nuclear fuel if such a repository is not ready when ISP's license expires. Those rosy assumptions are unsound: Radioactive waste has "the capacity to outlast human civilization as we know it," *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1257 (D.C. Cir. 2004) (per curiam), and any spent nuclear fuel that comes to the proposed ISP facility will be there to stay.

Congress began working on a lasting solution to the spent nuclear fuel problem by passing the Nuclear Waste Policy Act of 1982, which set standards for a permanent geologic repository, and the NWPA Amendments Act of 1987, which designated Yucca Mountain as the only site for it. Today, 38 years later, there is still no permanent geologic repository, with Yucca Mountain effectively having been abandoned. *See, e.g., New York v. NRC*, 824 F.3d 1012, 1014–15 (D.C. Cir. 2016); *In re Aiken County*, 645 F.3d 428, 430–33 (D.C. Cir. 2011). Once again, then, "[t]he [NRC] apparently has no long-term plan other than hoping for a geologic repository. If the government continues to fail in its quest to establish one, then [spent nuclear fuel] will seemingly be stored on site at nuclear plants on a permanent

basis. The [NRC] can and must assess the potential environmental effects of such a failure." *New York v. NRC*, 681 F.3d 471, 479 (D.C. Cir. 2012).

The Generic Environmental Impact Statement concedes (at page 4-95) that "additional security requirements may be necessary in the future if spent fuel remains in storage for a substantial period of time. Under those circumstances, it is reasonable to assume that, if necessary, the NRC will issue orders or enhance its regulatory requirements for ISFSI and DTS security, as appropriate, to ensure adequate protection of public health and safety and the common defense and security." This approach to future terrorist threats — essentially, a promise of *I'll tell you later* — is not good enough and does not protect Texas and its citizens.

Finally, safe transportation of spent nuclear fuel would require specialized emergency response equipment and trained personnel, as well as significant infrastructure investments. Texas currently has four counties (Bexar, Dallas, Midland, and Nueces) and one city (San Antonio) that have passed resolutions prohibiting the transportation of spent nuclear fuel and high-level waste. According to the Draft Environmental Impact Statement (at page 3-8), the cargo currently shipped on rail lines through the Permian Basin consists primarily of "oilfield commodities such as drilling mud, hydrochloric acid, fracking sand, pipe, and petroleum products, including crude oil, as well as iron and steel scrap." There are also significant agricultural commodities. In the event of a rail accident or derailment, even absent a radiological release, the resources and logistics required to address such an accident would severely disrupt the transportation of oilfield and agricultural commodities, to the detriment of the entire country.

In light of the grave risks associated with the proposed ISP facility, the absence of a permanent geologic repository, and the importance of the Permian Basin to the country's energy security and economy, I respectfully and emphatically request that the NRC deny ISP's license application.

Sincerely,

Greg Abbott
Governor

GA:jsk

cc: The Honorable Dan Brouillette, Secretary, U.S. Department of Energy
The Honorable Chad F. Wolf, Acting Secretary, U.S. Department of Homeland Security
Colonel Steven C. McCraw, Director, Texas Department of Public Safety
Mr. Toby Baker, Executive Director, Texas Commission on Environmental Quality
Ms. Ashley Forbes, Director, Radioactive Materials Division, TCEQ
Mr. James M. Bass, Executive Director, Texas Department of Transportation
Mr. Wei Wang, Executive Director, Texas Railroad Commission

EXHIBIT 5

GOVERNOR GREG ABBOTT

September 10, 2021

The Honorable Christopher T. Hanson
Chairman
U.S. Nuclear Regulatory Commission
Mail Stop 0-16 B33
Washington, D.C. 20555-0001

Re: Interim Storage Partners (ISP) Consolidated Interim Storage Facility Project, Docket ID NRC-2016-0231

Dear Chairman Hanson:

In my capacity as Governor of Texas, I previously submitted comments opposing ISP's application for a license to construct and operate a consolidated interim storage facility in Andrews County, Texas. Despite Texas's strong opposition, the NRC has been rushing to issue the requested license. I am writing again to reiterate that the proposed ISP facility is unacceptable to the State of Texas, and to put the NRC on notice of an important legal development.

On September 2, 2021, the Texas Legislature overwhelmingly passed House Bill 7, which bans the storage and disposal of high-level radioactive waste and spent nuclear fuel in Texas. The legislation also prohibits the Texas Commission on Environmental Quality from issuing certain permits for the construction or operation of a facility that stores high-level radioactive waste or spent nuclear fuel. On September 9, 2021, I signed House Bill 7, and it immediately became law. A copy of the legislation is attached for the NRC's information.

As I wrote on November 3, 2020, the State of Texas has serious concerns with the design of the proposed ISP facility and with locating it in an area that is essential to the country's energy security. Now the State has made clear that a consolidated interim storage facility is not only unwelcome here, but illegal. To avoid the potential for costly and protracted litigation, I again urge the NRC to deny ISP's license application.

Sincerely,

Greg Abbott
Governor

GA:cgd

POST OFFICE BOX 12428 AUSTIN, TEXAS 78711 512-463-2000 (VOICE) DIAL 7-1-1 FOR RELAY SERVICES

1 AN ACT
2 relating to the storage or disposal of high-level radioactive
3 waste.
4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:
5 SECTION 1. Section 401.003, Health and Safety Code, is
6 amended by adding Subdivision (12-b) to read as follows:
7 (12-b) "High-level radioactive waste" has the meaning
8 assigned by 42 U.S.C. Section 10101(12) and includes spent nuclear
9 fuel as defined by 42 U.S.C. Section 10101(23).
10 SECTION 2. Section 401.0525, Health and Safety Code, is
11 amended by adding Subsection (c) to read as follows:
12 (c) With the exception of a permit for a facility located at
13 the site of currently or formerly operating nuclear power reactors
14 and currently or formerly operating nuclear research and test
15 reactors operated by a university, the commission may not under the
16 authority given to the agency under Section 301, 304, or 401 of the
17 Clean Water Act (33 U.S.C. Sections 1311, 1314, and 1341) issue a
18 general construction permit or approve a Stormwater Pollution
19 Prevention Plan under Section 26.040, Water Code, or issue a permit
20 under the Texas Pollutant Discharge Elimination System Program
21 under Section 26.027, 26.028, or 26.121, Water Code, for the
22 construction or operation of a facility that is licensed for the
23 storage of high-level radioactive waste by the United States
24 Nuclear Regulatory Commission under 10 C.F.R. Part 72. Section

1 401.005 does not apply to this subsection.
2 SECTION 3. Subchapter C, Chapter 401, Health and Safety
3 Code, is amended by adding Section 401.072 to read as follows:
4 Sec. 401.072. DISPOSAL OR STORAGE OF HIGH-LEVEL RADIOACTIVE
5 WASTE. With the exception of storage at the site of currently or
6 formerly operating nuclear power reactors and currently or formerly
7 operating nuclear research and test reactors operated by a
8 university, a person, including the compact waste disposal facility
9 license holder, may not dispose of or store high-level radioactive
10 waste in this state.
11 SECTION 4. Section 401.0525(c), Health and Safety Code, as
12 added by this Act, applies only to an application for a permit or
13 permit amendment submitted on or after the effective date of this
14 Act.
15 SECTION 5. If any provision of this Act or its application
16 to any person or circumstance is held invalid, the invalidity does
17 not affect other provisions or applications of this Act that can be
18 given effect without the invalid provision or application, and to
19 this end the provisions of this Act are declared to be severable.
20 SECTION 6. This Act takes effect immediately if it receives
21 a vote of two-thirds of all the members elected to each house, as
22 provided by Section 39, Article III, Texas Constitution. If this
23 Act does not receive the vote necessary for immediate effect, this
24 Act takes effect December 5, 2021.

H.B. No. 7

President of the Senate

Speaker of the House

I certify that H.B. No. 7 was passed by the House on August 30, 2021, by the following vote: Yeas 94, Nays 32, 1 present, not voting; and that the House concurred in Senate amendments to H.B. No. 7 on September 2, 2021, by the following vote: Yeas 119, Nays 3, 1 present, not voting.

Chief Clerk of the House

I certify that H.B. No. 7 was passed by the Senate, with amendments, on September 1, 2021, by the following vote: Yeas 31, Nays 0.

Secretary of the Senate

APPROVED: 9-9-21

Date

Governor

FILED IN THE OFFICE OF THE SECRETARY OF STATE
__________O'CLOCK
SEP 09 2021
Secretary of State