ORAL ARGUMENT NOT SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

D.C. Cir. No. 21-1048
(Consolidated with D.C. Cir. Nos. 21-1055, 21-1056, 21-1179, 21-1227, 21-1229, 21-1230, 21-1231)

DON'T WASTE MICHIGAN, *ET AL.*,

Petitioners

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA,
Respondents

INTERIM STORAGE PARTNERS LLC,
Intervenor

Petition for Review of Final Administrative Action of the United States Nuclear Regulatory Commission

---

PETITIONER BEYOND NUCLEAR'S INITIAL OPENING BRIEF

DIANE CURRAN
Harmon, Curran, Spielberg
& Eisenberg, LLP
1725 DeSales Street NW, Suite 500
Washington, D.C. 20036
(240) 393-9285
dcurran@harmoncurran.com

MINDY GOLDSTEIN
Turner Environmental Law Clinic
Emory University School of Law
1301 Clifton Road
Atlanta, GA 30322
(404) 727-3432
magolds@emory.edu

March 18, 2022

CERTIFICATE AS TO PARTIES, RULING, AND RELATED CASES

Pursuant to D.C. Circuit Rules 27(a)(4) and 28(a)(1)(A), counsel for Petitioner Beyond Nuclear, Inc. ("Petitioner") certifies as follows:

1. Parties, Intervenors, and Amici Curiae

Petitioner is Beyond Nuclear. Respondents are the United States Nuclear Regulatory Commission ("NRC") and the United States of America. Intervenor-Respondent is Interim Storage Partners, LLC ("ISP"). Petitioner has been informed that Natural Resources Defense Council intends to seek leave to participate as an *amicus curiae* in support of Petitioner.

2. Rulings Under Review

In *Beyond Nuclear v. U.S. Nuclear Regulatory Commission and the United States of America,* No. 21-1056, Petitioner seeks review of two NRC rulings related to ISP's application to NRC for a license to build and operate a nuclear waste storage facility: (a) NRC's decision refusing to grant Petitioner a hearing, denying Petitioner's claims, and terminating the NRC licensing proceeding on review, *Interim Storage Partners LLC,* 92 N.R.C. 463 (2020); and (b) NRC's initial procedural ruling denying Petitioner's motion to dismiss the proceeding, *In the Matters of Holtec International and Interim Storage Partners LLC*, Docket Nos. 72-1051 and 72-1050, Order (Oct. 29, 2018), https://www.nrc.gov/docs/ML1830/ML18302A329.pdf.

In *Beyond Nuclear v. U.S. Nuclear Regulatory Commission and the United States of America,* No. 21-1230, Petitioner appealed NRC's issuance of the license itself.

3. Related Cases

Both of Petitioner's petitions for review have been consolidated with other petitions for review of NRC decisions in the ISP licensing proceeding in *Don't Waste Michigan v. U.S. Nuclear Regulatory Commission and the United States of America,* No. 21-1048 (consolidated with Nos. 21-1055, 21-1056, 21-1179, 21-1227, 21-1229, 21-1230, 21-1231).

In addition, petitions for review of NRC decisions in the same ISP licensing proceeding are pending in the Fifth and Tenth Circuits of the U.S. Court of Appeals: *State of Texas v. U.S. Nuclear Regulatory Commission and the United States of America,* No. 21-60743 (5th Cir.); and *State of New Mexico v. U.S. Nuclear Regulatory Commission and the United States of America,* No. 21-9593 (10th Cir.). Petitioner is not a participant in either of those cases.

Finally, this Court currently has before it *Beyond Nuclear v. U.S. Nuclear Regulatory Commission and the United States of America,* No. 20-1187 (consolidated with Nos. 20-1225, 21-1104, 21-1147 and held in abeyance). While that case involves a different nuclear waste storage facility, the legal basis for Petitioner's petition for review is substantially the same as in the instant case. And

one of the NRC orders on review in this proceeding (the 2018 Order) is also on review in No. 20-1187.

Respectfully Submitted,

___/signed electronically by/__
Diane Curran
Harmon, Curran, Spielberg, & Eisenberg, L.L.P.
1725 DeSales Street N.W., Suite 500
Washington, D.C. 20036
240-393-9285
Email: dcurran@harmoncurran.com

Counsel for Petitioner

March 18, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Judicial Authorities

Statutes

Regulations

Administrative Decisions

Federal Register Notices

Miscellaneous

GLOSSARY

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

Act	Nuclear Waste Policy Act of 1982
APA	Administrative Procedure Act
Board	Atomic Safety and Licensing Board
DOE	U.S. Department of Energy
Holtec	Holtec International
JA	Joint Appendix
ISP	Interim Storage Partners, LLC
NRC	Nuclear Regulatory Commission
Petitioner	Beyond Nuclear, Inc.
WCS	Waste Control Specialists LLC

JURISDICTIONAL STATEMENT

Pursuant to 42 U.S.C. § 2239(b), 28 U.S.C. § 2342(4), 42 U.S.C. § 10139(a)(1)(B), and 5 U.S.C. § 702, this Court has jurisdiction over two petitions filed by Beyond Nuclear, Inc. ("Petitioner") for review of final decisions rendered by the U.S. Nuclear Regulatory Commission ("NRC") in a licensing proceeding for a nuclear waste storage facility.

In No. 21-1056, Petitioner seeks review of NRC's decision refusing to grant Petitioner a hearing, denying Petitioner's claims, and terminating the proceeding. *In the Matter of Interim Storage Partners LLC,* 92 N.R.C. 463 (2020) (JA__) ("*ISP Decision"*). Petitioner also seeks review of NRC's initial procedural ruling denying Petitioner's motion to dismiss the proceeding. *In the Matters of Holtec International and Interim Storage Partners LLC*, Docket Nos. 72-1051 and 72-1050, Order (Oct. 29, 2018), www.nrc.gov/docs/ML1830/ML18302A329.pdf (JA__) ("2018 Order"). While Petitioner had sought and been refused immediate judicial review of the 2018 Order in No. 18-1340, it has now been rendered reviewable by NRC's subsequent issuance of a final decision denying all of Petitioner's claims. *Commonwealth of Massachusetts v. United States Nuclear Regulatory Comm.*, 924 F.2d 311, 323 (D.C. Cir. 1991) (holding reviewable "preliminary, intermediate or procedural rulings" in the same proceeding).

In No. 21-1230, to ensure the ripeness of its claims in No. 21-1056, Petitioner appealed NRC's issuance of the license itself. *See* Order Governing Future Proceedings at 1, *Don't Waste Michigan v. NRC,* No. 21-1048 (Nov. 10, 2021) (JA__).

Both of Petitioner's petitions for review were timely filed under 28 U.S.C. § 2344. Both have been consolidated with *Don't Waste Michigan v. NRC,* No. 21-1048.

STATUTES AND REGULATIONS

Relevant statutes and regulations are included in an addendum.

ISSUES PRESENTED FOR REVIEW

1. Did NRC violate the Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10101, *et seq.* (the "Act"), and the Administrative Procedure Act, 5 U.S.C. §§ 706(2)(A), (C) (the "APA"), when it refused to dismiss a licensing proceeding for an application to store federally-owned nuclear waste at a private facility, at the expense of the U.S. Department of Energy ("DOE"), and prior to the opening of a permanent repository?
2. Did NRC violate the Nuclear Waste Policy Act and the APA by issuing a license that authorized storage of federally-owned nuclear waste at a private facility, at DOE's expense, and prior to the opening of a permanent repository?

STATEMENT OF THE CASE

This appeal challenges NRC decisions to consider and then issue a license to Interim Storage Partners, LLC ("ISP") for private storage of up to 40,000 metric tons of nuclear waste (often called "spent fuel") generated by U.S. nuclear reactors, amounting to nearly half the nation's inventory of spent fuel currently stored at reactor sites. In particular, Petitioner seeks review of an unlawful license provision authorizing ISP to store DOE-owned spent fuel at its private facility, at DOE's expense. That provision is inconsistent with three key prohibitions and limitations in the Act: the prohibition against federal assumption of ownership of privately generated spent fuel until a repository has opened, the prohibition against transferring spent fuel storage costs from private reactor licensees to the federal government, and the limitation that only DOE may be licensed to operate a facility for storage of federally-owned spent fuel. NRC may not disregard the unambiguous mandates of Congress, and therefore its ISP licensing decisions must be reversed and vacated.

STATUTORY AND FACTUAL BACKGROUND

I. DEVELOPMENT OF FEDERAL LAW FOR SPENT FUEL STORAGE AND DISPOSAL

A. NRC Safety Regulations for Spent Fuel Storage

In 1980, as authorized by the Atomic Energy Act of 1954, 42 U.S.C. § 2011 *et seq*., and the Energy Reorganization Act of 1974, 42 U.S.C. § 5842, NRC promulgated its first set of safety regulations for spent fuel storage at reactor sites and "away-from reactor" sites. 45 Fed. Reg. 74,693 (Nov. 12, 1980). The regulations authorized licensing of private companies and DOE. *Id.* at 74,699–700 (10 C.F.R. §§ 72.2, 72.3(p) (1980)).

The regulations also required license applicants, including DOE, to demonstrate their financial qualifications to build, operate, and decommission spent fuel storage facilities. *Id.* at 74,703 (10 C.F.R. §§ 72.31(a)(6), (10) (1980)). That would change with the passage of the Nuclear Waste Policy Act. *See* Section I.C. below.

B. Nuclear Waste Policy Act

In 1982, Congress passed the Nuclear Waste Policy Act to address the "national problem" posed by the growing inventory of spent fuel at reactor sites. *Bullcreek v. NRC,* 359 F.3d 536, 538 (D.C. Cir. 2004).

1. Permanent disposal in a federal repository: Congress's priority

The Act's primary purpose was to provide for permanent disposal of spent fuel in a federal repository. 42 U.S.C. § 10131(b). *See also* Subtitle A, 42 U.S.C. §§ 10121–45. It required DOE to build and operate the repository, licensed by NRC. 42 U.S.C. §§ 10134(b), (d).

The Act prohibited transfer of title of spent fuel from reactor licensees to DOE until DOE opened its repository and was ready to receive the waste. 42 U.S.C. § 10222(a)(5)(A). The eventual transfer of title would not include transfer of financial responsibility, however. Instead, the Act required reactor licensees to bear the costs of building and operating the repository, through contributions to a federal Nuclear Waste Fund. 42 U.S.C. §§ 10131(a)(4), 10222.

2. Limited federal storage

The Act also contained two programs for federal storage of spent fuel, Subtitle C, 42 U.S.C. §§ 10161–69 (Monitored Retrievable Storage), and Subtitle B, 42 U.S.C. §§ 10151–57 (Interim Storage). Congress strictly limited these programs out of concern that federal spent fuel storage "would detract from efforts to develop a permanent repository, would lead to increased transportation of fuel, and would lead to utilities' avoiding taking initiative to solve their own spent fuel

storage problems." *Private Fuel Storage,* 56 N.R.C. 390, 404 (2002) (citing 128 Cong. Rec. 28,032-33 (1982)), *aff'd, Bullcreek,* 359 F.3d 536.[1]

Thus, Congress permitted only DOE to build and operate Monitored Retrievable Storage facilities, and only after DOE submitted to Congress a "proposal" that included design elements, cost estimates, and a set of alternative sites. 42 U.S.C. § 10161(b). Similarly, only DOE could build or operate Interim Storage facilities. 42 U.S.C. § 10151(b)(2). Congress further required reactor licensees to cover the cost of Monitored Retrievable Storage facilities, 42 U.S.C. §§ 10161(a)(4), (b)(2)(B), and Interim Storage facilities, 42 U.S.C. § 10156.

Finally, for Monitored Retrievable Storage, Congress made no exception to the Act's prohibition against DOE assumption of title to spent fuel before a repository opened. 42 U.S.C. § 10222(a)(5)(A). Even construction of a Monitored Retrievable Storage facility required Congressional approval and could not commence until NRC had licensed a repository. 42 U.S.C. §§ 10161(b), 10168(d)(1).

The Act's only exception to the prohibition against federal ownership of spent fuel prior to the opening of a repository was for the strictly limited and short-term emergency Interim Storage program, which sunset on January 1, 1990. 42

---

[1] *See also* 128 Cong. Rec. 28,037 (1982) ("Here is the problem: We will never have a permanent repository if the utilities do not have a need for one.") (Rep. Markey).

U.S.C. § 10156(a)(1). Under this program, reactor licensees could transfer no more than 1,900 metric tons of spent fuel to DOE, by demonstrating an urgent lack of onsite storage capacity. 42 U.S.C. §§ 10155(a), (b).

C. Revised NRC Safety Regulations

In 1988, responding to passage of the Nuclear Waste Policy Act, NRC amended its safety regulations to add federal Monitored Retrievable Storage. 53 Fed. Reg. 31,651-01, 31,654 (Aug. 19, 1988).[2] For the first time, based on DOE's presumed access to the Nuclear Waste Fund, the amended regulations excused DOE from demonstrating its financial qualifications to operate its own storage facilities or possession of sufficient funds to complete decommissioning. *Id.* (10 C.F.R. §§ 72.40(a)(6), (10) (1988)). For commercial applicants seeking to store privately-owned spent fuel, the regulations continued to require a demonstration of financial qualifications and adequacy of decommissioning funding. *Id*. These regulations remain in effect.

Thus, under current NRC safety regulations implementing the Nuclear Waste Policy Act, the only type of away-from-reactor facility for storage of federally-owned spent fuel that NRC may license is a federally-owned and operated, Congressionally-approved Monitored Retrievable Storage facility.

---

[2] NRC never adopted regulations concerning the Interim Storage program, which expired January 1, 1990.

Otherwise, the Atomic Energy Act continues to authorize NRC to license only *private* companies to build facilities for storage of *privately-owned* spent fuel. *Bullcreek,* 359 F.3d at 542 (when passing the Nuclear Waste Policy Act, Congress left the Atomic Energy Act-based regulatory scheme for privately owned waste "as it found it.").

D. President's Blue Ribbon Commission

In 2012, a presidential Blue Ribbon Commission recommended a new spent fuel disposal program, including consolidated storage of federally-owned spent fuel prior to opening of a repository. Beyond Nuclear Motion to Dismiss Licensing Proceedings ("Motion to Dismiss"), (Nos. 72-1050, 72,1051) at 14 (Sept. 14, 2018) (JA_) (citing Blue Ribbon Commission on America's Nuclear Future, *Report to the Secretary of Energy* (2012)). DOE endorsed the recommendations. *Id.* at 15 (citing *Strategy for the Management and Disposal of Used Nuclear Fuel and High-Level Radioactive Waste* (2013)) (JA__). But both DOE and the Blue Ribbon Commission recognized that federal legislation was necessary before the recommendations could be implemented. *Id.* at 14-15 (JA__). To date, Congress has not acted on the recommendations, nor has it made any changes to the Nuclear Waste Policy Act.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. ISP License Application

The first license application for a spent fuel storage facility on ISP's current site was submitted in 2016 by Waste Control Specialists LLC ("WCS"), seeking to store up to 40,000 metric tons of spent fuel. Environmental Report, at 4-8 (JA_).

While WCS applied to operate the proposed facility as a private business, it assumed that the spent fuel itself would be owned by DOE. Thus, the license application unequivocally asserted that DOE will be "contractually responsible for taking title of the spent fuel at the commercial reactor sites and transporting the spent fuel to the [facility]," and that "WCS shall not receive [spent fuel] until such a contract with the DOE is provided to the NRC as a condition of the license." *Id.* at 1-1, 1-6 (JA_).

Petitioner challenged the legality of the application under the Nuclear Waste Policy Act's prohibition against DOE ownership of spent fuel prior to the opening of a permanent repository. Curran, et al. letter to Victor McCree, NRC (Oct. 27, 2016) (JA_). NRC later suspended its review. 82 Fed. Reg. 33,521 (July 20, 2017) (JA_).

WCS and Orano CIS, LLC subsequently formed ISP as a joint venture and submitted a revised application, once again proposing to store up to 40,000 metric tons of spent fuel. Environmental Report at 1-1 (JA_). ISP's application differed

from WCS' application in one relevant respect: all previous language proposing that DOE would own the spent fuel was changed to provide that responsibility and ownership would lie with *either* DOE or private companies. ISP License Application at 1-1 – 1-2 (JA__); Environmental Report at 3-5, 7-15 (JA__). Thus, ISP's proposed license provided:

> Prior to commencement of operations, the licensee shall have an executed contract with the U.S. Department of Energy (DOE) or other [spent fuel] Title Holder(s) stipulating that DOE or the other [spent fuel] Title Holder(s) is/are responsible for funding operations required for storing the material.

Proposed License Conditions at A-4 (JA_).

B. Administrative Challenges and Denials

1. Motion to terminate the ISP and Holtec licensing proceedings

In 2018, NRC noticed a hearing opportunity on ISP's revised license application. 83 Fed. Reg. 44,070 (Aug. 29, 2018) (JA_). Petitioner immediately moved the Commission to terminate the proceeding and dismiss the application on the ground that "the central premise" of the proposed license – that DOE will be responsible for spent fuel during transportation and storage – violated the Nuclear Waste Policy Act's prohibition against DOE assumption of title to spent fuel unless and until a permanent repository has opened. Motion to Dismiss at 19-20 (JA_).

Petitioner's motion also sought dismissal of an NRC proceeding to consider a similar, concurrent application by Holtec International ("Holtec") to build and

operate another large, private facility for storage of either DOE-owned or privately owned spent fuel, approximately 40 miles away in New Mexico. *Id.* at 1 (JA__).

Rather than ruling on Petitioner's motion, the Commission instructed the Atomic Safety and Licensing Board ("Board") to consider Petitioner's claims in the individual licensing proceedings for the ISP and Holtec facilities. 2018 Order at 3 (JA_). In both proceedings, however, the Board refused to grant, or even hear, Petitioner's claims. In light of all the parties' "agreement" that "under current law, ISP may not contract for DOE to take title to private companies' spent nuclear fuel," the Board found "no dispute that warrants devoting agency resources to further legal briefing or to an evidentiary hearing." *Interim Storage Partners LLC,* 90 N.R.C. 31, 59 (2019) (JA_) (*"ISP Board Ruling"*). *See also Holtec International,* 89 N.R.C. 353, 382 (2019).

2. Commission decisions on ISP and Holtec applications

The Commission affirmed the Board in both cases. *ISP Decision,* 92 N.R.C. at 467-69 (JA_); *Holtec International,* 91 N.R.C. 167, 173-76 (2020) ("*Holtec Decision*").

a. *Holtec Decision*

The Holtec administrative proceeding concluded first. In reviewing the Board's decision, the Commission acknowledged that "it would be illegal under [the Act] for DOE to take title to the spent nuclear fuel at this time." 91 N.R.C. at

174. Nevertheless, the Commission found that the license itself was lawful because it "would not violate the [Act] by transferring title to the fuel, nor would it authorize Holtec or DOE to enter into storage contracts." *Id.* at 176. And Holtec could "hope" that Congress would amend the Act to allow DOE to take title to the spent fuel. *Id.* In the meantime, under the "presumption of regularity," Holtec and DOE could be assumed "to act properly" and not enter into unlawful contracts. *Id.* (citing *United States v. Armstrong,* 517 U.S. 456, 464 (1996) and *United States v. Chem. Found., Inc.,* 272 U.S. 1, 14-15 (1926)).

The Commission also found that the inclusion of a lawful provision in the license, allowing Holtec to contract with private reactor licensees for storage of spent fuel, saved the validity of the entire license, because Holtec could "enter into lawful customer contracts today" and wait to contract with "additional" customers "if and when [such contracts] become lawful in the future." *Id.*

Petitioner appealed the *Holtec Decision* to this Court in No. 20-1187. The case has been held in abeyance pending conclusion of the administrative proceeding as to other parties.

b. *ISP Decision*

Seven months later, relying on the *Holtec Decision,* the Commission affirmed the Board's rejection of Petitioner's claims against ISP's license. *ISP Decision,* 92 N.R.C. at 467-69 (JA_). As in the *Holtec Decision,* the Commission

agreed with Petitioner – and the other parties – that the Nuclear Waste Policy Act "does not authorize DOE to take title to [spent fuel] at this time." *Id.* at 467 (JA_). The Commission also recognized that ISP's license conferred a legal right on ISP that is inconsistent with the Act: the right to "bid[] for a contract with DOE." *Id.* at 468 (JA_).

Despite acknowledging the license's inconsistency with the Act, the Commission concluded the license did not actually violate it. The Commission reasoned in circles: because the Act itself would preclude ISP and DOE from entering the unlawful contracts authorized by the license, the license could not violate the Act. *Id.* at 469 (JA_) (citing *Kaiser Steel Corp. v. Mullins,* 455 U.S. 72, 77-78 (1982) for the proposition that "an illegal contract is unenforceable."). Moreover, ISP was entitled to "hope" that one day Congress would change the law to allow it to contract with DOE for storage of federally-owned spent fuel. *Id.* If and when the law changed, "ISP could take advantage of [the changed law] by bidding for a DOE contract without having to first amend its license." *Id.* at 468 (JA_). Finally, the Commission found that ISP's license was "not premised on illegal activity" because the license included a lawful option allowing ISP to contract with private reactor licensees. *Id.* at 469 (JA__).

C. Issuance of ISP License

On September 13, 2021, NRC issued a license to ISP. 86 Fed. Reg. 51,926-02 (Sept. 17, 2021) (JA__).

D. Petitions for Review

Petitioner sought review of the *ISP Decision* in No. 21-1056 and the license issuance in No. 21-1230. The cases were consolidated with *Don't Waste Michigan, et al. v. NRC,* No. 21-1048.

SUMMARY OF THE ARGUMENT

The primary goal of the Nuclear Waste Policy Act is to provide for the siting, construction, and operation by DOE of a permanent geologic repository where dangerous spent fuel can be placed indefinitely, at the smallest possible risk to humankind. *See* 42 U.S.C. § 10131. The Act contains significant and unambiguous prohibitions to ensure completion of a repository is not undermined by DOE's premature adoption of ownership of spent fuel at interim storage facilities. *Private Fuel Storage,* 56 N.R.C. at 404. Key among these prohibitions, the Act forbids DOE from taking responsibility for spent fuel generated by private reactors before a federal repository for permanent disposal of the waste becomes operational. 42 U.S.C. §§ 10131(a)(5), 10222(a)(5)(A), 10143. Further, the Act prohibits NRC from licensing any entity but DOE to build and operate a facility for storage of federally-owned spent fuel. It also precludes NRC from assigning spent

fuel storage costs to DOE, instead giving the generators of spent fuel "the primary responsibility to provide for, and … to pay the costs of, the interim storage of such waste and spent fuel." *Id.* at §§ 10131(a)(5), 10151(a)(1).

NRC's consideration and issuance of ISP's license violated all three of these prohibitions, thereby violating the APA. 5 U.S.C. §§ 706(2)(A), (C) (prohibiting decisions "not in accordance with law" or "in excess of statutory authority"). NRC's exceedance of its statutory authority also violated the constitutional separation of powers doctrine. And NRC's attempts to legitimate its actions by relying on the judicial presumption of regularity and the inclusion of lawful alternative license provisions do not cure these violations.

Accordingly, this Court should reverse and vacate ISP's license and hold that NRC violated the Nuclear Waste Policy Act and APA.

PETITIONER'S STANDING

Petitioner's Docketing Statement and attached standing declarations by Petitioner's members Rose Gardner, D.K. Boyd, Robert Boyd, and Anita Ireland demonstrate Petitioner's standing to bring this petition. Those members live and/or work within a few miles of the radioactive spent fuel that would be stored at ISP's facility. In the proceeding below, based on Rose Gardner's declaration, the Board found that Petitioner had satisfied "judicial concepts of standing." *ISP Board*

Ruling, 90 N.R.C. at 47 (JA_).[3] The Board's conclusion, which was not challenged on administrative appeal, is consistent with *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1265-66 and 1278-80 (D.C. Cir. 2004).

ARGUMENT

I. STANDARD OF REVIEW

In *Chevron U.S.A, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984), the Supreme Court established two steps for review of an agency's construction of a statute it administers. In the first step, if "Congress has spoken unambiguously to the question at hand," the court "must follow that language and give it effect." *Ind. Mich. Power Co. v. DOE,* 88 F.3d 1272, 1274 (D.C. Cir. 1996) (citing *Chevron* and quoting *Wisconsin Elect. Power Co. v. DOE,* 778 F.2d 1, 4 (D.C. Cir. 1985)). In addition to the "bare meaning" of a statutory provision, the court must also consider "its placement and purpose in the statutory scheme." *Id.* at 1275 (citing *Bailey v. United States,* 516 U.S. 137, 145 (1995), *superseded on other grounds, Welch v. United States,* 578 U.S. 120, 133 (2016)). Where an agency decision is "not an interpretation but a rewrite" of the statute, it "does not survive the first step" of *Chevron* review. *Ind. Mich. Power Co.,* 88 F.3d. at 1276.

---

[3] Because Rose Gardner lives within seven miles of the proposed facility, the Board did not find it necessary to consider the standing declaration of D.K. Boyd, who owns and ranches land located four miles from the facility.

Because NRC concedes that the Act prohibits ISP from contracting with DOE to store federally-owned spent fuel, and prohibits DOE from taking title to the spent fuel in the first place, ISP's license constitutes an unlawful "rewrite" of the Nuclear Waste Policy Act that cannot survive the first step of the *Chevron* analysis. *Id.,* 88 F.3d at 1274. The Court "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc.,* 467 U.S. at 842-43.

II. NRC'S CONSIDERATION AND APPROVAL OF ISP'S LICENSE VIOLATED THE NUCLEAR WASTE POLICY ACT AND THE APA

A. NRC violated the Act's Plain Language and Intent

By considering and then approving ISP's license application, NRC flouted the plain language of the Nuclear Waste Policy Act in three significant respects. First, while 42 U.S.C. § 10222(a)(5)(A) expressly prohibits federal ownership of spent fuel before a repository is operational, ISP's license explicitly allows ISP to contract with DOE for storage of DOE-owned spent fuel. Interim Storage Partners LLC, License SNM-2515 (Sept. 13, 2021) ("License") (providing in Provision 19 that "[p]rior to the commencement of operations, [ISP] shall have an executed contract with [DOE] or other [spent fuel] title holders") (JA_). *See also ISP Decision,* 92 N.R.C. at 469 (JA_) (recognizing that ISP can contract with DOE without amending its license). Second, while 42 U.S.C. § 10168(b) authorizes NRC to license only DOE to site, build, and operate a facility for storage of federally-owned spent fuel, NRC has licensed ISP, a private company, to carry out

those actions. License at 3. Third, while 42 U.S.C. § 10161(a)(4) mandates that reactor licensees bear the cost of spent fuel storage, ISP's license allows those costs to shift to DOE. *Id.* (providing in Provision 19 that "DOE or other [spent fuel] title holders is/are responsible for funding operations required for storing" the spent fuel at ISP's facility).

Furthermore, NRC's actions violate the "statutory scheme" of the Nuclear Waste Policy Act. *Indiana Mich. Power Co.,* 88 F.3d at 1275. The Act is designed to ensure the completion of a repository by limiting federal interim storage, and thereby precluding reactor licensees from "avoiding taking initiative to solve their own spent fuel storage problems." *Private Fuel Storage,* 56 N.R.C. at 404. NRC's licensing of ISP to store federally-owned spent fuel at DOE's expense upends that statutory scheme.

Because NRC's decisions comport with neither the plain language nor statutory purpose of the Act, "that is the end of the matter." *Chevron,* 467 U.S. at 842. "[T]he court, as well as the agency, must give effect to the unamibigously expressed intent of Congress." *Id.* at 842-843. *See also Nat'l. Ass'n of Regulatory Util. Comm'rs,* 736 F.3d. 517, 520 (D.C. Cir. 2013) (rejecting NRC's decision premised on a "wholesale reversal" of the Nuclear Waste Policy Act's statutory scheme as "flatly unreasonable"). Accordingly, NRC's decisions must be rejected

as "not in accordance with law," "in excess of statutory jurisdiction, authority, or limitations," and "short of statutory right." 5 U.S.C. §§ 706(2)(A), (C).

B. The Presumption of Regularity Does Not Excuse NRC's Unlawful Conduct

While conceding that ISP's license contained terms that violated the Nuclear Waste Policy Act, NRC rationalized that DOE could be presumed to comply with the Act as currently written, under the judicial presumption of regularity. *Holtec Decision,* 91 N.R.C. at 175 (citing *Armstrong,* 517 U.S. at 464, and *Chem. Found.,* 272 U.S. at 14-15). *See also ISP Decision,* 92 N.R.C. at 467 (JA_) (adopting the reasoning of the *Holtec Decision*).

But the presumption of regularity provides NRC no protection from the prohibitions of the APA, because NRC itself has not acted with regularity. The presumption of regularity applies "generally" to the official conduct of the entire "Government," including both DOE and NRC. *United States Dep't of State v. Ray,* 502 U.S. 164, 179 (1991). *See also Nat'l Archives & Records Admin. v. Favish,* 541 U.S. 157, 174 (2004) (characterizing the presumption of regularity as a "general working principle" that "supports the official acts of public officers"). This "general working principle" would become meaningless if one government agency could excuse its own admittedly unlawful conduct by assuming that another agency will refuse to follow suit. *Armstrong* and *Chem. Found.* do not hold

otherwise.[4] Having issued a license that admittedly violates the Nuclear Waste Policy Act, NRC has disqualified itself from relying on the presumption of regularity.[5]

C. The Inclusion of a Lawful License Provision Does Not Excuse NRC's Unlawful Conduct

Nor is NRC shielded from the APA by the inclusion in ISP's license of a lawful provision allowing ISP to contract with private generators for storage of their spent fuel. *ISP Decision,* 92 N.R.C. at 469 (JA_). Courts have long recognized that unlawful provisions must be severed, whether they appear in federal statutes, *Barr v. American Association of Political Consultants,* 140 S.Ct. 2335, 2350 (2020); regulations, *K-Mart Corp. v. Cartier*, 486 U.S. 281, 294 (1988); or contracts, Restatement (Second) of Contracts 184(1) (1981). Although courts may grapple with how to sever an unlawful provision while keeping the remaining lawful provisions intact (*see, e.g., Barr,* 140 S.Ct. at 2352), no court has

---

[4] *See also Natural Resources Defense Council,* 822 F.2d at 111 (presumption of regularity does not apply to actions that are "not in accordance with law"); *Nat'l Archives & Records Admin.,* 541 U.S. at 174 (presumption of regularity does not apply where there is "clear evidence" of "Government impropriety").

[5] NRC also cited *Kaiser Steel Corp.,* 455 U.S. at 77-78, for the proposition that "there is no credible possibility" ISP and DOE would enter unlawful contracts because they would be "unenforceable." 92 N.R.C. at 467 (JA__). But *Kaiser Steel Corp.* holds only that contracts are not enforceable if fulfillment of their terms would violate federal law. Nothing in *Kaiser* sanctions a federal agency's intentional inclusion of unlawful terms in its licenses.

held that these lawful provisions somehow rescue the unlawful ones. Instead, all proceed on the seemingly obvious premise that the unlawful provisions must be removed. The ISP license is no different: the addition of a lawful option does not excuse the unlawful option, which must be "set aside." 5 U.S.C. § 706(2).

III. NRC'S ISSUANCE OF ISP'S LICENSE VIOLATED THE CONSTITUTIONAL SEPARATION OF POWERS DOCTRINE

A. NRC Violated the Separation of Powers Doctrine

As this Court has recognized, "allowing agencies to ignore statutory mandates and prohibitions based on agency speculation about future congressional action" would "gravely upset the balance of powers between the Branches and represent a major and unwarranted expansion of the Executive's power at the expense of Congress." *In re Aiken Cnty.,* 725 F.3d 255, 260 (D.C. Cir. 2013). In *Aiken Cnty.,* NRC refused to process DOE's license application for the Yucca Mountain repository as required by the Nuclear Waste Policy Act, based on a "political prognostication" that Congress would not provide future funding to "complete the licensing process." *Id.* This Court flatly rejected NRC's approach, warning that allowing the agency to "simply defy[] a law enacted by Congress" would have "serious implications for our constitutional structure." *Id.* at 266-7.

Here, similar to *Aiken Cnty.,* NRC refused to dismiss ISP's application or terminate the ISP licensing proceeding, based only on the "hope" that a future Congress will abandon the Act's statutory prohibitions and thereby legitimate

ISP's now-unlawful license term. *Holtec Decision,* 91 N.R.C. at 176. This "hope" is necessarily premised on NRC's speculation that Congress will abandon its entire statutory scheme of preventing reactor licensees from foisting their liability and responsibility for spent fuel onto the federal government before a permanent repository has opened. *See Private Fuel Storage,* 56 N.R.C. at 404. But the separation of powers doctrine precludes NRC from relying on "political prognostications" about future Congressional actions to issue a license that "defies" both the text and the underlying purpose of the Nuclear Waste Policy Act as currently enacted. *In re Aiken,* 725 F.3d at 260, 266.

B. Future Actions by ISP or DOE Cannot Excuse NRC's Unlawful Conduct

NRC's violation of the separation of powers doctrine is not excused by the fact that the Nuclear Waste Policy Act currently precludes ISP from contracting with DOE. *See ISP Decision,* 92 N.R.C. at 469 (JA __). NRC's decisions have practical effects that undermine Congress' authority, regardless of whether ISP and DOE take the actions it authorized in the ISP license.

First, NRC's decisions impermissibly weakened Congressional authority by transferring to ISP a significant set of property rights that will persist into the future: the rights to choose a site, build, and operate a storage facility, and take possession of federally-owned spent fuel there. Congress, if it amends the Nuclear Waste Policy Act, will have to either affirm or negate those property rights. But,

the separation of powers doctrine requires NRC to respond to Congressional decisions, not the other way around. If NRC is allowed to use anticipatory licensing decisions to weight the political process, it will "gravely upset the balance of power" between itself and Congress. *Aiken Cnty.,* 725 F.32d at 260-61.

Second, by licensing ISP to store federally-owned spent fuel at a private facility, NRC effectively exchanged its statutory role of regulator for the role of ISP's political and economic tactician. Indeed, NRC's conceded aim in approving the unlawful license term was to position ISP to "take advantage" of Congress' anticipated change to the law by "bidding for a DOE contract without having to first amend its license." *ISP Decision,* 92 N.R.C. at 468 (JA_). Giving ISP the strategic "advantage" of a currently-unlawful license designed to anticipate future political changes, 92 N.R.C. at 468 (JA_), bears no relation to NRC's statutory mandate to "protect health" and "minimize danger to life or property." 42 U.S.C. § 2201(b).

CONCLUSION AND REQUEST FOR RELIEF

By considering and then approving ISP's license application, NRC has violated both the plain language and purpose of the Nuclear Waste Policy Act. Therefore, as required by the APA, the court should "hold unlawful" and "set aside" NRC's decisions, reversing and vacating them. 5 U.S.C. § 706(2).

Respectfully submitted,

___/signed electronically by/__
Diane Curran
Harmon, Curran, Spielberg, & Eisenberg, L.L.P.
1725 DeSales Street N.W., Suite 500
Washington, D.C. 20036
240-393-9285
Email: dcurran@harmoncurran.com

___/signed electronically by/__
Mindy Goldstein
Turner Environmental Law Clinic
Emory University School of Law
1301 Clifton Road
Atlanta, GA 30322
404-727-3432
Email: magolds@emory.edu

Counsel for Petitioner

March 18, 2022

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure Rule 32(a)(7)(C) and Circuit Rule 32(a)(2)(C), I certify that the attached Initial Opening Brief is proportionately spaced, has a typeface of Times New Roman, 14 points, and contains less than 5,000 words. This figure includes footnotes and citations, but excludes the Cover Page, Table of Contents, Table of Authorities, signature blocks, Certificate of Compliance, Certificate of Service, Addendum of Statutes, Rules, and Regulations, and Standing Addendum. I have relied on Microsoft Word's calculation feature for this calculation.

/s/ *Diane Curran*
Diane Curran
Harmon, Curran, Spielberg
& Eisenberg, LLP
1726 M Street NW, Suite 600
Washington, D.C. 20036
Tel: (202) 328-3500
Email: dcurran@harmoncurran.com
Counsel for Petitioner Beyond Nuclear

March 18, 2022