

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In re TEXAS,)	No. 17-60191
Petitioner.)	
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RESPONSE OF NUCLEAR REGULATORY COMMISSION AND ASSOCIATED RESPONDENTS TO MOTION FOR DECLARATORY JUDGMENT AND PRELIMINARY INJUNCTION

The State of Texas has filed a petition for a writ of mandamus against the U.S. Nuclear Regulatory Commission (“NRC”), as well as the Department of Energy (“DOE”) and the Department of Treasury, including their principal cabinet officers. Texas has now filed a motion for declaratory judgment and preliminary injunction asking this Court (1) to declare that DOE has violated the Nuclear Waste Policy Act by taking certain actions; and (2) to enjoin it from any further alleged violations of the Act. The NRC responds in opposition to the motion.¹

As an initial matter, the motion is procedurally improper. This Court has properly treated the case as a petition for a writ of mandamus. Indeed, the caption on this Court’s orders categorizes it as such. As a consequence, this Court imposed a briefing schedule in accordance with Fed. R. App. P. 21, calling for

¹ Our arguments on behalf of NRC apply equally to Texas’s claims against the Atomic Safety and Licensing Board, the Chairman, and the three Licensing Board judges named in Texas’s Petition (“Associated NRC Respondents”).

responses to the petition by April 19, 2017, *see* Order of March 20, 2017, and it later extended the deadline until May 30, *see* Order of April 14, 2017, and then June 29, 2017, *see* Order of May 30, 2017. No other filings by Texas, or separate treatment of Texas's individual requests for relief, was contemplated or is necessary to resolve the issues in this case.

NRC takes no position with respect to the merits arguments Texas advances in support of its motion, which seeks no relief against NRC. However, NRC disputes Texas's contention, offered with no supporting evidence, that the continued storage of spent nuclear fuel in Texas—fuel employed by plants operating in Texas that provide electricity to the citizens of Texas—*ipso facto* results in irreparable harm to the State and otherwise militates in favor of injunctive relief (Motion at 17-19).

The Atomic Energy Act is “a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives.” *Siegel v. AEC*, 400 F.2d 778, 783 (D.C. Cir. 1968). As NRC has recently explained, the agency's “statutory obligation to ensure the adequate protection of public health and safety encompasses an ongoing responsibility to regulate the continued storage of spent fuel, with or without a repository.” *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI.-15-4, 81 N.R.C. 221, 242

(2015). And the agency has concluded, on the basis of the technical judgment that Congress created it to exercise, that “spent fuel can be safely stored until a repository is available, or indefinitely should such storage become necessary.” *Id.*; *see also New York v. NRC*, 824 F.3d 1012 (D.C. Cir. 2016) (affirming NRC’s evaluation of the environmental impacts of the continued onsite storage of spent fuel, including storage over for an indefinite time-frame in which no repository is constructed).

Texas fails to demonstrate how any remote dangers associated with the storage of spent fuel at NRC-regulated facilities that meet the agency’s safety standards create a legally cognizable injury, let alone a substantial threat of imminent irreparable harm. *See Chacon v. Granata*, 515 F.2d 922, 925 (5th Cir. 1975). Like the four states that challenged NRC’s policies concerning the storage of spent fuel in *New York*, Texas’s concerns about the continued onsite storage of spent fuel raise policy issues that “should be directed to Congress.” *Id.* at 1023.

Nor do the cases that Texas cites on page 18 of its motion support its arguments in favor of a finding of imminent irreparable harm. *Massachusetts v. EPA*, 549 U.S. 497, 526 (2007), held that a state had standing to challenge the denial of a petition for rulemaking related to global warming; neither the decision nor the quotation Texas provides speaks to the substantiality or imminence of the threat involved or the propriety of an injunction.

Likewise, the portion of the decision in *New Mexico v. Watkins*, 969 F.2d 1122 (D.C. Cir. 1992), that Texas points to involved a district court's finding of irreparable harm from the deposit of radioactive waste into a new, experimental storage facility with no guarantee of retrievability. *Id.* at 1129. But the district court in *Watkins* did not find that storing spent fuel in an existing spent fuel storage facility in accordance with NRC regulations would cause irreparable harm to the State. Moreover, contrary to Texas's insinuation, the D.C. Circuit's affirmance of the injunctive relief ultimately issued did not rest upon any risk associated with the waste itself. *Id.* at 1138.

Finally, Texas cites *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987), for the proposition that environmental injury can be irreparable. But Texas ignores the very next sentence of the Supreme Court's decision, which indicates that injunctive relief is not warranted where, as here, the injury is "not at all probable."

Accordingly, this Court should deny Texas's motion and decide the case on the basis of Texas's petition and the responses directed by the Court.

Respectfully submitted,

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June 12, 2017

CERTIFICATE OF SERVICE

I hereby certify that on the date below a copy of the foregoing was filed electronically with the Clerk and served upon all counsel of record in the case through the court's CM/ECF System.

Dated: June 12, 2017

/s/Charles E. Mullins

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with (1) the type-volume limit of Fed. R. App. P. 21(d) because it contains 855 words; and (2) the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word 2013.

Dated: June 12, 2017

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