No. 17-60191

# In the United States Court of Appeals for the Fifth Circuit

TEXAS, *Petitioner*,

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF ENERGY; JAMES RICHARD "RICK" PERRY, IN HIS OFFICIAL CAPACITY AS UNITED STATES SECRETARY OF ENERGY; UNITED STATES NUCLEAR REGULATORY COMMISSION; KRISTINE L. SVINICKI, IN HER OFFICIAL CAPACITY AS CHAIRMAN OF THE UNITED STATES NUCLEAR REGULATORY COMMISSION; UNITED STATES NUCLEAR REGULATORY COMMISSION ATOMIC SAFETY AND LICENSING BOARD; THOMAS MOORE, PAUL RYERSON, AND RICHARD WARDWELL, IN THEIR OFFICIAL CAPACITIES AS UNITED STATES NUCLEAR REGULATORY COMMISSION ATOMIC SAFETY AND LICENSING BOARD JUDGES; UNITED STATES DEPARTMENT OF THE TREASURY; AND STEVEN T. MNUCHIN, IN HIS OFFICIAL CAPACITY AS UNITED STATES SECRETARY OF THE TREASURY, *Respondents,*

and

NUCLEAR ENERGY INSTITUTE; ENERGY NORTHWEST; KANSAS GAS AND ELECTRIC COMPANY D/B/A WESTAR ENERGY; KANSAS CITY POWER & LIGHT COMPANY; KANSAS ELECTRIC POWER COOPERATIVE, INC.; WOLF CREEK NUCLEAR OPERATING CORPORATION; UNION ELECTRIC COMPANY D/B/A AMEREN MISSOURI; AND TENNESSEE VALLEY AUTHORITY, *Intervenor-Respondents,*

and

STATE OF NEVADA, *Intervenor-Respondent*.

Original Action under the Nuclear Waste Policy Act

**TEXAS'S REPLY IN SUPPORT OF ITS MOTION FOR A DECLARATORY JUDGMENT AND A PRELIMINARY INJUNCTION (PRAYERS 1 & 2) AGAINST THE DEPARTMENT OF ENERGY AND THE SECRETARY OF ENERGY**

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## INTRODUCTION

After 35 years of inaction, and nearly a decade of violations, Respondents seek to undercut the Court's jurisdiction and power. The NWPA authorizes the type of lawsuit filed by Texas. NWPA original actions are not pigeonholed by petition for review or mandamus doctrines, but are expansive in scope and remedies. To those ends, Texas has standing to pursue all its claims, including a declaratory judgment that DOE failed to meet the 1998 deadline, and a preliminary injunction against DOE's consent-based siting for a permanent repository. These claims are not time-barred, as the violations are ongoing. DOE's failure to address the merits of Texas's motion, and its attempted resurrection of rejected arguments, speaks volumes. The Court should not indulge Respondents' narrow view of the NWPA or their attacks on the Court's jurisdiction—arguments designed to ensure that the Federal Respondents are not held accountable for their actions. The Court should declare DOE in violation of the NWPA and enjoin its consent-based siting activities.

## ARGUMENT

### I. The NWPA Gives the Court Power to Grant Texas's Requested Relief.

The NWPA grants the Court "original and exclusive jurisdiction over any *civil action*" "alleging the failure of the Secretary, the President, or the Commission to make any decision, or take any action, required under this part." 42 U.S.C. § 10139(a)(1)(B) (emphasis added). DOE's and NRC's responses fail to cite this part of the NWPA, though Texas pleads it as jurisdictional. Pet. 3–4. Respondents try to

cram Texas's civil action into a petition for review or writ of mandamus box, when the case clearly encompasses more than routine agency review mechanisms.

After 35 years of stagnation, a one-off petition for review, or writ of mandamus, is not what Texas seeks. *Aiken County* demonstrates why. Though NRC was ordered to complete the Yucca Mountain proceedings, it deliberately delayed and redirected action and funding. *Compare In re Aiken Cty.*, 725 F.3d 255, 266–67 (D.C. Cir. 2013) (ordering NRC to complete Yucca Mountain licensure), *with id.* at 267 (Randolph, J., concurring) (detailing malfeasance of NRC commissioners to prematurely defund and shut down Yucca Mountain proceedings), *and In re U.S. Dep't of Energy*, No. 63-001, 2013 WL 7046350, at *6–7 (N.R.C. Nov. 18, 2013) (performing few tasks to move the program forward).

The nature of siting a permanent repository for spent nuclear fuel ("SNF"), involving many federal, state, and local regulations, hardly follows conventional agency action patterns. Thus, Congress designed the NWPA to empower this Court with broad subject matter jurisdiction—"original and exclusive"—over this dispute. 42 U.S.C. § 10139(a)(1). Congress did not cabin NWPA proceedings, as Respondents contend. DOE Resp. 2–4. While the NWPA confers jurisdiction over the type of agency decisions or actions contemplated by Respondents, *id.* § 10139(a)(1)(A, C–F), it also confers jurisdiction over civil actions, as here, "alleging the failure of the Secretary [of Energy], the President, or the [Nuclear Regulatory] Commission to make any decision, or take any action, required under" the NWPA, *id.* § 10139(a)(1)(B). And concomitant with the NWPA's expansive jurisdiction is the

Court's broad, non-enumerated remedial powers. The Court may issue any lawful relief. *Kansas v. Nebraska*, 135 S. Ct. 1042, 1053 (2015).

This stands in stark contrast to a petition to review a discrete, final agency action. For example, review of agency decisions under the Clean Air Act ("CAA") is limited in scope, involving only formal agency action that "appears in the Federal Register." 42 U.S.C. § 7607(b)(1). And those final agency actions are preceded by extensive public interaction that shapes and molds what is eventually published. *Id.* § 7607(d). The CAA also limits certain petitions to venue in the District of Columbia—where the agency rulemaking occurs. *Id.* § 7607(b)(1). And seeking alternate relief through other mechanisms is foreclosed. *Id.*

The NWPA, enacted long after the petition for review process was well-established, is a different animal. The NWPA establishes a "civil action" for those affected by SNF. 42 U.S.C. § 10139(a)(1). It provides six broad categories of lawsuits to be brought in "the judicial circuit in which the petitioner involved resides or has its principal office . . . ." *Id.* § 10139(a)(2). By contrast, the CAA provides only a D.C.-based review of published rules, while the NWPA gives wide latitude regarding the types of challengeable actions or inactions—matters beyond things published in the Federal Register. *Id.* § 10139(a)(1).

Texas's civil action also differs from petitions for review or mandamus by starting an ongoing, Court-supervised process to result in the permanent, underground storage of nuclear waste. While DOE contends the case is different based on how it is docketed, DOE Resp. 1–2, how the action is docketed for administrative purposes does not alter the substance of Texas's filing.

Substantively, Respondents make no attempt to dispute the material facts pled by Texas. Rather, DOE avoids the merits by raising defenses, like waiver. DOE Resp. 12–13. But Texas did not waive the deadline issue because the original filing addresses the claim. Texas needs only a "'short and plain statement of the claim showing that the pleader is entitled to relief.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009) (quoting Fed. R. Civ. P. 8(a)(2)). Texas surpasses this standard, providing "detailed factual allegations" about Respondents' 35-year delay. *Id.* at 678. Texas pled the 1998 deadline as jurisdictional, Pet. 4–5, and part of the factual basis for this lawsuit, *id.* at 10. The 1998 deadline is central to DOE's continued defiance of the NWPA and its pursuit of consent-based siting for a permanent repository, rather than pursue the Yucca Mountain license.

Not once does DOE even admit it missed the 1998 deadline, resurrecting an argument that the deadline was conditional and contractual only. DOE Resp. 12–15. Since *Indiana Michigan Power Co. v. U.S. Department of Energy*, courts repeatedly reject that the deadline was conditional and contractual only. 88 F.3d 1272, 1274–76 (D.C. Cir. 1996); *see also Ala. Power Co. v. U.S. Dep't of Energy*, 307 F.3d 1300, 1304 (11th Cir. 2002); *N. States Power Co. v. U.S. Dep't of Energy*, 128 F.3d 754, 758–60 (D.C. Cir. 1997). Resolving the deadline issue at the outset will enable the Court, and the parties, to make progress with Respondents honoring the law.

Texas envisions other incremental steps, through motion practice, discovery, or otherwise, will also be necessary. Nevada, a party to many NWPA actions, understands that these cases evolve more like district court litigation than appellate review of agency actions. *See, e.g., Nevada v. Watkins*, 943 F.2d 1080, 1083 (9th Cir. 1991)

(seeking to enjoin site characterization activities at Yucca Mountain); *Nevada ex rel. Loux v. Herrington*, 777 F.2d 529, 531 (9th Cir. 1985) (seeking preliminary injunction). After all, it has moved to dismiss Texas's lawsuit, a common practice in district court litigation.

This case is not a one-off adjudication of an agency decision, nor a simple petition for writ of mandamus. While Texas wants the Court to issue writs of mandamus, it is also asking the Court to maintain ongoing jurisdiction such that its orders may be enforced, and penalties imposed (civil contempt, etc.), where necessary. For now, the Court is empowered to stop the DOE from its unlawful, consent-based siting. And DOE makes no attempt to dispute the threshold issue—whether DOE failed to accept SNF by 1998.

## II. Texas Possesses Standing.

Texas has standing. "In assessing standing, this court must accept as true all allegations in a petitioner's pleadings and construe the pleadings in favor of the petitioner." *Cal. Ass'n of Physically Handicapped, Inc. v. FCC*, 778 F.2d 823, 831 n.8 (D.C. Cir. 1985) (citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975)); *see also Crane v. Johnson*, 783 F.3d 244, 251 (5th Cir. 2015) ("we must accept as true the allegations set forth in the complaint"). Texas deserves "'special solicitude in the Court's standing analysis'" as it is not a "'normal litigant[] for the purpose of invoking federal jurisdiction.'" *Texas v. United States*, 809 F.3d 134, 152 (5th Cir. 2015) (quoting *Massachusetts v. EPA*, 549 U.S. 497, 518, 520 (2007)). Texas satisfies standing under Article III, standing under *Massachusetts v. EPA*, and standing as *parens patriae*. And if Nevada has standing to intervene, Texas has standing to sue.

## A. Standing under Article III.

Here, (1) Texas is suffering "injur[ies] in fact" that are "concrete and particularized" and "actual and imminent;" (2) "there [is] a causal connection" between Texas's injuries and Respondents' action/inaction; and (3) it is "likely" that favorable rulings will redress Texas's injuries. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (citations and quotation marks omitted).

### 1. Injuries-in-fact.

The ever growing stockpiles of SNF within Texas threaten not only the health and safety of its citizens and environment, but place Texas at greater risk for a nuclear incident (accidental or otherwise). DOE's failure to meet the 1998 deadline, and its consent-based siting activities, injures Texas by requiring it to house SNF in above-ground temporary storage casks.

In *Nuclear Energy Institute, Inc. v. EPA*, the court held an environmental organization had standing under the NWPA because the EPA's failure "to adopt more stringent radiation-protection standards would permit hazardous radionuclides from the buried waste to contaminate his community's ground-water supplies, causing adverse health effects." 373 F.3d 1251, 1266 (D.C. Cir. 2004). The injury to an organizational member's ground-water was not conjecture because "the Government plans to bury 70,000 metric tons of radioactive waste" on adjacent land. *Id.*; *see La. Envtl. Action Network v. EPA*, 172 F.3d 65, 67-68 (D.C. Cir. 1999) (standing exists by living near a landfill where hazardous waste was to be deposited). Injury was imminent, though contaminates "may not reach [his] community for thousands of years."

*Id.* The injury was "fairly traceable" to EPA's standards, which favorable relief would redress. *Id.* Thus, the mere presence of SNF *near* property is an injury-in-fact.

Similarly, in *New Mexico ex rel Udall v. Watkins*, the court issued an injunction, finding that Texas and New Mexico were suffering irreparable injuries due to DOE's application to place SNF in a test repository. 783 F. Supp. 628, 633 (D.D.C. 1991). Introducing commercial waste "may become unretrievable by reason of collapse of the underground facility, impending collapse, or loss of required clearance." *Id.*; *see also State of N.M. v. Watkins*, 969 F.2d 1122, 1138 (D.C. Cir. 1992) (affirming permanent injunction issued in same case). Irreparable injury is sufficient for Article III standing. *Texas Democratic Party v. Benkiser*, 459 F.3d 582, 586–87, 594 (5th Cir. 2006).

As in *Nuclear Energy Institute* and *Watkins*, the presence of SNF in Texas is an actual injury. Nuclear waste has "the potential to devastate public health and the environment." *Nuclear Energy Inst.*, 373 F.3d at 1257. "At massive levels, radiation exposure can cause sudden death. At lower doses, radiation can have devastating health effects, including increased cancer risks and serious birth defects such as mental retardation, eye malformations, and small brain or head size." *Id.* at 1258. There are "more than 100 interim storage locations sprinkled across thirty-nine states" and "over 161 million people reside within seventy-five miles of a nuclear waste storage facility." *Id.* Both Congress and DOE acknowledge the risk inherent in this obligation.

Moreover, Congress declared that the significant risks imposed by the indefinite storage of SNF in temporary locations causes concrete, actual, and imminent injury

to the communities where the waste is stored. 42 U.S.C. § 10131(a). SNF is a "national problem," *id.* § 10131(a)(2), and a "major subject[] of public concern," *id.* § 10131(a)(7). Thus, "appropriate precautions must be taken to ensure that such waste and spent fuel do not adversely affect the public health and safety and the environment for this or future generations." *Id.* "State and public participation in the planning and development of repositories is essential." *Id.* § 10131(a)(6).

Texas's injuries are imminent. DOE concluded that failure to build Yucca Mountain may result in "widespread contamination at the 72 commercial [nuclear power plants] and 5 DOE sites across the United States, with resulting human health impacts."[1] SNF, whether in pools or temporary casks, poses danger by its existence. Those dangers increase with the threat of natural disasters. App. 87.

Texas's injuries are fairly traceable to DOE's failure to build the Yucca Mountain storage facility. DOE abandoned Yucca, despite years of progress. DOE now perpetuates the health and safety risks by relying on temporary, above ground storage, rather than a safe repository. Megan Easley, *Standing in Nuclear Waste: Challenging Disposal of Yucca Mountain*, 97 CORNELL L. REV. 659, 660–61 (2012). Like

[1] U.S. Dep't of Energy, Office of Civilian Radioactive Waste Management, *Final Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada*, Readers Guide and Summary, at S-83 (Feb. 2002), *available at* http://energy.gov/sites/prod/files/EIS-0250-FEIS_Summary-2002.pdf.

*Nuclear Energy Institute* and *Watkins*, Texas suffers concrete injuries by the presence of SNF.[2]

Texas also expends resources regulating the safety and disposal of nuclear energy production and waste. Texas has four nuclear reactors at two different sites, with two more reactors approved for construction.[3] Texas is the fifth largest nuclear energy producer, and one of the top nuclear power capacity generators,[4] delivering nuclear-generated electricity to 90% of Texans.[5] Texas's four reactors support 9,000 jobs, generate $4.4 billion in economic output,[6] and *store 2,610 metric tons of SNF in*

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[2] After the September 11, 2001 attacks, NRC analyzed whether terrorists or saboteurs could exploit nuclear plants. App. 88. The NRC obligates nuclear plants to protect the nuclear waste by stationing armed security personnel. App. 89. However necessary, these requirements further oblige nuclear plants to pay more for nuclear waste storage, though they already paid into the Fund for its removal. These considerations are, of course, appurtenant to the fact that Texas has the duty to protect its citizenry. *See Texas v. Richards*, 301 S.W.2d 597, 602 (Tex. 1957) ("As a general rule the [police] power is commensurate with, but does not exceed, the duty to provide for the real needs of the people in their health, safety, comfort and convenience . . . .").

[3] Jordan Blum, *Regulators approve new nuclear reactors near Houston*, HOUSTON CHRON., Feb. 9, 2016, http://www.houstonchronicle.com/business/energy/article/Regulators-approve-new-nuclear-reactors-near-6819187.php.

[4] U.S. Dep't of Energy, Energy Information Admin., State Nuclear Profiles (last updated Apr. 26, 2012), http://www.eia.gov/nuclear/state/.

[5] Electric Reliability Council of Texas, About ERCOT, http://www.ercot.com/about.

[6] Nuclear Energy Inst., The Economic Benefits of Texas' Nuclear Power Plants 7–9 (Dec. 2015), http://www.nei.org/CorporateSite/media/filefolder/Policy/Papers/EconomicBenefitsStudyTexasNuclearPlants.pdf?ext=.pdf.

*temporary, aging, above-ground casks*.[7] Texas owns property adjacent to these sites, including roads. The presence of SNF in Texas is a safety concern.[8]

Texas has authority regarding SNF within its boundaries. Texas laws and agencies govern whether nuclear plants are built or waste is stored. *See Pacific Gas & Elec. Co. v. Cal. Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 208 (1983) (noting that, under 42 U.S.C. § 2018, Congress intended Texas "to continue to make judgments" about electricity and building nuclear plants); TEX. UTIL. CODE § 39.9016 (establishing fee for nuclear facilities); TEX. HEALTH & SAFETY CODE § 401.205 (regulating waste disposal licenses and implementing the NWPA); *id*. § 401.302 (establishing fee for nuclear operators). Texas regulates the handling and disposal of SNF, low-level radioactive waste, and other byproducts. *See* TEX. HEALTH & SAFETY CODE § 401. Texas is party to the Low-Level Radioactive Waste Disposal Compact, providing for the transfer and storage of such waste. *Id*. § 403.006.

Texas regulates electricity produced by nuclear power plants, both within and outside Texas. While Texas is home to four existing nuclear reactors, some of its utilities, such as El Paso Electric, draw nuclear energy from Arizona. The Texas Public Utility Commission ensures that customers receive "safe, reliable, and reasonably

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[7] Nuclear Energy Inst., US State by State Used Fuel and Payments to the Nuclear Waste Fund (last updated Feb. 2017), https://www.nei.org/Knowledge-Center/Nuclear-Statistics/On-Site-Storage-of-Nuclear-Waste/US-State-by-State-Used-Fuel-and-Payments-to-the-Nu.

[8] Sheryl DeVore, *Spent fuel rods stored in Zion raise safety, economic concerns*, CHICAGO TRIB., Oct. 30, 2015, http://www.chicagotribune.com/suburbs/lake-county-news-sun/news/ct-lns-zion-nuclear-plant-st-1031-20151030-story.html.

priced electricity." TEX. UTIL. CODE § 39.101(a)(1); *see also id.* § 53.001 (authorization to establish and regulate rates); *id.* § 53.111 (authorization to establish final utility rates); *TXU Generation Co., L.P. v. Pub. Util. Comm'n of Texas*, 165 S.W.3d 821, 833 (Tex. App.—Austin 2005, pet. denied) (describing consumer protection as a "vital objective" of Texas's public utilities law). When utilities pass Nuclear Waste Fund costs onto ratepayers, including Texas itself as a consumer of electricity, the Commission ensures those costs are reasonable.

Texas endeavors to ensure that nuclear energy production and waste is safe and that ratepayers receive fairly priced electricity generated by nuclear power. These efforts, however, do not ameliorate the continued existence of SNF in Texas. Like petitioners in *Nuclear Energy Institute* and *Watkins*, Texas is suffering an injury in fact by DOE's failure to build a repository.

### 2. DOE's failures injure Texas.

"Texas has satisfied the second standing requirement by establishing that its injury is 'fairly traceable'" to DOE. *Texas*, 809 F.3d at 156. Texas suffers an injury by DOE's failure to accept SNF by 1998, thus denying Texas a safe location to store the SNF located above ground within its borders.

DOE was to begin accepting SNF by January 31, 1998, but now estimates that it may do so by 2048. Despite the NWPA's 1998 deadline, DOE pursued consent-based siting, in contravention of the NWPA, causing further delay. SNF remains in Texas because DOE diverted resources to activities banned by the NWPA.

### 3. Redressability.

There is a "substantial likelihood" that favorable decision will redress Texas's injuries. *Cmty. for Creative Non-Violence v. Pierce*, 814 F.2d 663, 670 (D.C. Cir. 1987). First, a declaratory judgment that DOE failed to meet the 1998 deadline for accepting SNF establishes a threshold issue that DOE will not even acknowledge. That failure informs DOE's later decision to pursue consent-based siting. Second, an injunction against DOE's consent-based siting for a permanent repository will prevent further delays and the agency from expending taxpayer money on projects that Congress did not authorize. 42 U.S.C. § 10133(a).

## B. Standing under *Massachusetts v. EPA*.

Texas has standing under *Massachusetts v. EPA* to "preserve its sovereign territory." 549 U.S. 497, 517–18 (2007). Texas "[is] not [a] normal litigant[] for the purposes of invoking federal jurisdiction." *Id.* at 518. Two considerations entitle Texas to "special solicitude" regarding standing. *Id.* at 520; *Texas*, 809 F.3d at 151.

First, like the CAA, the NWPA creates a right to challenge the Federal Respondents. *Massachusetts*, 549 U.S. at 516–17. When "Congress has 'accorded a procedural right to protect [a litigant's] concrete interests,'" a litigant "'can assert that right without meeting all the normal standards for redressability and immediacy.'" *Id.* at 517–18 (citing *Lujan*, 504 U.S. at 572 n.7). "When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Id.* at 518.

The NWPA outlines sequential events to determine whether a repository is suitable. 42 U.S.C. §§ 10131(b), 10132–10145. DOE's failure to accept SNF by 1998, and its pursuit of consent-based siting, harms Texas. *Massachusetts*, 549 U.S. at 520. Texas is within the zone of interests protected by the NWPA and need not show that the Yucca Mountain repository will open to have standing. *See Lujan*, 504 U.S. at 573 n.7 ("The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."). Standing exists because the injury is "felt in a concrete way by the challenging parties." *See Devia v. U.S. Nuclear Regulatory Comm'n*, 492 F.3d 421, 424 (D.C. Cir. 2007) (quoting *Abbott Lab. v. Gardner*, 387 U.S. 136, 148–49 (1967)).

Second, Texas's "'quasi-sovereign' interest in its territory" establishes standing. *Texas*, 809 F.3d at 151. Texas "'has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain.'" *Massachusetts*, 549 U.S. at 518 (quoting *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907)). Texas "owns a great deal of the territory alleged to be affected." *Id.* at 519. SNF presents serious risk to Texas's communities and environment. The permanent, even temporary, loss of its land will result in harm. *Id.* at 523.

### C. Standing as *Parens Patriae*.

As *parens patriae*, Texas has standing to protect the health, welfare, safety, and property of its citizens and environment. In *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982), the Supreme Court identified the characteristics of *parens patriae* standing, one of which is when "a State has a quasi-sovereign interest in the

health and well-being-both physical and economic-of its residents in general." A "helpful indication" of this type of *parens patriae* standing "is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers." *Id.* Another indication of *parens patriae* standing is when the State alleges an "injury to a sufficiently substantial segment of its population." *Id.* Texas satisfies both considerations.

Texas regulates energy production and distribution, and ensures that nuclear utilities comply with the NWPA. *See supra* Part II.A.1. Texas also ensures the safe disposal of low-level nuclear waste and the reactors' compliance with the NWPA. Texas would regulate the disposal of SNF within its borders, but that responsibility belongs to Respondents. 42 U.S.C. § 10131(b)(1).

Texas has the authority to protect the safety of its citizens. *See, e.g.*, *Halter v. Nebraska*, 205 U.S. 34, 40–41 (1907) ("[A] state possesses all legislative power consistent with a republican form of government; therefore each state, when not thus restrained, and so far as this court is concerned, may, by legislation, provide not only for the health, morals, and safety of its people, but for the common good, as involved in the well-being, peace, happiness, and prosperity of the people."). There are "more than 100 interim storage locations [for SNF] sprinkled across thirty-nine states" and "over 161 million people reside within seventy-five miles of a nuclear waste storage facility." *Nuclear Energy Inst.*, 373 F.3d at 1258. Thus, the risk of death or other injury affects Texans. *See Pennsylvania v. West Virginia*, 262 U.S. 553, 592 (1923) (finding *parens patriae* standing when "a substantial portion of the state's population" was denied natural gas).

### D. Standing like Nevada.

Texas's standing is at least as strong as Nevada's. Intervenor defendants must satisfy Article III standing. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) ("Standing to sue or defend is an aspect of the case-or-controversy requirement."); *Diamond v. Charles*, 476 U.S. 54, 64–65 (1986) (holding intervenor defendant must have Article III standing to appeal). Nevada intervened to protect the "health and safety of its citizens from radiological injuries and in protecting its lands and groundwater from radioactive contamination." Nev. Mot. Intervene 11, Apr. 12, 2017, ECF No. 00513950929. Nevada acknowledges that "States are routinely allowed to intervene as a matter of right to protect their sovereign interests." *Id.* (citing *Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co.*, 386 U.S. 129, 135–36 (1967)).

## III. DOE's Violations Are Continuous.

DOE continues to flout the NWPA's requirement to accept SNF by 1998 and terminate siting activities beyond Yucca Mountain. Both are continuing violations and, thus, not time-barred.

A "civil action for judicial review . . . may be brought not later than the 180th day after the date of the decision or action or failure to act involved." 42 U.S.C. § 10139(c). Statutes like this "are intended to keep stale claims out of the courts," *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982), but "[w]here the challenged violation is a continuing one, the staleness concern disappears," *id.* The continuing violation doctrine "is based on the cumulative effect of a thousand cuts, rather than on any particular action taken by the defendant," so "the filing clock cannot begin running with the first act, because at that point the plaintiff has no claim;

nor can a claim expire as to that first act, because the full course of conduct is the actionable infringement." *Heath v. Bd. of Supervisors for S. Univ. & Agric. & Mech. Coll.*, 850 F.3d 731, 737 (5th Cir. 2017) (quotation omitted).

In *National Railroad Passenger Corp. v. Morgan*, the Supreme Court held that hostile work environment claims fall under the continuing violations doctrine because they typically comprise a series of acts that collectively constitute one unlawful practice. 536 U.S. 101, 117 (2002). Despite Title VII's requirement that a charge "shall be filed within [180] days after the alleged unlawful employment practice occurred," *id.* at 109, the continuing violations doctrine allows plaintiffs to recover outside the limitations period, *id.* at 118–19.

In *Newell Recycling Co., Inc. v. EPA*, 231 F.3d 204 (5th Cir. 2000), this Court applied the continuing violation doctrine to an environmental waste case where the EPA fined a company for unlawfully stockpiling waste for ten years, *id.* at 205, though there was a five year statute of limitations, *id.* at 206 (citing 28 U.S.C. § 2462). The company argued that claims accrued when the waste was *first* deposited on its land, *id.* at 206, but the Court found the violation continuing and held the limitations period did not begin until the unlawfulness *ceased*. *Id.* (citing *Fiswick v. United States*, 329 U.S. 211, 216 (1946) (statute of limitations for continuing offenses runs from last day of continuing offense)). *See also Schoeffler v. Kempthorne*, 493 F. Supp. 2d 805, 817–20 (W.D. La. 2007) (applying continuing violations doctrine to Endangered Species Act case involving failure to perform a non-discretionary duty, notwithstanding interim performance of non-final acts); William Blackstone, 3 Commentaries 219–20 ("every continuance of a nuisance is [considered] a fresh

one"); *cf. Jersey Cent. Power & Light Co. v. Lacey Twp.*, 772 F.2d 1103, 1108 (3d Cir. 1985) (nuclear waste case was not moot because of a continuing violation).

This NWPA "civil action" is brought to adjudicate claims based on 35 years of *continuing* action, inaction, and broken promises by the Respondents—violations that persist every day. Thus, the case is akin to environmental and other claims wherein the unlawful actions or inactions may occur over a lengthy period of time. Under these cases, a plaintiff may sue within the statutory time period based on any of the unlawful actions or inactions. That's what Texas has done here.

DOE does not dispute that it missed the 1998 deadline to accept SNF from commercial reactor sites. DOE continues to miss that deadline each passing day. Its duty to accept SNF by 1998 is both contractual and statutory. *Pac. Gas & Elec. Co. v. United States*, 536 F.3d 1282, 1284 (Fed. Cir. 2008) ("DOE does have a statutory obligation 'reciprocal to the utilities' obligation to pay' to dispose of waste beginning January 31, 1998") (quoting *Ind. Mich.*, 88 F.3d at 1277). The breach is "ongoing," *Boston Edison Co. v. United States*, 658 F.3d 1361, 1366 (Fed. Cir. 2011), and "at this time, there is not even a prospective site for a repository, let alone progress toward the actual construction of one," *New York v. U.S. Nuclear Regulatory Comm'n*, 824 F.3d 1012, 1015 (D.C. Cir. 2016). And, but for the continuing violations, DOE would not continue to pay damages to nuclear utilities for its continuing failure to accept SNF by the 1998 date. DOE Resp. 14 n.9. It makes no difference whether Texas was aware of a claim prior to filing. Texas's claims are ripe for adjudication.

Likewise, DOE's unlawful consent-based siting is based on a series of actions that continued at least through its January 2017 publication. *See* U.S. Dep't of Energy, *Draft Consent-Based Siting Process for Consolidated Storage and Disposal Facilities for Spent Nuclear Fuel and High-Level Radioactive Waste* 5 (Jan. 12, 2017).[9] Thus, DOE spent time and money on the January 2017 unlawful consent-based siting document.

Nevada's reliance on *Public Citizen v. NRC*, 845 F.2d 1105 (D.C. Cir. 1988), is misplaced. Nev. Resp. 12–14, June 12, 2017, ECF No. 00514029509. *Public Citizen* was not about a continuing violation, but the publication of a singular document. *Public Citizen*, 845 F.2d at 1106. Though it was argued that NRC's publication of regulations generally was ongoing, the court ruled that the "agency ha[d] acted." *Id.* at 1108. "[S]ince the courts may allow agencies some running room even where there are specific statutory deadlines, conceivably courts may provide a parallel relaxation for persons complaining of inaction." *Id.* (citing *Sierra Club v. Thomas*, 828 F.2d 783, 788-90, 794 n.78 (D.C. Cir.1987)). But since *Public Citizen* addressed a single rule, there was no need to apply the continuing violations doctrine to that case.

## IV. A Preliminary Injunction Is Necessary to Stop DOE's Unlawful Consent-Based Siting for a Permanent Repository.

A preliminary injunction against DOE's consent-based siting is warranted. The public interest and balance of hardships favors an injunction. DOE and NRC do not

[9] The draft report is available at https://www.energy.gov/sites/prod/files/2017/01/f34/Draft%20Consent-Based%20Siting%20Process%20and%20Siting%20Considerations.pdf.

respond and, thus, waive responses to these arguments. *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 452 (5th Cir. 2014).

Texas suffers irreparable injury every day SNF is stored within its borders, all while its citizens sponsor DOE's unlawful consent-based siting. SNF has sat in Texas for nearly two decades and, as DOE acknowledges, "'[i]rreparable means permanent or at least of sufficiently long duration to make it effectively permanent." DOE Resp. 16 (citing *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987)). Enjoining consent-based siting stops DOE from violating the NWPA and will help redirect its efforts toward lawful activities.

Texas's likelihood of success is grounded in the plain language of the statute, and precedent. Not once in its response does DOE confront the merits of Texas's consent-based siting claim, nor could it. The Act prohibits siting activity beyond Yucca Mountain. *See* 42 U.S.C. §§ 10172(a)(1), ("The Secretary shall provide for an orderly phase-out of site specific activities at all candidate sites other than the Yucca Mountain site."), 10172(a)(2). ("The Secretary shall terminate all site specific activities (other than reclamation activities) at all candidate sites, other than the Yucca Mountain site, within 90 days after December 22, 1987."). DOE's failure to explain how its current consent-based siting for permanent repositories other than Yucca Mountain complies with the Act is telling. Given the wealth of time and money that DOE has dedicated to siting activities beyond Yucca Mountain, the recent removal of a consent-based siting website cannot suffice to conclude that DOE has stopped the unlawful activity. Even so, "[i]t is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its

power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982).

## Conclusion

DOE has deliberately violated the NWPA for nearly twenty years. The Court has the power to declare and end some violations through this motion. The Court should declare that DOE's failure to accept SNF in 1998—or any time thereafter—violates the NWPA. The Court should also issue a preliminary injunction against any DOE consent-based siting activity related to a permanent repository.

Respectfully submitted this 16th day of June, 2017.

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## Certificate of Compliance

I hereby certify that this brief complies with: (1) the type-volume limitation of Fed. R. App. P. 27(d)(2)(A), because it contains 5,193 words; and (2) the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word.

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On June 16, 2017, this document was filed with the Clerk of Court via CM/ECF. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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