

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE SECRETARY

In the Matter of:)
)
Interim Storage Partners) Docket No. 72-1050
)
(WCS Consolidated Interim Storage Facility))
)

**BEYOND NUCLEAR’S REPLY TO OPPOSITIONS
TO HEARING REQUEST AND PETITION TO INTERVENE**

I. INTRODUCTION

Beyond Nuclear submits this Reply in response to the NRC Staff’s (the “Staff’s”) Response to Beyond Nuclear, Inc.’s Hearing Request and Petitions to Intervene (Oct. 29, 2018) (the “NRC Staff Response”) and Interim Storage Partners LLC’s (“ISP’s”) Answer Opposing Beyond Nuclear, Inc.’s Hearing Request and Petition to Intervene (Oct. 29, 2018) (the “ISP Response”) (collectively, the “Responses”), each addressing Beyond Nuclear’s Hearing Request and Petition to Intervene (Oct. 3, 2018) (the “Hearing Request”).

As discussed below in Section II.A, the Staff agrees that Beyond Nuclear has standing to request a hearing, and ISP has failed to demonstrate that Beyond Nuclear lacks standing. In Section II.B, Beyond Nuclear responds to arguments by ISP and the Staff that Beyond Nuclear’s single contention – which claims that both ISP’s application and the U.S. Nuclear Regulatory Commission’s (“NRC’s” or the “Commission’s”) very conduct of this proceeding violate the Nuclear Waste Policy Act (“NWPA”) – is inadmissible under the NRC’s admissibility standards in 10 C.F.R. § 2.309. Section II.B also addresses the effect of the NRC Commissioners’ October 29, 2018 Order denying, without prejudice, Beyond Nuclear’s Motion to Dismiss this proceeding and referring Beyond Nuclear’s claims to the Atomic Safety and Licensing Board (“ASLB”) for

consideration under 10 C.F.R. § 2.309. Order at 2-3. Beyond Nuclear continues to maintain that the claims raised by its contention, while falling outside the scope of this licensing proceeding, are nevertheless cognizable under the NWPA and the Administrative Procedure Act (“APA”). Therefore, Beyond Nuclear requests that any Atomic Safety and Licensing Board (“ASLB”) panel appointed to hear this case refer Beyond Nuclear’s claims to the Commission for further consideration.

II. DISCUSSION

A. Beyond Nuclear has Standing.

As the Staff acknowledges, Beyond Nuclear has standing. NRC Staff Response at 7. ISP, however, argues that Beyond Nuclear has failed to establish either proximity-based standing or traditional standing. ISP Response at 8-21. ISP’s arguments are without merit.

1. Beyond Nuclear has standing under the proximity presumption.

ISP and Beyond Nuclear agree that a petitioner can establish standing through the proximity presumption for non-nuclear reactor proceedings by showing an “obvious potential for offsite consequences.” ISP Response at 6, Hearing Request at 6-7. But ISP asserts that neighbors of an independent spent fuel storage installation (“ISFSI”) may not claim proximity-based standing because the Commission previously determined through rulemaking that an ISFSI has no obvious potential for offsite consequences. ISP Response at 10 (citing Final Rule, Emergency Planning Licensing Requirements for Independent Spent Fuel Storage Facilities and Monitored Retrievable Storage Facilities, 60 Fed. Reg. 32,430 (June 22, 1995) (“ISFSI Emergency Planning Rule”)). In that rulemaking, the NRC concluded that two key characteristics of ISFSIs would eliminate the chance that fuel could ignite and cause an offsite airborne release, thereby

precluding the need for offsite emergency planning: the robust design of the casks and the age of the fuel. 60 Fed. Reg. at 32,439.

By claiming that Beyond Nuclear must overcome these characteristics of ISFSIs in order to establish standing, ISP would have Beyond Nuclear supply the very type of “causal link” between the proposed centralized interim spent fuel storage facility (“CISF”) and Beyond Nuclear’s injuries that the NRC has long rejected as a requirement for proximity-based standing. In *Armed Forces Radiobiology Research Inst. (Combalt-60 Storage Facility)*, ALAB-682, 16 NRC 150 (1982), for example, the Appeal Board reversed the ASLB’s denial of standing based on the petitioners’ failure to show how operation of a proposed irradiation facility would harm them. Instead, the Appeal Board concluded that their close proximity to “a large source of radioactivity,” *i.e.*, the 320,000 curies of radioactive cobalt-60 that would be present on the site, “establishes petitioners’ interest.” *Id.* at 154 (citing *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 74 (1978)).¹ Demonstration of a causal link or mechanism is required *only* where proximity-based standing cannot be demonstrated. *Schofield Barracks*, CLI-10-20, 72 NRC 185, 190 (2010).

Consistent with *Armed Forces*, the NRC has applied the proximity-based doctrine in other ISFSI cases decided *after* the Commission promulgated the ISFSI Emergency Planning Rule. *See, e.g., Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation) LBP-98-7, 47 NRC 142, 169 and 171 (1998) (proximity-based standing found at four miles in licensing proceeding for away-from-reactor ISFSI that would store 40,000 metric tons of spent fuel); *Pac. Gas & Electric Co.*, (Diablo Canyon ISFSI), LBP-02-23, 56 NRC 413, 428 (2002), *petition for*

¹ In contrast, the depleted uranium at issue in *Schofield Barracks* (cited in ISP Response at 9) was “not ‘a significant quantity’” and “scattered” over the site. 72 NRC at 190.

review denied, CLI-03-12, 58 NRC 185 (2003) (proximity-based standing found at 17 miles for ISFSI on reactor site).² The absence of offsite emergency planning standards for these proposed facilities was not at issue in either decision.³

Other non-reactor licensing cases in which the NRC has applied the proximity-based standard, without reference to applicable emergency planning standards, include *USEC, Inc.* (American Centrifuge Plant), CLI-05-11, 61 NRC 309, 311-12 (2005) (proximity-based standing found at one mile for uranium centrifuge facility); and *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-15, 59 NRC 256 (2004) (proximity-based standing found for petitioners living in close proximity to uranium enrichment facility). And in *Nuclear Energy Institute, Inc. v. EPA*, 373 F.3d 1251, 1266 (D.C. Cir. 2004), the Court of Appeals found standing for a neighbor of the proposed Yucca Mountain spent fuel repository, which would store 70,000 metric tons of spent fuel.⁴

² ISP incorrectly asserts that *Private Fuel Storage* was based on traditional standing principles rather than proximity standing. ISP Response at 12. The language of the decision itself demonstrates that the Board relied exclusively on the proximity of each petitioner to the proposed ISFSI. The decision contains no analysis of causation. And in rejecting the standing of one set of petitioners, the Board found the petitioners' allegations were insufficient to establish "injury in fact to any of its members by reason of their proximity to the proposed facility." 47 NRC at 176.

³ Moreover, contrary to ISP's claim, *Strata Energy, Inc.* (Ross In Situ Uranium Recovery Project), CLI-12-12, 75 NRC 603, 610 n.32 (2012) does not support the inference that if the NRC does not impose offsite emergency planning zones ("EPZs") on ISFSI operations, then neighbors of a proposed ISFSI lack proximity-based standing. ISP Response at 10. In *Strata*, the Commission merely noted that the 50-mile "proximity zone" used to establish proximity-based standing in reactor licensing cases "corresponds roughly" to the 50-mile ingestion pathway EPZ. *Id.*

⁴ ISP attempts to distinguish *Nuclear Energy Institute* by arguing that the potential injury to the petitioners in that case constituted degradation of storage casks in a permanent repository for which the licensed time period is thousands of years. In contrast, the proposed CISF is a temporary facility that will operate for a matter of decades. ISP Response at 9 n.39. While the court did discuss the length of time it may take radionuclides to migrate offsite, the court also recognized that living next to (in this case, 18 miles from) a large source of radioactive waste was "a sufficient harm in and of itself." 373 F.3d at 1266.

In the alternative, assuming that proximity-based standing cannot be eliminated entirely for ISFSIs, ISP argues that the zone of proximity should be “particularly small” for this “proposed action.” ISP Response at 6 (citing *Consumers Energy Co. (Big Rock Point ISFSI) CLI-07-19*, 65 NRC 423, 426 (2007)). Unlike the instant case, however, *Consumers Energy* did not concern an initial construction permit or license, where a major new source of radioactivity would be licensed for the first time. Instead, the subject of *Consumers Energy* was the transfer of a license for an ISFSI, which “involved no changes to the physical plant, its operating procedures, or its design basis accident analysis.” 65 NRC at 426. And while the Commission ruled out proximity-based standing at 50 miles, it did not rule out the possibility that standing could be established at a closer distance. *Id.*

Accordingly, Beyond Nuclear has demonstrated proximity-based standing.

2. The transportation of spent nuclear fuel to the CISF will cause an injury to Beyond Nuclear members that establishes standing.

ISP misconstrues both the law regarding transportation-related injuries and the nature and extent of the injuries to Beyond Nuclear’s members. First, ISP incorrectly claims that “transportation safety-related concerns are not within the scope of this proceeding, and therefore cannot provide a basis for standing.” ISP Response at 15. In fact, transportation impacts are within the scope of the environmental analysis that must be prepared under the National Environmental Policy Act (“NEPA”), as affirmed by ISP’s own discussion of transportation-related impacts in its Environmental Report. *See* Environmental Report, Section 4.2. The cases cited by ISP, *Energy Solutions, LLC (Radioactive Waste Import/export Licensees)*, CLI-11-3, 73 NRC 613 (2011) and *UniTech Services Group, In. (Export of Low-Level Waste)*, CLI-18-2, 87 NRC 78 (2018) do not hold otherwise. *Energy Solutions* concerned the admissibility of contentions raising non-NEPA transportation-related safety claims, and therefore has no bearing

on this case. In *UniTech*, the Commission found the petitioners lacked standing because their claimed injuries were already occurring as a result of separate permits that were previously issued to the license applicant. 87 NRC at 82. Here, in contrast, Beyond Nuclear's injuries would result directly from licensing of the proposed CISF. Thus, transportation related injuries are within the scope of this proceeding.

Second, ISP incorrectly characterizes the transportation-related injuries Beyond Nuclear's members will suffer as "hypothetical and minute." ISP Response at 18. There is nothing hypothetical about the injuries to Beyond Nuclear's members. As stated in Beyond Nuclear's Hearing Request, the Texas and New Mexico Railway, "parallels Highway 18 within a few hundred feet for approximately 40 miles. Beyond Nuclear members who live or travel on roads that cross or parallel the Texas and New Mexico Railway will be exposed to small doses of unwanted radiation during the normal transportation of spent nuclear fuel to the WCS CISF and a higher likelihood of an accident involving spent nuclear fuel." *Id.* at 5. Multiple licensing boards have found that "the threat posed by transportation of radioactive waste" is "an injury that is real and concrete." *U.S. Dep't. of Energy (High-Level Waste Repository)*, 69 NRC 367, 424 (2009); *Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility)*, LBP-01-35, 54 NRC 403 (2001).

Nor does Beyond Nuclear provide only "tenuous assumptions" that an accident involving the transportation of spent nuclear fuel may occur that would injure its members. ISP Response at 17 (citing *Exxon Nuclear Co. (Nuclear Fuel Recovery and Recycling Center)*, LBP-77-59, 6 NRC 518 (1977) (rejecting standing based on mere statements that if an accident happened to occur during transportation of radioactive material 100 miles from the facility it would cause injury)). An accident is more likely to occur near Beyond Nuclear's members for two reasons.

First, unlike transportation routes farther afield, every single ton of the total 40,000 metric tons of spent fuel proposed to be stored at the CISF must pass on the railroad along which Beyond Nuclear members live and travel. *See* Hearing Request at 5. Second, the oil and gas boom has already overtaxed the transportation infrastructure near the CISF, making transportation more dangerous in this specific area. *Id.* Beyond Nuclear adequately alleged injury from accidents involving transportation of spent nuclear fuel to establish standing.

ISP further asserts that “the Commission categorically held that mere potential exposure to minute doses of radiation within regulatory limits does not constitute” an injury for standing. ISP Response at 17 (citing *EnergySolutions, LLC* (Radioactive Waste Import/Export), CLI-11-3, 73 NRC 613, 623 (2011)). But the petitioner in *EnergySolutions* suggested that the facility would emit *low-level radioactive waste* that would somehow reach the petitioner *10 to 25 miles away*. 73 NRC at 623. The “minute dose” that was insufficient for standing in *Exxon* is not comparable to the cumulative doses of radiation Beyond Nuclear members will receive when they are forced to travel directly next to large quantities of spent nuclear fuel in transit. Hearing Request at 4-5.

And while ISP correctly states that the NRC has *generically* concluded that public radiation exposures from routine transportation of spent fuel *generally* are below the average background radiation levels, it does not follow that exposures to Beyond Nuclear members will also be that low. ISP Response at 18. The dose “depends on the amount of time workers or the public are exposed to the cask, the distance from the cask, the external radiation from the cask, and the intervening shielding.” NUREG-2125, Spent Fuel Transportation Risk Assessment at 18-19 (Jan. 2014) (ML 14031A323). Thus, “an individual member of the public residing near the transport route receives the largest dose from a moving vehicle when he or she is as close as possible to the vehicle and the vehicle is traveling as slowly as possible.” *Id.* Beyond Nuclear’s

members live and regularly travel along routes that ISP plans to transport every bit of the 40,000 tons of spent nuclear fuel and will therefore receive the largest radiation doses of any member of the public. Beyond Nuclear Petition at 4. As such, Beyond Nuclear's members will be injured by exposure to radiation from traveling beside spent nuclear fuel that is being transported to the CISF.

Finally, ISP does not refute Beyond Nuclear's assertion that its members' interest in and right to travel will also be injured because they will either not know which route is safest to avoid radiological injury or they will be unable to avoid unsafe routes because of the limited highways in the area. Hearing Request at 5.

Accordingly, Beyond Nuclear's claims of injury from transportation of spent nuclear fuel to the CISF are sufficient to establish traditional standing.

3. Beyond Nuclear members are threatened with actual, concrete injury of decreased property values.

ISP improperly dismisses the concerns of Beyond Nuclear's members regarding diminished property value. ISP begins by misleadingly claiming that Beyond Nuclear's members' property values will not be impacted because they "already live close to multiple existing nuclear facilities" in an industrial area. ISP Response at 19-20 (emphasis omitted). ISP would have the ASLB believe that it is proposing a small expansion to an existing facility. *See* ISP Response at 20 n.89. But the proposed CISF is a new 40,000-ton spent nuclear fuel storage facility and vastly different from the existing "low-level and mixed waste facilities." ISP Response at 20. Spent nuclear fuel "poses a dangerous, long-term health and environmental risk [and] [i]t will remain dangerous for time spans seemingly beyond human comprehension." *N.Y. v. N.R.C.*, 681 F.3d 471, 474 (D.C. Cir. 2012); *see also* Blue Ribbon Commission on America's Nuclear Future, Report to the Secretary (Jan. 2012) (ML120970375) ("if not managed properly,

[spent nuclear fuel] can deliver much higher levels of radiation than humans are normally exposed to from natural background, medical procedures, and the like.”). Such a large, uniquely dangerous high-level nuclear waste storage facility is unlike any other facility in the area, or indeed anywhere in the United States. ISP’s claims that the CISF will not independently impact property values because of the existence of the other, unrelated facilities are simply not credible.

ISP then asserts that property values may actually increase near a nuclear installation, but it deceptively cherry-picks language to support its assertion. ISP Response at 19-20 (citing *La. Energy Servs., LP* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 108 (1998)). The Commission in *La. Energy Servs.* explained that while “the Board also found that two or three parcels of property near the [facility] may increase in value, as possible sites for new business ventures supporting [the company] (e.g., food service and equipment vendors)..., the new business ventures would *not* create an overall increase in property values in the adjacent communities.” CLI-98-3, 47 NRC at 108 (emphasis added). It thus concluded that the argument that property values may actually increase was “wholly untenable.” *Id.* Contrary to ISP’s claims, the potential for a few parcels’ property values to increase does not negate the evidence that construction of a nuclear facility generally decreases property values.

Finally, ISP asserts that Beyond Nuclear’s members’ concern regarding their diminished property values is too subjective to establish standing. ISP Response at 19 (citing *Strata Energy*, (Ross in Situ Recovery Uranium Project), LBP-12-3, 75 NRC 164, 183-184 (2012)). This argument is also flawed. While the Board in *Strata Energy* found standing for the petitioners, it declined to do so based on diminished property values. LBP-12-3, 75 NRC at 183-184. The Board found unpersuasive the petitioner’s claim, based on her “perception,” that property values would be impacted from the presence of a uranium *in situ* leach mine miles downstream from her

property, and it set forth examples of additional information the petitioner could have provided to persuade the Board otherwise. *Id.* at 184. But, contrary to ISP’s framing, the Board did not purport to establish a new requirement that all future petitioners must meet to establish standing based on property value decline caused by all types of proposed nuclear facilities, or even simply for the type of mining facility relevant in its decision. Instead, the Board made a much more limited finding that, “*in this instance,*” it could not afford standing based on property value decline alone. *Id.* The Board’s reluctance in *Strata Energy* to create a new standing requirement is unsurprising; to do so would run counter to decisions from courts and other licensing boards.

In fact, Beyond Nuclear’s members have provided factual support for their concerns about depressed property values by asserting that their property values will decrease due to proximity to the CISF, which may store thousands of metric tons of spent nuclear fuel. Similar assertions of diminished property values were found sufficient to confer standing in *Kelley v. Selin*, 42 F.3d 1501, 1509-10 (6th Cir. 1995), where the license applicant proposed to store much smaller quantities of spent fuel than ISP.⁵ NRC decisions have also found assertions of property value decline sufficient to establish standing. *Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), LBP-01-21, 54 NRC 33, 44 (2001) (in a challenge to a license termination plan, the

⁵ The court also found in *Kelley* that the petitioner’s allegations of standing must be “accepted as true” and construed in the petitioner’s favor. 42 F.3d at 1508. *See also U.S. Army Installation Command* (Schofield Barracks, Oahu, Hawaii, & Pohakuloa Training Area, Island of Hawaii, Hawaii), LBP-10-4, 71 NRC 216, 229 (2010) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (“It is generally sufficient if the petitioner provides plausible factual allegations.”)). *But see Strata Energy, Inc.*, 75 NRC at 177–78 (“if a petitioner’s factual claims in support of its standing are contested, untenable, conjectural, or conclusory, a board need not uncritically accept such assertions, but may weigh those informational claims and exercise its judgment about whether the standing element at issue has been satisfied.”). In light of these well-established precedents, it is not necessary for Beyond Nuclear to obtain expert declarations confirming that proximity to a nuclear facility injures property values when the NRC and courts already accept it as a likely injury.

Board found an organization established standing when its members alleged in affidavits that, among other injuries, their “property values would be affected”); *see also La. Energy Servs*, CLI-98-3, 47 NRC at 108-109 n.26 (1998) (in a challenge to an Environmental Impact Statement, the Commission recognized that property values near an enrichment facility may be negatively impacted).

Accordingly, Beyond Nuclear has provided sufficient support to establish standing based on its members’ diminished property values.

B. Beyond Nuclear’s Contention Satisfies All Aspects of the NRC’s Admissibility Standards Except for Scope and Materiality.

1. Beyond Nuclear agrees with ISP that the contention is not within the scope of this proceeding or material to issues that must be decided.

Beyond Nuclear and ISP are in agreement that Beyond Nuclear’s contention lies outside the scope of this NRC licensing proceeding, and therefore does not meet the admissibility requirement of 10 C.F.R. § 2.309(f)(1)(iii). *See* ISP Response at 26.⁶ For the same reason, it is not material to the findings the NRC must make in this proceeding. *See* 10 C.F.R. § 2.309(f)(1)(iv). The contention does not fall within the scope of the proceeding or raise material issues because violations of the NWPAs are not a proper subject of the hearing. Hearing Request at 10. Beyond Nuclear filed its contention in an abundance of caution, not because it considers the contention to be an appropriate topic for this licensing proceeding. Beyond Nuclear respectfully submits that the appropriate venue for consideration of its claim is a separate proceeding on Beyond Nuclear’s Motion to Dismiss.⁷

⁶ The Staff does not address the issues of scope or materiality.

⁷ The Staff asserts that Beyond Nuclear’s contention is admissible to the extent that it “challenges the adequacy of the basis for [ISP’s] proposed exemption from the decommissioning financial assurance requirements, which is premised on obtaining a contract with [the Department of Energy].” NRC Staff Response at 12. But the Staff misconstrues Beyond

In its October 29, 2018 Order, the Commission denied Beyond Nuclear's Motion to Dismiss on the "procedural grounds" that NRC regulations for consideration of hearing requests and petitions to intervene "do not . . . 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." Order at 2. Because the Order did not reach the question of whether Beyond Nuclear's claims are admissible as a contention in this proceeding, the ASLB must address it in the first instance. Beyond Nuclear respectfully submits that while its claims do not meet the NRC's requirements for an admissible contention, they *are* cognizable under the NWPA and the APA. Therefore, Beyond Nuclear requests that any ASLB panel appointed to hear this case refer Beyond Nuclear's claims to the Commission for further consideration. *See Private Fuel Storage, L.L.C.*, (Independent Spent Fuel Storage Installation) CLI-02-11, 55 N.R.C. 260 (2002), in which the Commission considered whether the NRC had jurisdiction to issue a license because jurisdiction is "a fundamental issue going to the very heart of [a] proceeding." *Id.* at 264. While the Commission has referred Beyond Nuclear's Motion to Dismiss to the ASLB for consideration in the first instance, Beyond Nuclear respectfully submits that the Motion should be referred back to the Commission for disposition of the fundamental jurisdictional issue that it raises. As the Commission observed, "[i]f in fact NRC has no authority to issue . . . a license, completion of the licensing process would be a waste of resources for all parties as well as the Commission." *Id.*

Nuclear's contention. Beyond Nuclear's contention does not claim violations of the Atomic Energy Act or any of its implementing regulations. It claims only violations of the NWPA and the APA.

2. ISP's and the Staff's other arguments against the admissibility of Beyond Nuclear's contention are without merit.

While Beyond Nuclear and ISP agree on the issues of scope and materiality, both ISP and the Staff err in challenging the legal and factual accuracy of the contention. In order to ensure that these errors are not relied on in any decision relating to Beyond Nuclear's claims, we discuss them below.

a. Beyond Nuclear's contention does not mischaracterize the law.

Citing two decisions, ISP argues that “the NWPA in no way limits or affects the NRC’s authority to license away-from-reactor centralized interim storage facilities.” ISP Response at 32 (citing *Private Fuel Storage, L.L.C.*, (Independent Spent Fuel Storage Installation) CLI-02-29, 56 N.R.C. 390 (2002) and *Bullcreek v. Nuclear Reg. Comm’n*, 359 F.3d 536 (D.C. Cir. 2004)). Neither of those decisions addresses the question at issue here: whether the NWPA precludes the licensing of a private facility that would store spent fuel *owned by the federal government and transported to the facility by the federal government*. As discussed at length in Beyond Nuclear’s Motion to Dismiss, and incorporated into Beyond Nuclear’s contention, the NWPA prohibits the federal government from taking ownership of spent fuel unless and until a repository has been licensed, built, and opened. Motion to Dismiss at 19-20. Thus, Beyond Nuclear’s contention does not mischaracterize the law.⁸

⁸ ISP also argues that the ASLB may put on blinders, disregarding the Department of Energy’s (“DOE”) ownership of the spent fuel to be stored at its facility as essentially an issue for DOE alone. ISP Response at 33-34 (noting “separate” required agency approvals should not limit the NRC’s licensing ability). But the issue must involve NRC. Unlike the examples ISP provides, here the NRC’s *own* licensing action would allow for unlawful DOE ownership of spent fuel. This flies in the face of the APA, which prohibits federal agencies from taking action that is “not in accordance with law,” or “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. §§ 706(2)(A), (C). *See also Nat’l Ass’n of Regulatory Util. Comm’rs v. U.S. Dep’t of Energy*, 736 F.3d 517, 519-520 (D.C. Cir. 2013).

b. Beyond Nuclear’s contention does not mischaracterize the facts.

ISP and the Staff both dispute Beyond Nuclear’s assertion that federal ownership of spent fuel is “central” to ISP’s application. ISP Response at 27, NRC Staff Response at 12. Because ISP’s application states that the owner of the spent fuel will be either the DOE “or” private licensees, ISP argues that it does not “necessarily” assume DOE will hold title to the spent fuel to be transported to and stored at the CISO. ISP Response at 27. According to ISP, its application is lawful because “[i]f ISP does not have an executed contract with DOE, then it must have executed contracts with commercial entities holding title to [spent nuclear fuel.]” *Id.* at 31.

First, ISP is not offering two equal alternatives when it states “either” DOE “or” private spent fuel generators will be its customers. Rather, as ISP acknowledges, DOE ownership is its preferred alternative. ISP will turn to private owners only as a second option “if it is not able to execute ... a contract with DOE.” ISP Response at 29. Because the ISP application gives preference to DOE ownership, Beyond Nuclear made no factual error regarding the application’s central focus.

Second – and more importantly – ISP fails to recognize that by seeking approval of an operational scheme that *could* include DOE ownership of spent fuel, and therefore *could* result in NAWPA violations if carried out, ISP violates the NAWPA. And by entertaining a license application containing provisions that would approve and allow ISP to violate the NAWPA, the NRC would also violate the NAWPA. *Arizona Public Service Co., et al.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-82-117A, 16 N.R.C. 1964, 1991 (1964) (“[I]t would be improper for the Board to entertain a collateral attack upon any action *or inaction* of sister federal agencies on a matter over which the Commission is totally devoid of any jurisdiction.”) (emphasis added). *See also U.S. Dep’t of Energy* (High-Level Waste Repository), CLI-09-14, 69

NRC 580, 605-06 (2009) (refusing to admit a contention challenging DOE's integrity as an applicant for a repository license where "Congress has already determined DOE as the appropriate license applicant, indeed the *only* appropriate applicant."). The fact that ISP *might not* violate the NWPA does not sanction an NRC licensing decision that would give ISP the unchecked opportunity. To rule otherwise would violate not only the NWPA, but basic principles of "comity" between federal agencies. *Arizona Public Service Co.*, 16 NRC at 1991.

III. CONCLUSION

For the foregoing reasons, Beyond Nuclear's Hearing Request should be denied on grounds of scope and materiality alone, and its claims should be referred to the Commission.

Respectfully submitted,

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November 5, 2018

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE SECRETARY

In the Matter of:)
)
Interim Storage Partners) Docket No. 72-1050
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(WCS Consolidated Interim Storage Facility))
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CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2018, BEYOND NUCLEAR’S REPLY TO OPPOSITIONS TO HEARING REQUEST AND PETITION TO INTERVENE was posted on the NRC’s Electronic Information Exchange System.

___/signed electronically by/___
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