

No. 21-60743

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UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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STATE OF TEXAS; GREG ABBOTT, GOVERNOR OF TEXAS;  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY;  
FASKEN LAND AND MINERALS, LTD.; and  
PERMIAN BASIN LAND AND ROYALTY OWNERS,  
*Petitioners,*

v.

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

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On Petition for Review of Action by the  
Nuclear Regulatory Commission

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**MOTION TO DISMISS OR TRANSFER THE  
PETITION FOR REVIEW OF FASKEN LAND AND MINERALS  
AND PERMIAN BASIN LAND AND ROYALTY OWNERS**

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

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

## CERTIFICATE OF INTERESTED PERSONS

Case No. 21-60743

STATE OF TEXAS; GREG ABBOTT, GOVERNOR OF TEXAS;  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY;  
FASKEN LAND AND MINERALS, LTD.; and  
PERMIAN BASIN LAND AND ROYALTY OWNERS,  
*Petitioners,*

v.

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

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

1. Petitioners
  - a. State of Texas
  - b. Greg Abbott, Governor of Texas
  - c. Texas Commission on Environmental Quality
  - d. Fasken Land and Minerals, Ltd.
  - e. Permian Basin Land and Royalty Owners
2. Counsel for Petitioners
  - a. Michael Abrams, Office of Attorney General, State of Texas
  - b. Ryan Baasch, Office of Attorney General, State of Texas

- c. Henry Carl Myers, Office of Attorney General, State of Texas
  - d. Allan L. Kanner, Kanner & Whiteley, L.L.C.
  - e. Annemieke M. Tennis, Kanner & Whiteley, L.L.C.
  - f. Monica Renee Perales
3. Respondents
- a. United States Nuclear Regulatory Commission
  - b. United States of America
4. Counsel for Respondents
- a. Andrew P. Averbach, U.S. Nuclear Regulatory Commission
  - b. Todd Kim, U.S. Department of Justice
  - c. Jennifer Scheller Neumann, U.S. Department of Justice
  - d. Justin Heminger, U.S. Department of Justice
5. Respondent-Intervenor
- a. Interim Storage Partners, LLC
  - b. Orano CIS, LLC
  - c. Orano USA, LLC
  - d. Orano SA, owned by government of France, Mitsubishi, and Japan  
Nuclear Fuel
  - e. Waste Control Specialists, LLC
  - f. Fermi Holdings, Inc.

- g. J.F. Lehman & Co.
6. Counsel for Respondent-Intervenor
- a. Brad Fagg, Morgan, Lewis & Bockius LLP

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

Respondents Nuclear Regulatory Commission (“NRC”) and the United States of America move to dismiss or in the alternative to transfer to the U.S. Court of Appeals for the District of Columbia Circuit, the Petition for Review of Fasken Land and Minerals, Limited and Permian Basin Land and Royalty Owners (together “Fasken”). Counsel for Respondents contacted all parties concerning this motion. Fasken opposes this motion and will file a response. Petitioners State of Texas, Governor Abbott, and Texas Commission on Environmental Quality (collectively “Texas”) oppose the relief requested and intend to file a response. Respondent-Intervenor Interim Storage Partners, LLC (“ISP”) supports the requested relief but will not file a separate response.

### **BACKGROUND**

This action concerns an Atomic Energy Act (“AEA”) license that the NRC issued on September 13, 2021, to ISP to construct and operate a facility in Texas for the storage of spent nuclear fuel. On September 23, 2021, Texas filed a petition for review in this Court challenging the license. The NRC and the United States moved to dismiss that petition because Texas did not participate in the adjudicatory hearing process before the NRC. On November 19, 2021, this Court ordered that motion be carried with the case. Order (Nov. 19, 2021) (per curiam).

Unlike Texas, Fasken *did* participate in the NRC’s adjudicatory proceedings. In decisions dated December 17, 2020 and June 22, 2021, the NRC determined that

Fasken's contentions supporting its request to intervene as a party were not admissible, denied its hearing request, and declined to admit Fasken as a party. In August 2021, Fasken petitioned for review of those decisions in the D.C. Circuit. *See* Exhibit 1. The D.C. Circuit consolidated Fasken's petition with three other similar petitions for review (the first of which was filed in February 2021) challenging the NRC's decisions denying the other petitioners' requests for party status in the ISP license adjudicatory proceedings. On November 10, 2021, the D.C. Circuit issued an order establishing a briefing format and schedule for these consolidated petitions for review. Petitioners' opening brief (or briefs) is due January 20, 2021.

On November 12, 2021, the three sets of petitioners before the D.C. Circuit other than Fasken filed four new petitions for review in the D.C. Circuit, this time purporting to challenge the NRC's September 13, 2021, issuance of the ISP license. The D.C. Circuit consolidated three of the petitions (apparently inadvertently excluding the fourth) with the petitions that had previously been filed, including Fasken's. Order, Doc. No. 1922896, *Don't Waste Michigan v. NRC*, No. 21-1048 (D.C. Cir. Nov. 17, 2021). The D.C. Circuit also ordered that the previously entered briefing format and schedule also applied to the newly consolidated petitions. Thus, eight consolidated petitions for review are pending before the D.C. Circuit related to the ISP license, including Fasken's.

Fasken did not take the same route as the other D.C. Circuit petitioners. Rather than filing another petition in the D.C. Circuit, as its co-petitioners did, Fasken filed a new Petition for Review of the ISP license itself in this Court.

## ARGUMENT

### **I. The Petition for Review should be dismissed because Fasken cannot directly challenge the ISP license and because the license was issued under the Atomic Energy Act, not the Nuclear Waste Policy Act.**

Fasken’s Petition for Review should be dismissed because this Court lacks jurisdiction to hear a direct challenge to the ISP license by a party that unsuccessfully sought intervention in the NRC’s adjudicatory proceedings. As discussed below, a party denied intervenor status must challenge the decision denying intervention, and it cannot seek judicial review of the final order issuing the license.

Section 189 of the AEA, 42 U.S.C. § 2239(a), (b), and the Hobbs Act, 42 U.S.C. §§ 2342, 2342, permit “parties aggrieved” by final orders in NRC licensing proceedings to seek judicial review of those orders in the United States courts of appeals. Only “parties aggrieved” by such orders are permitted to seek such relief. *See In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 799 F.2d 317, 334-35 (7th Cir. 1986) (Hobbs Act “limits review to petitions filed by parties, and that is that.”). When an intervenor is admitted to an NRC proceeding for the issuance of a license, it becomes a “party” and is permitted to file a petition for review in the

court of appeals within sixty days of the issuance of the license. 28 U.S.C. § 2344. Indeed, this is the “ordinary” scenario in which the “final order” that triggers Hobbs Act jurisdiction is the issuance of the license. *See, e.g., City of Benton v. NRC*, 136 F.3d 824, 825 (D.C. Cir. 1998).

However, when a putative intervenor before the NRC does not obtain party status because the agency does not admit its contentions, then it is not a “party aggrieved” with respect to the issuance of the license; rather, the putative intervenor is a “party aggrieved” with respect to the independent NRC order denying it intervention. In that situation, the putative intervenor’s proper judicial remedy is to challenge the decision denying it party status, which it must do within 60 days of the order denying its admission to the proceeding, and it cannot challenge the license itself. *See* 28 U.S.C. § 2344; *Alaska v. FERC*, 980 F.2d 761, 763 (D.C. Cir. 1992) (“Having failed to achieve the status of a party to the litigation, the putative intervenor could not later seek review of the final judgment on the merits.”); *Ecology Action v. Atomic Energy Comm’n*, 492 F.2d 998, 1000 (2nd Cir. 1974) (order denying intervention is immediately appealable as final order even if license has not yet issued); *Thermal Ecology Must Be Preserved v. Atomic Energy Comm’n*, 433 F.2d 524, 526 (D.C. Cir. 1970) (“An order denying intervention would be reviewable . . .”).



Fasken followed the path charted by these precedents. Along with the other D.C. Circuit petitioners, Fasken challenged the NRC's adjudicatory decisions denying it party status by filing a petition for review in the D.C. Circuit. And Respondents have not contested the D.C. Circuit's jurisdiction over those original petitions for review. But this Court lacks jurisdiction over Fasken's new Petition for Review because Fasken never obtained intervenor status in the NRC's adjudicatory proceedings that led to the issuance of the ISP license. Under these circumstances, Fasken's sole remedy under the Hobbs Act is to pursue its challenge to the NRC's denial of its admission as a party to the proceedings, as it has already done in the D.C. Circuit. *Alaska*, 980 F.2d at 763. Fasken's Petition for Review before this Court of its claims directly challenging the ISP license should be dismissed.

In addition to claiming jurisdiction under the Hobbs Act, Fasken's Petition for Review also invokes the judicial review provision of the Nuclear Waste Policy Act ("NWPA"), 42 U.S.C. § 10139. This provision is inapplicable. The NRC issued the ISP license under the AEA and, specifically, its authority to issue licenses for the possession of spent nuclear fuel pursuant to 10 C.F.R. Part 72. The very first paragraph of the license plainly states this. *See* Exhibit 2 ("Pursuant to the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974 (Public Law 93-438), and Title 10, Code of Federal Regulations, Chapter 1,

Part 72, and in reliance on statements and representations heretofore made by the licensee, a license is hereby issued . . .”). And it is well-settled that the Commission has authority under the AEA (not the NWPA) to license and regulate the storage of such fuel by private parties. *Bullcreek v. NRC*, 359 F.3d 536, 538-39 (D.C. Cir. 2004); *see also id.* at 542 (In enacting NWPA, “Congress did not intend to repeal or supersede the NRC's authority under the AEA to license and regulate private use of private away-from-reactor spent fuel storage facilities.”).

The NWPA’s judicial review provision plainly relates to review of agency action taken pursuant to the NWPA, not the AEA. Specifically, the NWPA authorizes judicial review of agency action related to the issuance of a license *to the Department of Energy* to construct and operate a spent fuel storage or disposal facility.<sup>1</sup> The license at issue in this case was issued pursuant to the AEA to a private party, ISP, not to the Department of Energy; and it is the judicial review provision of that statute (i.e., AEA § 189(b), 42 U.S.C. § 2239(b), invoking review under the Hobbs Act) that governs Fasken’s challenge.

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<sup>1</sup> Section 10139 of the NWPA refers to judicial review of actions of the President, DOE, or NRC taken under “this part,” which is a reference to actions undertaken pursuant to U.S. Code Title 42, Chapter 108, Subchapter 1, Part A, 42 U.S.C. §§ 10131-10145. The licensing action that Fasken challenges in its Petition for Review was not undertaken pursuant to any of these provisions, or any provision of the NWPA.

In summary, because neither the Hobbs Act nor the NWPA gives this Court jurisdiction to review the ISP license, Fasken's Petition for Review should be dismissed.

**II. Alternatively, the Petition for Review should be transferred to the D.C. Circuit, where Fasken is already pursuing a challenge to the NRC's actions.**

If this Court declines to dismiss Fasken's Petition for Review, it should transfer the Petition to the D.C. Circuit. Transfer is in the interests of justice, promotes efficient use of judicial and party resources, and avoids the potential for conflicting decisions involving the same parties.

In August 2021, Fasken filed a petition for review in the D.C. Circuit that challenges the NRC's denial of intervention in the ISP license proceedings. Since then, Fasken has continued to pursue that petition, including by joining the other petitioners in requesting and obtaining a briefing schedule and format from the D.C. Circuit. There is no question that, as did the other D.C. Circuit petitioners, Fasken *could* have filed its subsequent petition for review challenging the ISP license in the D.C. Circuit (even if there is no independent jurisdictional basis for the court to review the license itself, as discussed above). Instead, Fasken filed the Petition for Review of the ISP license in this Court. Fasken's decision to bifurcate judicial review of the related actions by the NRC between two courts of appeals could lead to conflicting judicial opinions. For instance, if the D.C. Circuit were to

hold that the NRC properly denied Fasken intervention in the ISP proceedings, then this Court's review of Fasken's challenge to the ISP license would conflict with that decision.

Moreover, the D.C. Circuit has consolidated the petitions for review pending in that court, both the petitions challenging the NRC's orders denying intervention and the petitions directly challenging the NRC's issuance of the ISP license (by parties other than Fasken). If this Court does not transfer Fasken's Petition, Fasken would be participating in briefing in two courts of appeals challenging the same ISP license. This is an improper and inefficient use of judicial and party resources that creates a risk of conflicting opinions by two courts of appeals involving the same order (the ISP license) and the same parties (Fasken and Respondents).

Fasken also appears likely to raise issues in this Court that substantially overlap with the issues it intends to pursue in the D.C. Circuit. For example, in its non-binding statement of issues filed before the D.C. Circuit, Fasken identified the following issue, among others:

Whether the NRC acted arbitrarily and capriciously, failed to engage in reasoned decision-making, acted without substantial evidence, abused its discretion, and/or acted otherwise contrary to law, including but not limited to in violation of the NWPA, the APA, the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, *et seq.* ("NEPA") and/or its own regulations, when it denied Petitioners' the required opportunity for a hearing and ruled that Petitioners' contentions were inadmissible in CLI-20-14 and/or CLI-21-09.

Petitioners’ Non-Binding Statement of Issues at 2, Doc. No. 1921498, *Don’t Waste Michigan v. NRC*, No. 21-1048 (D.C. Cir. Nov. 8, 2021). This issue is similar to the NEPA argument that Fasken has identified in its Petition for Review before this Court. *See* Petition for Review at 2 (asserting that “the NRC’s record of decision eschews reasonable consideration of environmental impacts of the ISP/[Waste Control Specialists’ Consolidated Interim Storage Facility]”). Fasken should not be permitted to pursue similar issues before multiple courts of appeals, especially when that overlap is the result of its choice to file petitions in both courts. Moving forward with the Petition for Review in this Court that raises similar issues to those that will be raised in the D.C. Circuit would undermine a sister circuit’s case management efforts and needlessly complicate the litigation for all involved, including the courts.

To the extent this Court has jurisdiction over Fasken’s Petition for Review (and it plainly does not), it is empowered to transfer the Petition to the D.C. Circuit, where Fasken could have filed the Petition. *See* 28 U.S.C. § 2343; *American Newspaper Publishers Ass’ns v. U.S. Postal Service*, 789 F.2d 1090, 1092 (5th Cir. 1986) (transferring case to Fourth Circuit). And, in this case, the interest of justice—with respect to conserving judicial resources, the undesirability of inconsistent decision from different circuits, and the discouragement of forum-

shopping—strongly militates in favor of transfer here. *Cf.* 28 U.S.C. § 1404(a) (permitting transfer of district court actions in the interest of justice).

This interest likewise militates in favor of transfer in the event that Fasken invokes 28 U.S.C. § 2112(a) as a reason to keep its Petition for Review in this Court. Section 2112(a) is “a somewhat unusual venue statute” that provides for consolidated review of petitions in a single court of appeals “to avoid confusion and duplication by the courts” and “to prevent unseemly conflicts that could result should sister circuits take the initiative and issue conflicting decisions.”

*Westinghouse Elec. Corp. v. NRC*, 598 F.2d 759, 766-67 (3rd Cir. 1979). Under Section 2112(a), consolidated review is determined by (1) a lottery, when multiple petitions are filed in different circuits within 10 days of the agency order issuing; or (2) a first-filed ruled. 28 U.S.C. § 2112(a); *see Wynnewood Refining Co. v. OSHA*, 933 F.3d 499, 500 & n.1 (5th Cir. 2019). But while Texas was the only party to directly challenge the ISP license itself within ten days of the NRC issuing the license, Section 2112 does not “anchor” challenges to the license in this Court.

First, Texas’s petition for review is jurisdictionally infirm, for the reasons set forth in our prior Motion to Dismiss. Although this Court has deferred resolution of that Motion to the merits stage, neither Fasken nor Texas should not be able to rely on Texas’s petition as the first filed when there is a serious question whether that petition is jurisdictionally sound. *Cf. Pub. Serv. Comm’n for State of N.Y. v.*

*Fed. Power Comm'n*, 472 F.2d 1270, 1272 (D.C. Cir. 1972) (noting exception to the first-to-file rule for “a case where the first petition to review is filed by a party *who is not substantially aggrieved*, in effect undercutting the assumption of a good faith petition to review” (emphasis added)).

Second, the jurisdictionally sound petitions for review in the D.C. Circuit (including Fasken’s) were filed long before Texas filed its petition. Section 2112 provides “a mechanical rule for determining which court should determine venue in the case of conflicting petitions for review.” *Nat’l Parks Conservation Ass’n v. EPA*, 991 F.3d 681, 684 (5th Cir. 2021) (cleaned up). “Specifically, [i]f proceedings are instituted in two or more courts of appeals with respect to the same [administrative agency] order, then the court in which the proceedings ‘were first instituted’ should determine venue.” *Id.* (quoting 28 U.S.C. § 2112(a)(1), (5)) (cleaned up). In this regard, the courts of appeals recognize that Section 2112(a)’s reference to the “same order” should account for multiple orders issued in the same or interrelated proceedings. *See, e.g., Pub. Serv. Comm’n for N.Y.*, 472 F.2d at 1272 (noting exception to the first-to-file rule for “a case where the same or inter-related proceeding was previously under review in a court of appeals and is now brought for review of an order entered after remand, or in a follow-on phase, where continuance of the same appellate tribunal is necessary ‘to maintain continuity in the total proceeding’”); *BASF Wyandotte Corp. v. Costle*, 582 F.2d 108, 112 (1st

Cir. 1978) (adopting a rule under which “sequential regulations should be considered the same order” for purposes of Section 2112(a) “if they arise from the ‘same or interrelated proceedings’”); *Westinghouse*, 598 F.2d at 767 (“Also in keeping with the purposes of the statute, courts have interpreted the term, ‘the same order,’ so as to insure the consolidation in one court of petitions from sequential orders arising from the same administrative background and cumulative record.”).

Here, although those petitions challenge earlier actions by the NRC, those actions arose from the same proceedings that eventually resulted in the ISP license. And the D.C. Circuit has now consolidated the new petitions for review challenging the ISP license with the earlier-filed petitions challenging the NRC order denying intervention. Order, Doc. No. 1922896, *Don’t Waste Michigan v. NRC*, No. 21-1048 (D.C. Cir. Nov. 17, 2021). Under these circumstances, the first-to-file rule should be measured from the first petition filed in the D.C. Circuit in February 2021. *See* Petition for Review, *Don’t Waste Michigan v. NRC*, No. 21-1048 (D.C. Cir. Feb. 2, 2021). This Court should reject Fasken’s attempt to shift the locus of properly filed proceedings away from the circuit in which they were originally filed and, in so doing, create a duplication of judicial and party resources and a substantial risk of inconsistent judgments.



Finally, we acknowledge that even if this Court transfers Fasken’s Petition for Review to the D.C. Circuit, Texas’s petition will remain in this Court. For three reasons, however, the perfect should not be the enemy of the good.

First, unlike Fasken, Texas filed in only one court of appeals and has challenged only the ISP license.

Second, unlike Fasken, Texas never sought to participate in the ISP adjudicatory proceedings. For the reasons explained in our prior Motion to Dismiss, Texas therefore is precluded from challenging the ISP license in any court of appeals. Thus, the final disposition of Texas’ petition for review should be dismissal for lack of jurisdiction. In contrast, Fasken has a timely, jurisdictionally proper petition for review that has been pending in the D.C. Circuit since August 2021. That court, therefore, is the proper forum for any and all of Fasken’s challenges to the NRC’s actions to be heard.

Third, Section 2112(a) authorizes the court where the record is filed to “transfer all proceedings with respect to that order” to any court of appeals “[f]or the convenience of the parties in the interest of justice.” 28 U.S.C. § 2112(a)(5). Here, the convenience of the parties and the interest of justice weigh in favor of Fasken’s Petition being transferred to the D.C. Circuit. *Cf. American Pub. Gas Ass’n v. Fed. Power Comm’n*, 555 F.2d 852, 857, 861 (D.C. Cir. 1976) (observing that this Court had agreed to a procedure by which the D.C. Circuit “should take

the lead and reach a determination on venue” and looking to the convenience of the parties and interest of justice as the basis for determining venue). As to the parties’ convenience, the D.C. Circuit has established an efficient briefing format and schedule that will govern the consolidated petitions for review before that Court, including Fasken’s own, earlier-filed petition. As to the interest of justice, Fasken’s strategic choice to file in two courts of appeals should not be rewarded.

### CONCLUSION

Respondents respectfully request that this Court dismiss Fasken’s Petition for Review for lack of subject-matter jurisdiction, or in the alternative, transfer the Petition to the United States Court of Appeals for the D.C. Circuit.

Respectfully submitted,

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

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

December 2, 2021

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

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

I further certify that this filing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 3,298 words, excluding the parts of the of the filing exempted under Fed. R. App. P. 32(f), according to the count of Microsoft Word.

/s/ Andrew P. Averbach

Andrew P. Averbach

Counsel for Respondent

U.S. Nuclear Regulatory Commission

## CERTIFICATE OF SERVICE

I certify that on December 2, 2021, I served a copy of **MOTION TO DISMISS OR TRANSFER THE PETITION FOR REVIEW OF FASKEN LAND AND MINERALS AND PERMIAN BASIN LAND AND ROYALTY OWNERS** upon counsel for the parties in this action by filing the document electronically through the CM/ECF system. This method of service is calculated to serve counsel at the following e-mail addresses:

**Michael Abrams**

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

**Henry Carl Myers**

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

**Justin Heminger**

justin.heminger@usdoj.gov, efile\_app.enrd@usdoj.gov

**Arnold Bradley Fagg**

brad.fagg@morganlewis.com

**Allan L. Kanner**

a.kanner@kanner-law.com; A.Tennis@kanner-law.com, k.crowell@kanner-law.com

/s/ Andrew P. Averbach

Andrew P. Averbach

Counsel for Respondent  
U.S. Nuclear Regulatory Commission

# EXHIBIT 1

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

FASKEN LAND AND MINERALS,  
LTD. and PERMIAN BASIN LAND  
AND ROYALTY OWNERS,

Petitioners,

v.

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

Respondents.

Case No. 21-1147

**PETITION FOR REVIEW**

Pursuant to 42 U.S.C. § 2239, 28 U.S.C. § 2344, 5 U.S.C. § 702, 42 U.S.C. § 10139, Fed. R. App. P. 15(a), and D.C. Cir. Rule 15(a), Petitioners Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners (“Fasken” or “Petitioners”), through undersigned counsel, hereby petitions for review of the following orders by the United States Nuclear Regulatory Commission (the “NRC”):

- Order of NRC Secretary (unpublished) issued on October 29, 2018 (“Secretary’s Order”) (attached hereto as Exhibit A);
- NRC Memorandum and Order CLI-20-04 issued on April 23, 2020 (“CLI-20-04”) (attached hereto as Exhibit B); and
- NRC Memorandum and Order CLI-21-07 issued on April 28, 2021 (“CLI-21-07”) (attached hereto as Exhibit C).

Petitioners seek review of the foregoing agency actions on the grounds that the NRC abused its discretion, acted arbitrarily and capriciously, in excess of statutory jurisdiction, and in violation of the Nuclear Waste Policy Act (“NWPA”), U.S.C. §§ 10222(a)(5)(A) and 10143, the Atomic Energy Act (“AEA”), 42 U.S.C. §§ 2011 *et seq.*, the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 706, the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 *et seq.*, and/or NRC’s own regulations and policies when it denied Petitioners a meaningful opportunity to participate in the process.

Specifically, Petitioners contend that the Secretary’s Order violated the NWPA and the APA by refusing to dismiss an administrative proceeding that contemplated issuance of a license permitting federal ownership of used reactor fuel at a commercial fuel storage facility and disregarding the unambiguous provisions of the NWPA. Petitioners also contend that the NRC violated the NWPA and the APA in CLI-20-04 by ruling that the application under review in the proceeding was lawful and by refusing to grant Petitioners a hearing on the question of whether the NRC is prohibited by the APA from issuing a license that contains provisions that would violate the NWPA if implemented.

Finally, Petitioners seek review of CLI-21-07 on the grounds that the NRC wrongfully applied the NWPA, AEA, APA, NEPA and/or its own regulations when it ruled that Petitioners site-specific contentions relating to inaccurate, insufficient

and inconsistent characterizations of property rights, land-use and subsurface mineral rights in the vicinity of the proposed location for the commercial fuel storage facility were inadmissible.

Petitioners respectfully request that this Court review, reverse and vacate CLI-20-04 and CLI-21-07; alternatively, and/or cumulatively, order the dismissal of the license application under review; and grant any other additional remedies that may be warranted by law and equity.

Venue is proper in this Court pursuant to 28 U.S.C. § 2343.

Dated: June 25, 2021.

Respectfully submitted,

KANNER & WHITELEY, LLC

/s/ Allan Kanner

Allan Kanner, Esq.

Annemieke M. Tennis, Esq.

701 Camp Street

New Orleans, Louisiana 70130

(504) 524 - 5777

[a.kanner@kanner-law.com](mailto:a.kanner@kanner-law.com)

[a.tennis@kanner-law.com](mailto:a.tennis@kanner-law.com)

Monica Renee Perales, Esq.

6101 Holiday Hill Road

Midland, TX 79707

Phone (432)687-1777

[monicap@forl.com](mailto:monicap@forl.com)

*Counsel for Petitioners*



# EXHIBIT 2

**LICENSE FOR INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL AND  
HIGH-LEVEL RADIOACTIVE WASTE**

Pursuant to the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974 (Public Law 93-438), and Title 10, Code of Federal Regulations, Chapter 1, Part 72, and in reliance on statements and representations heretofore made by the licensee, a license is hereby issued authorizing the licensee to receive, acquire, and possess the power reactor spent fuel and other radioactive materials associated with spent fuel storage designated below; to use such material for the purpose(s) and at the place(s) designated below; and to deliver or transfer such material to persons authorized to receive it in accordance with the regulations of the applicable Part(s). This license shall be deemed to contain the conditions specified in Section 183 of the Atomic Energy Act of 1954, as amended, and is subject to all applicable rules, regulations, and orders of the Nuclear Regulatory Commission now or hereafter in effect and to any conditions specified herein.

This license is conditioned upon fulfilling the requirements of 10 CFR Part 72, as applicable, the attached Appendix A (Technical Specifications), and the conditions specified below.

## Licensee

- |    |  |                                  |   |
|----|--|----------------------------------|---|
| 1. | Interim Storage Partners LLC (ISP)   | 3. License No.                   | SNM-2515  |
|    |  | Amendment No.                    | 0   |
| 2. | WCS CISF<br>9998 Highway 176 West<br>Andrews, Texas, 79714   | 4. Expiration Date               | September 13, 2061  |
|    |  | 5. Docket or Reference No.       | 72-1050   |
| 6. | Byproduct, Source, and/or Special Nuclear Material   | 7. Chemical and/or Physical Form | 8. Maximum Amount That Licensee May Possess at Any One Time Under This License  |
| A. | Spent nuclear fuel elements from commercial nuclear utilities licensed pursuant to 10 CFR Part 50, including those stored under either a Part 50 general license or Part 72 specific license, and associated fuel assembly control components and associated radioactive materials related to the receipt, transfer, and storage of that spent nuclear fuel. | A.                               | Intact fuel assemblies, damaged fuel assemblies, failed fuel and fuel debris, as allowed by Materials License SNM-2510, Amendment 4; Table 1-1c or Table 1-1j of Certificate of Compliance No. 1004, Amendments 3 through 13; Table 1-1t of Certificate of Compliance No. 1004, Amendments 10 through 13; Section 2.1 of Certificate of Compliance No. 1029, Amendments 0, 1, and 3; Section B 2.1 of Certificate of Compliance No. 1025, Amendments 0 through 6; Section B 2.1.2 of Certificate of Compliance No. 1015, Amendments 0 through 5; Table B 2-1 of Certificate of Compliance No. 1031, Amendments 0 through 3 Revision 1, and 4 through 5, modified as described in Condition 9 below. |
| B. | Greater than Class C Waste, reactor related material generated as a result of plant operations and decommissioning where radionuclide concentration limits of Class C waste in 10 CFR 61.55 are exceeded.  | B.                               | Greater than Class C Waste, as activated and potentially surface contaminated metals comprised of miscellaneous solid waste resulting from segmentation and decommissioning processes.  |
|    |  | B.                               | 231.3 MT (510,000 pounds) of Greater than Class C Waste.  |

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**LICENSE FOR INDEPENDENT STORAGE OF SPENT NUCLEAR  
FUEL AND HIGH-LEVEL RADIOACTIVE WASTE  
SUPPLEMENTARY SHEET**

9. Authorized Use: The material identified in 6.A, 6.B, 7.A and 7.B above is authorized for receipt, possession, storage, and transfer at the WCS Consolidated Interim Storage Facility (WCS CISF), as described in the WCS CISF Final Safety Analysis Report (FSAR) as updated. Storage of fuel is authorized only in canisters referenced in Section 2.1 of the Attachment, Appendix A Technical Specifications and all fuel with assembly average burnup greater than 45 GWd/MTHM shall be canned inside the canister.
10. Authorized Place of Use: The licensed material is to be received, possessed, transferred, and stored at the WCS CISF, geographically located within Andrews County, Texas.
11. The Technical Specifications contained in the Appendix attached hereto are incorporated into the license. The Licensee shall operate the installation in accordance with the Technical Specifications in the Appendix.
12. The licensee shall follow WCS ERP-100, "Consolidated Emergency Response Plan," Revision 02-08-2019, and as it may be further revised in accordance with 10 CFR 72.44(f).
13. The Licensee shall:
- (1) follow the Physical Protection Plan entitled, "WCS Consolidated Interim Storage Facility (CISF) Physical Security Plan," Revision 5, dated September 18, 2019, as well as changes made in accordance with 10 CFR 72.44(e) and 72.186(b);
  - (2) follow the Training and Qualification Plan entitled, "WCS Consolidated Interim Storage Facility (CISF) Training and Qualification Plan Appendix B to the CISF Physical Security Plan," dated September 18, 2019, as well as changes made in accordance with 10 CFR 72.44(e) and 72.186(b);
  - (3) follow the Safeguards Contingency Plan entitled "WCS Consolidated Interim Storage Facility (CISF) Safeguards Contingency Plan Appendix C to the CISF Physical Security Plan," dated September 18, 2019, as well as changes made in accordance with 10 CFR 72.44(e) and 72.186(b);
  - (4) follow the "Additional Security Measures for the Physical Protection of Dry Independent Spent Fuel Storage Installations," dated September 28, 2007; and
  - (5) follow the "Additional Security Measures for Access Authorization and Fingerprinting at Independent Spent Fuel Storage Installations," dated December 19, 2007.
14. Construction of the WCS CISF shall not commence before funding (equity, revenue, and debt) is fully committed that is adequate to construct a facility with the initial capacity as specified by the Licensee to the NRC. Construction of any additional capacity beyond the initial capacity amount shall commence only after funding is fully committed that is adequate to construct such additional capacity.
15. The Licensee shall, in its contracts with clients:
- (1) include provisions requiring clients to retain title to the material identified in 6.A, 6.B, 7.A or 7.B, and include provisions allocating legal and financial liability among the Licensee and the client(s);
  - (2) include provisions requiring clients to periodically provide credit information, and, when necessary, additional financial assurances such as guarantees, prepayment, or payment bond(s);
  - (3) include a provision requiring the Licensee not to terminate the license prior to furnishing storage services covered by the contract.
16. The Licensee shall obtain onsite and offsite insurance coverage in the amounts committed to by ISP in the ISP license application.

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License No. Amendment No.

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72-1050

**LICENSE FOR INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL AND HIGH-LEVEL RADIOACTIVE WASTE**

**SUPPLEMENTARY SHEET**

17. To conform with the requirements of 10 CFR 72.42, the Licensee shall submit a request for license amendment(s) to incorporate any technically applicable provisions of the Aging Management Programs (AMPs) and Time-Limited Aging Analyses (TLAAs) approved in future renewals of NAC Systems CoCs 1015 and 1025 and 1031, for all applicable NAC spent fuel canisters and storage overpacks.

The Licensee shall submit the amendment request(s) within 120 days of the effective date of the applicable CoC approval. In the event that the current CoC holder for CoC 1015 and/or 1025 and/or 1031 does not submit a timely renewal as defined in 10 CFR Part 72.240, the Licensee shall submit a license amendment request, incorporating AMP and TLAA information compliant with 10 CFR 72.42, within one (1) year following the timely renewal deadline defined in 10 CFR 72.240(b) for the applicable CoC.

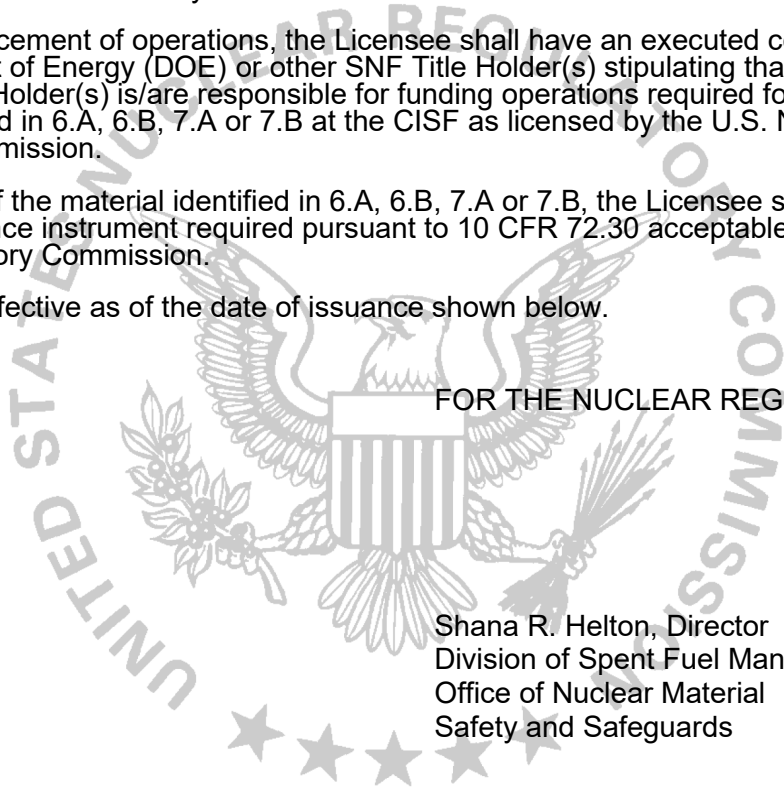
18. The Licensee shall submit a startup plan as described in Chapter 13 of the WCS CISF FSAR, as updated, to the NRC at least 90 days prior to receipt and storage of the material identified in 6.A, 6.B, 7.A or 7.B at the facility.

19. Prior to commencement of operations, the Licensee shall have an executed contract with the U.S. Department of Energy (DOE) or other SNF Title Holder(s) stipulating that the DOE or the other SNF Title Holder(s) is/are responsible for funding operations required for storing the material identified in 6.A, 6.B, 7.A or 7.B at the CISF as licensed by the U.S. Nuclear Regulatory Commission.

20. Prior to receipt of the material identified in 6.A, 6.B, 7.A or 7.B, the Licensee shall have a financial assurance instrument required pursuant to 10 CFR 72.30 acceptable to the U.S. Nuclear Regulatory Commission.

21. This license is effective as of the date of issuance shown below.

FOR THE NUCLEAR REGULATORY COMMISSION



Shana R. Helton, Director  
Division of Spent Fuel Management  
Office of Nuclear Material  
Safety and Safeguards

Date of Issuance September 13, 2021

Attachments: Appendix A –WCS Consolidated Interim Storage Facility Technical Specifications