ORAL ARGUMENT NOT YET SCHEDULED

No. 21-1048 (consolidated with Nos. 21-1055, 21-1056, 21-1179, 21-1227, 21-1229, 21-1230, 21-1231)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DON'T WASTE MICHIGAN, *et al.*,
Petitioners,
v.
NUCLEAR REGULATORY COMMISSION and
UNITED STATES OF AMERICA,
Respondents,

INTERIM STORAGE PARTNERS LLC,
Respondent-Intervenor.

On Petition for Review of Action
by the Nuclear Regulatory Commission

BRIEF FOR FEDERAL RESPONDENTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with Circuit Rule 28(a)(1), Respondents United States Nuclear Regulatory Commission and the United States of America submit this certificate as to parties, rulings, and related cases.

(A) Parties, Intervenors, and Amici

Petitioners are (1) Beyond Nuclear; (2) Sierra Club; (3) Don't Waste Michigan; Citizens' Environmental Coalition; Citizens for Alternatives to Chemical Contamination; Nuclear Energy Information Service; Public Citizen, Inc; San Luis Obispo Mothers for Peace; and Sustainable Energy and Economic Development Coalition; and (4) Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners.

Interim Storage Partners, LLC, has been granted leave to intervene.

Amici are the City of Fort Worth and Natural Resources Defense Council.

(B) Rulings under Review

Petitioners identify the following documents as the rulings under review:

(1) Nuclear Regulatory Commission Order, *Holtec International and Interim Storage Partners LLC*, Docket Nos. 72-1051 and 72-1050 (Oct. 29, 2018);

(2) Nuclear Regulatory Commission Memorandum and Order, *Interim Storage Partners LLC*, CLI-20-14, 92 N.R.C. 463 (Dec. 17, 2020);

(3) Nuclear Regulatory Commission Memorandum and Order, *Interim Storage Partners LLC*, CLI-20-15, 92 N.R.C. 491 (Dec. 17, 2020);

(4) Nuclear Regulatory Commission Memorandum and Order, *Interim Storage Partners, LLC*, CLI-21-9, 93 N.R.C. 244 (June 22, 2021); and

(5) Nuclear Regulatory Commission Materials License SNM-2515 (Sept. 13, 2021.

(C) Related Cases

There are petitions for review pending in the United States Court of Appeals for the Fifth Circuit and the United States Court of Appeals for the Tenth Circuit that are related to this one. Those petitions purport to challenge the issuance of the license (and associated documents by the agency) that are at issue in this case. *See Texas v. NRC*, No. 21-60743 (5th Cir.) (consolidated with Petition for Review brought by Petitioners herein Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners); *New Mexico v. NRC*, No. 21-9593 (10th Cir.).

/s/ Andrew P. Averbach
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GLOSSARY

AEA	Atomic Energy Act
DOE	U.S. Department of Energy
EIS	Environmental Impact Statement
EPA	U.S. Environmental Protection Agency
NEPA	National Environmental Policy Act
NRC	U.S. Nuclear Regulatory Commission
NWPA	Nuclear Waste Policy Act

INTRODUCTION

These Petitions for Review challenge decisions of the Nuclear Regulatory Commission ("Commission" or "NRC" [1]) in proceedings that led to the issuance of a license to Intervenor Interim Storage Partners, LLC, to store spent nuclear fuel at a facility in Andrews County, Texas. Each Petitioner sought to be admitted as a party to the licensing proceeding, submitting adjudicatory "contentions" in support of its request for a hearing before the agency. But, applying its contention admissibility standards governing adjudicatory proceedings, the Commission reasonably found that Petitioners had failed to identify a genuine dispute with the license application (and that one Petitioner's proposed contention was untimely). Petitioners provide no basis to overturn the Commission's reasonable application of its rules as part of its adjudicatory process.

In addition to challenging the denial of their hearing requests, several Petitioners also challenge the ultimate issuance of the license, including associated documents issued by the agency. The Court lacks jurisdiction to consider these assertions. And even if these arguments were reviewable, the Court would have no basis in law or fact to disturb the agency's considered judgment.

The Petitions for Review should be denied.

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[1] We use the terms "NRC" or "agency" to refer to the agency as a whole, and the term "Commission" to refer to the collegial body that oversees the agency and issues rules and adjudicatory decisions on its behalf.

STATEMENT OF JURISDICTION

The Court directed the parties in this case to (1) include in their briefs a discussion of which orders referenced in the Petitions for Review are within the Court's jurisdiction; and (2) indicate whether the proper vehicle for challenging a license, if issued after a request for intervention is denied, is an amended or a new petition for review. Order of November 10, 2021 (Document #1921742). We address those issues briefly here and in Argument Section III.A. below.

The Hobbs Act grants this Court exclusive jurisdiction to entertain challenges to "final orders" entered in proceedings conducted under Section 189(a) of the Atomic Energy Act. 28 U.S.C. § 2342(4); 42 U.S.C. § 2239(a), (b). The term "final order" includes final decisions of the Commission not to admit putative intervenors as parties to the adjudicatory proceedings before the agency. *Ecology Action v. Atomic Energy Comm'n*, 492 F.2d 998, 1000 (2nd Cir. 1974); *Thermal Ecology Must Be Preserved v. Atomic Energy Comm'n*, 433 F.2d 524, 526 (D.C. Cir. 1970). However, where a putative intervenor is not admitted to the proceeding, its sole judicial remedy is to seek review of the decision denying its admission; it cannot challenge the issuance of a license on the merits. *See Alaska v. FERC*, 980 F.2d 761, 763 (D.C. Cir. 1992); *cf. Nat'l Parks Conservation Ass'n v. FERC*, 6 F.4th 1044, 1049 & n.4 (9th Cir. 2021).

Here, after thoroughly considering all of Petitioners' contentions, the Commission declined to admit any Petitioner to the proceeding (other than with respect to a single contention that was dismissed as moot and did not proceed to final adjudication on the merits). The Court has jurisdiction to consider the first four Petitions for Review that were filed—by Don't Waste Michigan and its co-petitioners (collectively, "Don't Waste Michigan") (No. 21-1048); Sierra Club (No. 21-1055); Beyond Nuclear (No. 21-1056); and Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners (together, "Fasken") (No. 21-1179)—because those Petitions contest the Commission's decision not to admit the Petitioners as parties to the proceedings before the agency. However, the Court lacks jurisdiction over the four Petitions for Review challenging the license as well as documents associated with the license—filed by Sierra Club (No. 21-1227); Sierra Club and Don't Waste Michigan (No. 21-1229); Beyond Nuclear (No. 21-1230); and Don't Waste Michigan (21-1231)—because the Petitioners are not "part[ies] aggrieved" with respect to these orders. *See* 28 U.S.C. § 2344.

Beyond Nuclear and Fasken each submitted separate briefs to the Court, and the arguments contained in these briefs pertain solely to the Commission's decision not to admit them as parties to the adjudicatory proceeding. Their arguments are thus all properly before the Court. But

Don't Waste Michigan and Sierra Club—which filed a combined brief, and to whom we refer as Environmental Petitioners—challenge both the Commission's resolution of their petitions to intervene before the agency *and* the agency's issuance of documents, including the license, after they were denied party status. Only the former set of arguments of these Petitioners are properly considered.

With respect to the question posed by the Court concerning the appropriate vehicle for a petitioner denied party status to challenge the issuance of a license, such a petitioner has no basis—whether by an amended petition or a new petition—to challenge the issuance of a license by the NRC. The 60-day window that the Hobbs Act provides to challenge final orders opens once, and only once, for each petitioner—upon the nonadmission of a putative intervenor's contentions *or*, if the intervenor is granted admission to the proceeding before the agency as a party and pursues a contention to final resolution on the merits, upon issuance of the license.

STATEMENT OF THE ISSUES

1. Whether the NRC acted consistently with the Nuclear Waste Policy Act ("NWPA"), which precludes private storage of fuel to which the Department of Energy ("DOE") holds title, when the NRC issued a license that permits the storage of privately owned fuel, and the Commission has unequivocally stated that,

absent a change in legislation, the licensee's storage of DOE-titled fuel would be illegal and would not be permitted?

2. Whether the Commission reasonably denied Fasken's motion to reopen the adjudicatory record to address a late-filed contention concerning the impacts of transportation under the National Environmental Policy Act ("NEPA"), when the contention was based on information previously available to Fasken and in any event provided no basis to contest the agency's analysis of transportation routes?

3. Whether the Commission reasonably denied admission of Environmental Petitioners' contentions arising under NEPA, when the agency evaluated the impacts of the facility and potential alternatives consistent with NEPA's rule of reason and Environmental Petitioners do not address the Commission's rationales for declining to admit their contentions?

PERTINENT STATUTES AND REGULATIONS

All pertinent statutes and regulations are set forth in the separate Addendum of Statutes and Regulations filed contemporaneously with this brief.

STATEMENT OF THE CASE

I. Statutory and regulatory background

A. The NRC's regulation of spent nuclear fuel

The NRC is an independent regulatory commission created by Congress. *See* Energy Reorganization Act of 1974, 42 U.S.C. § 5841. In the Atomic Energy Act ("AEA"), Congress conferred broad authority on the agency to license and regulate the civilian use of radioactive materials. *See* 42 U.S.C. §§ 2011-2297h-13. Along with regulating the construction and operation of nuclear power plants, the AEA authorizes the NRC to license and regulate the storage of high-level nuclear waste, including the storage of spent nuclear fuel (fuel that is still radioactive but is no longer useful in the production of electricity) before its ultimate disposal.

Congress granted the NRC authority to license parties to possess spent nuclear fuel in three AEA provisions governing the licensed materials that spent fuel contains. First, the AEA authorizes the NRC to issue licenses for the possession of "special nuclear material." 42 U.S.C. § 2073. Second, it authorizes the issuance of licenses to possess "source material." *Id.* § 2092. And, third, it authorizes the issuance of licenses for "byproduct material." *Id.* § 2111; *see also id.* § 2014 (defining each term). As a consequence of the authority set forth in these provisions, "it has long been recognized that the AEA confers on the NRC

authority to license and regulate the storage and disposal of [spent] fuel." *Bullcreek v. NRC*, 359 F.3d 536, 538-39 (D.C. Cir. 1984). And consistent with this statutory authority, the agency has promulgated regulations allowing it to issue "materials" licenses permitting the storage of spent fuel both at the site of nuclear reactors and away from reactor locations. *See* 10 C.F.R. Part 72; Licensing Requirements for the Storage of Spent Fuel in an Independent Spent Fuel Storage Installation, 45 Fed. Reg. 74,693, 74,694, 74,696 (Nov. 12, 1980).

Storage of spent fuel under the AEA is distinct from *disposal*. The NWPA establishes the federal government's policy to permanently dispose of high-level radioactive waste in a deep geologic repository. *See* 42 U.S.C. §§ 10101-10270. Under the NWPA, Congress designated DOE as the agency responsible for designing, constructing, operating, and decommissioning a repository, *id.* § 10134(b); the U.S. Environmental Protection Agency ("EPA") as the agency responsible for developing radiation protection standards for the repository, *id.* § 10141(a); and the NRC as the agency responsible for developing regulations to implement EPA's standards and for licensing and overseeing construction, operation, and closure of the repository, *id.* §§ 10134(c)-(d), 10141(b).

Although Congress designated Yucca Mountain, Nevada, as the site for a first spent fuel repository, 42 U.S.C. § 10172, DOE announced in 2010 that it considered the site untenable and attempted to withdraw its license application (a

request that the NRC did not grant). Since that time, Congress has not provided additional funding for the Yucca Mountain project and, while the NRC has spent substantially all the appropriated funds it has received and has completed its safety and environmental review of the repository, the project has stalled. *See generally Texas v. United States*, 891 F.3d 553, 565 (5th Cir. 2018) (dismissing petition for writ of mandamus brought by Texas, which sought to compel completion of proceedings for licensure of Yucca Mountain repository).

B. Avenues for participation in NRC's licensing proceedings

In the AEA, Congress provided interested persons with an opportunity to intervene in NRC licensing proceedings and to object to the issuance of a license. Specifically, Section 189 of the AEA enables a person to request a hearing before the agency to contest the legal or factual basis for the agency's licensing decision. *See* 42 U.S.C. § 2239(a)(1).

Hearings are governed by the NRC's regulations. *See* 10 C.F.R. Part 2. To be admitted as a party to a licensing proceeding, an intervenor must, among other things, establish administrative standing and submit at least one "contention" setting forth an issue of law or fact to be controverted. *See id*. § 2.309(d), (f)(1). The proponent of a contention must provide a "concise statement of the alleged facts or expert opinions which support [its] position . . . , together with references

to the specific sources and documents on which [it] intends to rely." *Id.* § 2.308(f)(1)(v).

An admissible contention also must raise an issue that is within the scope of the licensing proceeding and is material to the agency's licensing decision. *See* 10 C.F.R. § 2.309(f)(1)(iii), (iv); *Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1443 (D.C. Cir. 1984). Thus, intervenors may challenge the NRC's compliance with NEPA through the NRC's adjudicatory process. *See, e.g.*, *Beyond Nuclear v. NRC*, 704 F.3d 12 (1st Cir. 2013) (reviewing Commission disposition of contentions raised under NEPA).

Under the NRC's rules, an applicant for a license to construct and operate a spent fuel storage facility must submit to the agency, along with its application, an "Environmental Report" containing an analysis of each of the considerations required by NEPA. 10 C.F.R. §§ 51.45, 51.61. So as to bring any NEPA deficiencies to the agency's attention as soon as possible, and thus to facilitate the prompt resolution of assertions that the agency has not acted in compliance with NEPA, interested parties seeking to raise contentions arising under NEPA must challenge the analysis in the Environmental Report. *See id.* § 2.309(f)(2). If any deficiencies in that analysis are not cured in the draft or final Environmental Impact Statement ("EIS") prepared by the NRC, or if those documents contain new and materially different information from the information contained in the

Environmental Report, participants in the proceedings may seek leave to file new or amended environmental contentions after the intervention deadline to challenge the analyses in those documents. *Id*. § 2.309(c)(1).

If an intervenor does not obtain the relief that it requests through the hearing process, the AEA provides for judicial review of the agency's final order, either in the United States Court of Appeals for the circuit in which the petitioner is located or in this Court. 42 U.S.C. § 2239(b) (specifying that the courts of appeals must review the agency's decision in accordance with the APA and the Hobbs Act); 28 U.S.C. § 2342(4) (providing jurisdiction in the courts of appeals under the Hobbs Act); *see also id*. § 2343 (establishing venue for Hobbs Act cases).

II. Factual background

Petitioners' challenges relate to a Part 72 materials license ultimately issued to Interim Storage Partners. We provide a summary of the facts leading up to issuance of the license below.

A. The license application and notice of opportunity for a hearing

In April 2016, the NRC received an application for a license that would permit construction of a "consolidated interim spent fuel storage facility" (at times referred to as a CISF) in Andrews County, Texas, at an existing low-level- and hazardous-waste storage and disposal site. *See generally* Interim Storage Partners Waste Control Specialists Consolidated Interim Storage Facility, 83 Fed. Reg.

44,070 (Aug. 29, 2018), *corrected*, 83 Fed. Reg. 44,680 (Aug. 31, 2018); EIS at 2-4 (JA___).[2] The facility, as proposed, would consist of dry cask storage systems stored on concrete pads (which systems have already been certified for use by the NRC in accordance with 10 C.F.R. Part 72 and put into use at other sites). EIS at 2-1 to 2-13 (JA___-___); Final Safety Evaluation Report at ES-1 (JA___). These cask systems would provide structural protection and radiation shielding for canisters that contain spent fuel. Final Safety Evaluation Report at ES-1 (JA___).

The original applicant requested suspension of the agency's safety and environmental review in July 2017. 83 Fed. Reg. at 44,0701. In July 2018, Interim Storage Partners, a partnership between the original applicant and another company, filed a request with the NRC to resume consideration of the license application. *Id.* The NRC provided notice in the Federal Register that it was resuming consideration of the license application. *Id*. The notice explicitly stated that interested persons had the opportunity to request a hearing and petition for leave to intervene as a party to the proceedings in accordance with the AEA. *Id.* The notice explained that a petition to intervene "should specifically explain the reasons why intervention should be permitted" and "must also set forth the specific

[2] The materials related to the agency's review of the application and issuance of the license, which are part of the administrative record, are available at https://www.nrc.gov/waste/spent-fuel-storage/cis/waste-control-specialist.html.

contentions which the petitioner seeks to have litigated in the proceeding."). *Id.* (citing 10 C.F.R. § 2.309(d),(f)).

B. The NRC's safety and environmental evaluations and issuance of the license

In accordance with its obligations under the AEA and NEPA, the NRC conducted exhaustive safety and environmental reviews of the license application. In addressing NRC's technical questions identified during the review, Interim Storage Partners submitted four revisions of its license application, three revisions of its Environmental Report, and five revisions of the "Safety Analysis Report" that applicants are required to prepare.[3]

The NRC's ultimate determination that the proposed facility was consistent with adequate protection of the public health and safety, as required by the AEA, is set forth in the agency's September 2021 Final Safety Evaluation Report. That document reflects the agency's conclusions that the proposed facility will be designed, constructed, and operated so that public health and safety will be adequately protected at all times, including during normal operations and credible accident conditions. Final Safety Evaluation Report at ES-3 (JA___).

[3] These voluminous submissions, which are part of the administrative record, are available at https://www.nrc.gov/waste/spent-fuel-storage/cis/wcs/wcs-app-docs.html.

The agency also conducted an environmental review of the proposed facility, as required by NEPA. In November 2016, the NRC published a notice of its intent to prepare an EIS. *See* Waste Control Specialists LLC's Consolidated Interim Spent Fuel Storage Facility Project, 81 Fed. Reg. 79,531 (Nov. 14, 2016). In May 2020, after completing the scoping process, the NRC published a draft EIS (spanning nearly 500 pages) evaluating the effects of the proposed facility. (JA___). The agency received over 2,500 unique comments on the draft EIS. EIS at D-1 (JA___).

The NRC issued its final EIS in July 2021. Over nearly 700 pages, the NRC analyzed the reasonably foreseeable radiological and non-radiological potential environmental impacts arising from the construction, operation, and decommissioning of the proposed facility. The NRC examined potential impacts across thirteen different resource areas: land use, transportation, geology and soils, water resources, ecology, air quality, noise, cultural and historic resources, visual and scenic resources, socioeconomics and environmental justice, public and occupational health, and waste management. *Id.* at 2-25 to 2-29 (JA___-___). And the NRC concluded that the potential environmental impacts of the facility would in most cases be small, but in a few cases small to moderate. *Id.*

In the EIS, the NRC considered several potential alternatives to the Interim Storage Partners facility, including storage at a DOE-owned facility and alternate

design or storage technologies. As to the first alternative, the NRC concluded that a DOE-owned facility would satisfy the purpose and need for the facility (i.e., providing the owners of spent fuel with the option of an away-from-reactor storage facility before a permanent repository is available). *See id.* at 1-3, 2-22 (JA ___, ___). Nonetheless, the NRC determined that a detailed comparison of the impacts of the Interim Storage Partners facility and a DOE facility could not be performed because a DOE facility was only in the planning stages and sufficient detail was not available to support such a comparison. *Id.* at 2-22 (JA___). As to the second alternative, the NRC determined that (a) other existing forms of licensed dry cask storage were not technologically superior; and (b) options proposed for "hardened" onsite storage of spent fuel at or near existing plants would not satisfy the purpose and need that the agency had identified for the facility—i.e., to provide the fuel owners with the option for offsite storage. *Id.* at 2-22 to 2-23 (JA___-___). NRC further determined that none of the other potential sites that Interim Storage Partners identified through a screening process was clearly environmentally preferable. *Id.* at 2-23 to 2-25 (JA___-___). Accordingly, the NRC's comprehensive evaluation of impacts compared the proposed facility solely to the no-action alternative, i.e., storing fuel at existing reactor sites. *Id.* at 2-1, 2-25 to 2-29, 4-1 to 4-97 (JA___, ___-___, ____-____).

In addition to evaluating the potential environmental impacts of constructing, operating, and decommissioning the Interim Storage Partners facility during the term of the proposed license, the agency also addressed the potential effects of storage *after* the licensed term of the facility. Specifically, the NRC's NEPA analysis included its generic analysis of the impacts of onsite and offsite spent fuel storage contained in its Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel ("Continued Storage Generic EIS"). *Id.* at 1-7 (JA___); *see* 10 C.F.R. § 51.23(b) ("The impact determinations in [the Continued Storage Generic EIS] regarding continued storage shall be deemed incorporated into the environmental impact statements" for affected licenses); *id.* § 51.97(a) (specifically incorporating the agency's generic analysis into EISs for spent fuel storage facilities licensed under 10 C.F.R. Part 72).[4] This analysis documents the agency's evaluation of the reasonably foreseeable impacts of the storage of spent fuel pending shipment to a repository, including in a scenario in which a repository is not available. *See* Continued Storage Generic EIS at 1-13 to 1-15 (JA___). *See generally New York v. NRC*, 824 F.3d 1012 (2016) (upholding legal challenge to NRC rule adopting Continued Storage Generic EIS).

[4] The Continued Storage Generic EIS is specifically incorporated into the Final EIS (and thus a part of the administrative record) and is available in its entirety at https://www.nrc.gov/docs/ML1419/ML14196A105.pdf.

In September 2021, the agency issued the materials license, (JA___), a Final Safety Evaluation Report (JA___), and a Record of Decision documenting its NEPA review (JA___), *see* 10 C.F.R. § 51.102(a). The license, as ultimately issued, authorizes Interim Storage Partners to store spent nuclear fuel in canisters using specified storage systems for a term of 40 years. Issuance of Materials License and Record of Decision, 86 Fed. Reg. 51,926 (Sept. 17, 2021); License preamble at 1-2 (JA___); License at 2 (JA___); Technical specifications at 2-1 (JA___).

III. Procedural background

A. Adjudicatory proceedings before the Licensing Board and Commission

In September 2018, Fasken and Beyond Nuclear lodged with the Commission "motions to dismiss" the Interim Storage Partners application. Fasken and Beyond Nuclear asserted in their motions that the NRC's consideration of the applications violated the NWPA because the application sought authorization to store spent fuel to which DOE, rather than private parties, held title. Order of the Commission at 1-2, *Holtec International and Interim Storage Partners LLC*, Docket Nos. 72-1051 and 72-1050 (Oct. 29, 2018) (JA___-___). The Commission denied the motions, explaining that the agency's rules do not provide for the filing of motions to dismiss license applications, but it referred the underlying arguments about the NWPA to the Commission's Atomic Safety and

Licensing Board Panel ("Licensing Board"), which had convened to adjudicate hearing requests that had already been filed. *Id.* at 2-3 (JA___-___).[5] Beyond Nuclear petitioned for review of the Commission's order in this Court, which dismissed the petition because the referral of the arguments to the Licensing Board was not a final order reviewable under the Hobbs Act. Order, *Beyond Nuclear, Inc. v. NRC*, No 18-1340, Document No. 1792613 (D.C. Cir. June 13, 2019).

Meanwhile, the Licensing Board considered the contentions filed by Fasken and Beyond Nuclear, as well as by Don't Waste Michigan (and co-petitioners, to whom the Licensing Board and the Commission referred as "Joint Petitioners") and Sierra Club. The Licensing Board issued four decisions ruling on the admission of the proposed contentions and motions to submit amended contentions.[6] With the exception of one contention that was admitted but was subsequently dismissed as moot, the Licensing Board declined to admit the contentions, and it denied the organizations intervenor status. The organizations

[5] The Licensing Board is a panel of administrative judges, appointed by the Commission, that is authorized by the AEA to conduct hearings. 42 U.S.C. § 2241.

[6] *Interim Storage Partners LLC*, LBP-19-7, 90 N.R.C. 31 (2019) (JA___); *Interim Storage Partners LLC*, LBP-19-9, 90 N.R.C. 181 (2019) (JA___); *Interim Storage Partners LLC*, LBP-19-11, 90 N.R.C. 358 (2019) (JA___) ; *Interim Storage Partners LLC*, LBP-21-2, 93 N.R.C. 104 (2021) (JA___).

filed seven appeals to the Commission from those Licensing Board decisions, and the Commission issued four orders affirming the Board's decisions.[7]

B. Proceedings in the courts of appeals

After the Commission affirmed the dismissal of the contentions raised by Fasken, Beyond Nuclear, Don't Waste Michigan, and Sierra Club, those organizations filed four petitions for review in this Court.[8] The Court consolidated those Petitions.

Following the NRC's issuance of the license in September 2021, various petitioners filed additional petitions for review in three courts of appeals. First, Beyond Nuclear, Sierra Club, and Don't Waste Michigan filed four more Petitions for Review in this Court, challenging the license and associated agency actions.[9] This Court consolidated these four Petitions with the four original Petitions.

Second, the State of Texas (which had not participated in the adjudicatory proceedings before the agency) and Fasken separately petitioned for review in the

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[7] *Interim Storage Partners LLC*, CLI-20-13, 92 N.R.C. 457 (2020) (JA___); *Interim Storage Partners LLC*, CLI-20-14, 92 N.R.C. 463 (2020) (JA___); *Interim Storage Partners LLC*, CLI-20-15, 92 N.R.C. 491 (2020) (JA___); *Interim Storage Partners LLC*, CLI-21-9, 93 N.R.C. 244 (2021) (JA___).

[8] *Don't Waste Michigan v. NRC*, No. 21-1048 (D.C. Cir.); *Sierra Club v. NRC*, No. 21-1055 (D.C. Cir.); *Beyond Nuclear* v. *NRC*, No. 21-1056 (D.C. Cir.); *Fasken Land & Minerals, Ltd. v. NRC*, No. 21-1179 (D.C. Cir.).

[9] *Sierra Club v. NRC*, No. 21-1227 (D.C. Cir.); *Sierra Club & Don't Waste Michigan v. NRC*, No. 21-1229 (D.C. Cir.); *Beyond Nuclear v. NRC*, No. 21-1230 (D.C. Cir.); *Don't Waste Michigan v. NRC*, No. 21-1231 (D.C. Cir.).

United States Court of Appeals for the Fifth Circuit, which consolidated the petitions.[10] Unlike its claim before this Court, Fasken's petition in the Fifth Circuit challenges the license (distinct from the Commission's adjudicatory decisions denying Fasken party status). Third, the State of New Mexico, which (like Texas) did not participate in the adjudicatory proceedings before the NRC, petitioned for review of the license in the United States Court of Appeals for the Tenth Circuit.[11]

Federal Respondents moved to dismiss the Fifth and Tenth Circuit petitions for review for lack of subject-matter jurisdiction (because the petitioners, who are seeking review of the license without having been admitted to the adjudicatory proceeding, were not parties aggrieved by the orders under review). Those courts referred the motions to the respective merits panels. Briefing has been completed in the Fifth Circuit and is scheduled to be completed in the Tenth Circuit by June 16, 2022; neither court has scheduled oral argument.

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[10] *Texas v. NRC*, No. 21-60743 (5th Cir.).

[11] *New Mexico v. NRC*, No. 21-9593 (10th Cir.). In March 2021, New Mexico also filed a complaint in the United States District Court for the District of New Mexico, challenging the licensing of the Interim Storage Partners facility and another interim storage facility in New Mexico for which a license application is pending. The NRC moved to dismiss the case, and the court granted the NRC's motion. *See* Order, *Balderas v. NRC,* No. 1:21-cv-00284-JB-JFR, Document No. 48 (D.N.M. Mar. 11, 2022).

SUMMARY OF ARGUMENT

Petitioners' three opening briefs raise numerous challenges to the Commission's decisions in the adjudicatory proceeding and to the license and related actions. We address each opening brief in a separate Argument section. A summary of each Argument follows.

1. In Argument Section I, we explain how the Commission acted consistently with the AEA and the NWPA and thus properly declined to admit Beyond Nuclear's contention.

The Commission acted in accordance with its AEA authority when it considered and ultimately issued the license. Largely ignoring the AEA, Beyond Nuclear contends that the Commission violated the NWPA by authorizing the storage of fuel to which DOE holds title. But the Commission did not do that. The Commission directed that the licensee must prove that the owner of the spent fuel to be stored—no matter who it is—will fund facility operations, and the Commission has unequivocally stated that, absent a change in the law, the licensee cannot satisfy the financial assurance requirement of the license through a contract with DOE to provide such funding. Further, the Commission has acknowledged that, under current law, the storage of spent fuel to which DOE owns title would be illegal; there is thus no realistic possibility that the license would permit illegal

activity. The agency's recognition that the law could be amended someday to permit storage of DOE-titled fuel does not alter this conclusion.

2. In Argument Section II, we explain that the Commission properly denied Fasken's requests to admit an untimely and in any event inadmissible contention.

The Commission did not abuse its discretion in declining to permit Fasken to submit a new contention after the deadline for doing so. NRC regulations governing contention admissibility make clear that contentions arising under NEPA must be raised against an applicant's Environmental Report, and Fasken failed to identify any information or legal theory contained in its transportation-related contention that could not have been raised against the licensee's Environmental Report. Indeed, other putative intervenors raised essentially the same contention based on the Environmental Report. Moreover, the Commission rationally concluded that Fasken's contention, even had it been timely, failed to raise a genuine dispute over the license application. In particular, the Commission reasonably determined that NEPA did not require Interim Storage Partners to provide a detailed analysis of specific transportation routes for the shipment of spent fuel, when the fuel owners seeking to ship the fuel are not currently known.

3. In Argument Section III.A., we explain why the Hobbs Act does not grant this Court jurisdiction to review the direct challenges to the license and

related actions raised by Environmental Petitioners. In Argument Section III.B., we explain how the Commission rationally declined to admit these petitioners' contentions.

The only arguments that Environmental Petitioners raise that are properly before the Court relate to the Commission's decision not to admit their contentions and to deny them party status. Their challenges to the final EIS, and to the license itself, are barred by the Hobbs Act, which limits challenges to parties that have been aggrieved by a final order of the NRC. And, with respect to the Commission's final orders affirming the Licensing Board's decision not to admit their contentions, Environmental Petitioners fail to identify any error. Environmental Petitioners cite to select pieces of evidence to suggest that Interim Storage Partners might have performed its analysis in its Environmental Report differently. But they do not address any of the reasons that the Licensing Board or the Commission cited for determining that these Petitioners failed to raise a genuine dispute with respect to the license application. Both the Commission and this Court have repeatedly required parties asserting violations of NEPA to establish flaws in a proffered environmental analysis. Reasonably applying its contention admissibility standards, and consistent with this Court's decisions, the Commission determined that Petitioners' suggestions that the NEPA analysis could have been done differently, unaccompanied by evidence demonstrating that

reliance upon statements contained in the applicant's Environmental Report would be unreasonable, did not create a genuine dispute warranting a hearing with respect to any of the contentions that Environmental Petitioners raised. This conclusion was reasonable and warrants deference.

STANDARD OF REVIEW

This Court's review is governed by the Administrative Procedure Act, which permits this Court to set aside an agency order only where it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); 42 U.S.C. § 2239(b); *see also CTIA-Wireless Ass'n v. FCC*, 466 F.3d 105, 112-17 (D.C. Cir. 2006). This deferential standard applies in cases, like this one, involving judicial review of NRC orders resolving hearing contentions filed in an NRC licensing proceeding. *Blue Ridge Envtl. Def. League v. NRC*, 716 F.3d 183, 195-96 (D.C. Cir. 2013); *Massachusetts v. NRC*, 708 F.3d 63, 77 (1st Cir. 2013). Thus, agency factual conclusions are reviewed for "substantial evidence," a standard more deferential than the "clearly erroneous" standard for appellate review of trial court findings. *See Dickinson v. Zurko*, 527 U.S. 150, 162, 164 (1999). And when NRC's decision involves the application of its adjudicatory rules to Petitioners' contentions, the relevant question is whether the agency's determination constitutes a reasonable application of its rules; if so, the agency's conclusions are entitled to deference. *Blue Ridge*, 716 F.3d at 196.

Where the issues raised involve NEPA compliance, the Court should set aside the agency's substantive findings only where it has committed a clear error of judgment. *Blue Ridge*, 716 F.3d at 195; *see WildEarth Guardians v. Jewell*, 738 F.3d 298, 308 (D.C. Cir. 2013) (courts do not "flyspeck" an agency's environmental analysis looking for minor deficiencies). Indeed, courts "must give deference to agency judgments as to how best to prepare an EIS." *Indian River County, Fl. v. U.S. Dept. of Transp.*, 945 F.3d 515, 533 (D.C. Cir. 2019). Because the NEPA process "involves an almost endless series of judgment calls," the "line-drawing decisions necessitated" by that process "are vested in the agencies, not the courts." *Duncan's Point Lot Owners Ass'n, Inc. v. FERC*, 522 F.3d 371, 376 (D.C. Cir. 2008). And when a high level of expertise is required, such as when NRC makes "technical judgments and predictions," this court must defer to the agency's weighing of the evidence as long as its decisionmaking is informed and rational. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377 (1989); *Blue Ridge*, 716 F.3d at 195 (citing *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1983)).

ARGUMENT

I. Issuance of a license to Interim Storage Partners complies with the AEA and the NWPA.

The NRC issued the Interim Storage Partners license under its AEA authority. And this Court has affirmed the NRC's delegated authority to do so in *Bullcreek v. NRC*, 359 F.3d 536, 538-39 (D.C. Cir. 1984). In its separate brief,

Beyond Nuclear agrees (Br. 8, 20) that the NRC has that authority under the AEA. But Beyond Nuclear contends that the NRC's consideration and approval of the license application was inconsistent with the NWPA. Br. 17-21. It is incorrect. While the NWPA places restrictions on the storage of spent fuel owned by *DOE*, it places no similar restrictions on the *private* storage of spent fuel owned by *private* entities—the precise situation here. The license granted by the NRC fully complies with the NWPA because it authorizes a private party (Interim Storage Partners) to temporarily store spent fuel owned by private parties.

Beyond Nuclear objects to the license provision stating that, "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 required other SNF Title Holder(s) is/are responsible for funding operations for storing the material . . . ." License at 3 ¶ 9 (JA___). Beyond Nuclear asserts that this provision permits Interim Storage Partners to contract with DOE for the storage of DOE-owned spent fuel, in violation of three NWPA provisions. *See* 42 U.S.C. § 10222(a)(5)(A) (prohibiting federal ownership of spent fuel before a permanent repository is operational); *id*. § 10168(b) (prohibiting NRC from licensing private parties to store federally owned spent fuel); and *id*. § 10161(a)(4) (requiring reactor licensees to bear the cost of spent fuel storage). Its arguments are unavailing for many reasons.

First, the NRC determined during the adjudicatory proceedings that the terms of the license did not violate the NWPA's prohibitions because there was no possibility that the license would be exercised illegally. The Licensing Board explained, when it rejected Beyond Nuclear's contention on this issue, that Interim Storage Partners had agreed that "under current law, [it] may not contract for DOE to take title to private power companies' spent nuclear fuel. There is no credible possibility that such contracts will be made in violation of the law." LBP-19-7, 90 N.R.C. at 59 (JA___); *see also id.* at 59-60 (rejecting Sierra Club's contention to same effect for same reason) (JA___-___).[12] And the Commission, reviewing the same argument on appeal, determined that "Interim Storage Partners plainly could not rely on [contracts with DOE] to ensure its operating funds" because those contracts would be illegal. CLI-20-14, 92 N.R.C. at 468-69 (JA___-___); *see also Holtec International*, CLI-20-4, 91 N.R.C. 167, 173-76 (2020) (rejecting similar argument raised by Beyond Nuclear, Sierra Club, and Fasken in challenge to application to construct separate spent fuel storage facility in New Mexico).

Second, the Commission observed that there was a "lawful option by which Interim Storage Partners could fulfil the proposed license condition"—through the

[12] As the Licensing Board explained, Interim Storage Partners acknowledged in response to written questions that "Applicant agrees that, absent new legislation, the DOE could not lawfully assume ownership of the spent nuclear fuel in the proposed interim storage facility." LBP-19-7, 90 N.R.C. at 57 (JA___).

storage of spent fuel to which private entities retain title. CLI-20-14, 92 N.R.C. at 469 (JA___). Private entities own title to the spent fuel they generate until it is accepted by DOE for ultimate disposal. *See* 42 U.S.C. §§ 10143, 10222(a)(5)(A). And under the terms of the license, these private entities would be required to commit themselves by contract to fund operations of the Interim Storage Partners facility. License at 3 ¶ 19 (JA___). Beyond Nuclear concedes that this option is lawful. (Br. 8, 20).

Third, the license provision that Beyond Nuclear challenges *requires* that the entities that own the spent fuel to be stored, whoever they may be, enter into contracts pursuant to which they will provide financial backing sufficient to fund operations for the facility. License at 3 ¶ 19 (JA__). The provision does not *authorize* the licensee to do anything, and it certainly does not authorize anything illegal.[13] The provision's purpose is to make sure that operational funding is guaranteed by the entities benefitting from the storage of the fuel, i.e., the fuel title holders. But there is no reason to believe either that DOE would enter into a contract that violates the NPWA or that the NRC would permit such a contract to

[13] Amicus Natural Resources Defense Council likewise asserts (Br. 18) that the agency's "allowance" for DOE to take title to spent fuel would constitute a violation of the NWPA. But the license was issued to a private party; it does not "allow" DOE to do anything. Moreover, the Commission has unequivocally stated that the private party that holds the license cannot store DOE-titled fuel because that arrangement would be illegal. CLI-20-14, 92 N.R.C. at 468-69 (JA___-___)

satisfy this license condition, contrary to the Commission's position in its adjudicatory decision. *See* CLI-20-14, 92 N.R.C. at 468-69 (JA___) ("Because an illegal contract is unenforceable, Interim Storage Partners plainly could not rely on such contracts to ensure its operating funds."). And, of course, were DOE or NRC to take action that allegedly contravened the NWPA, those actions would be subject to judicial review. *See* 5 U.S.C. § 706(2)(A).

Fourth, Beyond Nuclear contends (Br. 19-20) that the agency's conclusion should not be afforded the presumption of regularity. But none of the authorities it cites involve a situation where, as here, the agency has authorized conduct that *can* be performed in a legal manner and the agency has clearly stated that it would deem a licensee out of compliance with its obligations if it relied on illegal conduct to satisfy its regulatory obligations. Under these circumstances, there is no evidence, let alone "clear evidence," of "Government impropriety." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004).

To the extent that Beyond Nuclear asserts that the presumption of regularity does not extend to actions that are "not in accordance with law," Br. 20. n.4 (quoting *NRDC v. EPA*, 822 F.2d 104, 111 (D.C. Cir. 1987)), it puts the cart before the horse. To be sure, a presumption that agencies act consistently with the law can be rebutted with evidence of illegality. But the inapplicability of the presumption is the *conclusion* and not, as Beyond Nuclear would have it, the

starting point, for the Court's consideration of the issue. Given that the license authorizes lawful spent fuel storage activities under the AEA and that the Commission has stated that contractual arrangements that violate the NWPA will not satisfy the licensee's obligation, there is no basis to conclude that either DOE or NRC would permit the licensee to operate illegally.

Nor is Beyond Nuclear correct when it asserts (Br. 20-21) that the existence of a legal means of exercising the license does not "rescue" the allegedly offending ones. Again, the language in the license does not specifically authorize the storage of DOE-owned spent fuel. It merely states that the owner of the spent fuel, *whoever it may be*, must contractually commit itself to providing operational funding for the facility. The conduct authorized by the license would be no different if, rather than specifically referring to DOE, it had generically referred to the entity owning the spent fuel as "the title holder." Were that the case, Beyond Nuclear would be left in the same position—to accept the licensee's and the Commission's statements that the licensee will not, and will not be permitted to, accept fuel to which DOE holds title as long as such an arrangement is illegal under Federal law.

Finally, Beyond Nuclear asserts that the agency has violated the separation of powers doctrine by prognosticating about future legislation (Br. 21-23). This argument is unpersuasive. All parties—Petitioners, the licensee, and the agency—

agree that the license does not currently permit the storage of DOE-titled fuel. Perhaps Congress will amend the NWPA so as to permit Interim Storage Partners to satisfy its license condition by relying upon a contract with DOE as the source of operational funding. But that is a matter for Congress to decide, and it has no bearing on the current status of the Interim Storage Partners license. Nor is it inappropriate for Interim Storage Partners to be permitted to "take advantage" of a change in the law (Br. 23); if such an arrangement were ever to become legal, there is no reason for it not to be afforded this opportunity. In the meantime, however, the language clearly permits operation in a manner that complies with statutory obligations and, as explained by the Commission, cannot be construed to authorize illegal conduct. Beyond Nuclear's arguments do not provide a reason to set aside the agency's extensive consideration of the safety and environmental issues raised by the license application and its approval of the license in light of this review.

II. The Commission reasonably determined that the contention that Fasken sought to admit was neither timely raised nor admissible.

A. Fasken raised its transportation contentions after its original contentions, and other intervenors' transportation-related contentions, had been deemed inadmissible, and after the deadline that the Commission had established.

The Licensing Board issued a comprehensive decision on contention admissibility in August 2019, in which it explained its decision not to admit the five contentions that Fasken originally (and timely) raised. LBP-19-7, 90 N.R.C.

31, 110-18 (JA___-___) (declining to admit Fasken's contentions that (1) the facility was not needed to ensure safe storage of spent fuel; (2) the Environmental Report had not provided adequate information concerning oil and gas wells; (3) the applicant's emergency repose plan was inadequate; (4) the applicant failed to address environmental impacts, including the potential for contaminated wastewater traveling to aquifers; and (5) the Environmental Report failed to adequately characterize threatened and endangered species near the proposed facility). The Board's decision also declined to admit numerous contentions from other intervenors, including contentions that specifically challenged the applicant's evaluation of transportation-related issues. *Id.* at 63-66, 82-84 (JA___-___, ___-___) (declining to admit Sierra Club contention 4, which asserted that the Environmental Report did not adequately address the risks and consequences of a transportation accident, including the costs of a cleanup; and contention 15, which questioned the lack of analysis of environmental justice associated with transportation); *id.* at 87-89, 93-94 (JA___-___, ___-___) (declining to admit Don't Waste Michigan's contention 1 questioning the alleged exclusion from the Environmental Report and illegal segmentation of "of details and environmental impacts of a planned 20-year shipping campaign involving at least 3,000 deliveries

of" spent nuclear fuel, and contention 5, asserting a lack of environmental justice analysis relating to transportation).[14]

In July 2020, after the Board had issued this comprehensive decision, and nearly two years after the October 2018 deadline set by the agency for raising contentions, Fasken filed a motion to reopen the proceeding and a motion for leave to file a new contention. *See* 10 C.F.R. § 2.309(c)(1) (criteria for submitting contention after initial deadline for hearing requests); *id.* § 2.326 (criteria for filing motion to reopen closed adjudicatory record). In that proposed new contention, Fasken asserted, based on the Draft EIS that the agency had issued in May 2020, that "Interim Storage Partners' application fail[ed] to adequately, accurately, completely and consistently consider the cumulative impacts of transporting high-level radioactive waste and spent nuclear fuel to and the socioeconomic benefits of the proposed . . . project." Motion for Leave at 11 (JA___).

The Licensing Board denied both motions. It concluded that the proposed contention was not timely raised because, while purporting to challenge conclusions contained in the draft EIS, it could have been lodged earlier (and in fact had been lodged earlier, in substantially similar form, by other intervenors) as a challenge to information contained in the Environmental Report. LBP-21-2, 93

[14] Environmental Petitioners' challenge to the Commission's disposition of this contention is addressed in Argument Section III.B.1 *infra.*

N.R.C. at 109 (JA___) (citing 10 C.F.R. § 2.309(f)(2), which requires litigants to raise claims arising under NEPA based on the applicant's Environmental Report, to the extent possible)). The Licensing Board explained that Fasken's criticisms of the use of representative routes to identify transportation impacts were untimely because the route analyzed in the draft EIS was comparable to analysis contained in the Environmental Report. *Id.* at 110 (JA___) (noting that Don't Waste Michigan had raised contentions concerning the use of representative routes in hearing requests that were timely filed); *see also* Environmental Report (rev. 3), at 4-11 to 4-29 (JA___-___) (identifying the sample routes selected, which Interim Storage Partners asserted provided a bounding analysis of the likely radiological impacts of transportation of fuel by rail); Environmental Report (rev. 2), at 4-12-to 4-27 (JA___, ___) (same).

The Board further noted that Fasken's assertion in its motion that the draft EIS "for the first time relies on and cites to data" concerning the impact of transportation of spent fuel to Yucca Mountain via barge was belied by the statements in the Environmental Report reflecting Interim Storage Partners' analysis of the effects of transport of fuel by barge and its conclusion that barge transportation was not a significant contributor to collective radiation dose. LBP-21-2, 93 N.R.C. at 110 (JA___) (citing Environmental Report (rev. 3), at 4-11 (JA___)). The Board likewise observed that Fasken had failed to demonstrate that

the alleged deficiencies in the draft EIS related to analysis of the impacts from transportation-related accidents and earthquakes were not equally applicable to the Environmental Report. *Id.* at 111 (JA___). And it concluded that Fasken's challenge to the alleged omission of analysis of "the responsibility of the costs for coordinating transportation, payments for needed infrastructure improvements and providing emergency training for first responders" could have been raised at the outset of the proceeding, given that this information was not a part of the Environmental Report either. *Id.*.[15]

The Board further held that, even if Fasken's motion had been timely, the underlying contention it sought to raise was not admissible, primarily because Fasken failed to demonstrate that reliance on representative, rather than specific, routes in analyzing the impacts of shipping fuel from reactor sites to the Interim Storage Partners facility, would be unreasonable. *Id.* at 114-15 (JA___) (relying on the Commission's decision reaching the same conclusion with respect to transportation contentions raised by Don't Waste Michigan). The Board further observed that the actual routes, when they are chosen, would be chosen by spent fuel owners, rather than Interim Storage Partners, and would be the subject of

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[15] The Board reached the same conclusions with respect to the portions of Fasken's contention that raised the omission of analysis of terrorism and alleged flaws in the site-selection process. LBP-21-2, 93 N.R.C. at 111 (JA___) (noting that other intervenors before the agency had timely raised contentions with respect to these issues as well).

future approvals. *Id.* at 115 (JA___). And, inasmuch as Fasken asserted that it was necessary to evaluate the socioeconomic impacts (including the costs of transportation coordination, infrastructure improvements, and first responder emergency training) associated with the effect of transporting fuel through specific communities, the Board determined that such assertions, in addition to being untimely, were not admissible because they were beyond the scope of the proceeding for the Interim Storage Partners license and could be evaluated in the context of the separate review and approval processes to performed by the NRC, the Department of Transportation, and affected States and Tribes. *Id.*. The Commission affirmed the Licensing Board's denial of Fasken's motions in all material respects. CLI-21-9, 93 N.R.C. at 249-51 (JA___).[16]

B. The Commission reasonably and properly determined that Fasken's assertions were not based on new information and that its contention was in any event inadmissible.

Fasken asserts that the Commission erred in affirming the Licensing Board's decision based on several related arguments. We address each below.

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[16] With respect to the availability of information concerning the use of representative transportation routes, the Commission deemed it more appropriate to rely on revision 2 of the Environmental Report, rather than revision 3 (which the Board had relied on), because revision 2 was submitted and made available prior to the October 2018 deadline for submitting contentions. CLI-21-9, 93 N.R.C. at 247 n.21 (JA___).

First, attacking the Commission's conclusions concerning the untimeliness of its contention, Fasken contends that "new disclosures regarding the responsibility and costs for coordinating transportation, infrastructure improvements, and necessary emergency training appeared for the first time" in the draft EIS. Br. 10-11 (relying on a passage in the draft EIS recognizing that "if [spent fuel] is shipped to a [consolidated interim storage facility], some States, Tribes, or municipalities along transportation routes may incur costs for emergency-response training and equipment that might otherwise be eligible for funding" through the NWPA "if DOE shipped the fuel from existing sites to a repository").

This argument fails because the Commission correctly found that Fasken was not relying on new information as the basis for its contention. While Fasken suggests that the language in the draft EIS related to states' and localities' assumption of responsibility for emergency-related costs was somehow new and thus justified its untimely submission, the language it criticizes is simply another way of stating information that was included in the Environmental Report. As Fasken itself notes (Br. 10), Interim Storage Partners stated in its Environmental Report that "if" DOE were the shipper of spent fuel, the federal government would assume responsibility for the cost of emergency training along the route. But Interim Storage Partners specifically recognized—on the same page of the

Environmental Report that Fasken cites—the possibility that DOE would *not* be the shipper. *See* Environmental Report (rev. 3) at 4-8 (JA____) ("The DOE *or nuclear plant owner(s)* holding title to the SNF will be responsible for transporting SNF from existing nuclear power plants to the CISF by rail in transportation casks licensed by the NRC pursuant to 10 CFR 71." (emphasis added)); *see also* Environmental Report (rev. 2) at 4-9 (JA____) (same). And, in such a circumstance, there would be no basis for the federal government to assume the costs of such emergency training. The Commission thus reasonably concluded that Fasken's arguments concerning responsibility for emergency-response training costs were ascertainable from the Environmental Report and thus could have been raised earlier.

Fasken also asserts (Br. 11) that language in the Environmental Report pertaining to the costs of infrastructure upgrades necessary to transport spent fuel is somehow at odds with language in the draft EIS. Its arguments are uncompelling. Contrary to Fasken's assertions, the portion of the Environmental Report that it cites (pages 3-8 to 3-9, JA___-____) says nothing to "suggest[] that DOE would be responsible for infrastructure upgrades required to transport the [s]pent fuel to a storage [s]ite." And the language in the draft EIS (page 4-10, JA___) that Fasken criticizes merely reflects the potential need for such upgrades at decommissioned sites; it does not reflect a "shift in responsibility and

particularly in costs." Br. 11. Again, Fasken's arguments do not identify new information in the draft EIS that could have provided a basis for a timely contention.

Fasken next attempts to move beyond the untimeliness of its proposed contention to the merits of its contention. These arguments are irrelevant given that the Commission's demonstrably correct conclusion that Fasken's arguments are untimely, and the Court need go no further. But the arguments also fail on the merits. Fasken asserts that the agency failed to "reach any quantifiable or qualitative determination on []regional transportation impacts, risks and costs," and that this failure, and the failure to analyze the cost of infrastructure upgrades, distorted the agency's cost-benefit analysis. Br. 11-12. These assertions do not address, let alone refute, the Licensing Board's conclusion that specific transportation-related costs, including the cost of infrastructure upgrades, would be identified at the time of the approval of specific transportation routes by the NRC and the Department of Transportation and were therefore beyond the scope of the agency's review of Interim Storage Partners' application. LBP-21-2, 93 N.R.C. at 115 (JA___).

Moreover, the draft EIS contradicts Fasken's complaint (Br. 11) that the agency failed to reach "any quantifiable or qualitative impact determination about regional transportation impacts," whether direct, indirect, or cumulative, or to

address infrastructure upgrades. The draft EIS contained an extensive discussion of the facility's effects on regional transportation, and of the effects of transportation of spent fuel on the region. In Section 3.3.1 of the draft EIS, NRC described the local transportation infrastructure and potential rail routes for shipments of fuel to the Interim Storage Partners facility. Draft EIS at 3-6 to 3-10 (JA___-____). In Section 4.3, NRC analyzed the transportation-related impacts caused by the construction, operation, and decommissioning of the facility, including the impacts (1) from supply shipments and commuting workers, *id.* at 4-6 to 4-9 (JA___-___); (2) from nationwide shipments of spent fuel to the Interim Storage Partners facility, *id.* at 4-9 to 4-10 (JA___-___); and (3) on workers and the public, both radiological and non-radiological, from transportation of spent fuel both in incident-free and accident scenarios, *id.* at 4-10 to 4-24 (JA___-___).

NRC likewise devoted an entire section of the draft EIS's cumulative impacts analysis to the issue of transportation. *Id.* at 5-17 to 5-20 (JA___-___). And it further explained that the cost of infrastructure upgrades to load fuel onto rails was not readily ascertainable because routes had not yet been established. *Id.* at 8-11 (JA___). NRC also observed that those costs would not affect the agency's cost-benefit analysis because they would be incurred both in the event the facility is constructed and in the world of the no-action alternative (where fuel would

ultimately be transferred to a newly licensed facility, after the expiration of each reactor's storage license). *Id*.

Fasken did not provide to the Commission, and does not provide any basis now, to contest the agency's analyses. Thus, even if the Commission had not reasonably concluded that Fasken's assertions were impermissibly late, it still reasonably applied its rules governing contention admissibility in determining that Fasken had not offered a genuine dispute sufficient to warrant admission of its contention. *Blue Ridge*, 716 F.3d at 195 (concluding that Commission acted reasonably in determining that contention was not admissible where petitioner failed to provide facts to agency supporting position and failed to provide references of specific portions of the environmental report that it disputed).

C. Fasken's additional arguments are unpersuasive.

Beginning on page 13 of its Brief. Fasken makes a series of arguments related to transportation impacts that it claims bear on the Commission's decision to deny its motions. To the extent these arguments raise issues not previously discussed above, they are uniformly unavailing.

Fasken first attempts (Br. 13) to identify daylight between the Environmental Report and the draft EIS by noting that a document referenced in the draft EIS—an analysis performed by DOE relating to Yucca Mountain in 2008—indicates that spent fuel may be moved by barge or truck from generator

sites to rail lines. Inasmuch as the information is meant to question the Licensing Board's conclusion that Fasken's arguments concerning the use of barges could have been raised earlier, it fails to address the Licensing Board's specific determination that the use of barges was specifically referred to in Interim Storage Partners' Environmental Report. LBP-21-2, 93 N.R.C. at 110 (JA___) (citing Environmental Report (rev. 3) at 4-11 (JA___)).

Next, Fasken raises a series of assertions advocating the need for site-specific impact transportation analysis rather than representative routes. Br. 14-20. But, again, it fails to explain why its criticism of the use of representative routes could not have been leveled at the Environmental Report, which relies heavily on this approach. Environmental Report (rev. 2), at 4-11 (JA___) (referencing transportation study included as Attachment 4-1 (JA___-___)). Nor has Fasken identified any error in the agency's resolution of this issue on this ground. LBP-21-2, 93 N.R.C. at 110 (JA___). Fasken similarly criticizes (Br. 15-16) the agency's use of an NRC study performed in 2014 known as NUREG-2125 and entitled "Spent Fuel Transportation Risk Assessment" to define the impacts of a national shipping campaign. But it fails to identify any error in the conclusion that arguments could have been raised upon review of the Environmental Report, which drew repeatedly from the same source in preparing its analysis of transportation impacts. Environmental Report (rev. 2) at 4-14, 4-15, 4-25 (JA___,

___-___). The same is true of Fasken's various criticisms (Br. 15-18) of the "specific regional issues" that it contends the agency failed to address in the Draft EIS, but that were addressed in the same manner by the Environmental Report. As the Board and Commission determined, each of these arguments could have been raised against the Environmental Report. LBP-21-2, 93 N.R.C. at 111 (JA___); *see also* CLI-21-9, 93 N.R.C. at 249-50 (JA___).

And even assuming that Fasken's contention should have been considered timely, there still would be no basis to disturb the Licensing Board's determination, affirmed by the Commission, that Fasken's contention would not be admissible. LBP-21-2, 93 N.R.C. at 114-15 (JA___); *see also* CLI-21-9, 93 N.R.C. at 250 (JA___). The Licensing Board properly observed that, because selection of specific routes would be the responsibility of the spent fuel owners, not Interim Storage Partners, and were currently unknown, NEPA did not require it to more fully disclose and analyze "hypothetical future transportation routes." LBP-21-2, 93 N.R.C. at 115 (JA___); *cf. Suffolk County v. Secretary of Interior*, 562 F.3d 1368, 1379 (2nd Cir. 1977) (reversing district court's determination that approval of leases for oil and gas exploration had been illegally segmented due to alleged failure to specify probable pipeline destinations because the pipeline destinations were not known at the time). Fasken does not provide any basis to depart from this conclusion.

Nor, as the Board observed, does Fasken draw any meaningful distinction between the arguments that it belatedly lodged against the draft EIS and those that were timely raised by Don't Waste Michigan and others—and rejected by the Licensing Board and the Commission—when they challenged the use of representative transportation routes in the Environmental Report. LBP-21-2, 93 N.R.C. at 115 (JA___) (citing LBP-19-7, 90 N.R.C. at 88-89 (JA___) and CLI-20-14, 92 N.R.C. at 479 (JA___)). Fasken's arguments concerning transportation thus fail for the same reasons as the arguments of Environmental Petitioners that we address in Argument Section III.B.1 *infra.*

Finally, Fasken objects (Br. 20-22) to what it refers to as a "heightened pleading standard" that requires it to file its adjudicatory contentions as early in the process as possible and, where the contentions assert violations of NEPA, against the applicant's Environmental Report. Long ago, this Court upheld the NRC's requirements governing the timing of environmental contentions. *See Union of Concerned Scientists v. NRC*, 920 F.2d 50, 56-57 (D.C. Cir. 1990) (rejecting facial challenge to NRC's procedural regulations, including to the requirement that intervenors raise contentions arising under NEPA, to the extent possible, based upon the license applicant's Environmental Report). Since then, this Court and others have applied those requirements in challenges to NRC licensing proceedings. *See, e.g.*, *NRDC v. NRC*, 879 F.3d 1202, 1208-09 (D.C. Cir. 2018)

(recognizing that intervenor that had previously challenged environmental analysis in the license application had the opportunity to show good cause to pursue an amended contention challenging new information contained in draft EIS pursuant to 10 C.F.R. § 2.09(c)); *Beyond Nuclear*, 704 F.3d at 23 (affirming NRC's denial of admission of contentions challenging applicant's Environmental Report but noting that petitioner could raise new contentions if new and materially different information became available). And these procedural requirements do not work an injustice upon interested parties. Indeed, the Licensing Board observed, with respect to two separate arguments that Fasken advanced in support of the admission of its belated contention, that other intervenors had raised the same arguments earlier in the process. LBP-21-2, 93 N.R.C. at 110, 111 (JA___,___). The exclusion of Fasken's contentions is not the result of a heightened pleading process and does not deny "meaningful participation"; it is simply a function of Fasken's failure to submit admissible contentions in a timely manner.

Fasken attempts to avoid this conclusion by suggesting (Br. 21-22) that the third revision of Interim Storage Partners' Environmental Report did not become publicly available until February 2020, and that it could not have brought its contentions challenging information contained in that document until then. Its argument fails. First, as the Commission noted, the information that Fasken cited from Revision 3 was contained in prior revisions of the Environmental Report,

which was made available prior to the deadline for submitting contentions, *see* CLI-21-9, 93 N.R.C. at 247 n.21 (JA___), and Fasken provides no argument suggesting otherwise. Second, even if Fasken had only become aware of the information in February 2020, it offers no explanation why it waited five months more—until July 2020—to raise its new contention 5.

In short, the Commission reasonably determined that Fasken's contention was untimely and in any event not sufficient to generate a genuine despite with respect to the application. It likewise did not abuse its discretion in declining to permit Fasken to belatedly assert claims—which already had been raised by other putative intervenors and rejected by the Commission—that could have been brought earlier.

III. The Commission reasonably and properly declined to admit the contentions of Environmental Petitioners, and the arguments these Petitioners raise outside their contentions are not properly before the Court and alternatively lack merit.

In Petitioners' third brief, Environmental Petitioners raise 14 arguments (labelled Points III through IX and XI through XVI[17]) purporting to identify errors by the Commission either in declining to admit their contentions or in complying with NEPA in the Final EIS. As we explain in Section III.A below, the only

[17] Points II and X adopt the arguments raised in the brief of Beyond Nuclear. There is no point XII, and the last two arguments are both designated as Point XVI; we refer to the second such argument as Point XVII.

arguments properly before the Court are Environmental Petitioners' Points III through VIII, which challenge the Commission's dismissal of the contentions that Don't Waste Michigan and Sierra Club proposed to raise in the adjudicatory proceedings before the agency. As we explain in Section III.B., the Commission rationally denied these contentions in the adjudicatory proceedings. We address arguments concerning these contentions on a subject-by-subject basis, along with the related (but extra-jurisdictional) arguments that Environmental Petitioners raise that challenge the license and the Final EIS.

A. The Court's jurisdiction extends solely to its review of the reasonableness of the Commission's decisions not to admit Environmental Petitioners' contentions.

As we noted in the Statement of Jurisdiction *supra*, the parties in this case were specifically directed to include in their briefs a discussion of which orders referenced in the Petitions for Review the Court are within the Court's jurisdiction. Order of November 10, 2021 (Document #1921742). Environmental Petitioners did not comply with this directive (although they "adopt the jurisdictional statement in the Brief of Beyond Nuclear" (Br. 1), which does not address the Court's questions). The Court should limit its consideration of Environmental Petitioners' arguments to those that challenge the Commission's decisions denying their requests to be admitted as parties to the adjudicatory proceeding and should

disregard the arguments they make (in Points IX and XI through XVII of their argument) directly challenging the license and the final EIS.

The Hobbs Act provides that only a "party aggrieved" by a final order entered in a proceeding described in AEA § 189 may obtain judicial review of the issuance of an NRC license. *See* 28 U.S.C. §§ 2342(4), 2344; 42 U.S.C. § 2239(a)(1)(A), (b)(1). To obtain judicial review of an NRC licensing proceeding, a petitioner either must (1) participate in the adjudicatory proceedings before the agency by submitting adequate contentions under 10 C.F.R. § 2.309, *see NRDC v. NRC*, 823 F.3d 641, 643 (D.C. Cir. 2016); or (2) seek review of the Commission's decision denying its request for party status, *Alaska v. FERC*, 980 F.2d 761, 763 (D.C. Cir. 1992). In the second scenario (which is applicable here),[18] the petitioner before the Court cannot directly challenge the Commission's final order (i.e., the license or documents ancillary to the license); instead, judicial review is limited to the propriety of the Commission's decision denying the petitioner the status of a "party" to the proceeding. *See id.* ("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."); *see also Nat'l Parks*

[18] The second scenario is applicable because no putative intervenor was admitted as a party to the adjudicatory proceeding and pursued its contention to a final resolution on the merits. Sierra Club was originally admitted with respect to one contention, but the contention was dismissed as moot. *See* CLI-20-15, 92 N.R.C. at 493 (JA___).

Conservation Ass'n v. FERC, 6 F.4th 1044, 1049 & n.4 (9th Cir. 2021) (addressing whether FERC "erred in denying the [Petitioner's] motion to intervene" but noting that "[b]ecause the [Petitioner] was not a party to the proceeding, [the court] lack[ed] jurisdiction to review the [Petitioner's] substantive challenge that [FERC] exceeded its authority.").

These rules are derived from the exhaustion requirements of the AEA and the Hobbs Act. The courts of appeals have "consistently held" that the "party aggrieved" language in the Hobbs Act, 28 U.S.C. § 2344, "requires that petitioners have been parties to the underlying agency proceedings." *ACA Int'l v. FCC*, 885 F.3d 687, 711 (D.C. Cir. 2018) (citing *Simmons v. Interstate Commerce Comm'n*, 716 F.2d 40 (D.C. Cir. 1983)); *Wales Transp., Inc. v. ICC,* 728 F.2d 774, 776 n.1 (5th Cir. 1984). The Hobbs Act "limits review to petitions filed by parties, and that is that." *In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 799 F.2d 317, 334-35 (7th Cir. 1986).

Outside the context of licensing (where the AEA provides for an adjudicatory hearing), merely "submitting comments" or otherwise making a "full presentation of views to the agency" may be enough to confer "party aggrieved" status on litigants seeking review of agency action under the Hobbs Act. *See, e.g.*, *ACA Int'l*, 885 F.3d at 711 (commenting in support of a petition filed by another party is sufficient to obtain "party aggrieved" status). But "[t]he degree of

participation necessary to achieve party status varies according to the formality with which the proceeding was conducted." *Water Transport Ass'n v. ICC*, 819 F.2d 1189, 1192 (D.C. Cir. 1987). As a result, a less formal administrative process—where merely providing comments or correspondence to the agency is sufficient to confer party status for purposes of judicial review—is reserved for "agency proceedings that do *not* require intervention as a prerequisite to participation." *ACA Int'l*, 885 F.3d at 711 (emphasis added).[19] And in AEA Section 189 proceedings for the issuance of a license (where, as here, an opportunity for a hearing in accordance with the procedures set forth in 10 C.F.R. Part 2 is available), "participating in the appropriate and available administrative procedure"—that is, submitting a request for a hearing—is a "statutorily prescribed prerequisite." *Gage v. Atomic Energy Comm'n,* 479 F.2d 1214, 1217 (D.C. Cir. 1973); *see also NRDC,* 823 F.3d at 643 ("To challenge the Commission's grant of a

[19] Thus, submission of comments is sufficient to confer "party aggrieved" status in an NRC *rulemaking* proceeding that is reviewable under the Hobbs Act. *Reytblatt v. NRC*, 105 F.3d 715, 720 (D.C. Cir. 1997). Submission of comments, rather than formal intervention, is the means by which members of the public participate in informal rulemaking. This is distinguishable from a licensing proceeding in which an adjudicatory hearing is available and NRC regulations specify the mechanism through which outsiders can obtain "party" status. *See* 10 C.F.R. § 2.309(a) ("Any person whose interest may be affected by a proceeding *and who desires to participate as a party* must file a written request for hearing and a specification of the contentions which the person seeks to have litigated in the hearing." (emphasis added)).

license renewal, then, a party must have successfully intervened in the proceeding by submitting adequate contentions under 10 C.F.R. § 2.309").

Sound policy justifications support these rules. Congress contemplated that judicial review of NRC licensing decisions would be channeled through the agency's adjudicatory process. *See* 42 U.S.C. § 2239(a), (b). Under that process, parties seek to be heard first by the NRC—which Congress recognized as the experts in a highly technical field—and the agency's disposition of their arguments would in turn be subject to judicial review under the Hobbs Act.

Allowing litigants to challenge the license itself, divorced from the agency's adjudicatory proceedings, effectively nullifies the statutory exhaustion requirement. This is not what Congress intended when, in enacting the AEA and channeling judicial review of licensing decisions to the courts of appeals, it created a "coherent plan for the development and regulation of nuclear energy" that would enable "prompt implementation of national nuclear policy." *Quivira Mining Co. v. EPA*, 728 F.2d 477, 481 (10th Cir. 1984). To permit Environmental Petitioners to raise claims challenging the license or associated documents such as the Final EIS, divorced from the adjudicatory opportunity that Congress provided in the AEA, would disregard the statutory exhaustion requirements in this case and incentivize parties to ignore the requirement in future NRC licensing actions, to the detriment of both comprehensive agency decisionmaking in the first instance and efficiency

in subsequent judicial review. The Court should therefore not consider the arguments in Point IX and Points XI through XVII of Environmental Petitioners' brief.

B. The Commission properly denied Environmental Petitioners' contentions and fully addressed the environmental issues they now raise.

1. The Commission reasonably declined to admit Environmental Petitioners' transportation-related contentions and otherwise reasonably addressed the impacts of transportation.

Environmental Petitioners assert in Point III of their argument that the Licensing Board, and the Commission on appeal, erred in dismissing Sierra Club's contention 4 and Don't Waste Michigan's contention 1. But the Commission and the Board properly considered and rejected both contentions.

In contention 4, Sierra Club asserted that that the Environmental Report underestimated the consequences and likelihood of a rail accident involving the shipment of high-level waste. The Licensing Board, and the Commission on appeal, rejected the admission of this contention because it did not address, and did not identify any deficiencies in, the radiation dose assessments that were set forth in the Report (at section 4.2.8, JA___-___). LBP-19-7, 90 N.R.C. at 64 (JA___); CLI-20-15, 92 N.R.C. 491, 500-01 (JA___-___).

Challenging this conclusion, Environmental Petitioners first assert (Br. 8-9) that the Environmental Report relied on an assessment of radiological exposure in

the event of an accident that was smaller than the exposure identified in a report (based on a self-identified worst-case scenario) compiled in opposition to DOE's Yucca Mountain application. But the Licensing Board reasonably and correctly observed that merely pointing to a worst-case scenario, without explaining why it was unreasonable to rely on the information actually provided, does not create a genuine dispute sufficient to warrant a hearing. LBP-19-7, 90 N.R.C. at 64 (JA___).

This rationale comports with the agency-level case law that the Licensing Board cited. *See, e.g.*, *NextEra Energy Seabrook, LLC*, CLI-12-5, 75 N.R.C. 301, 323 (2012) ("We have long held that contentions admitted for litigation must point to a deficiency in the application, and not merely 'suggestions' of other ways an analysis could have been done, or other details that could have been included."). And the Board's reasoning is consistent with this Court's decisions. *See Blue Ridge*, 716 F.3d at 195 (upholding Commission's determination that contention was not admissible where petitioner failed to provide facts to agency supporting position and failed to provide references of specific portions of the environmental report that it disputed); *see also Sierra Club v. Dep't of Energy*, 867 F.3d 189, 201 (D.C. Cir. 2017) ("Sierra Club suggests certain estimates that the Department could have provided, such as regional totals of estimated water usage; but its suggestions do not reveal any flaw in the Department's reasoning . . . ."). An

environmental analysis is not required to adopt worst-case projections, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 354–355 (1989), and Petitioners' assertion that the analysis *could have* been performed differently simply because it *could have* relied on different (and worst-case) analyses does not warrant relief.

Environmental Petitioners also assert (Br. 10-11) that the NRC erred by purportedly segmenting transportation from the agency's consideration of the license application, as Don't Waste Michigan asserted in contention 1. But Environmental Petitioners fail to address the Board's and the Commission's reasons for not admitting this contention—that Interim Storage Partners had in fact addressed transportation impacts in its Environmental Report by including "an evaluation of the environmental impacts that would be expected along representative waste transportation routes to the proposed CISF from twelve different potential facilities," CLI-20-14, 92 N.R.C. at 480 (JA___), and that "Joint Petitioners [did] not address or dispute the transportation analyses that are contained in the application," LBP-19-7, 90 N.R.C. at 88-89; *see also* CLI-20-14, 92 N.R.C. at 480 (JA___).

In other words, Don't Waste Michigan and Sierra Club failed to question the transportation analysis that was actually provided, or to contest the Licensing Board's observation that, consistent with NEPA's rule of reason, Interim Storage Partners was not "required to divulge all transportation routes of casks from

customers, unknown at this time, for the 20-year transportation and loading campaign." LBP-19-7, 90 N.R.C. at 89 (JA___) (citing *NRDC v. Morton*, 458 F.2d 827 (D.C. Cir. 1972)); *see also* CLI-20-14, 92 N.R.C. at 480 & n.101 (JA___) (concluding that the use of representative routes in this situation was consistent with NEPA's rule of reason). NEPA requires no more, both because the specific parameters of a transportation campaign are not currently known and because the decision to embark upon such a campaign will require separate requests for approval that are not currently before the agency. *See Suffolk County*, 562 F.3d at 1379 (2nd Cir. 1977); *cf. Delaware Riverkeeper v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014) (project improperly segmented when it divides multiple connected and pending actions into more than one analysis).

Environmental Petitioners renew these criticisms in Point XI of their argument (Br. 29-34), contesting the treatment of transportation-related impacts in the final EIS and asserting that the agency improperly segmented transportation impacts from its environmental analysis. The Court should not reach this argument because of its jurisdictional infirmities (as set forth in Argument Section III.A. above). But Petitioners also fail to address the actual analysis of transportation-related impacts that the agency performed. In Section 3.3. of the EIS, NRC described the local transportation infrastructure and potential routes for shipments of fuel to the facility by rail. JA___-___. Likewise, in Section 4.3 of the EIS,

NRC analyzed the transportation-related impacts caused by construction, operation, and decommissioning of the facility. JA___-___. And NRC included an entire section of the EIS's cumulative impacts analysis to the issue of transportation. *Id.* at 5-18 to 5-21 (JA___-___).

Environmental Petitioners offer a grab-bag of data suggesting that the agency might perhaps have reached different conclusions concerning transportation (including data submitted to the agency as part of the adjudication both with respect to this license, Br. 30, 31-32, and in *another* licensing proceeding, Br. 31). But they completely fail to establish why the comprehensive analysis that the agency actually performed in *this* proceeding is in any way flawed, let alone materially so. Nor do they confront the agency's explanation that because it could only surmise at this time which reactor owners might eventually seek authorization to ship fuel to the facility, it conservatively analyzed transportation impacts based on representative routes that it concluded were "bounding"—i.e., that "overestimate[] the impacts of the proposed transportation relative to a more dispersed route-specific approach." EIS at D-60 to D-61 (JA___-___). Thus, even if Environmental Petitioners' arguments concerning the

agency's treatment of transportation impacts in the final EIS were properly before the Court (they are not), they would fail on the merits.[20]

2. The Commission acted reasonably in declining to admit Sierra Club's contention about, and in otherwise addressing, earthquakes and other impacts from oil and gas drilling.

Environmental Petitioners next assert (Br. 12-13) that the Commission wrongfully dismissed Sierra Club's contention 6 related to "the risk of earthquakes and other impacts from oil and gas drilling." They criticize the Licensing Board's dismissal of this contention, asserting that the Board simply accused them of "not reading the available information" in Interim Storage Partners' license application. Br. 13. Their arguments are unpersuasive.

In its contention 6, Sierra Club asserted that the documents contained in the license application (the Environmental Report and the Safety Analysis Report) failed to adequately evaluate the earthquake potential at the proposed site. The Licensing Board declined to admit the contention. First, the Board noted that the Environmental Report contained an evaluation of seismic activity, including seismic activity attributable to the oil and gas industry in Sections 3.3.2, 3.3.3 and

[20] In its amicus brief (at 9), the City of Fort Worth, Texas, asserts that it will be adversely affected by the transport of waste through the city by rail, and it suggests that the agency has failed to evaluate the impacts of transportation on the environment. But it likewise fails to identify any flaw in the agency's analysis of the effects of transportation of fuel through the region or its determination that the analyses it has provided bound the transportation-related impacts likely to be experienced at any particular locality.

3.3.4 (JA___-___, ___-___, ___-___), and that Sierra Club "fail[ed] to point to specific portions of the application where alleged deficiencies exist and to provide reasons why they are deficient." LBP-19-7, 90 N.R.C. at 68-69 (JA___-___). Second, the Board observed that the Safety Analysis Report contained a seismic hazard evaluation that was proprietary and that Sierra Club opted not to seek authorization to obtain. *Id.* at 69. The Commission affirmed the Licensing Board's conclusions. CLI-20-15, 92 N.R.C. at 502.

Environmental Petitioners identify no error in either the Licensing Board's decision not to admit Sierra Club's contention 6 or the Commission's affirmation of that decision. Once again, they cite (Br. 12) to studies that they contend bolster their position, but those studies only prove what the Environmental Report acknowledged—that there has been seismic activity in the area. Indeed, while Petitioners assert that the Environmental Report "concludes there is essentially no chance of an earthquake in the area," Br. 12, the report does no such thing. The Report concedes that significant earthquakes have in fact occurred in the site region (as recently as a 1992 earthquake 30 kilometers away) and notes that seismic occurrences have been "spatially correlated" to active hyrdrocarbon production in the region. But the Report ultimately concludes that, even with petroleum recovery activities, the faulting and low to moderate rate of background seismicity "result[] in relatively low seismic hazard" at the site. Environmental

Report (rev. 2) at 3-12 (JA___). Environmental Petitioners fail to point to any specific flaw in the analysis contained in the Environmental Report or the Safety Analysis Report that Interim Storage Partners submitted, a failure that this Court has ruled justifies the non-admission of their contention. *See Blue Ridge*, 716 F.3d at 195 (Commission reasonably declined to admit contention where putative intervenor failed to provide references to specific portions of the environmental report that it disputed, with supporting reasons).

Environmental Petitioners likewise fail to identify any basis for their assertion (Br. 13), beyond mere speculation, that the lack of information concerning Interim Storage Partners' mineral rights means that fracking or waste well injection disposal activities will be undertaken directly beneath the site. The Board recognized that the Environmental Report reached its conclusions *after* taking the reasonably likely effects of petroleum recovery into account, LBP-19-7, 90 N.R.C. at 68-69 (JA___); *see also* CLI-20-15, 92 N.R.C. at 502 (JA___) (affirming Board's determination); and Environmental Petitioners provide no basis to disturb that conclusion.

In Point XV (Br. 36-37), Environmental Petitioners raise similar objections about the analysis of earthquake impacts, this time directed at the final EIS (which, again, are jurisdictionally barred). But the arguments fail on the merits for the same reasons that the NRC properly denied admission of Sierra Club's contention.

Environmental Petitioners contend that the agency's analysis "misses the earthquake activity more recently caused by fracking for oil and gas." Br. 7. But the agency specifically acknowledged in the EIS that "in recent years, fluid injection and hydrocarbon production have been identified as potential triggering mechanisms for numerous earthquakes that have occurred in the Permian Basin." EIS at 3-21 (JA___). And the agency reasonably concluded, based on a 2018 study, that the potential for increased seismic activity attributable to oil and gas development activities was low. *Id.* at 5-22 (JA___). It further observed that its safety review would ensure that the project's structures, systems, and components important to safety would be designed to withstand the effects of earthquakes without impairment. *Id.* Even setting aside the jurisdictional infirmities of their argument, Environmental Petitioners provide no basis to contest any of these considered judgments.

3. The Commission acted reasonably in declining to admit Sierra Club's contention concerning, and in otherwise addressing Environmental Petitioners' arguments about, groundwater and geology.

In Point V (Br. 13-16), Environmental Petitioners challenge the agency's rejection of Sierra Club's contention 10. In that contention, Sierra Club asserted that Interim Storage Partners' Environmental Report and Safety Analysis Report were required to address the impact on groundwater from the release of radioactive material, which, Sierra Club asserted, could come from a ruptured cask, a seismic

event caused by fracking, or a terrorist attack. LBP-19-7, 90 N.R.C. at 73 (JA___). The Licensing Board dismissed the contention, holding that (1) Sierra Club failed to provide expert opinion or plausible facts suggesting how a cask could become ruptured, or how radioactive material could get into the groundwater; and (2) in any event, Sierra Club's arguments to the contrary were an impermissible attack on the certificates of compliance for the canister systems that Interim Storage Partners proposed to use (and had been licensed in separate rulemaking proceedings, which themselves were challengeable under the Hobbs Act). *Id.* at 73-74 (JA___-___). The Commission affirmed the Board's conclusions. CLI-20-15, 92 N.R.C. at 503-04 (JA___-___).

Environmental Petitioners identify no errors in the Board's or the Commission's decisions. Rather, they repeat their technical assertions made before the agency that certain characteristics of the fuel rods being stored within storage casks (and, in particular, the zirconium fuel "cladding") are susceptible to decay when storing "high burnup" fuel (i.e., fuel that has been used to generate a greater amount of energy). But this argument does not explain, as the Licensing Board and the Commission observed, how radioactive material could plausibly escape from the confines of the storage canisters, given the exhaustive analysis that

the agency performed when it certified these canisters for use.[21] And Environmental Petitioners fail even to mention, let alone refute, the Commission's conclusion that arguments questioning the ability of a storage system to prevent escape of radioactive material are an attack on the system's certification, which must be raised either directly as a challenge to the rule certifying the storage system or via separate petition for rulemaking. *See* CLI-20-15, 92 N.R.C. at 504 (JA___-___); *see also Public Watchdogs v. NRC*, 984 F.3d 744, 759 (9th Cir. 2021) (recognizing that rulemaking authorizing use of canister system was final order reviewable under the Hobbs Act).

Environmental Petitioners raise related arguments concerning groundwater and geology in Point XIV (Br. 36), vaguely asserting that the discussion of geology in the EIS "does not describe how the geology relates to storage-related issues." This direct challenge to the EIS is jurisdictionally infirm. Besides, Environmental Petitioners' arguments fail to identify any aspect of the storage of spent fuel that could even conceivably affect the geology at the site. As the agency explained in rejecting Sierra Club's contention 10, Sierra Club provides no basis to question the agency's judgment that the release of radiation under the carefully controlled conditions required by the license is not a realistic possibility requiring further

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[21] NRC noted as much when it explained that the transportation and storage systems prevent the release of radioactive materials even under accident conditions. EIS at D-77 (JA___).

study. *See* LBP-19-7, 90 N.R.C. at 74 (JA___). And, to the extent that Environmental Petitioners incorporate the critique provided by an expert during the adjudicatory proceedings and invite the Court to "scrutinize" her analysis, they do not present a developed argument to the Court that provides a basis for relief. *Anna Jaques Hospital v. Sebelius*, 583 F.3d 1, 7 (D.C. Cir. 2009) (quoting *Carducci v. Regan,* 714 F.2d 171, 177 (D.C. Cir. 1983) ("We will not consider 'asserted but unanalyzed' arguments because 'appellate courts do not sit as self-directed boards of legal inquiry and research . . . .")). Finally, on this highly technical issue, the Court should defer to the NRC's expert judgment that the facility's design will ensure that spent fuel is stored safely.

4. Environmental Petitioners identify no error with respect to Don't Waste Michigan's contention concerning, or the agency's discussion in the EIS of, alternatives.

Environmental Petitioners' Point VI (Br. 17-18) is a challenge to the rejection by the Licensing Board and the Commission of Don't Waste Michigan's contention 8. That contention asserted that the Environmental Report inadequately identified alternatives (including so-called hardened onsite storage at reactor sites and various modifications to the proposed Interim Storage Partners facility). The Licensing Board declined to admit the contention, ruling that hardened onsite storage was a modification of the no-action alternative that the agency was not required to consider (and had in any event never been licensed or implemented),

and that the remaining alternatives suggested in contention 8 were simply suggestions for improving the proposed project rather than alternatives to constructing it. LBP-19-7, 90 N.R.C. at 97-99 (JA___-___). The Commission affirmed the Board's conclusions, noting that the agency was not required to consider alternatives that would not meet the purpose and need of the project (to construct a privately owned, centralized storage facility), and that the proposed improvements to the Interim Storage Partners project were neither required by the Commission's safety regulations nor needed to avoid or mitigate an environmental impact. CLI-20-14, 92 N.R.C. at 484-86 (JA___-___).

Environmental Petitioners do not address, let alone identify error in, the Licensing Board's or the Commission's decision or their explanation for not deeming the alternatives reasonable. Their failure to identify a specific error in the agency's reasoning is sufficient grounds to defeat their argument. See *Blue Ridge*, 716 F.3d at 200 (deferring to NRC's conclusion that supplemental environmental assessment was not warranted where petitioner did not challenge agency's analysis supporting contrary conclusion). And their reliance in their brief and before the agency on *DuBois v. Dep't of Agriculture,* 102 F.3d 1273, 1287 (1st Cir. 1996), for the proposition that they need not explain why "reasonable but unexamined" alternatives must be evaluated presupposes the reasonableness of the alternatives—the precise flaw that the Commission identified in contention 8. CLI-20-14, 92

N.R.C. at 485 ("Here, unlike in *Dubois*, Joint Petitioners have not shown that their proposed alternatives are reasonable . . . .").

Environmental Petitioners suggest (Br. 17) that the agency should have considered onsite storage at reactor sites as an alternative, asserting that the agency concluded when it promulgated the Continued Storage Rule that fuel can be stored safely at reactor sites indefinitely. But that document did not in any way require that fuel be stored onsite; in fact, it expressly contemplated the construction of away-from-reactor storage facilities as an available option for the owners of spent fuel. Continued Storage Generic EIS at 2-18 to 2-35 (JA___-____). The Board's and the Commission's analysis is therefore plainly consistent with the analysis supporting the Continued Storage Rule.

Moreover, Don't Waste Michigan and Sierra Club provide no reason to depart from the Commission's conclusion that onsite storage at reactor sites would not satisfy the purpose and need for the Interim Storage Partners facility—to provide the *option* of offsite storage. CLI-20-14, 92 N.R.C. at 486 & n.145. While some spent fuel owners may choose to keep fuel in its current location, Petitioners provide no reason to foreclose that option (and no statutory basis for the NRC to decline to authorize such an option) if it can be safely accomplished.

Environmental Petitioners repeat the same arguments in Point XIII of their argument (Br. 34-35), but this time focus their criticism on the EIS rather than the

Environmental Report. Their arguments, which we again stress are beyond the Court's jurisdiction, are no more persuasive when raised in this context. As an initial matter, Environmental Petitioners point to no evidence undermining the agency's technical conclusion—that hardened onsite storage is a "generalized concept" for which detailed plans sufficient to support a comparison are not available. EIS at 2-22 (JA___). And they again ignore the agency's determination that storage of fuel *on*site would not satisfy the purpose and need of the project—providing the owners of spent fuel with an option for *off*site storage, which would in turn facilitate the use of land at reactor sites for other purposes. *Id.* at 1-3, 2-22, D-40 to D-41 (JA___, ___, ___-___).

Finally, we note that Environmental Petitioners do not contend that the purpose and need for the facility is somehow deficient. They not only should not be permitted to do so on reply but would also lack a basis to do so. *See, e.g.*, *Louisiana Wildlife Fed'n, Inc. v. York*, 761 F.2d 1044, 1048 (5th Cir. 1985) (under guidelines promulgated by EPA, "not only is it permissible for the Corps to consider the applicant's objective; the Corps has a duty to take into account the objectives of the applicant's project. Indeed, it would be bizarre if the Corps were to ignore the purpose for which the applicant seeks a permit and to substitute a purpose it deems more suitable."); *see also City of Grapevine, Tex. v. Dep't of Transp.*, 17 F.3d 1502, 1506 (D.C. Cir. 1994) ("Per then-Judge Thomas, where a

federal agency is not the sponsor of a project, 'the Federal government's consideration of alternatives may accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project. In formulating the EIS requirement, the Congress did not expect agencies to determine for the applicant what the goals of the applicant's proposal should be.'" (quoting C*itizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 199 (D.C. Cir. 1991)).

5. Environmental Petitioners identify no error with respect to Sierra Club's contention concerning ecological impacts or with respect to the treatment of these impacts in the EIS.

In Point VII of their argument (Br. 18-20), Environmental Petitioners address Sierra Club's contention 13, which related to the Environmental Report's treatment of two lizard species of concern, the Texas horned lizard and the dunes sagebrush lizard.[22] Environmental Petitioners neglect to confront the Licensing Board's reasons, affirmed by the Commission, for ultimately deeming the contention, as amended, inadmissible.

[22] Neither of these species is currently listed as endangered under the Endangered Species Act, though the Texas horned lizard is listed as threatened under Texas law. In June 2021, the Fish and Wildlife Service proposed listing the lesser prairie chicken (which Environmental Petitioners also reference) as endangered in the Permian Basin. Endangered and Threatened Wildlife and Plants; Lesser Prairie-Chicken; Threatened Status With Section 4(d) Rule for the Northern Distinct Population Segment and Endangered Status for the Southern Distinct Population Segment, 86 Fed. Reg. 29,432 (June 1, 2021).

Specifically, the Licensing Board determined that (1) Sierra Club had failed to raise a genuine dispute as to whether the studies that Interim Storage Partners relied on adequately supported its description of the affected environment for the two species, LBP-19-9, 92 N.R.C. at 187-90; and (2) Sierra Club had failed to demonstrate a genuine dispute as to whether Interim Storage Partners' conclusions concerning the impact of its proposed facility on these species are reasonable, *id.* at 190-91. The Commission affirmed the Board's decision on appeal. CLI-21-15, 92 N.R.C. at 496-98.

Environmental Petitioners do not point to any error in the Board's conclusions or the Commission's affirmance of the Board's decision. With regard to the first issue (the description of the affected environment), the Board determined that Sierra Club had not identified any flaw in the description of the affected environment in the Environmental Report. The Board observed that, contrary to Sierra Club's assertions, the proposed facility was within the radius of a survey conducted in 1997 by doctoral-level research scientists that covered five sites. LBP-19-9, 92 N.R.C. at 188 (JA___). The Board noted that the Environmental Report's conclusions concerning the unsuitability of the site for the dunes sagebrush lizard population (a fact confirmed by field studies) was consistent with 2004 and 2007 studies suggesting that the lizards were generally present "in the area around the site," because of "a high frequency of mesquite and

grassland vegetation associations" and a "low frequency of shinnery oak dunes and large blowouts," at the immediate location of the storage facility. *Id.* at 189-90 (JA___) (citing Environmental Report (rev. 2) at 3-34 to 3-37 (JA__-___)). And the Board explained that the Environmental Report acknowledged that the Texas horned lizard had been reported as present on the property. *Id.* at 190 (JA___) (citing Environmental Report (rev. 2) at 3-34 (JA___)).

The Environmental Report also analyzed, contrary to Sierra Club's assertions, the effect of the facility on this environment. As the Licensing Board noted, the Environmental Report did not characterize the impact as nonexistent, as Sierra Club contended, but as small (with a potential for loss of breeding habitat for the Texas horned lizard). *Id.* (JA___) (citing Environmental Report (rev. 2) at 4-37, 4-38 (JA___,___)). The Board further recognized the Report's assessment that the affected property would constitute only a small percentage of Interim Storage Partners' holdings and of the suitable habitat throughout the region. *Id.* (JA___) (citing Environmental Report (rev. 2) at 4-37 (JA___)). And the Board observed that both species were "highly adaptable" because of their mobility. *Id.* (citing Environmental Report (rev. 2) at 4-38 (JA___)). Finally, the Board concluded that Sierra Club failed to cite any facts or expert opinions undercutting the Environmental Report's analysis of potential impacts to the lizards. *Id.* Environmental Petitioners fail to provide a reason to second-guess the Board's

finding (affirmed by the Commission) that, in light of these unrebutted conclusions, Petitioners failed to identify a genuine issue to be disputed at a hearing. *See Blue Ridge*, 716 F.3d at 195.

Environmental Petitioners' arguments are no more compelling when raised in Point XIII (Br. 37-39) as a challenge to the EIS. They attack the agency's reliance on studies as untimely or as prepared in a biased manner, yet they fail to provide a factual basis to suggest that the studies are outdated or inaccurate. They assert that the agency failed to "clearly state" in the EIS that construction of the Interim Storage Partners facility would destroy vegetation that provides a habitat for the Texas horned lizard, the dunes sagebrush lizard, and the lesser prairie chicken, yet they ignore that the EIS addresses both the parameters of construction at the facility, the likelihood that each of these species would inhabit the affected area, and the effect of construction and operation on wildlife and vegetation (including actions to mitigate these impacts). EIS at 3-48 to 3-52, 4-37-51 (JA___-___. ___-___). And while Environmental Petitioners malign field surveys undertaken in October 2018 and 2019 to locate these species (Br. 39), they fail to note that the EIS specifically acknowledges the possibility of these species' presence. *See, e.g.*, EIS at 3-50 (JA___) ("[P]otentially suitable habitat for the Texas horned lizard and harvester ant mounds were observed within the proposed

CISF project area."); *id.* at 3-52 (JA___) ("[I]t is reasonable to anticipate that [dunes sagebrush lizard] could potentially be present at the proposed CISF.").

Finally, Joint Petitioners question the efficacy of potential mitigation efforts relating to the identified species (Br. 39). These mitigation efforts include, among numerous steps for each resource area identified in the EIS, coordination and consultation with the Texas Parks and Wildlife Department to develop a survey plan for and limit disturbances to the lizard species and the prairie chicken. EIS 4-44 to 4-45, 6-8 to 6-9 (JA___-___, ___-___). Environmental Petitioners fail to provide either a regulatory basis for NRC to impose additional conditions on the license to mitigate the impacts that are identified or to show that the agency has failed in its obligation to identify mitigation measures. *Robertson*, 490 U.S. at 352-53 ("There is a fundamental distinction, however, between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other."); *see also Mayo v. Reynolds*, 875 F.3d 11, 22 (D.C. Cir. 2017) (deeming mitigation analysis sufficient where it contained detailed discussion of possible mitigation measures relevant to the environmental risks identified in EIS).

6. Environmental Petitioners identify no error with respect to the Commission's resolution of Sierra Club's contention concerning the long-term storage of spent fuel or the agency's treatment of the issue in the EIS.

Environmental Petitioners' Point VIII challenges the dismissal by the Licensing Board (and affirmation of that dismissal by the Commission) of Sierra Club's contention 14. In that contention, Sierra Club purported to identify an apparent disconnect in the license application, noting that "[t]he containers in which the waste will be transported to and stored at the Interim Storage Partners site are licensed for a period of 20 years" but that the facility will be licensed for longer than that.

The Licensing Board dismissed the contention, LBP-19-7, 90 N.R.C. at 80-81 (JA___), and the Commission affirmed the decision on appeal, CLI-20-14, 92 N.R.C. at 506-08 (JA___). The Commission emphasized that either the certificate holder of the container or the licensee possessing it can seek renewal of the storage period under 10 C.F.R. § 72.240(a), which will require a new safety analysis, including a description of the aging management program for the system, CLI-20-14, 92 N.R.C. at 507 (JA___). The Commission further noted that the aging management program was addressed in the Safety Analysis Report that Interim Storage Partners submitted with its license application, and that materials for the

storage system were selected with concerns about aging management—i.e., the potential for cracking due to corrosion—in mind. *Id.* at 507-08 (JA___-___).

Sierra Club and Don't Waste Michigan assert that Sierra Club's contention should have been admitted because the agency cannot presume renewal of the certification. Br. 21. But it is not inappropriate to rely upon the possibility that the certification will be renewed for purposes of identifying the likely environmental impacts of the facility. And, in any event, the agency has previously confronted the possibility of the expiration of the storage canisters when it promulgated the Continued Storage Rule (which is incorporated into the agency's environmental analysis of spent fuel storage facilities, *see* 10 C.F.R. §§ 51.23(b) § 51.97(a)). Indeed, the agency considered the potential impacts of storage of spent fuel after the expiration of the term of a spent fuel storage facility (including the expiration of the certificates of compliance for the storage systems employed at reactor sites), and its consideration of those impacts were codified into its regulations and have survived judicial review. *See* 10 C.F.R. § 51.23(b); *New York*, 824 F.3d at 1019-22 (upholding the NRC's generic analysis of the impacts of storing spent fuel both on the site of existing reactors and at offsite facilities). And in this analysis NRC specifically described a process in which spent nuclear fuel stored in storage casks would be transferred, using a dry transfer system, to a new (and separately licensed) facility when it became necessary to do so. *See* Continued Storage

Generic EIS at 2-20 to 2-24 (describing the dry transfer systems), 2-31 to 2-35 (describing the additional activities that would be required to replace storage systems) (JA___-___, ___-___).

The Licensing Board reasonably and properly dismissed Sierra Club's contention as an impermissible attack upon the analysis that the Commission codified in the Continued Storage Rule, *see* 10 C.F.R. § 2.335, and Environmental Petitioners provide no basis to conclude otherwise. Interim Storage Partners will be required to store fuel in storage systems that are licensed, and at some future date it may be required either to obtain renewals of the applicable certifications (supported by adequate safety and environmental analyses) or make use of alternate, licensed systems to transfer and store fuel for additional periods of time. The Commission reasonably determined that the potential need to select one of these options later is not a basis to deny the license now.

Environmental Petitioners recycle these assertions in Point IX of their argument (Br. 22-29), which directly challenges the EIS's analysis of this issue. Beyond being outside the Court's Hobbs Act jurisdiction, these arguments are unavailing for largely the same reasons. Environmental Petitioners' assertion (Br. 23) that the EIS "does not consider the likelihood that a permanent repository will never be developed" flies in the face of this Court's conclusion that the Continued Storage Generic EIS, specifically incorporated into the Interim Storage Partners

EIS, adequately studied the probability and consequences of a failure to site a permanent repository. *New York*, 824 F.3d at 1020. And Environmental Petitioners' assertion that the agency would be forced to renew the container license or face "stranding" the waste ignores that, when it becomes necessary to do so, the owner of the spent fuel will be responsible for constructing a new, separately licensed storage installation, the very assumption that this Court deemed to have been reasonably drawn in *New York*. *See id.* at 1023.

Nor are Don't Waste Michigan's and Sierra Club's arguments concerning the threats to canister integrity caused by high burnup fuel (Br. 25) well taken. Indeed, the Commission already licensed the canisters in a notice-and-comment rulemaking, reviewable under the Hobbs Act, and Environmental Petitioners cannot mount a collateral attack on their safety through these proceedings. *Cf. Public Watchdogs*, 984 F.3d at 759. Moreover, each canister system has specifications for the type of fuel that it can safely store; to the extent that Petitioners raise concerns here about the use of non-conforming fuel in a storage system, those are concerns related to enforcement, as against Interim Storage Partners, LLC, of existing requirements (either raised by the agency itself as part of its oversight of licensees or in response to a citizen petition pursuant to 10 C.F.R. § 2.206) and not a reason to deny a license.

Finally, inasmuch as Environmental Petitioners contend (Br. 26) that the license and EIS are inadequate because the license does not include plans to construct a dry transfer system now for use in the future, they overlook this Court's holding in *New York*. There, this Court endorsed the assumption, which itself was based on the agency's conclusion concerning the feasibility of a dry transfer system, *see* Continued Storage GEIS at 2-20 to 2-24, 2-31 to 2-35 (JA___-____, ___-___), that the agency would be able to replace storage systems through the use of a dry transfer system when the need to do so arises. *New York*, 824 F.3d at 1023. And contrary to Environmental Petitioners' assertions, (Br. 28-29), the Continued Storage Generic EIS did not assume that a dry transfer system would be part of the original license application. In fact, the Generic EIS assumed that it would be built "sometime after" the original construction because "it would not be needed immediately." Continued Storage EIS at 5-2 (JA___).

Environmental Petitioners also suggest (Br. 26), in support of the same argument concerning the need for a dry transfer system, that the agency has violated NEPA by failing to identify the corrective actions it would take to address container failures. But the statement they cite from the EIS (page 4-85, JA___) does not suggest that the agency has no means of preventing the release of contaminated material (such that a dry transfer system should be required now). Rather, "corrective action" is one of several listed "factors that contribute to the

containment of [spent nuclear fuel] during normal operation." *Id.* And that list also includes other key safety measures to prevent the release of contamination—the use of sealed canisters that are welded shut, the engineered features of the cask system, and inspection of casks upon arrival. *Id.* All of these factors led the agency to rationally conclude that a release of radioactive material would not be expected during normal operations. *Id.*

Environmental Petitioners do not contest any of the agency's conclusions or provide any support for their suggestion that the agency was required to provide more information to support its technical judgment. And, in any event, the EIS contains a discussion of the potential for release of radioactive material as part of its analysis of accidents. EIS at 4-94 to 4-97 (JA___-___). Petitioners' assertion that the agency has violated its public disclosure requirements in failing to address to the possibility of a loss of containment, and in failing to confront the allegedly corresponding need for a dry transfer system now, therefore ring hollow.

Finally, Don't Waste Michigan and Sierra Club assert (Br. 26) that "degradation over time is inevitable" and that, absent a dry transfer system, "catastrophic releases of hazardous radioactivity are quite imaginable." These assertions do not appear to be directed at any particular aspect of the Final EIS and are little more than a generic and unsupported attack on the safety of the facility. Yet Petitioners conspicuously do not mention, let alone refute, the agency's

comprehensive safety evaluation (upon which the agency's conclusions concerning the impacts of storage were premised).

Indeed, in its Final Safety Evaluation Report, the agency concluded that the use of weld-sealed canister-based systems satisfies the confinement requirements of 10 C.F.R. § 72.122(h)(1), namely that that the spent fuel cladding be protected during storage against degradation, and that the facility operating procedures, design, and controls ensure that radiological exposures to facility personnel and the public are as low as reasonably achievable. Final Safety Evaluation Report at 4-14 (JA___). And, of course, Petitioners had the opportunity to litigate these highly technical issues by following the process that Congress created when it enacted the Atomic Energy Act—by submitting an admissible conclusion for adjudication before the Commission. Yet they failed to do so, and their resort to conclusory assertions in support of an argument that the EIS is somehow flawed is unpersuasive.

7. Environmental Petitioners identify no error with respect to the radiological impacts of potential accidents.

In Point XVII (Br. 39-42), Environmental Petitioners do not challenge the dismissal of any contention—a jurisdictional flaw that itself prevents the Court from considering their argument. But even if the Court had jurisdiction to address this argument, no relief would be warranted.

Echoing comments they made on the draft EIS, Environmental Petitioners object that the EIS's evaluation of accidents is premised upon compliance with the NRC's safety evaluation, and incorrectly assert that this evaluation has not yet occurred (Br. 41).[23] As an initial matter, the agency is entitled to presume compliance with regulatory obligations in assessing environmental impacts. *See, e.g.*, *New York*, 824 F.3d at 1021 (upholding the agency's determinations concerning the risks of leaks from spent fuel pools in light of NRC regulations requiring leak detection). And in this case, contrary to Environmental Petitioners' assertions, the agency *has* completed its safety evaluation of the proposed facility. The agency thoroughly evaluated the safety implications of accidents such as fires and explosions; building structural failure, heatup and blockage of air inlets and outlets; dropped and tipped-over casks; earthquakes; lightning; floods; tornado wind and missiles; and accidents at nearby sites. Final Safety Evaluation Report at 16-1 to 16-15 (JA___-___). The agency concluded that the design of the facility, including the use of the specified storage systems proposed to be used, met the NRC's stringent requirements for handling the consequences of these potential accident scenarios without endangering public health and safety. *Id.* Other than to

[23] This language of this assertion tracks the language originally made in a comment on the draft EIS, submitted on behalf of Don't Waste Michigan and its co-petitioners, on November 3, 2020. Comments of Don't Waste Michigan (Certified Index entry 696) at 18 (JA___). The agency's Final Safety Evaluation Report was completed in September 2021, ten months later. (JA___).

mistakenly assert that the analysis has not been performed, Don't Waste Michigan and Sierra Club provide no basis to question any of the agency's safety conclusions set forth in this comprehensive evaluation.

* * *

In short, the Commission reasonably determined that the contentions that Environmental Petitioners raised were inadmissible, primarily because they did not provide a factual basis to contest the conclusions in the Environmental Report or were a challenge to rules that the agency has adopted through notice-and-comment rulemaking. And, beyond the fact the Court lacks jurisdiction to consider the arguments that Environmental Petitioners raise concerning the EIS, Environmental Petitioners present no basis to question the agency's considered judgment in weighing evidence and drawing conclusions as part of its environmental review.

CONCLUSION

For all these reasons, the Court should dismiss the Petitions for Review to the extent they directly challenge the license and associated documents. And the Court should deny the Petitions for Review to the extent they challenge the Commission's decisions denying Petitioners' intervention in the licensing proceeding.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This document complies with the Court's order of February 15, 2022, because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), it contains 18,261 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

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