

No. 21-9593

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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STATE OF NEW MEXICO, *ex rel.* HECTOR H. BALDERAS, Attorney General  
and the NEW MEXICO ENVIRONMENT DEPARTMENT,

*Petitioners,*

v.

NUCLEAR REGULATORY COMMISSION and  
UNITED STATES OF AMERICA,

*Respondents.*

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On Petition for Review of Action by the  
Nuclear Regulatory Commission

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**REPLY BRIEF OF PETITIONERS**

**STATE OF NEW MEXICO, *ex rel.* HECTOR H. BALDERAS, Attorney  
General, and NEW MEXICO ENVIRONMENT DEPARTMENT**

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## GLOSSARY

The following abbreviations and acronyms are used in this brief:

AEA	Atomic Energy Act
APA	Administrative Procedures Act
CISF	Consolidated Interim Storage Facility
DEIS	Draft Environmental Impact Statement
DOE	U.S. Department of Energy
EIS	Environmental Impact Statement
ISFSI	Independent Spent Fuel Storage Installation
ISP	Interim Storage Partners, LLC
NEPA	National Environmental Policy Act
NMED	New Mexico Environment Department
NRC	U.S. Nuclear Regulatory Commission
NUREG	U.S. Nuclear Regulatory Commission Report
NWPA	Nuclear Waste Policy Act
SNF	Spent Nuclear Fuel
WCS	Waste Control Specialist, LLC

## **I. INTRODUCTION**

New Mexico stands on its arguments made in its opening brief (“Opening Br.”) and provides a reply to the arguments made by the U.S. Nuclear Regulatory Commission (“NRC”) in its Response Brief (“Resp. Br.”) and by Integrated Storage Partners (“ISP”) in its Intervenor Brief (“ISP Br.”), focusing on arguments involving the application of the AEA and the NWPA and the NRC’s arbitrary, capricious, and unlawful actions in the licensing of the ISP facility, the unfunded mandate and burden that has been placed on New Mexico by the NRC, and the NRC’s arbitrary, capricious, and the narrow review of the environmental impacts that does not comply with the National Environmental Policy Act (“NEPA”).

## **II. ARGUMENT**

### **A. The NRC’s Jurisdictional Arguments Should Be Rejected**

#### **1. New Mexico’s standing is self-evident and apparent from the record**

The NRC’s argument that the State lacks standing, specifically that it has not shown an injury-in-fact, is meritless. The State’s standing is self-evident and facially apparent from the record.<sup>1</sup>

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<sup>1</sup> Indeed, although the NRC filed a motion to dismiss raising jurisdictional issues (arguing that this Court lacks jurisdiction to hear a direct challenge by a party that unsuccessfully sought intervention in the NRC’s adjudicatory proceeding), the NRC did not argue the State lacked standing. In its response to that motion, New Mexico stated that it “indisputably has Article III standing to challenge the license.” Resp. to MTD at 11. In its reply, the NRC acknowledged New Mexico’s statement

Here, although the ISP Consolidated Interim Storage Facility (“CISF”) is physically located in Texas, the facility is 0.37 miles from the New Mexico border. REC. 125, EIS at xvii & 2-2. Moreover, the transportation routes for shipments of spent nuclear fuel (“SNF”) to the ISP CISF utilize New Mexico’s roadways and railways. State Highway 18, which connects Hobbs and Eunice, New Mexico, would be used to access the ISP CISF. *Id.* at xxi – xxii & 4-6. The Texas-New Mexico Railroad, running through New Mexico, will be a primary route for shipments of SNF. *Id.* at 2-11 (indicating that shipments of SNF would be transported across the United States to Monahans, Texas, and then would be transported north to Eunice, New Mexico, on the existing Texas-New Mexico Railroad); *see also Id.* at 2-12, Figure 2.2-7. These transportation routes traverse lands owned in trust and leased for oil and gas development by the State Land Office. *See* Exhibit 1 Decl. of Sunalei Stewart. Any accident on or near these lands involving a nuclear release would likely directly impact the State’s proprietary interest in oil and gas revenue.

Further, as the Environmental Impact Statement (“EIS”) indicates, the nearest residents to the ISP CISF are in New Mexico. *Id.* at 3-2. The proximity of the ISP CISF to New Mexico thus poses serious threats to New Mexico’s quasi-sovereign interests in lands and water within its borders, as well as creating a financial burden

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regarding its standing and did not refute it or otherwise suggest New Mexico’s standing was contested. MTD Reply at 9.

of emergency response and infrastructure improvements. *See* Petition for Review at 2 (indicating that the ISP CISF is located on the Texas/New Mexico border and will significantly impact surrounding human environments); Resp. to MTD at 1 (noting the serious and substantial threats the ISP CISF poses to New Mexico citizens and that New Mexico communities would be responsible for costs associated with training, equipping and funding emergency response).

Accordingly, Governor Lujan Grisham submitted comments to the NRC on the Draft EIS (“DEIS”), itemizing many of the State’s concerns over the ISP CISF. REC. 1295:

[T]he ISP project would place unfunded safety mandates on local communities. Transporting spent nuclear fuel across the nation is complex and extremely dangerous. Safe transportation of spent nuclear fuel requires both well-maintained infrastructure and highly specialized emergency response equipment and personnel that can respond quickly to an incident at the facility or on transit routes. New Mexico residents cannot afford and should not be expected to bear the costs associated with transporting material to the proposed CISF or responding to an accident on transport routes or near the facility.

*Id.* at 2. The Governor also warned of economic harm to New Mexico, as “[a]ny disruption of agricultural or oil and gas activities as a result of a perceived or actual nuclear incident would be catastrophic to New Mexico, and even taking steps toward siting a CISF in the area could cause a decrease in investment in two of our state’s biggest industries.” *Id.*

Secretary Kenney of the New Mexico Environment Department (“NMED”) also identified health and safety impacts on New Mexico citizens and the environment based on the fact that contaminants released to the air and water at the ISP site have the potential to migrate into New Mexico. REC. 1386 at 2. The prevailing wind direction is generally from the ISP CISP towards New Mexico, groundwater flow beneath the site is predominantly to the southwest towards New Mexico, and surface water flow from the site is directed through outfalls that flow directly into New Mexico. *Id.* at 4. Thus, there are multiple pathways for contaminant release to directly migrate into New Mexico. *Id.* Indeed, as Secretary Kenney stated in his comments, because of the potential for existing operations at the site currently operated by WCS to affect groundwater quality in New Mexico, NMED required Waste Control Specialists (“WCS”) to obtain a groundwater discharge permit for its waste disposal operations in Texas. *Id.* at 2.

The risk to the State were also expressed by NMED employee Teresa McDill. “Furthermore, the consequences of a release of radiation due to accidental events pose an unreasonable threat to New Mexico’s citizens, environment, communities, and economic industries. These severe consequences are completely preventable by not allowing an interim storage facility on the border of west Texas.” REC. 1432 at 106. *See also*, Opening Br. at 15-16.

The threat of environmental damage to New Mexico's quasi-sovereign interests, including to its land, water, air, and the health and safety of its citizens sufficiently supports the State's standing. *New Mexico, ex rel. Richardson v. Bureau of Land Management*, 565 F.3d 683, 696 n.13 (10th Cir. 2009) (citing *Massachusetts v. EPA*, 549 U.S. 497 (2007)); *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez*, 458 U.S. 592, 607 (1982) (finding that a state has a quasi-sovereign interest in its citizens' general health and well-being, both physical and economic).

Contrary to NRC's assertions, New Mexico's standing to protect these quasi-sovereign interests is not barred by *Massachusetts v. Mellon*, 262 U.S. 447 (1923), merely because Respondents are part of the federal government. Resp. Br. at 17. In *Massachusetts v. EPA*, "the Court specifically rejected the argument, advanced by the Chief Justice in dissent, that Mellon amounted to a ban" on state *parens patriae* actions against the federal government. *Aziz v. Trump*, 231 F. Supp. 3d 23, 31 (E.D. Va. 2017) (citing *Ariz. State Legis. v. Ariz. Ind. Redistricting Comm'n*, 576 U.S.787, 802 n.10 (2015)). Instead, because *Mellon's* rationale has less force when an executive, rather than congressional, action is challenged, "a state is not be barred [sic] by the *Mellon* doctrine from a *parens patriae* challenge to executive action when the state has grounds to argue that the executive action is contrary to federal statutory or constitutional law." *Aziz*, 231 F. Supp. 3d at 31-32. *See also New Mexico v. McAleenan*, 450 F. Supp. 3d 1130, 1183 (D.N.M. 2020) (rejecting argument that

*Mellon* foreclosed New Mexico’s *parens patriae* standing to bring claims based on quasi-sovereign interests against the U.S. Dept of Homeland Security).

In addition, the financial burden that NRC admits will be borne by New Mexico, as well as other states along the SNF transportation routes, for funding emergency preparation and response, as well as infrastructure improvements necessary to transport the SNF to and from the ISP CISF (REC. 125, EIS at 4-74 to 4-75; Resp. Br. at 45-46) creates a financial harm providing a clear basis for standing. *Texas v. United States*, 809 F.3d 134, 155 (5th Cir. 2015). Moreover, as Eunice, New Mexico is the nearest city to the ISP site, its emergency personnel would likely be the first responders called in the event of an emergency at the ISP site. REC. 125, EIS at 3-87, 4-72.

Finally, the State has standing based on a procedural injury resulting from the NRC’s failure to comply with NEPA’s procedural requirements in its EIS process. *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 938 (9th Cir. 2005) (“NEPA is a procedural statute, and thus it is not surprising that procedural injuries frequently suffice for standing in the NEPA context.”). For a procedural injury, the standing requirements are “somewhat relaxed, or at least conceptually expanded.” *WildEarth Guardians v. EPA*, 759 F.3d 1196, 1205 (10th Cir. 2014); *Massachusetts*, 549 U.S. at 517-18. As articulated by the Tenth Circuit, in NEPA cases, injury-in-fact is shown where the agency created an increased risk of actual, threatened, or imminent

environmental harm in making its decision without following NEPA's procedures. *Kansas Natural Resource Coalition v. United States Department of Interior*, 971 F.3d 1222, 1240 (10th Cir. 2020) ("Specifically, we have recognized that the creation of an increased risk of environmental harm flowing from an agency's failure to follow statutory procedures is a concrete injury.") (Lucero, J., dissenting); *Committee to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 448-49 (10th Cir. 1996); *WildEarth Guardians*, 759 F.3d at 1205 (finding that with respect to a procedural violation, the injury results from the agency's uninformed decision-making). As discussed herein, the NRC's failure to comply with NEPA resulted in an uninformed decision that increased the risk of harm to New Mexico's economic, proprietary, and quasi-sovereign interests. *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1178 (9th Cir. 2011) (finding that state had standing to assert its own procedural interest in federal agency decisions made under the NEPA when the agency's decision would potentially increase the risk of environmental harm to areas within the state's borders); *Committee to Save the Rio Hondo*, 102 F.3d at 449 (finding that a geographic nexus to or actual use of the site of the agency action is sufficient to satisfy the concrete interest requirement in NEPA claims).<sup>2</sup>

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<sup>2</sup> The NRC's standing argument seems to be more technical than substantive, as the NRC asserts that Petitioners may not submit evidence supporting standing on reply. Resp. Br. at 28. However, the NRC misinterprets the D.C. Circuit case on which it relies. As the D.C. Circuit explained in addressing an argument similar to the NRC's here,

## 2. New Mexico is a party aggrieved

New Mexico addressed the NRC’s and ISP’s arguments regarding its “party aggrieved” status in its Response to the Motion to Dismiss, which the Court carried with the case. New Mexico does not repeat those arguments here.

The NRC’s “further observation”—that Congress desired judicial review of NRC licensing decisions to be channeled through the agency’s adjudicatory process—is unsupported. The statute on which NRC relies for this alleged expression of Congressional will, 42 U.S.C. § 2239, states only that “[i]n any proceeding under this chapter, for the granting . . . of any license . . . , the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.” *Id.* at § 2239(a)(1)(A). Nothing therein requires NEPA issues to be restricted to the NRC’s administrative hearing procedure.

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MPAA’s interpretation of *Sierra Club* rests on a faulty construction of the opinion and is inconsistent with the law of this circuit. Nothing in *Sierra Club* suggests that it is intended to create a ‘gotcha’ trap whereby parties who reasonably think their standing is self-evident nonetheless may have their cases summarily dismissed if they fail to document fully their standing at the earliest possible stage in the litigation. . . . In *Communities Against Runway Expansion*, we ruled that, even though petitioners had failed to include submissions adequate to demonstrate standing with their opening brief, *Sierra Club* did not preclude the court from considering declarations submitted along with petitioners’ reply brief, after an intervenor had challenged petitioners’ standing

*American Library Ass’n v. FCC*, 401 F.3d 489, 493-94 (D.C. Cir. 2005).

Further, NEPA concerns the NRC's EIS, not the various iterations of ISP's Environmental Report.<sup>3</sup> The NRC published its draft EIS in May 2020, and its public notice and deadline, to provide public comment. REC. 94, 85 Fed. Reg. 27447. . . NEPA and the NRC's own regulations require it to review and consider these comments before a final agency action. *E.g.*, 10 C.F.R. §§ 51.91, 51.117. New Mexico timely submitted public comments to the draft EIS in accordance with the NRC's instructions in its public notice. NEPA's public participation requirement becomes meaningless if members of the public can submit comments but not seek judicial review of the EIS and the NRC's final agency action because they did not seek intervention in the adjudicatory proceeding that terminated much earlier and before the NRC's NEPA document was published.

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<sup>3</sup> As discussed in New Mexico's opening brief, the NRC terminated the adjudicatory proceeding well before it published its draft EIS and issued notice for solicitation of public comment pursuant to NEPA. Opening Br. at 12-13.

ISP takes issue with New Mexico's statement that the NRC terminated the adjudicatory proceeding and closed the administrative record, suggesting that closing an adjudicatory record is not the same thing as closing the administrative record. ISP Br. at 36-37. The NRC's Atomic Safety and Licensing Board's order cited by ISP (ISP Br. at 39) supports New Mexico's statement. LBP-21-2, 2021 WL 8087739, at \* 2-3 (Jan. 29, 2021) (noting two motions are "[b]efore the Board in this closed proceeding," one of which was to "reopen the record," and noting that "[t]he Commission considers 'reopening the record for any reason to be an extraordinary action and places an intentionally heavy burden on the parties seeking to reopen the record'"). Further, the NRC opinion cited by ISP concerns closing the evidentiary hearing on an admitted contention as part of the adjudicatory process, which has no relation to this matter. *Entergy Nuclear Generation Co.*, CLI-08-9, 67 N.R.C. 353 (2008).

The NRC and ISP also rely on a mandatory exhaustion requirement that does not exist. The Hobbs Act does not contain a clear requirement for mandatory exhaustion; rather, it only requires the challenger be a “party aggrieved.” 28 U.S.C. § 2344; *Vermont Dept. of Public Service v. NRC*, 684 F.3d 149, 156 (D.C. Cir. 2012) (finding that the Hobbs Act does not contain the necessary unequivocal Congressional jurisdictional exhaustion requirement).

As set forth in its opening brief, New Mexico participated in the proceeding and provided the NRC with an opportunity to address the issues raised (Opening Br. at 13-17), satisfying the non-jurisdictional exhaustion requirements and the Hobbs Act.<sup>4</sup> *See Vermont Dept. of Public Service*, 684 F.3d at 157 (noting that the petitioners could have petitioned the Commission for interlocutory review of the Board’s denial of late-filed contention; they could have filed a new, separate contention; or they could have submitted a comment for the Commission’s review in response to the draft EIS); *see also* Opening Br. at 13 (regarding NRC’s predetermination and futility of attempts to raise issues in the administrative process); ISP Br. at 26 (regarding the importance of presenting issues to the agency to allow the agency to correct errors and compile a record for judicial review). By the NRC’s own admission (Resp. Br. at 7), the New Mexico’s Governor and NMED

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<sup>4</sup> The NRC contends that it addressed New Mexico’s comments in Appendix D to the EIS. MTD at 10 n.8. However, this statement again underscores NRC’s failure to have an adjudicatory proceeding on the issues raised.

submitted timely comments on the DEIS, giving the NRC the opportunity to correct its own errors and compile a record adequate for judicial review. *Vermont Dept. of Public Service*, 684 F.3d at 158. Judicial review of the NRC’s EIS and record of decision associated with its issuance of the ISP License is proper.

**B. NRC’s Issuance of the ISP License was Arbitrary, Capricious and in Violation of Law**

New Mexico generally rests on the arguments in its opening brief; however, New Mexico briefly responds below to some of the specific arguments made by the NRC and/or ISP.<sup>5</sup>

**1. Bullcreek and Skull Valley do not support NRC’s licensing of the ISP CISF**

The NRC asserts authority to issue the ISP License under AEA, but even *Bullcreek*, on which the NRC heavily relies, acknowledged that the AEA does not specifically provide such authorization; rather, such authority was presumed. *Bullcreek v. NRC*, 359 F.3d 536, 538 (D.C. Cir. 2004) (noting that “the AEA does not specifically refer to the storage or disposal of spent nuclear fuel”). Thus, any suggestion that Congress granted NRC the authority to license a private consolidated interim storage facility (“CISF”) to collect, consolidate and store the nation’s nuclear

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<sup>5</sup> Notably, despite its statement that it would seek to avoid duplicative briefing as a result of its intervention (ISP Notice of Intervention ¶ 24), ISP’s brief largely repeats the arguments made by the NRC in its brief. New Mexico does not separately address ISP’s duplicative arguments herein.

waste hundreds of miles from where it was generated and where it is currently being safely stored for an indefinite time period of 60 to 80 years or more is unsupported. Moreover, the regulations the NRC enacted pursuant to its presumed authority concern Independent Spent Fuel Storage Installations (“ISFSIs”) for onsite and away-from-reactor storage of SNF for nuclear generators, not the CISF proposed by ISP which is not a nuclear generator. *See Bullcreek*, 359 F.3d at 538 (“Pursuant to its AEA authority, the NRC promulgated regulations in 1980 for licensing onsite and away-from-reactor spent nuclear fuel storage facilities *for private nuclear generators.*”) (emphasis added); *see also* 10 C.F.R. Part 72; *Licensing Requirements for the Storage of Spent Fuel in an Independent Fuel Spent Storage Installation*, 45 Fed. Reg. 74693.

The two appellate cases on which the NRC rely are factually distinguishable and do not support NRC’s issuance of the ISP License here. Both *Bullcreek* and *Skull Valley* concern a consortium of private utility companies, Private Fuel Storage, Inc.’s (“PFS”), application for an ISFSI for temporary storage of SNF. *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1227-28 (10th Cir. 2004); *Bullcreek*, 359 F.3d at 539. This is very different from the ISP CISF. ISP is neither a utility nor a generator in need of additional temporary storage for its SNF. Rather, ISP whose sole purpose is to license, design, construct and operate this CISF, ISP Br. at 2, is a private third party that seeks to provide a consolidated disposal site for all the

nation's SNF at least until a permanent repository is established (assuming the availability of long-term interim storage does not undermine the political will to create a permanent depository), but perhaps longer. *See* Resp. Br. at 33, 38. While the NRC's regulations in 10 C.F. R. Part 72 authorize its licensing of an ISFSI, those regulations do not mention, much less authorize, a CISF, as the NRC licensed here, for rolling 40 year license terms.<sup>6</sup>

In sum, *Bullcreek* and *Skull Valley* stand for the proposition that in enacting section 10155(h) of the NWPA, Congress did not *categorically* overrule NRC's conclusion that the licensing of private, away-from-reactor storage facilities is authorized under the AEA.<sup>7</sup> However, to say that an agency possesses a certain authority is a far cry from holding that such authority is boundless. Those cases did not involve a situation, as here, where the scale and duration of the interim "storage" are so vast as to completely undermine and render superfluous the nationwide policy for spent nuclear fuel disposal set forth by Congress in the NWPA. Even if Congress consented *sub silentio* to some role for private away-from-reactor storage, that

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<sup>6</sup> The NRC and ISP attempt to distinguish "repository" from "temporary storage" but fail to reconcile that the proposed CISF is in all practicality a consolidated disposal site, as waste could be stored at ISP for 80 years or more. Resp. Br. at 31-32; ISP Br. at 32-33. But it is clear that there is currently no plan for permanent storage of the nation's nuclear waste, and the NRC has resorted to an illegal scheme whereby the NRC outsources the federal government's role in finding and disposing of the nation's SNF to a private contractor.

<sup>7</sup> On this issue, *Skull Valley* simply adopted *Bullcreek's* holding and declined to add further analysis. 376 F.3d at 1232 (10th Cir. 2004)

cannot be construed as endorsement of a wholesale replacement of its carefully crafted disposal policy. *See New Mexico v. Dep't of Interior*, 854 F.3d 1207, 1226 (10th Cir. 2017) (“Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”) (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)).

Furthermore, in exercising its authority to license ISFSIs for the temporary storage of SNF, the NRC must nevertheless comply with Congress’ dictates set forth in the NWPA. In addition to declaring that the generators and owners of SNF have the primary responsibility to provide for and pay the costs of interim storage until a permanent disposal is operational (42 U.S.C. § 10131 (a)(5)), Congress required private owners and operators of reactors to exhaust onsite storage of SNF (42 U.S.C. § 10151(a)(1) (stating that owners should “maximiz[e] to the extent practical, the effective use of existing storage facilities at the site of each civilian nuclear power reactor, and by adding new onsite storage capacity where practical”)).

The NWPA also dictates that the federal government, which would include the NRC, “has the responsibility to encourage and expedite the effective use of existing storage facilities and the addition of needed new storage capacity at the site of each civilian nuclear power reactor.” *Id.* at § 10151(a)(2). Further, the NRC, among others, “shall each take such actions as such official considers necessary to

encourage and expedite the effective use of available storage, and necessary additional storage, at the site of each civilian nuclear power reactor” consistent with several enumerated considerations, including the protection of public health and safety and the environment. *Id.* at § 10152. Such considerations do not include providing an option for generators to store SNF off-site should they so prefer, cited by the NRC (Resp. Br. at 41), and such business decisions surely cannot trump the dictates of Congress in focusing on the on-site storage of SNF. *See* Section 4, *infra*.

The NRC’s issuance of an off-site CISF, for which no need has been established, is not only not authorized by the AEA, but is also arbitrary, capricious and in violation of the NWPA.

**2. The NRC issued the ISP License containing a condition that violates the NWPA**

The ISP License affirmatively allows ISP to contract with DOE wherein DOE retains title to the SNF and would be responsible for funding the storage of SNF at the ISP CISF. REC. 130, ISP License at ¶¶ 15, 19. It is undisputed that this is unlawful and in violation of the NWPA. Resp. Br. at 35; ISP Br. at 29. NRC’s response—that because it has recognized that the condition authorized by the ISP license is illegal, and an illegal condition cannot satisfy the license requirement, the license does not authorize illegal storage of SNF—is nonsensical. Resp. Br. at 35; *see also* ISP Br. at 30-31. The question is not whether any other entity will violate

the law by acting in compliance with the illegal license.<sup>8</sup> The question is whether NRC's decision to issue a license containing an unlawful condition is arbitrary, capricious and in violation of the law. The NRC acknowledges that its actions taken in violation of the NWPA would be subject to judicial review and properly enjoined because they are contrary to law. Resp. Br. at 37. This is precisely what New Mexico asks of this Court.

### **3. NRC's issuance of the ISP License imposes unfunded mandates on New Mexico**

Despite acknowledging that every shipment of the nation's SNF to be stored at the ISP CISF will be transported to the ISP CISF primarily via the Texas-New Mexico rail line and alternatively via New Mexico's roadways, the NRC did not evaluate or quantify the costs of infrastructure improvements necessary to accommodate the massive volume of SNF transport using oversized, heavy railcars and trucks and the associated wear and tear, or the substantial funding needed for training and equipping first responders along these routes. *See* REC. 125, EIS at 3-6 ("Regional access to the proposed CISF project area is by New Mexico State Route

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<sup>8</sup> The NRC suggests that because an illegal contract is unenforceable, ISP could not rely on such contract for its operations. Resp. Br. at 35. But would such a contract be unenforceable, given that it would be in compliance with the license issued by the NRC? Further, the NRC argues that it surely would not permit such an illegal contract (*id.* at 36); however the fact that it issued the license containing an illegal condition in the first place does little to instill public confidence in its practices going forward.

18, which is a divided highway with two lanes in each direction”), 4-10 (“SNF canisters and casks that are expected to be used in a cross-country transportation campaign exceed the limits of legal truck weights”; “[h]eavy-haul trucks that are capable of hauling higher-capacity SNF casks are oversized vehicles”). Instead, the NRC considered these costs, which it admits will be borne by New Mexico, as unquantifiable or outside the scope of the EIS. *See* Opening Br. at 40-41. By saddling New Mexico with these costs, the NRC imposed an unfunded mandate on the State when it arbitrarily, capriciously, and in violation of law issued the ISP License.

ISP argues that NRC’s decision not to quantify the costs to states and local governments associated with the transportation of SNF to the ISP CISF was reasonable because of the NRC’s conclusion that these “costs would accrue under *both* the proposed action and the no-action alternative.” ISP Br. at 56 (emphasis in original). While transportation costs would accrue under the no-action alternative once a permanent repository was operational and SNF is shipped to that facility, the costs associated with the one-time shipments to a permanent repository cannot compare to the costs associated with numerous shipments to the ISP CISF over a period of 60 to 80 or more years. Failure to quantify these costs skewed the cost-benefit analysis. ISP’s statement that quantification of costs to the states and local governments would not meaningfully inform the NRC’s decision suggests that costs to the states does not matter.

Similarly, the NRC and ISP argue that there is no mandate because nothing in the ISP License requires New Mexico to assume costs it was not already incurring, given that nationwide, there are many shipments of radioactive material each year for which the states already provide emergency response. Resp. Br. at 45-46; ISP Br. at 59. This does not address New Mexico's argument, as neither the NRC nor ISP have pointed to anything suggesting that shipments akin to the SNF shipments requiring oversized railcars or heavy haul trucks are currently being transported on the rails and roads in New Mexico. New Mexico must ensure its roads and railways can handle the increased shipments and make improvements if necessary. These are additional costs that New Mexico has to make because of the proposed shipments or risk potential disaster along its roads and railways.

In addition, measures must be taken to prepare agencies, hospitals and others for emergency response. New Mexico's hospitals and first responders and remediation crews must be able to respond to a spill immediately once the shipments to ISP begin, and New Mexico must fund the training and equipment necessary to respond before radioactive waste has been released into the environment.

So although the NRC argues that New Mexico is not mandated to do anything, using New Mexico's roads and railways to ship high level waste forces New Mexico to prevent and prepare for emergencies before shipments begin, not after an accident has occurred.

**4. The NRC's purpose and need statement for the ISP CISF is arbitrary and capricious**

The NRC argues that it reasonably assessed the purpose and need for the ISP CISF; however, at the same time, the NRC suggests that if the proposed facility complies with the applicable health and safety requirements, it is not NRC's place to foreclose the private non-utility and non-waste-generator applicant's goals, suggesting that the NRC does not, in fact, independently evaluate the purpose and need for the proposal. Resp. Br. at 39-41. This in itself violates NEPA's dictates that the agency independently review the information submitted by the applicant; however, NRC's arguments attempting to support its purpose and need statement demonstrate the arbitrary and capricious nature of the NRC's actions.

ISP's stated purpose and need for the CISF, which was adopted by the NRC, is to provide an away-from-reactor private option for storing SNF from nuclear power reactors before a permanent repository is available. REC. 125, EIS at xviii. Given Congress' instruction to "encourage and expedite the effective use of existing storage facilities and the addition of needed new storage capacity at the site of each civilian nuclear power reactor" (42 U.S.C. § 10151(a)(2)), the NRC's estimate that a permanent repository will be available by 2048 (REC. 125, EIS at 2-2), and its prior findings that continued storage of SNF (on-site at ISFSIs and away-from-reactor ISFSIs) was safe until a permanent repository is established (Continued Storage Generic EIS, NUREG-2157 (NRC, 2014)), there is no need for such a

facility. The NRC's assertion that its role is simply not to foreclose the private applicant's goals, and specifically this option for storing SNF offsite, is therefore inconsistent with NEPA and the NWPA.

The lack of a permanent repository to dispose of the nation's SNF does not provide the NRC with a more urgent need to create temporary storage, particularly when Congress legislated a focus of on-site storage. Instead of developing schemes to circumvent the law, the NRC should be urgently working with DOE to develop a permanent storage facility. The NRC's current plan for SNF storage more closely resembles a radioactive merry-go-round than a safe and cohesive strategy for disposing of the nation's waste. The NRC has failed to consider how licensing the ISP CISO will impact Congress' goal of establishing a permanent repository, and the suitability of the ISP CISO for permanent disposal should it supplant a permanent repository.

With respect to New Mexico's argument that the ISP CISO will be a *de facto* permanent repository, ISP argues that the use of 2048 as the approximate date a repository will be available is not inconsistent with its projections of storage of SNF at the ISP CISO for 60 to 100 years. ISP Br. at 42. According to ISP, re-transporting the SNF stored at the ISP CISO to the permanent repository will not occur instantaneously (ISP Br. at 42-43) and apparently may take as long as 73 years, using 2048 as the repository availability date. This is inconsistent with the NRC's analysis.

The EIS states that the ISP CISF would serve as an interim storage facility until the SNF can be shipped to a permanent repository or until the end of the 40-year license term. REC. 125, EIS at 8-1. The NRC's cost-benefit analysis assumed transportation of the SNF from the ISP CISF to the repository would occur during years 39 and 40 for Phase 1 of the project and years 31 to 40 for full build-out. *Id.* at 85-5. ISP seems to suggest that transportation of the SNF from the ISP CISF to a permanent repository will take much longer. Whether the EIS analysis is flawed, the 2048 assumption is wrong, or ISP intends to operate its CISF longer than necessary, means the possibility that it could take decades to be rid of the SNF even after a repository opens only deepens New Mexico's concerns.

**5. The NRC violated NEPA by failing to assess the risks from terrorist attacks, acts of malice or sabotage**

As discussed in New Mexico's opening brief, in *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006) the Ninth Circuit found that the NRC violated NEPA when it failed to consider environmental effects of a terrorist attack on a proposed ISFSI. Opening Br. at 45-46. The NRC relies on the Third Circuit case, *New Jersey Dept. of Environmental Protection v. NRC*, 561 F.3d 132 (3d Cir. 2009) to justify its refusal to conduct such an analysis here.<sup>9</sup> Notably, the Third

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<sup>9</sup> Contrary to the NRC, ISP argues that it is not the Third Circuit decision, but a prior NRC decision that excuses the NRC's refusal to consider terrorism risks in the EIS. ISP Br. at 44-47 & n.15 (citing *Amergen Energy Co.*, CLI-07-8, in which the NRC expressed disagreement with the *San Luis Obispo Mothers for Peace* decision and

Circuit itself distinguished the factual scenario in the matter before it (relicensing of an existing facility) from that involved in *San Luis Obispo Mothers for Peace* (proposed construction of a new facility) as a basis for its departure from the Ninth Circuit’s rationale. 561 F.3d at 142. The instant case concerns the licensing of a new facility, making the reasoning in *San Luis Obispo Mothers for Peace* analogous, and the fact that the ISP CISO, consolidating massive amounts of the nation’s SNF, is to be located in the heart of the nation’s largest oil and gas reservoir significantly increases the risk and probability of a terrorist attack. It is unreasonable for the NRC to refuse to assess the risks of terrorist attacks in its site-specific EIS.

Further, the NRC and ISP suggest that the NRC did analyze the effects of potential accidents in its NEPA analysis.<sup>10</sup> Resp. Br. at 50-51; ISP Br. at 45-46. However, risks posed by accidental fires, floods, and tornados are far different from those posed by a terrorist attack, involving planned, deliberate acts of human beings

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concluded that it is not obligated to follow that decision in other proceedings). Notably, not even the NRC made this argument in its brief; rather, it relied on the Third Circuit decision. More remarkably, ISP contends that the Supreme Court encourages agencies to adopt different standards for different Circuits. ISP Br. at 47 (citing *United States v. Mendoza*, 464 U.S. 154, 160 (1984)). That decision, involving nonmutual offensive collateral estoppel and Fifth Amendment due process arguments in a naturalization matter, highlighted the benefit of having several courts of appeals explore a difficult question before the Supreme Court makes a decision. *Id.* It says nothing about whether the NRC’s refusal to conduct a risk assessment for terrorist acts violates NEPA.

<sup>10</sup> In response to comments expressing concerns about security and the potential for terrorist attacks, the NRC refused to consider these issues, declaring them to be outside “the scope of the environmental review.” REC. 125, EIS at D-150.

seeking to exploit weaknesses. Freak weather occurrences cannot reasonably be considered to be similar to hijacking an aircraft and crashing it into the facility or bombing the facility.

The NRC and ISP also rely on an earlier assessment of the threat of terrorism on a generic basis. Resp. Br. at 51-52; ISP Br. at 45-46. The NRC must also consider site-specific characteristics of the ISP CISF requiring specific analysis. *New York v. NRC*, 824 F.3d 1012, 1018 (D.C. Cir. 2016) (“When the NRC does make a licensing decision in partial reliance on the GEIS [generic analysis], it must *at that time* ensure that it has fully complied with NEPA.”) (emphasis in original). The ISP site is a consolidated location for the entire nation’s nuclear waste, and given the location of the ISP CISF within the Permian Basin, “the largest inland oil and gas reservoir and the most prolific oil and gas producing region in the world,” (REC. 1295 at 5) and multiple rounds of proposed transport, the NRC’s reliance on the generic assessment is insufficient.

**6. The NRC’s knowing acceptance of a flawed site selection process is unreasonable**

The NRC deemed ISP’s site selection process to be reasonable. REC. 125, EIS at 2-25. ISP itself stated that its CISF should only be located where it has the support of the hosting state and community, and it screened out several states for lack of support and chose Andrews County in part because it had expressed support. REC. 88, ER (Rev. 3, Part 1) at 2-10, 2-61 to 2-64. The NRC confirmed this in its

EIS. REC. 125, EIS at 2-24. As explained in New Mexico's opening brief, this support was fleeting and no longer exists. Opening Br. at 46-48. In its place is vocal opposition that includes laws and resolutions passed to prevent the transportation and/or storage and disposal of SNF within the region and state. *Id.*

Both the NRC and ISP respond that ISP had support at one time, relying on information provided by ISP from 2014 and 2015. ISP specifically states that it had the support of the host state and county at the time its application was submitted. ISP Br. at 50-51. However, despite its numerous revisions to other aspects of its application and related documents, ISP never revised this statement to reflect the withdrawal of support.<sup>11</sup>

Furthermore, before issuing its DEIS, the NRC had received information directly from New Mexico indicating such support was no longer present. Opening Br. at 46-48. The NRC nevertheless accepted ISP's site selection process, to the exclusion of consideration of alternative sites, based on stale information impacting its specific site selection criteria. The NRC did not discuss this opposition or how the ISP CISF would operate in the face of such opposition, which includes legislation

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<sup>11</sup> ISP also argues that there are no regulatory site selection criteria, and the NRC's review is of the reasonableness of ISP's site selection criteria. ISP Br. at 51. This ignores that ISP itself stated that its CISF should only be located where it has the support of the hosting state and community. C.I. 88, ER (Rev. 3, Part 1) at 2-10, 2-61 to 2-64. This was confirmed by the NRC in its EIS. C.I. 125, EIS at 2-24.

banning the storage and disposal of SNF in Texas, in violation of 10 C.F.R. 51.91(b)'s requirement to discuss relevant responsible opposing views.

### III. CONCLUSION

For the reasons set forth herein and in New Mexico's opening brief, the Court should hold unlawful and set aside the NRC's record of decision and vacate the ISP License. In the alternative, New Mexico respectfully requests that this Court stay any future activity relating to the ISP License and until the NRC complies with NEPA and the Administrative Procedures Act.

Dated: June 16, 2022

Respectfully submitted by:

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*/s/ Zachary E. Ogaz* \_\_\_\_\_  
Zachary E. Ogaz  
Attorney for the State of New Mexico

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of Petitioners' Reply Brief was filed through the CM/ECF system on June 16, 2022, causing all other parties or counsel in this matter for whom electronic service has been authorized to be served by electronic means.

/s/ Marcus J. Rael, Jr.

No. 21-9593

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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STATE OF NEW MEXICO, *ex rel.* HECTOR H. BALDERAS, Attorney General  
and the NEW MEXICO ENVIRONMENT DEPARTMENT,

*Petitioners,*

v.

NUCLEAR REGULATORY COMMISSION and  
UNITED STATES OF AMERICA,

*Respondents.*

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On Petition for Review of Action by the  
Nuclear Regulatory Commission

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**DECLARATION OF SUNALEI STEWART**

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I, Sunalei Stewart, state and declare as follows:

1. My name is Sunalei Stewart. I am over 21 years of age and am fully competent and duly authorized to make this Declaration. The facts contained in the Declaration are based on my personal knowledge and are true and correct.
2. I submit this declaration in support of New Mexico's reply brief on the merits in this case.
3. I serve as the Deputy Commissioner of Operations for New Mexico's elected Commissioner of Public Lands, Stephanie Garcia Richard. Commissioner Garcia

EXHIBIT

1

Richard is the executive officer of New Mexico's State Land Office, which has jurisdiction over lands owned in trust by the State of New Mexico.

4. The New Mexico State Land Office is an independent state agency responsible for administering around nine million acres of surface and 13 million acres of mineral estate for the beneficiaries of the state land trust, which include public schools, universities, hospitals and other important public institutions. New Mexico acquired many of these lands, known as state trust lands, under federal legislation (the Ferguson Act of 1898 and the Enabling Act of 1910), with additional lands obtained through subsequent conveyances and exchanges.
5. The Commissioner and the agency she leads, the State Land Office, have a duty to optimize revenue for New Mexico schoolchildren and other beneficiaries while protecting the long-term health of state trust lands for future generations. By leasing state trust lands for a wide variety of uses, including farming and ranching, renewable energy, and oil and gas development, the State Land Office generates hundreds of millions of dollars each year – and for the past several years, over one billion dollars per year – to support the trust beneficiaries.
6. In my role as Deputy Commissioner, I have become familiar with proposals for Consolidated Interim Storage Facilities for the nation's spent nuclear fuel, one in Lea County, New Mexico, by Holtec International, Inc., and one in neighboring Andrews County, Texas, by Interim Storage Partners, LLC ("ISP").
7. Based on the final Environmental Impact Statement for the ISP facility, shipments of spent nuclear fuel to the facility would be transported over New Mexico State Highway 18, and by the Texas New Mexico Railway, which largely parallels Highway 18.

8. The State Land Office manages significant land resources in Lea County in the southeast part of the state bordering Andrews County in Texas. See Map, attached hereto as Exhibit A – state trust land full estate is shaded blue, and state trust land mineral estate only is shaded brown.
9. Shipments of spent nuclear fuel to the ISP facility therefore would necessarily traverse land owned in trust by the State of New Mexico and managed by the Commissioner through the State Land Office. Accidents involving the release of radioactive material on or near state trust lands would pose a risk to oil and gas production on these lands, harming the State Land Office’s ability to generate revenue from those lands. In addition, an accident with more widespread impacts on oil and gas production in the region could have substantial effects on the State Land Office’s revenue stream.

I make this declaration under penalties of perjury of the laws of the State of New Mexico and the United States of America, this 16<sup>th</sup> day of June, 2022.



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SUNALEI STEWART

