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)

In the United States Court of Appeals
For the District of Columbia Circuit

DON'T WASTE MICHIGAN, ET AL.,

Petitioners

v.

U.S. NUCLEAR REGULATORY COMMISSION AND UNITED STATES OF AMERICA,

Respondents

INTERIM STORAGE PARTNERS, LLC,

Intervenor for Respondent

On Petition for Review of Action by the U.S. Nuclear Regulatory Commission

INITIAL BRIEF OF INTERVENOR INTERIM STORAGE PARTNERS, LLC

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. R. 28(a)(1)(A), the undersigned counsel certifies as follows:

(A) **Parties and Amici.** No parties appeared before a district court. All parties, intervenors, and amici appearing in this court are listed in the Initial Briefs of Petitioners (Document Nos. 1939572, 1939676, 1941675) and Nuclear Energy Institute, Inc. (Document No. 1950439).

(B) **Rulings Under Review.** References to the rulings at issue appear in the Initial Briefs of Petitioners (Document Nos. 1939572, 1939676, 1941675).

(C) **Related Cases.** Two cases involving substantially the same parties and the same or similar issues are pending in two other United States Courts of Appeals:

- *State of Texas, et al. v. NRC* (5th Cir. Case No. 21-60743), and
- *State of New Mexico, et al. v. NRC* (10th Cir. Case No. 21-9593).

As may be relevant, another case pending before this Court involving a different facility, different agency applicant, and different

agency proceeding presents a challenge to an agency order that also is under review in this proceeding:

- *Beyond Nuclear v. NRC* (D.C. Cir. Case No. 20-1187) (consolidated with other cases and held in abeyance).

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GLOSSARY OF ABBREVIATIONS

AEA	Atomic Energy Act of 1954
APA	Administrative Procedure Act
DOE	Department of Energy
ISP	Interim Storage Partners, LLC
NEPA	National Environmental Policy Act of 1969
NRC	Nuclear Regulatory Commission (agency as a whole)
NWPA	Nuclear Waste Policy Act of 1982

INTRODUCTION

This proceeding involves the issuance of a license by the U.S. Nuclear Regulatory Commission ("NRC") under the Atomic Energy Act of 1954, as amended ("AEA"), and NRC regulations at 10 C.F.R. Part 72 (the "License"). The License authorizes a private party, Interim Storage Partners, LLC ("ISP"), to safely store spent nuclear fuel for up to forty years at a remote location in West Texas. In the AEA, Congress established an adjudicatory hearing process in which the public may challenge NRC licensing actions. Petitioners participated in that process for the ISP License, proposing various challenges, known as "contentions."[1]

The contentions were initially considered by the NRC's Atomic Safety and Licensing Board ("Board"), which is a tribunal of first

[1] Petitioners are (1) **Beyond Nuclear**; (2) Don't Waste Michigan (which also includes Citizens' Environmental Coalition; Citizens for Alternatives to Chemical Contamination; Nuclear Energy Information Service; Public Citizen, Inc.; San Luis Obispo Mothers for Peace; Sustainable Energy and Economic Development Coalition; and Leona Morgan); and Sierra Club (together with Don't Waste Michigan, the "**Environmental Petitioners**"); and (3) Fasken Land and Minerals, Ltd. And Permian Basin Land and Royalty Owners (together "**Fasken**").

instance, independent from the Commission and the NRC Staff.[2] The Board is composed of administrative judges who are lawyers, engineers, and scientists.[3] After multiple rounds of briefing and oral argument, in proceedings spanning multiple years, the Board issued a series of orders ultimately rejecting all of the proposed contentions because they were factually inaccurate, legally meritless, procedurally defective, or some combination thereof, and therefore failed to meet the threshold admissibility criteria. The Petitioners then appealed the Board's rulings to the Commission. In extensive written orders designated "CLI-20-14," "CLI-20-15," and "CLI-21-9," which are the orders under review here, the Commission explained its views, analyzed the arguments and issues, summarized the evidence, and ultimately concluded that Petitioners had not demonstrated any "error of law or abuse of discretion" in the Board's rulings.

To be clear, it is the Commission's orders (and not the Board's) that are the "final orders" that are appealable under the Hobbs Act. And

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[2] *See generally* 10 C.F.R. § 2.347 ("Ex parte communications").

[3] *See* NRC, *Atomic Safety and Licensing Board Panel*, https://www.nrc.gov/about-nrc/organization/aslbpfuncdesc.html.

Petitioners ostensibly seek review of those orders. Surprisingly, however, none of the Petitioners' briefs even discuss those orders or the Commission's application of its "error of law or abuse of discretion" standard, much less demonstrate how those orders were arbitrary and capricious. Indeed, in circumstances such as this, the issue on appeal to this Court is whether the NRC reasonably applied its adjudicatory rules and procedures—in light of that, it is bizarre for Petitioners not to even mention the end results of those adjudications. Petitioners cannot simply disregard the actual agency orders under review, and expect this Court to presume a violation of the Administrative Procedure Act ("APA").

Even if Petitioners had no obligation to articulate, with specificity, a challenge to the actual adjudicatory orders under review, the record in any event confirms that those well-reasoned orders were not arbitrary and capricious.

Separately, the Environmental Petitioners attempt to raise entirely new arguments for the first time, here, on appeal. These claims allege that the NRC's Environmental Impact Statement does not comply with the National Environmental Policy Act of 1969 ("NEPA"), in certain ways that were not pursued through the agency adjudicatory processes.

Admittedly ignoring those adjudicatory requirements, with these claims the Environmental Petitioners purport to directly challenge "the issuance of the license." As the Federal Respondents explain, these new and distinct claims are jurisdictionally barred. Fed-Br. at 2–4, 46–51. Even if such claims were jurisdictionally proper (and they are not), this Court should reject them on separate, jurisprudential, failure-to-exhaust grounds. And, even beyond all of that, the Environmental Petitioners fall far short of showing that the NRC's 684-page Environmental Impact Statement was arbitrary and capricious or an abuse of discretion, under the highly deferential standards that would apply here.

For all of these reasons, the Petitions for Review should be denied to the extent they challenge NRC adjudicatory orders, and dismissed to the extent they purport to challenge the "License" on separate grounds.

STATEMENT OF JURISDICTION

ISP agrees with Federal Respondents' arguments regarding jurisdiction. Fed-Br. at 2–4, 46–51. ISP will not repeat those arguments here, but will instead address Petitioners' claims assuming, for argument's sake, that jurisdiction exists.

STATUTES AND REGULATIONS

Except for 10 C.F.R. §§ 2.326 and 2.347, which are set forth in an addendum bound with this brief, all applicable statutes and regulations are provided in the addenda provided by the Petitioners and Federal Respondents.

STATEMENT OF THE ISSUES

1. Whether Petitioners have established an APA violation with regard to the Commission's "final orders," when Petitioners in their briefs do not even address the substance, reasoning, support, or sufficiency of those orders.

2. Whether, if not dismissed on jurisdictional grounds, the jurisprudential doctrine of administrative exhaustion requires dismissal of the Environmental Petitioners' new claims that were never raised before the Commission in the ISP adjudicatory proceeding.

3. Whether a miscellany of allegations by the Environmental Petitioners regarding argued non-compliance with the APA and NEPA, all of which should have been raised under the mandatory NRC adjudicatory scheme, but instead are being argued for the first time on

judicial appeal, establish any arbitrary and capricious action by the NRC on the record in this case.

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

Two statutes are relevant to this proceeding. First, the AEA grants the NRC broad authority to regulate radiological safety, including the authority to issue licenses authorizing storage of SNF. Second, NEPA requires federal agencies, including the NRC, to consider the environmental impacts and reasonable alternatives to proposed major Federal actions (including the issuance of licenses) significantly affecting the quality of the human environment. Beyond Nuclear also asserts that a third statute—the NWPA—has relevance here. These statutes, corresponding NRC regulations, and their respective relationships to this proceeding are detailed in Federal Respondents' brief at 6–10.

II. NRC Adjudicatory Proceeding on ISP's Application

The NRC's adjudicatory process is the established means by which members of the public and interested government entities may "participate" in a licensing proceeding and raise environmental, safety,

or legal challenges.[4] *See* AEA, § 189a, 42 U.S.C. § 2239(a); 10 C.F.R. § 2.309. *E.g., Blue Ridge Envtl. Def. League v. NRC*, 716 F.3d 183, 196 (D.C. Cir. 2013) (NRC procedural rules "consistent with NEPA"). On August 29, 2018, the NRC published a notice in the *Federal Register* providing the public an opportunity to participate in the ISP licensing proceeding by (1) requesting a formal evidentiary hearing to challenge the Application, and (2) petitioning for leave to intervene in that proceeding. *See* Interim Storage Partner's Waste Control Specialists Consolidated Interim Storage Facility, 83 Fed. Reg. 44,070 (Aug. 29, 2018).

Petitioners recognized this, and between September 2018 and November 2018 submitted to the NRC various filings, including hearing requests and petitions to intervene in the adjudicatory proceeding, purporting to challenge ISP's license application ("Initial Filings").[5] *See generally Interim Storage Partners, LLC* (WCS CISF), LBP-19-7, 90 N.R.C. 31 (2019) (JA__(slip op.)). NRC procedural regulations require petitioners to identify the specific "contentions" they wish to litigate in a

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[4] *See also* Fed-Br. at 8–10.

[5] *See also id*. at 16–18.

hearing, and those "contentions" must satisfy several threshold admissibility criteria. 10 C.F.R. § 2.309(a), (f)(1).

In November 2018, the Commission referred the Initial Filings to the NRC's Atomic Safety and Licensing Board Panel for consideration under the NRC's Rules of Practice and Procedure at 10 C.F.R. § 2.309. The Panel's Chief Administrative Judge then established a three-judge Board to adjudicate the Initial Filings. *See generally* LBP-19-7, 90 N.R.C. at 42–45 (procedural history).

The NRC's Rules of Practice and Procedure at 10 C.F.R. § 2.309(c) also permit participants to file new or amended contentions *after* the initial intervention deadline if they are based on materially different information that was not previously available. Certain of the Petitioners proposed such contentions. *See Interim Storage Partners, LLC* (WCS CISF), CLI-20-14, 92 N.R.C. 463, 475–78 (2020) (JA__(slip op.)); *Interim Storage Partners, LLC* (WCS CISF), LBP-21-2, 93 N.R.C. 104, 104–17 (2021) (2021 WL 8087739 at *1–9) (JA__(slip op.)); *Interim Storage Partners, LLC* (WCS CISF), CLI-21-9, 93 N.R.C. 244, 244–51 (2021) (JA__(slip op.)).

Following multiple rounds of briefing and oral argument, the Board issued, between 2019 and 2021, a series of orders ultimately denying or dismissing all challenges filed by the Petitioners and terminating the adjudicatory proceeding.[6] *See* LBP-19-7, 90 N.R.C. at 118 (2019) (JA__(slip op.)); *Interim Storage Partners, LLC* (WCS CISF), LBP-19-9, 90 N.R.C. 181 (2019) (JA__(slip op.)); *Interim Storage Partners, LLC* (WCS CISF), LBP-19-11, 90 N.R.C. 358 (2019) (JA__(slip op.)); LBP-21-2, 93 N.R.C. 104 (2021 WL 8087739) (JA__(slip op.)).

Each of the Petitioners also appealed certain aspects of the Board's orders to the Commission. In a series of orders between 2020 and 2021, the Commission affirmed each of those orders, or declined discretionary review, because the Petitioners failed to demonstrate any "error of law or abuse of discretion" by the Board. *See Interim Storage Partners, LLC* (WCS CISF), CLI-20-13, 92 N.R.C. 457 (2020) (JA__(slip op.)); *Interim Storage Partners, LLC* (WCS CISF), CLI-20-14, 92 N.R.C. 463(JA__(slip op.)); *Interim Storage Partners, LLC* (WCS CISF), CLI-20-15,

[6] The Board granted Sierra Club's hearing request and petition to intervene and partially admitted one of its contentions. LBP-19-7, 90 N.R.C. at 118 (JA__(slip op.)). However, the contention was later mooted and dismissed. LBP-19-9, 90 N.R.C. at 192 (JA__(slip op.)).

92 N.R.C. 491 (2020) (JA__(slip op.)); CLI-21-9, 93 N.R.C. 244 (JA__(slip op.)). Under that standard, the Commission gives "substantial deference" to Board findings of fact;[7] reviews questions of law *de novo*;[8] and finds discretion abused only when an appellant demonstrates "that a reasonable mind could reach no other result."[9]

III. NRC Staff Review of ISP's Application

In parallel with the adjudicatory process, the NRC Staff conducted its own safety and environmental reviews of ISP's application. This review is more fully described in Federal Respondents' brief at 12–16. Key milestones included the following.

In May 2020, the NRC staff issued a draft Environmental Impact Statement. A 180-day comment period began on May 8, 2020, to allow members of the public an opportunity to comment on the draft Environmental Impact Statement. *See* Interim Storage Partners

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[7] *Crow Butte Res., Inc.* (Marsland Expansion Area), CLI-14-2, 79 N.R.C. 11, 26 (2014).

[8] *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 N.R.C. 235, 259 (2009).

[9] *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), ALAB-952, 33 N.R.C. 521, 532 (1991), *aff'd*, CLI-91-13, 34 N.R.C. 185 (1991) (internal citation omitted)

Consolidated Interim Storage Facility Project, 85 Fed. Reg. 27,447 (May 8, 2020) (initial 120-day comment period); Interim Storage Partners Consolidated Interim Storage Facility Project, 85 Fed. Reg. 44,330 (July 22, 2020) (60-day extension). Additionally, the NRC staff held multiple public meetings in several states on October 1, 6, 8, and 15, 2020, to discuss the draft Environmental Impact Statement. JA__[R359.3]. The final Environmental Impact Statement was issued in July 2021 and it contained responses to *all* public comments, written and oral, received during the draft Environmental Impact Statement comment period. JA__[R355.491–680]. In September 2021, the NRC also published its Final Safety Evaluation Report, documenting the agency's technical, scientific, and engineering analyses, and its ultimate conclusion that the proposed facility satisfied all regulatory requirements and adequately protected public health and safety. JA__[R364].

On September 13, 2021, based on its robust, multi-year environmental and safety reviews, the NRC issued Materials License No. SNM-2515 to ISP, pursuant to 10 C.F.R. Part 72. JA__[R360].

SUMMARY OF ARGUMENT

1. On a fundamental level, Petitioners fail to demonstrate any APA violation in the Commission's "final orders," because in their briefs Petitioners do not even address the actual final agency orders at issue in these appeals. In those orders, the Commission thoroughly evaluated various administrative appeals filed by Petitioners purporting to challenge the conclusions of the Board (i.e., the tribunal of first instance), and applied the NRC's well-settled adjudicatory and hearing rules. None of the Petitioners even address those ultimate agency actions, much less demonstrate that the adjudicatory processes or conclusions at issue in this appeal were arbitrary and capricious.

2. In any event, a review of each issue raised by Petitioners confirms that the Commission's conclusions were not arbitrary and capricious. For example, Beyond Nuclear disputes the rejection of a proposed "contention" claiming that the License "authorizes" or "allows" ISP and the U.S. Department of Energy ("DOE") to enter into illegal contracts. It does not. The NRC (which is of course the agency that can speak most authoritatively about what its licenses do and do not "authorize") confirmed, on the administrative record of this proceeding,

that the License does *not* authorize ISP, DOE, or anyone else to enter into illegal contracts. That decision was not arbitrary and capricious. The same is true with regard to all of the Commission's conclusions in CLI-20-14, CLI-20-15, and CLI-21-9.

3. Beyond the jurisdictional defects in the Environmental Petitioners' "new" (*i.e.*, unexhausted) NEPA challenges (Fed-Br. at 2–4, 46–51), the well-established jurisprudential doctrine of administrative exhaustion also dictates dismissal of those claims. They are being argued here, improperly, for the very first time on appeal. Petitioners cannot simply side-step the adjudicatory participation process established by Congress in the AEA.

4. Even if the Environmental Petitioners' unexhausted arguments are jurisdictionally proper (and they are not), and even if this Court declines to dismiss them on separate jurisprudential failure-to-exhaust grounds (which it should), those NEPA-based challenges are meritless for additional multiple and overlapping reasons. Contrary to the Environmental Petitioners' counterfactual portrayal, the NRC thoroughly analyzed the potential impacts of the licensing action in a 684-page Environmental Impact Statement that responded to all timely

public comments. For example, the Environmental Petitioners claim that the agency improperly "segmented" the transportation analysis, but that is plainly not the case—the Environmental Impact Statement very clearly contains a detailed analysis of transportation activities connected to the proposed action. Similarly, the other NEPA claims suffer from a litany of factual and legal errors that render those claims meritless. At best, those claims represent policy disagreements and after-the-fact "flyspecking," but they fail to demonstrate any action by the NRC that was arbitrary and capricious or an abuse of discretion.

For these and all of the other reasons explained below, Petitioners have no valid complaint under the APA or NEPA.

STANDARD OF REVIEW

This court reviews federal agency decisions under the standard of review established by the Administrative Procedure Act, 5 U.S.C. § 706. Applying that standard, this Court will affirm an agency decision unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *CTIA-Wireless Ass'n v. FCC*, 466 F.3d 105, 112–17 (D.C. Cir. 2006) Licensing decisions such as the one challenged in this appeal are "generally entitled to the highest judicial deference," *Massachusetts v. NRC*, 924 F.2d 311, 324 (D.C. Cir. 1991), and that is especially true where, as here, the agency decision is based upon evaluation of complex scientific data within the agency's technical expertise. *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983).

This deferential standard applies in cases, like this one, involving judicial review of NRC orders resolving adjudicatory "contentions." *Blue Ridge*, 716 F.3d at 195–96 (D.C. Cir. 2013); *Massachusetts v. NRC*, 708 F.3d 63, 77 (1st Cir. 2013). On judicial review, the relevant question is whether the agency reasonably applied its adjudicatory rules; if so, the

agency's conclusions are entitled to deference. *Blue Ridge*, 716 F.3d at 196.

NEPA provides no cause of action against federal agencies for alleged noncompliance with the statute; nor does it provide a basis for subject matter jurisdiction over such claims. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 872 (1990). Accordingly, it is well established that a petitioner alleging NEPA noncompliance must base its cause of action on the Administrative Procedure Act. *Id.* In reviewing NEPA challenges, a court's task is not to "flyspeck" the Environmental Impact Statement for minor deficiencies. *WildEarth Guardians v. Jewell*, 738 F.3d 298, 308 (D.C. Cir. 2013). Indeed, courts "must give deference to agency judgments as to how best to prepare an EIS," *Indian River County 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" that "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) (citation omitted).

ARGUMENT

I. The Challenged Adjudicatory Orders Are Not Arbitrary and Capricious

A. The Unpublished Order Dated October 29, 2018, Is Not Arbitrary and Capricious

In the adjudicatory proceeding before the agency, Beyond Nuclear asserted that the NRC could not even *entertain* ISP's application because issuing the License purportedly would "authorize" ISP or DOE to "violate" the NWPA. Beyond Nuclear raised this argument in a filing with the Commission styled as a "Motion to Dismiss Licensing Proceedings." The Commission issued an unpublished order denying that motion on procedural grounds—without prejudice to the underlying merits of the legal arguments—because the agency's Rules of Adjudicatory Practice and Procedure in 10 C.F.R. Part 2 "do not provide for the filing of threshold 'motions to dismiss' a license application; instead, interested persons must file petitions to intervene." (JA__[R49.2]).

Here, Beyond Nuclear purports to seek review of the Commission's unpublished order denying its extraprocedural "motion to dismiss." BN-Br. at 1. Inexplicably, however, the argument section of Beyond Nuclear's brief does not *mention* the unpublished order. BN-Br.

at 16–23. Beyond Nuclear's challenge to that order should be rejected for that reason alone.

Furthermore, the Commission's conclusion in that order—that the NRC's Rules of Adjudicatory Practice and Procedure do not provide for threshold motions to "dismiss" a license application—is manifestly correct. *See generally* 10 C.F.R. Part 2. Moreover, as explained below (Part I.B, *infra*), Beyond Nuclear later re-filed its substantive NWPA argument using the proper procedural vehicle, and the agency fully considered Beyond Nuclear's substantive arguments. There was no error with regard to the NRC's order on the "motion to dismiss."

B. CLI-20-14 Is Not Arbitrary and Capricious

Beyond Nuclear's second filing was properly styled as a "Hearing Request and Petition to Intervene," proposing one "contention" that advanced the same NWPA-based argument presented in its extraprocedural "motion to dismiss." The Board denied Beyond Nuclear's request and petition because the sole proposed "contention" failed to satisfy the admissibility criterion in 10 C.F.R. § 2.309(f)(1)(vi). LBP-19-7, 90 N.R.C. at 56–59 (JA__[R126] (slip op.)). That criterion places an affirmative burden on the petitioner to:

> provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

10 C.F.R. § 2.309(f)(1)(vi). The Board noted ISP's acknowledgement, and DOE's public statements, that DOE cannot contract for private interim storage without violating the NWPA unless and until (1) a permanent repository is opened or (2) the statute is amended. LBP-19-7, 90 N.R.C. at 58. Given that clarity, the Board concluded that "[t]here is no credible possibility that such contracts will be made in violation of the law." *Id.* at 59. Accordingly, the Board held there was no "genuine dispute."

Beyond Nuclear appealed the Board's decision to the Commission, largely repeating its earlier arguments that the License somehow gave DOE new "rights" and would "allow" DOE to violate the NWPA. CLI-20-14, 92 N.R.C. at 468 (JA__[R221] (slip op.)). The Commission (which obviously has authority to define the scope of the licenses it issues) explained in no uncertain terms that any assertion that the ISP License purports to "allow" DOE to enter illegal contracts simply

"misunderstands the nature of the [ISP License] and its conditions." CLI-20-14, 92 N.R.C. at 468 (JA__[R221] (slip op.)). In fact, the Commission confirmed the opposite—that the ISP License does "not 'authorize' ISP to enter into illegal contracts" and does "not grant any rights to DOE." *Id.* at 468–69 (JA__[R221] (slip op.)). Given all of this, the Commission concluded that Beyond Nuclear had not demonstrated any "error of law or abuse of discretion" in the Board's comparison of this demonstrably incorrect reading of the License against the requirements of Section 2.309(f)(1)(vi). *Id.* (JA__[R221] (slip op.)).

The argument section of Beyond Nuclear's brief fails to acknowledge or address the Commission's adjudicatory actions in CLI-20-14 or its application of law to the facts of this case: that order is not cited, mentioned, or discussed. Beyond Nuclear certainly does not demonstrate how CLI-20-14—which is, again, the actual agency action at issue in this appeal—is arbitrary or capricious.

In any event, the Commission's conclusion was eminently reasonable and correct. Beyond Nuclear correctly notes that the NWPA currently prohibits the federal government from taking title to SNF or entering contracts for its interim storage until a permanent SNF

repository has opened. *E.g.*, BN-Br. at 5, 14. On this point, there is no dispute. Indeed, the ISP License contains an important restriction providing that, prior to accepting any SNF from a customer (either DOE or a private owner), ISP *must* have a valid and legally enforceable contract with that customer. (JA__[R360.3(ML21188A099).3¶19]).

Beyond Nuclear, however, asserts that this condition "violated" the NWPA because DOE *cannot* presently enter such a contract. BN-Br. at 17–21. According to Beyond Nuclear, the condition purports to "explicitly allow[]" DOE and ISP to enter into unlawful contracts. BN-Br. at 17. That is simply not correct, as the administrative record plainly confirms. The Commission documented the scope of activity authorized by the License it issued and unequivocally confirmed that it does "not 'authorize' ISP to enter into illegal contracts" and does "not grant any rights to DOE." *Id.* at 468–69 (JA__[R221] (slip op.)). The Commission also noted that the license condition (requiring ISP to enter into a contract with DOE as a prerequisite to storing any DOE-owned SNF) could not be satisfied by a contract made in violation of the NWPA

"[b]ecause an illegal contract is unenforceable." *Id.* (JA__[R221] (slip op.)).[10]

Beyond Nuclear cannot establish an APA violation by merely asserting—incorrectly and without any support—that the License allegedly "authorizes" or "allows" illegal activity. It does not. The Commission correctly concluded that Beyond Nuclear failed to demonstrate any "error of law or abuse of discretion" in LBP-19-7, and that determination was not arbitrary or capricious.[11]

C. CLI-20-15 Is Not Arbitrary and Capricious

In the adjudicatory proceeding before the agency, the Environmental Petitioners submitted hearing requests and petitions to intervene, proposing multiple contentions. The Board found that most of

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[10] *See also* CLI-20-15, 92 N.R.C. at 499 (JA__[R222] (slip op.)) (Commission reiterating that nothing in the ISP License "purports to authorize ISP or the DOE to enter" such contracts and confirming that the subject license condition merely "expresses a *limitation* on ISP's operating authority." (emphasis added)).

[11] Beyond Nuclear also claims the License somehow "rel[ies] on the presumption of regularity." BN-Br. at 20. But this assertion, which rests on a background discussion in a different licensing proceeding, is meritless because the License does not rely on such a presumption. Rather, as explained above, the License contains an explicit and legally-enforceable *condition* that prevents the "illegal" activity to which Beyond Nuclear objects.

those proposed contentions failed to satisfy one or more of the admissibility criteria in 10 C.F.R. § 2.309(f)(1). LBP-19-7, 90 N.R.C. at 59–109 (JA__[R126] (slip op.)). The Environmental Petitioners appealed the Board's decision, in part, to the Commission. The Commission, in two thorough, well-reasoned, 32- and 26-page opinions, affirmed the Board's ruling as to each appealed contention because the Environmental Petitioners failed to demonstrate any "error of law or abuse of discretion" in the Board's decision. CLI-20-14, 92 N.R.C. at 478–89 (JA__[R221] (slip op.)) (Don't Waste Michigan's appeal); CLI-20-15, 92 N.R.C. at 496–509 (JA__[R222] (slip op.)) (Sierra Club's appeal).

According to the Environmental Petitioners' "Certificate as to Parties, Rulings, and Related Cases," they are seeking review of Commission order CLI-20-15 (but not CLI-20-14). Env-Br. at [unnumbered PDF page 6 of 59]. Once again, however, the Environmental Petitioners' brief does not otherwise mention or discuss CLI-20-15—*not even once*. The Environmental Petitioners certainly do not demonstrate how CLI-20-15 is arbitrary and capricious, nor show

how the Commission erred or misapplied its adjudicatory procedures or rules.

Instead, the Environmental Petitioners' adjudicatory-related arguments (Env-Br. at 8–23) discuss six contentions and register their disagreement with the Board's admissibility findings. For the reasons explained below and in the Federal Respondents' brief at 51–79, those claims in any event miss the mark.[12]

Transportation (Env-Br. at 8–12): The thrust of Sierra Club's "Contention 4" was a claim that ISP's environmental report (a required element of its license application, as required by 10 C.F.R. Part 51, intended to assist the NRC in complying with its NEPA obligations) did not consider information from a report that, by its own title, presented "Worst Case" transportation accident scenarios. LBP-19-7, 90 N.R.C. at 63–66 (JA__[R126] (slip op.)). The Board concluded that "Contention 4" did not raise a "genuine dispute" (as required by 10 C.F.R. § 2.309(f)(1)(vi)). *Id.* at 65 (JA__[R126] (slip op.)). Specifically, the Board

[12] The Environmental Petitioners purport to "adopt" Beyond Nuclear's NWPA arguments. Env-Br. at 8. Those arguments are unavailing for the reasons explained in Part I.B, *supra*.

found that Sierra Club failed to engage with the transportation accident analysis presented in the application (or explain why it purportedly was deficient or that anything further was required) and failed to demonstrate that NEPA mandated consideration of "Worst Case" analyses. *Id*. at 64–65 (JA__[R126] (slip op.)). On administrative appeal, Sierra Club largely repeated its original arguments; but, as the Commission explained, "an appeal cannot simply repeat the same arguments . . . it must show that the Board's ruling was in error." CLI-20-15, 92 N.R.C. at 501 (JA__[R222] (slip op.)). Because Sierra Club did not do so, the Commission affirmed the Board's ruling. *Id*. (JA__[R222] (slip op.)). Nothing about those facts or circumstances constitutes arbitrary or capricious action by the agency.

Seismic (Env-Br. at 12–14): Sierra Club's primary argument in "Contention 6" was that ISP's application (both the safety and environmental portions) did not consider seismic events in the area of the proposed facility, including those initiated by oil and gas extraction activities. LBP-19-7, 90 N.R.C. at 67–69 (JA__[R126] (slip op.)). The Board concluded, under 10 C.F.R. § 2.309(f)(1)(vi), that Sierra Club failed to demonstrate a "genuine dispute" because the application did, *in fact*,

consider such information—yet, Sierra Club neither reviewed that discussion nor identified any deficiency therein. *Id.* at 68–69 (JA__[R126] (slip op.)). On administrative appeal, Sierra Club "readily acknowledge[d] that it never saw ISP's seismic analysis." CLI-20-15, 92 N.R.C. at 502 (JA__[R222] (slip op.)). Thus, the Commission agreed that Sierra Club could not have articulated a "genuine dispute" with a portion of the application that it never even reviewed. CLI-20-15, 92 N.R.C. at 501–02 (JA__[R222] (slip op.)). Accordingly, the Commission held that Sierra Club failed to demonstrate any "error of law or abuse of discretion" in the Board's ruling. *Id.* (JA__[R222] (slip op.)). Nothing about those facts or circumstances constitutes arbitrary or capricious action by the agency.

Groundwater (Env-Br. at 14–16): Sierra Club's primary argument in "Contention 10" was that ISP's application did not consider the impacts of a hypothetical discharge of radioactive material from a theoretical "cask rupture" to an aquifer Sierra Club alleged to be beneath the proposed site. LBP-19-7, 90 N.R.C. at 72–74 (JA__[R126] (slip op.)). The Board concluded that "Contention 10" did not satisfy, *inter alia*, the admissibility criterion in 10 C.F.R. § 2.309(f)(1)(vi) ("genuine dispute")

because, even assuming a worst-case "cask rupture" scenario, Sierra Club failed to articulate any credible theory as to how solid, ceramic fuel pellets inside dry steel cannisters within concrete casks somehow could reach deep geologic formations such as the alleged aquifer. *Id.* at 74 (JA__[R126] (slip op.)). On administrative appeal, Sierra Club once again merely "repeat[ed] the claims it made before the Board without asserting that the Board erred." CLI-20-15, 92 N.R.C. at 504 (JA__[R222] (slip op.)). Not surprisingly, the Commission concluded that Sierra Club failed to identify any "error of law or abuse of discretion" in the Board's ruling on "Contention 10." *Id.* Once again, there is nothing about those facts or circumstances that constitutes arbitrary or capricious action by the agency.

Project Alternatives (Env-Br. at 16–18): In "Contention 8," Don't Waste Michigan alleged that ISP's environmental report was deficient because it did not discuss five alleged "alternatives" to the proposed action. LBP-19-7, 90 N.R.C. at 97–99 (JA__[R126] (slip op.)). As an initial matter, the "final order" dispositioning that contention is CLI-20-14, not CLI-20-15 (CLI-20-14, 92 N.R.C. at 484–86 (JA__[R221] (slip op.)), and the Environmental Petitioners *do not purport to seek*

review of CLI-20-14. Env-Br. at [unnumbered PDF page 6 of 59] (seeking review of only one adjudicatory order: CLI-20-15).

Even if the Environmental Petitioners had properly sought review of CLI-20-14, the Commission's conclusion on Don't Waste Michigan's "Contention 8" is well-founded and correct. The Board concluded that Don't Waste Michigan did not demonstrate a "genuine dispute" with the application, as required by 10 C.F.R. § 2.309(f)(1)(vi), because it failed to identify a *duty* to consider its five "suggestions" (and failed even to explain how those suggestions were project alternatives at all).[13] LBP-19-7, 90 N.R.C. at 98 (JA__[R126] (slip op.)). On administrative appeal, Don't Waste Michigan asserted that, under *Dubois v. U.S. Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1996), they had no obligation to identify a *duty* to consider their five suggestions. According

[13] As the Board noted, four of the five items were suggestions for equipment, design, procedure, and ownership modifications. *Id.* (JA__[R126] (slip op.)). And the fifth item was a proposal to leave SNF at existing reactor sites (*i.e.*, the *status quo*), but in a new type of storage system. As the Board noted, the environmental report had already evaluated the *status quo*; and, even if viewed as a project alternative, it would not achieve the purpose and need for the project, which aims to allow SNF to be *removed* from individual reactor sites so they may be restored to productive use. (JA__[R355.51]).

to Don't Waste Michigan, an agency is legally obligated to analyze each and any suggestion proposed by a commenter. But, as the Commission explained, Don't Waste Michigan misconstrued the holding in *Dubois*, which only requires consideration of "reasonable" project alternatives; and, because Don't Waste Michigan failed to show that any of its suggestions were "reasonable" project alternatives, it had not satisfied its burden (under 10 C.F.R. § 2.309(f)(1)(vi)) to demonstrate a "genuine dispute" on a material issue. Accordingly, the Commission found Don't Waste Michigan had not demonstrated any "error of law or abuse of discretion" in the Board's ruling. CLI-20-14, 92 N.R.C. at 86 (JA__[R221] (slip op.)). The Commission's conclusion—that NEPA does not require consideration of *unreasonable* alternatives—is not arbitrary or capricious, or contrary to law.

Wildlife (Env-Br. at 18–21): Sierra Club's primary argument in "Contention 13" was that ISP's environmental report contained insufficient factual support for its discussion of two species of concern. LBP-19-7, 90 N.R.C. at 72–74 (JA__[R126] (slip op.)). Although the environmental report cited the scientific studies and other source materials for those statements (including the dates thereof), those

materials were not publicly available; thus, the Board admitted Contention 13 as a contention of omission and ordered an evidentiary hearing to consider whether those materials were required to be included in the application itself. LBP-19-7, 90 N.R.C. at 78–80.

Before the hearing occurred, ISP amended its application to append those source materials, thereby curing the omission and mooting the contention. LBP-19-9, 90 N.R.C. at 184–85. Sierra Club then moved to amend its contention to challenge the sufficiency (rather than omission) of the studies, claiming, *inter alia*, they were (1) outdated and (2) did not evaluate the geographic area of the proposed site. *Id*. at 185. The Board found that the proposed amended contention was inadmissible because, *inter alia*, the first claim was untimely,[14] and the second claim was factually incorrect.[15] The contention therefore failed to demonstrate a genuine dispute under 10 C.F.R. § 2.309(f)(1)(vi). LBP-19-9, 90 N.R.C.

[14] The study dates were plainly available in the original environmental report and could have been challenged at the outset of the proceeding. LBP-19-9, 90 N.R.C. at 187 n.39.

[15] Record information demonstrably showed that the proposed site was within the geographic area of the study. LBP-19-9, 90 N.R.C. at 188.

at 187–191. On administrative appeal, the Commission observed that Sierra Club merely:

> reiterate[d] the same arguments it raised before the Board without addressing the Board's reasons for rejecting them. An appeal must point to a Board error; it is not enough for an appellant to simply repeat the arguments it made before the Board and hope for a different result from the Commission.

CLI-20-15, 92 N.R.C. at 498 (JA__[R222] (slip op.)). So too here. The Environmental Petitioners merely reiterate their claims from the agency adjudicatory proceeding, which is insufficient. Nothing about these facts or circumstances constitutes arbitrary or capricious action by the agency.

Long-Term Storage (Env-Br. at 21–23): Sierra Club's primary argument in "Contention 14" was that ISP's application did not consider the impacts of storing SNF for 40 years or more in containers that are licensed in 20-year increments. LBP-19-7, 90 N.R.C. at 80–81 (JA__[R126] (slip op.)). Because the NRC already has evaluated that issue generically under NEPA,[16] and has codified its conclusion,[17] the Board concluded that "Contention 14" was inadmissible because it

[16] NUREG-2157, Vol. 1, "Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel" at 5-52 (2014) [hereinafter Continued Storage GEIS] (JA__).

[17] 10 C.F.R. § 51.23 (Continued Storage Rule).

presented an unauthorized[18] challenge to NRC regulations (rather than the ISP license application) and therefore did not satisfy, *inter alia*, the admissibility criterion in 10 C.F.R. § 2.309(f)(1)(iii), which limits adjudicatory challenges to matters within the scope of the licensing proceeding. *Id.* (JA__[R126] (slip op.)). On administrative appeal, Sierra Club offered a new theory that ISP's application improperly "assumes" that the container licenses will be renewed. CLI-20-15, 92 N.R.C. at 507 (JA__[R222] (slip op.)). The Commission found that new theory unavailing because, even assuming *arguendo* it is correct (and it is not), Sierra Club articulated no reason that was an *unreasonable* assumption in light of the NRC's cask-relicensing framework and the aging management requirements applicable to those containers (*e.g.*, proceduralized surveillance and maintenance activities). CLI-20-15, 92 N.R.C. at 507–08 (JA__[R222] (slip op.)). The Commission reasonably concluded that this unavailing new theory failed to identify any "error of law or abuse of discretion" in the Board's ruling on

[18] *See* 10 C.F.R. § 2.335(a) ("no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding.").

"Contention 14." *Id.* Nothing about those facts or circumstances constitutes arbitrary or capricious action by the agency.

D. CLI-21-9 Is Not Arbitrary and Capricious

As noted above, Fasken's original hearing request and petition to intervene, filed at the outset of the proceeding, were denied because none of its proposed contentions were admissible. LBP-19-7, 90 N.R.C. at 109–118 (JA__[R126] (slip op.)). A few months later, after all contested issues had been resolved, the Board "terminated" the adjudicatory proceeding. LBP-19-11, 90 N.R.C. 358, 368 (JA__[R185] (slip op.)).

Under certain circumstances, however, NRC regulations also permit new or amended contentions to be filed *after* the initial hearing request deadline. More specifically, pursuant to 10 C.F.R. § 2.309(c)(1), a party seeking to make such a filing must affirmatively establish that:

> (i) The information upon which the filing is based was not previously available;
>
> (ii) The information upon which the filing is based is materially different from information previously available; and
>
> (iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.

Additionally, pursuant to 10 C.F.R. § 2.309(c)(4), the party's new or amended proposed contention must meet the six contention admissibility requirements in 10 C.F.R. § 2.309(f)(1)(i)–(vi). Finally, NRC regulations also allow for previously terminated adjudicatory proceedings to be "re-opened" if the requesting party can demonstrate satisfaction of three criteria specified in 10 C.F.R. § 2.326(a):

> (1) The motion must be timely . . .
>
> (2) The motion must address a significant safety or environmental issue; and
>
> (3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

After the Board terminated the ISP adjudicatory proceeding, Fasken moved to re-open the adjudicatory proceeding and for leave to file a new contention. LBP-21-2, 93 N.R.C. at 107 (2021 WL 8087739 at *2–3) (JA__[R224]). The Board denied both motions because Fasken failed to satisfy the applicable requirements. *Id.* at 116. Most notably, Fasken failed to show that its claims were based on new and materially different information. *Id.* at 109 ("New Contention 5 and Fasken's associated motion to reopen the record are based on statements in the [Draft Environmental Impact Statement] that do not differ materially

from information that was publicly available in ISP's application materials much earlier."). Fasken sought discretionary review of the Board's decision, but the Commission denied that request because Fasken failed to demonstrate any "error of law or abuse of discretion" in the Board's decision and therefore failed to identify a substantial question warranting discretionary review. CLI-21-9, 93 N.R.C. at 246 (JA__[R230] (slip op.)).

According to Fasken's "Certificate as to Parties, Rulings, and Related Cases," it seeks review of Commission order CLI-21-9. F-Br. at i. Yet, the argument section of Fasken's brief (F-Br. at 8–22) does not, even one time, mention or discuss CLI-21-9. Instead, much like the Environmental Petitioners, Fasken repeats claims that it presented to the Board and suggests (without even analyzing the applicable requirements in 10 C.F.R. §§ 2.309(c), 2.309(f)(1), or 2.326) that the Board's ruling was somehow incorrect. However, the Board's decision is not the "final order" at issue here. At a minimum, the full Commission's thorough written holding in CLI-21-9 is a key part of the agency decision, and Fasken cannot establish the requisite arbitrary and capricious action

without even addressing—indeed without even *mentioning*—the relevant and operative agency determination.

In any event, Fasken's claims are meritless for the additional reason that the Commission's conclusions in CLI-21-9 were reasonable and correct. Fasken claimed that its new contention was based on new and materially different information in the Draft Environmental Impact Statement, but, as the adjudicatory record clearly shows, other petitioners already had raised nearly identical contentions, based on nearly identical information in ISP's environmental report, at the outset of the proceeding. LBP-21-2, 93 N.R.C. at 110 (2021 WL 8087739 at *4–5) (JA__(slip op.)). Not surprisingly, the Board found that Fasken could have done the same, but "did not." *Id.* In essence, the Board rejected the notion that Fasken's belated *discovery* of such information (which other parties had long-ago identified and challenged) somehow rendered that information new and materially different. On appeal, Fasken argued that the Board erred because there were wording differences between the Draft Environmental Impact Statement and ISP's environmental report. CLI-21-9, 93 N.R.C. at 249–50 (JA__(slip op.)). "However, Fasken d[id] not explain how the differences it cites are

significant under our contention admissibility or reopening standards or address the Board's reasons for finding those differences insufficient to justify Fasken's untimely filing." *Id*. at 250 (JA__(slip op.)). For that and other reasons, the Commission found Fasken's arguments did not identify any "error of law or abuse of discretion" in LBP-21-2. *Id*. at 246 (JA__(slip op.)). That conclusion was not arbitrary or capricious.

II. The Environmental Petitioners' Unexhausted NEPA Claims Should be Dismissed, and Are In Any Event Meritless

A. The Environmental Petitioners' Unexhausted NEPA Claims Should Be Dismissed on Jurisprudential Failure-to-Exhaust Grounds

By their own admission, the Environmental Petitioners are seeking to raise entirely new claims before this Court for the first time. Specifically, in their brief, the Environmental Petitioners distinguish between claims they raised in the adjudicatory proceeding (presented in Env-Br. at 8–30) versus those they did not (presented in Env-Br. at 30–43). Env-Br. at 4.[19] The Environmental Petitioners "emphasize"

[19] For the sake of clarity, because the numbering system used throughout the Environmental Petitioners' brief is inconsistent, the discussion herein references page numbers only. *Compare* Env-Br. at i–ii and 1–2 ("Table of Contents" and "Statement of Issues," numbering arguments from I to XVI) *with id*. at 4–6 ("Summary of the

that the latter "are *distinct* from their claims raised in the NRC's administrative licensing proceedings." Env-Br. at 8 (emphasis added). The Environmental Petitioners assert that they had no obligation to raise these new and "distinct" NEPA claims before the NRC because the agency has an "independent obligation to comply with NEPA." *Id.* As Federal Respondents explain (Fed-Br. at 2–4, 46–51), that assertion flies in the face of well-settled jurisdictional exhaustion requirements, and would render meaningless the statutorily-prescribed hearing scheme designed by Congress in Section 189a of the AEA. But, even beyond that, the Court should also reject, on separate *jurisprudential* exhaustion grounds, the Environmental Petitioners' end-run around the agency adjudicatory process.

The Supreme Court has consistently endorsed the doctrine of administrative law that, "[i]n most cases, an issue not presented to an administrative decisionmaker cannot be argued for the first time in federal court." *Sims v. Apfel*, 530 U.S. 103, 112 (2000) (O'Connor, J., concurring in part and concurring in the judgment). The administrative

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Argument," numbering arguments up to XVIII) *and id.* at 30, 34, 38, 40 ("Argument," skipping XII and using XVI twice).

exhaustion requirement serves the important purposes of "giving agencies the opportunity to correct their own errors, affording parties and courts the benefits of agencies' expertise, and compiling a record adequate for judicial review." *Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1247 (D.C. Cir. 2004) (citation and brackets omitted).

"[A]s a general rule[,] courts should not topple over administrative decisions unless the administrative body not only has erred, *but has erred against objection made at the time appropriate under its practice*." *Woodford v. Ngo*, 548 U.S. 81, 90 (2006) (citation omitted). The Supreme Court has recognized that it is improper and inefficient to permit a litigant to "side-step[] a corrective process which might have cured or rendered moot the very defect later complained of in court." *McGee v. United States*, 402 U.S. 479, 483 (1971). This Court should not permit the Environmental Petitioners to do so here.

The Environmental Petitioners apparently made a tactical decision to eschew the well-settled and mandatory agency processes with respect to their new claims. There is, however, no exception to the exhaustion requirement for that. Accordingly, this Court should summarily reject the new and "distinct" claims raised by the Environmental Petitioners for

the first time in this appeal—if not as a jurisdictional matter, then on jurisprudential exhaustion grounds.

B. The Environmental Petitioners' Unexhausted NEPA Claims Are Meritless and Identify No APA Violation

Even beyond the jurisdictional and jurisprudential failure-to-exhaust defects, the Environmental Petitioners' new claims do not establish any APA violation, for the reasons explained below and in Federal Respondents' brief at 51–79.[20]

Long-Term Storage (Env-Br. at 23–30): The Environmental Petitioners claim that the Environmental Impact Statement fails to consider the possible environmental impacts of long-term storage of spent nuclear fuel because it "does not even consider the likelihood a permanent repository will never be developed." Env-Br. at 23. That statement is demonstrably false. The NRC prepared a Generic Environmental Impact Statement,[21] which it incorporated into the Environmental Impact Statement for the ISP License (JA__[R355.55]),

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[20] The Environmental Petitioners purport to "adopt" Beyond Nuclear's NWPA arguments. Env-Br. at 8. Those arguments are unavailing for the reasons explained in Part I.B, *supra*.

[21] *See generally* Continued Storage GEIS (JA__).

that analyzes the impacts of storing spent nuclear fuel for different lengths of time, including the indefinite time scenario where no repository is ever constructed.[22]

In an alternative (and seemingly contradictory) argument, the Environmental Petitioners appear to acknowledge the Generic Environmental Impact Statement, but allege that it is inapplicable to the ISP facility. Env-Br. at 29. The theory is that the Generic Environmental Impact Statement notes that spent nuclear fuel may need to be repackaged at some point, whereas the ISP facility does not currently have repackaging equipment. *Id.* The Environmental Petitioners suggest this is an inconsistency that renders the Generic Environmental Impact Statement inapplicable to the ISP facility. That is not so. Contrary to the assertion by the Environmental Petitioners, the absence of repackaging equipment at the initial construction phase is fully *consistent* with the Generic Environmental Impact Statement. As that assessment observes, the discussion acknowledges that such

[22] *See also* LBP-19-7, 90 N.R.C. at 66–67, 100–101, 109–111 (rejecting multiple contentions raising nearly identical arguments before the Board for this reason) (none of those parties appealed the Board's holdings on these contentions to the Commission).

equipment "would not be needed immediately," and would be installed "sometime after" initial construction. (JA__[CSGEIS at 5-2]).[23] And, this Court has acknowledged the feasibility of doing so when the need arises. *New York v. NRC*, 824 F.3d 1012, 1023 (D.C. Cir. 2016). Thus, nothing about the NRC's reliance on the Generic Environmental Impact Statement to analyze this issue was arbitrary or capricious.

Transportation (Env-Br. at 30-34): The Environmental Petitioners present two claims regarding transporation, both of which are meritless. First, they assert that the NRC improperly "segmented" the transportation analysis out of the Environmental Impact Statement. Env-Br. at 33. In the NEPA context, "segmentation" means a decision by an agency to *omit* from an Environmental Impact Statement consideration of the impacts of a connected action, such as transportation. The NRC clearly has not done so here. The Environmental Impact Statement, on its face, analyzes the impacts of *both* the proposed action *and* the impacts of connected transportation activities. (JA__[R355.106–109 (§ 3.3 Transportation Affected

[23] *See also* JA__[R355.524–526] (addressing comments on this subject).

Environment); R355.218–237 (§ 4.3 Transportation Impacts); R355.336–339 (§ 5.3 Transportation Cumulative Impacts)]).

Second, the Environmental Petitioners contend that the Environmental Impact Statement did not provide certain information. For example, they complain that the statement did not provide a comprehensive list of "all" transportation routes that might be used. Env-Br. at 30. However, the petitioners identify no explicit obligation to do so. Because precise transportation routes are unknowable at this point,[24] the Environmental Impact Statement reasonably analyzes a set of representative transportation routes that the agency considered "bounding." JA__[R355.552–554]. The Environmental Petitioners identify no legal bar to this approach, which is not surprising given that the use of representative routes is fully consistent with NEPA. *See, e.g.*, *County of Suffolk v. Sec'y of Interior*, 562 F.2d 1368, 1379 (2nd Cir. 1977). And, the Environmental Petitioners do not challenge the NRC's

[24] As a general matter, transportation is an activity that: may occur decades in the future; is not authorized by the instant License; would be subject to separate government approvals; would not be conducted by ISP; and the routes of which would depend on who and where ISP's speculative future customers may be. LBP-19-7, 90 N.R.C. at 89.

determination that the representative routes are bounding. There is no APA violation regarding the NRC's treatment of transportation.

Alternatives (Env-Br. at 34–36): The Environmental Petitioners contend that the Environmental Impact Statement is insufficient because it does not evaluate storage of spent nuclear fuel in a conceptual at-reactor storage system known as "hardened on-site storage" or "HOSS." Env-Br. at 35. In its Environmental Impact Statement, the NRC certainly considered the concept, but did not perform a detailed analysis of it. JA__[R355.90–91, 532–533]. That is because, *inter alia*, it would not accomplish the purpose and need for the action. *Id.* Specifically, the action aims to provide optionality for reactor owners to ship spent nuclear fuel *away* from the reactor site so the property can be used for other purposes. JA__[R355.51]. The Environmental Petitioners' suggestion to evaluate a different type of *at*-reactor storage system plainly would not achieve that purpose. To be sure, a purpose and need statement cannot be defined so narrowly that only one alternative will satisfy it. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991). But, that is not the case here. The Environmental Impact Statement describes commercial optionality to store spent

nuclear fuel *anywhere* but at the reactor site itself. Through any objective lens, this open-ended statement is not impermissibly narrow. The agency's determination that at-reactor hardened on-site storage was not a "reasonable" alternative was not arbitrary and capricious.

Geology and Groundwater (Env-Br. at 36–37): The Environmental Petitioners argue that the Environmental Impact Statement "does not describe how the geology [at the ISP site] relates to storage-related issues." Env-Br. at 37. They also reference a document that purports to "critique[]" ISP's application. *Id.* Notably, that document does not mention the Environmental Impact Statement, its author does not claim to have reviewed the statement, and it was prepared before the Environmental Impact Statement was issued. Neither the Environmental Petitioners' brief, nor the cited report, engage with any particular content in the Environmental Impact Statement or articulate, with specificity, any alleged deficiency. Nor is it apparent from these vague statements how or why the discussion of geology or groundwater allegedly fails, in some unarticulated way, to comply with NEPA. These conclusory assertions fail to support the Environmental Petitioners' allegation that the Environmental Impact Statement somehow is

deficient. *See Blue Ridge*, 716 F.3d at 200 ("Without an explicit challenge . . . Petitioners have failed to demonstrate that NRC acted less than reasonably").

Seismic (Env-Br. at 37–38): The Environmental Petitioners argue that the analysis of seismic issues in the Environmental Impact Statement relies on data from 1975 to January, 2015, and therefore "misses" data after January, 2015. Env-Br. at 38. The petitioners, however, simply misread the Environmental Impact Statement, which states, in plain text, that the agency considered "Recorded earthquakes from 1973 to January 2021." JA__[R355.120]. The Environmental Petitioners also claim the Environmental Impact Statement fails to acknowledge earthquake activity "caused by fracking for oil and gas." Env-Br. at 38. That, too, is simply wrong. The statement plainly states: "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." JA__[R355.121]. Finally, the Environmental Petitioners assert that the Environmental Impact Statement "fails to address" the question of whether earthquakes could cause "impacts to the ISP facility." Env-Br. at 38. Once again, the

petitioners disregard the relevant information. The Environmental Impact Statement notes that impacts to the facility from natural phenomena are not expected, given ISP's compliance with the safety requirement in 10 C.F.R. § 72.122 that the facility's "structures, systems, and components important to safety be designed to withstand the effects of earthquakes." JA__[R355.340]. None of the Environmental Petitioners' counterfactual statements reveal any infirmity or omission in the NRC's fulsome consideration of seismic issues, nor establish arbitrary or capricious action on the part of the agency.

Ecological Impacts (Env-Br. at 38–40): The Environmental Petitioners deride the agency's consideration of ecological issues because the studies cited in the Environmental Impact Statement should have been, in their view, "more independent." Env-Br. at 39. However, petitioners cite no legal requirement imposing a prescriptive "independence" threshold for external studies cited in an Environmental Impact Statement (because no such requirement exists); and they identify no material defect in the studies that results from the lack of "independence" they allege. At most, the Environmental Petitioners complain that the site surveys described in those studies conducted

visual observations for species of concern near the facility, but did not find any. Env-Br. at 39–40. But the petitioners fail to explain how that outcome somehow undermined the analysis. And, in fact, it did not. Notwithstanding the lack of visual observations, the Environmental Impact Statement still acknowledges that: (1) those species of concern *could* be present on the site due to the presence of suitable habitat (JA__[R355.150]), and (2) facility construction could have corresponding impacts (JA__[R355.251–257]). There is nothing about those conclusions that constitutes arbitrary or capricious action.

Radiological (Env-Br. at 40–43): Finally, the Environmental Petitioners challenge a discussion in the Environmental Impact Statement regarding "off-normal events."[25] Env-Br. at 40–42. Therein, the NRC notes that environmental impacts associated with "off-normal events" would be SMALL, so long as the NRC finds that ISP conducted a satisfactory safety analysis of such events. JA__[R355.308]. The Environmental Petitioners assert that the Envioronmental Impact

[25] In NRC safety evaluations, events that may occur during licensed activities are classified as either "normal" (routine operations), "accident conditions" (e.g., a cask drop or tornado), or something in between the two known as "off-normal." JA__[R364.342].

Statement is deficient because the NRC "has not yet evaluated" ISP's safety analysis. Env-Br. at 42. That is factually incorrect. The NRC completed its evaluation prior to issuing the License and concluded that ISP's analysis was, in fact, acceptable (the prerequisite for the EIS's SMALL impacts conclusion). JA__[R364.342–345]. The Environmental Petitioners do not identify any deficiency in that evaluation, nor any other grounds for reversal.

CONCLUSION

For all these reasons, the Court should either dismiss or deny the Petitions for Review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of FED. R. APP. P. 32(a)(7)(B) and D.C. Cir. R. 32(e)(2)(B)(1) because, excluding the parts of the brief exempted by FED. R. APP. P. 32(f) and D.C. Cir. R. 32(e)(1), this brief contains 8,954 words. This brief also complies with the typeface requirements of FED. R. APP. P. 32(a)(5)(A) and the type-style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook font.

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ADDENDUM OF STATUTES & REGULATIONS

Table of Contents

10 C.F.R. § 2.326 Motions to reopen.

(a) A motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied:

(1) The motion must be timely. However, an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented;

(2) The motion must address a significant safety or environmental issue; and

(3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

(b) The motion must be accompanied by affidavits that set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) of this section have been satisfied. Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. Evidence contained in affidavits must meet the admissibility standards of this subpart. Each of the criteria must be separately addressed, with a specific explanation of why it has been met. When multiple allegations are involved, the movant must identify with particularity each issue it seeks to litigate and specify the factual and/or technical bases which it believes support the claim that this issue meets the criteria in paragraph (a) of this section.

(c) A motion predicated in whole or in part on the allegations of a confidential informant must identify to the presiding officer the source of the allegations and must request the issuance of an appropriate protective order.

(d) A motion to reopen that relates to a contention not previously in controversy among the parties must also satisfy the § 2.309(c) requirements for new or amended contentions filed after the deadline in § 2.309(b).

10 C.F.R. § 2.347 Ex parte communications.

In any proceeding under this subpart -

(a)(1) Interested persons outside the agency may not make or knowingly cause to be made to any Commission adjudicatory employee, any ex parte communication relevant to the merits of the proceeding.

(2) For purposes of this section, merits of the proceeding includes:

(i) A disputed issue;

(ii) A matter which a presiding officer seeks to be referred to the Commission under 10 CFR 2.340(a); and

(iii) A matter for which the Commission has approved examination by the presiding officer under § 2.340(a).

(b) Commission adjudicatory employees may not request or entertain from any interested person outside the agency or make or knowingly cause to be made to any interested person outside the agency, any ex parte communication relevant to the merits of the proceeding.

(c) Any Commission adjudicatory employee who receives, makes, or knowingly causes to be made a communication prohibited by this section shall ensure that it, and any responses to the communication, are promptly served on the parties and placed in the public record of the proceeding. In the case of oral communications, a written summary must be served and placed in the public record of the proceeding.

(d) Upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this section, the Commission or other adjudicatory employee presiding in a proceeding may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why its claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of the violation.

(e)(1) The prohibitions of this section apply -

(i) When a notice of hearing or other comparable order is issued in accordance with §§ 2.104(a), 2.105(e)(2), 2.202(c), 2.205(e), or 2.312; or

(ii) Whenever the interested person or Commission adjudicatory employee responsible for the communication has knowledge that a notice of hearing or other comparable order will be issued in accordance with § 2.104(a), § 2.105(e)(2), § 2.202(c), 2.205(e), or § 2.312.

(2) The prohibitions of this section cease to apply to ex parte communications relevant to the merits of a full or partial initial decision when, in accordance with § 2.341, the time has expired for Commission review of the decision.

(f) The prohibitions in this section do not apply to -

(1) Requests for and the provision of status reports;

(2) Communications specifically permitted by statute or regulation;

(3) Communications made to or by Commission adjudicatory employees in the Office of the General Counsel regarding matters pending before a court or another agency; and

(4) Communications regarding generic issues involving public health and safety or other statutory responsibilities of the agency (e.g., rulemakings, congressional hearings on legislation, budgetary planning) not associated with the resolution of any proceeding under this subpart pending before the NRC.

(5) Communications, in contested proceedings and uncontested mandatory proceeding, regarding an undisputed issue.