



OFFICE OF THE  
GENERAL COUNSEL

UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20555-0001

July 27, 2022

Mark Langer, Clerk of Court  
United States Court of Appeals  
for the District of Columbia Circuit  
333 Constitution Ave., NW  
Washington, DC 20001

Re: *Don't Waste Michigan v. NRC*, No. 21-1048 (consolidated)

Dear Mr. Langer:

Pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, Respondent Nuclear Regulatory Commission (NRC), on behalf of Federal Respondents, responds to Beyond Nuclear, Inc.'s citation to *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), as supplemental authority.

First, *West Virginia* is inapplicable to any aspect of this case, as confirmed by the Petitioners' failure to cite to it in any of their three reply briefs filed on July 20, 2022. No party raised the major questions doctrine in *any* brief. Indeed, neither Beyond Nuclear nor any of the other Petitioners has even challenged the agency's authority to issue licenses to store spent fuel. Thus, the Court should not address *West Virginia* or the major questions doctrine at all because the issue is not presented by these cases and has been waived.

Second, Beyond Nuclear's letter fails to show that this is an "extraordinary" case that would require application of the major questions doctrine. The agency's authority to license the storage of spent fuel has "long been recognized." *Bullcreek v. NRC*, 359 F.3d 536, 538 (D.C. Cir. 2004). This authority lies at the core of the agency's mission and expertise and falls clearly within the plain language of Congress's delegation of authority to the agency to issue licenses for

M. Langer

the possession of source, byproduct, and special nuclear material. Respondents' Brief at 6-7; 10 C.F.R. Part 72; Licensing Requirements for the Storage of Spent Fuel in an Independent Spent Fuel Storage Installation, 45 Fed. Reg. 74,693, 74,694-96 (Nov. 12, 1980). *West Virginia* therefore does not affect the Court's analysis of the license at issue. *See* 142 S. Ct. at 2608-10.

Third, Beyond Nuclear's letter misstates the facts when it asserts that the NRC has licensed ISP to store spent fuel owned by the Department of Energy (DOE). To the contrary, the NRC acknowledges that the Nuclear Waste Policy Act prohibits DOE and ISP from doing so. Federal Respondents' Brief at 24-30. Beyond Nuclear's assertion that the license authorizes illegal conduct is therefore incorrect.

Respectfully,

/s/ Andrew P. Averbach  
Solicitor