Oral Argument Not Yet Scheduled

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

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

DON'T WASTE MICHIGAN, et al.,

Petitioners,

vs.

NUCLEAR REGULATORY COMMISSION and
UNITED STATES OF AMERICA,

Respondents,

and

INTERIM STORAGE PARTNERS LLC,

Respondent-Intervenor.

On Petition for Review of Action by the Nuclear Regulatory Commission

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PETITIONERS' REPLY BRIEF

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GLOSSARY

AEA – Atomic Energy Act
APA – Administrative Procedure Act
Licensing Board – Atomic Safety and Licensing Board
CEQ – Council on Environmental Quality
Draft EIS – Draft Environmental Impact Statement
DOE – Department of Energy
EA – Environmental Assessment
EIS – Environmental Impact Statement
Generic EIS – Generic Environmental Impact Statement
ISP – Interim Storage Partners
NEPA – National Environmental Policy Act
NRC – Nuclear Regulatory Commission
NWPA – Nuclear Waste Policy Act
ROD – Record of Decision
Supplemental EIS – Supplemental Environmental Impact Statement

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. This Court Has Jurisdiction to Determine Petitioners' NEPA Claims.

II. The NWPA Prohibits the Licensing of the Proposed Consolidated Interim Storage Facility.

III. The NRC Did Not Adequately Consider the Risks and Impacts of Transporting Spent Nuclear Fuel to the ISP Facility.

IV. The NRC Did Not Adequately Consider the Risk of Earthquakes and Other Impacts from Oil and Gas Drilling.

V. The NRC Did Not Adequately Consider the Impacts to Groundwater from the ISP Facility.

VI. The NRC Allowed an Inadequate Examination and Evaluation of Alternatives.

VII. The NRC Did Not Adequately Consider the Impacts to Wildlife from the ISP Facility.

VIII. The NRC Did Not Adequately Consider the Impacts of Long-Term Storage of Spent Fuel at the ISP Facility.

IX. The EIS Does Not Contain An Adequate Analysis of Long Term Storage at the Consolidated Interim Storage Facility.

X. The EIS Does Not Discuss That the Consolidated Interim Storage Facility Is Illegal Under the Nuclear Waste Policy Act.

XI. The EIS Does Not Adequately Discuss the Impacts of Transportation of the Nuclear Waste to the Facility.

XII. The EIS Presents an Inadequate Discussion of Alternatives.

SUMMARY OF THE ARGUMENT

This Court has jurisdiction of Petitioners' NEPA claims under the Hobbs Act because Petitioners commented on the Draft EIS in the agency proceedings. Petitioners adopt the argument in the Reply Brief of Beyond Nuclear and the Amicus Brief of the Natural Resources Defense Council in this case that the Nuclear Waste Policy Act prohibits this license. Petitioners pointed to underestimations of radiation exposure during transportation in the environmental report, and that the EIS did not identify the rail routes and ignored a 2019 study saying transport could not occur until at least 2019. The environmental report is deficient because it relies on outdated studies of earthquakes and does not discuss mineral rights, and the EIS does not rely on recent earthquake studies and misrepresents the findings of the most recent study. High burnup fuel will cause breach of the spent fuel containers and impact groundwater, and Sierra Club's expert is properly relied on in challenging the EIS. Hardened on-site storage is an alternative that should have been discussed in the environmental report, and Petitioners explained why the EIS should have discussed hardened on-site storage as a reasonable alternative. Petitioners explained exactly how, why and where the environmental report and EIS did not properly evaluate impacts on wildlife.

Respondents assume, with no basis, recertification of the storage containers. Nor does the Continued Storage Rule assure long term safety.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO DETERMINE PETITIONERS' NEPA CLAIMS.

Petitioners properly and timely brought their petition for review from the agency's denial of Petitioners' contentions in the agency's adjudicatory proceeding. Respondents argue that issues IX-XVI, challenging the agency's environmental impact statement (EIS), are not within the Court's jurisdiction.

All parties agree that the Court's jurisdiction to entertain the Petitioner's Petition for Review is based on the Hobbs Act, 28 U.S.C. § 2342, 2344. The Hobbs Act grants judicial review to "parties aggrieved." The Nuclear Regulatory Commission (NRC) maintains the Petitioners are not parties aggrieved because they did not seek to intervene and request a hearing from the NRC, pursuant to 10 C.F.R. § 2.309. Respondents argue that the procedure set forth in 10 C.F.R. § 2.309 is required by § 189 of the Atomic Energy Act (AEA), 42 U.S.C. § 2239. Petitioners allege a violation of the National Environmental Policy Act (NEPA). There is nothing in § 189 that mandates

that NEPA requirements be addressed in the hearing referred to in the AEA. Section 189 of the AEA states:

> In 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.

42 U.S.C. § 2239.

Nothing there restricts NEPA issues to the hearing procedure, and nothing abrogates or supersedes the public participation provisions of NEPA regulations. See, 40 C.F.R. §§ 1501.4(b), 1506(6).

While under the Hobbs Act only a "party aggrieved" by a final order may petition for review in the Courts of Appeals, the determination of whether an entity is an aggrieved party is not dependent upon the agency's labeling of an entity as a "party." *Clark & Reid Co. v. United States*, 804 F.2d 3, 6 (1st Cir. 1986). If an agency's labeling of participants were controlling, any agency could arbitrarily deny a person's right to judicial review by simply refusing to recognize such person as a party. Obviously, this cannot be the case. Rather, under the Hobbs Act, it is the courts, not the agencies, that construe "party" to encompass "those who directly and actually participated in the administrative proceedings. *Id.* at 5; *ACLU v. FCC*, 774 F.2d 24, 26 (1st Cir. 1985); *Reyblatt v. NRC*, 105 F.3d 715, 720 (D.C. Cir. 1997). Moreover, participation can

include tendering comments if that avenue is available for participation. *Id.*; *Water Transp. Ass'n. v. ICC*, 819 F.2d 1189, 1192-93 (D.C. Cir. 1987).

Respondents cite *NRDC v. NRC*, 823 F.3d 641, 643 (D.C. Cir. 2016), where the court said, "To challenge the Commission's grant of a license renewal, then, a party must have successfully intervened in the proceeding by submitting adequate contentions under 10 C.F.R. § 2.309." That holding does not apply here. Petitioners in this case are not challenging the issuance of the license. They are challenging the EIS. Challenging the EIS is an entirely separate issue from challenging the issuance of the license. Furthermore, *NRDC v. NRC* did not involve a NEPA challenge. The challenge, but rather safety issues, clearly governed by the AEA, not NEPA.

The case of *Vermont Dep't of Pub. Serv. v. U.S.*, 684 F.3d 149 (D.C. Cir. 2012), is instructive. In *Vermont* the petitioners claimed the NRC in considering the amendment of a nuclear reactor license did not ensure that the applicant complied with a requirement of the Clean Water Act for a state water quality certification. The petitioners there had made no effort whatever to raise the water quality certification issue until after the NRC had issued the amended license.

As this Court observed in *Vermont*, *Id*. at 157:

> [Petitioners] could have petitioned the Commission for interlocutory review of the Board's denial of their Late Contention/Request to Amend pursuant to 10 C.F.R § 2.341(f)(2). Or they could have filed a new, separate contention limited to their section 401 objection either immediately after the Board's denial . . . or upon discovering that neither the Draft nor the Final SEIS mentioned a section 401 WQC . . . . **Or they could have submitted a comment for the Commission's review in response to the December 2006 Draft SEIS** . . . . (emphasis added).

Thus, the *Vermont* court made clear that filing a petition to intervene in an adjudicatory hearing is not the only way to become a party in an NRC proceeding when a NEPA claim is involved. Specifically, and most relevant to this case, the *Vermont* court said the petitioners could have submitted comments on the draft environmental impact statement. That is exactly what Petitioners did in this case when they submitted detailed comments on the draft EIS. Petitioners' comments gave the agency "the opportunity to correct [its] own errors, affording parties and courts the benefits of [the agency's] expertise, and compiling a record adequate for judicial review." *Id*. at 158.

Public comments are the nature of the administrative record in any NEPA case. See, *e.g*., *Nat'l. Comm. For the New River v. FERC*, 373 F.3d 1323 (D.C. Cir. 2004). An agency prepares its NEPA documentation and makes it available for public input. The agency is then supposed to consider the public input and prepare the NEPA document based on its consideration of

public comments. Forcing the NEPA process into an adjudicative proceeding designed to limit public participation flaunts the public participation requirement of NEPA.

To put a finer point on this, it is important for the Court to understand how the NRC's regulation that governs hearings, 10 C.F.R. § 2.309, works in reality. First, the applicant for a license submits its application, accompanied by an environmental report and a safety analysis report. A prospective intervenor then has only 60 days to review the hundreds of pages of documents submitted by the applicant; determine what contentions would be submitted; find, consult with, and obtain extensive written opinions from expert witnesses; and prepare detailed contentions to be submitted with the request to intervene.

If the intervenor successfully crosses those hurdles, it must then meet the "strict by design" standard for admissibility of contentions. *Shieldalloy Metallurgical Corp.* (Amendment Request for Decommissioning of the Newfield, New Jersey Facility), 65 NRC 341, 352 (2007). Legally this means that a petitioner must show facts and issues to minimally form a basis for supporting the contention. In reality it means that a petitioner must posit an extensive claim, supported by detailed facts and expert opinion, embodying all possible information known to the petitioner on the date the petition is filed.

It further means that a petitioner is charged with knowing every word in the hundreds of pages of documentation submitted by the license applicant to ensure that the contention takes proper issue with the documentation. Furthermore, the petitioner is presumed to have intimate knowledge of every document referenced in the license applicant's documentation. Finally, the petitioner is required to have intimate knowledge of information that does not even appear in the license applicant's documentation nor is referenced in that documentation, but which nonetheless exists in the public domain.

The upshot is that it is extremely difficult, if not virtually impossible, for a petitioner to surmount the barriers to intervention. The Atomic Energy Act's supposed "right" to a hearing is illusory, especially with respect to NEPA issues. Throughout much of the contention pleading process, it is typical for the NRC to have not yet prepared an EA or EIS for a project. So a petitioner's contentions must be directed at the applicant's environmental report, which is not the agency's NEPA document. Sometimes, as in this case, the adjudicatory proceeding is terminated before the EIS or EA is even published. Although NRC regulations, 10 C.F.R. §§ 2.309(c) and 2.326, provide for filing new contentions once the EA or EIS is published, and for reopening the adjudicatory proceeding, that is also illusory. In order to file a new contention

based on the NRC NEPA document, § 2.309(c) requires that the petitioner show 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.
>
> Then, to reopen a closed adjudicatory proceeding, § 2.326 requires that:
>
> (a)
>
> (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.

A review of the foregoing regulations shows that there is an almost insurmountable challenge to reopen a proceeding for a new contention based on an EA or EIS. The real issue, though, is whether participating in the NRC NEPA process by submitting comments is available to members of the public, making them participants and thus parties under the Hobbs Act, or whether doing so when the § 2.309 adjudicatory record has been closed renders the NEPA proceeding a merely performative gesture. Clearly, they are parties. As this Court said in *Vermont Dep't of Pub. Serv.*, *supra*, commenting on NEPA documents comprises participation in that administrative process and serves to exhaust administrative remedies.

By procedurally restricting participation in the NRC's version of the NEPA process, the NRC has violated the public participation requirement of NEPA. Even if members of the public can submit comments, depriving the public of judicial review, as the Respondents propose, renders public comment meaningless.

II. THE NWPA PROHIBITS THE LICENSING OF THE PROPOSED CONSOLIDATED INTERIM STORAGE FACILITY.

Petitioners adopt the argument on this issue in the Reply Brief of Beyond Nuclear and the Amicus Brief of the Natural Resources Defense Council in this case.

III. THE NRC DID NOT ADEQUATELY CONSIDER THE RISKS AND IMPACTS OF TRANSPORTING SPENT NUCLEAR FUEL TO THE ISP FACILITY.

Respondents claim Sierra Club's Contention 4 did not identify any deficiencies in ISP's environmental report. But Contention 4 explained why Table 4.2-9 in the environmental report underestimated radiation exposure in a transportation accident. Radiation doses claimed in Table 4.2-9 were far smaller than doses explained in detail and documented in Contention 4 by Sierra Club expert Dr. Marvin Resnikoff.

In addition to Dr. Resnikoff's analysis, Sierra Club also relied on the opinion of Dr. Gordon Thompson as described in Petitioners' initial Brief. Respondents have not challenged Dr. Thompson's opinions.

It is important to recognize the standard for admissibility of contentions as explained in Petitioners' initial Brief at p. 6-8. The burden on Petitioners at the contention stage is not great. The NRC is now attempting to impose a higher burden. Petitioners presented a genuine issue of material fact.

IV. THE NRC DID NOT ADEQUATELY CONSIDER THE RISK OF EARTHQUAKES AND OTHER IMPACTS FROM OIL AND GAS DRILLING.

Respondents claim ISP's environmental report and safety analysis report did evaluate the possibility and impact of earthquakes on the project. But that discussion in the environmental report was superficial and irrelevant. Referring to the portions of the environmental report cited by NRC, section 2.3.2 discussed general geologic features of the area, but does not mention earthquakes, especially earthquakes induced by fracking for oil and gas. Section 3.3.3 claims there is minimum risk due to faulting and seismicity. That statement relies on a 2016 study, reference to a 1992 earthquake, and geologic maps from 2014. The environmental report also cites a study by the University of Texas. No date is given but there is a reference to modeling from 2013.

Section 3.3.4 of the environmental report discusses faulting and relies on data from 1961-1989, and refers to natural faults, not faults induced more recently by mineral extraction.

The environmental report's analysis is no match for Sierra Club's more recent studies from the University of Texas and Stanford University. Sierra Club has certainly raised a genuine issue of material fact, satisfying the standard for contention admissibility.

Petitioners have also pointed out that the environmental report did not discuss the status of mineral rights beneath the ISP site.

V. THE NRC DID NOT ADEQUATELY CONSIDER THE IMPACTS TO GROUNDWATER FROM THE ISP FACILITY.

Respondents' primary argument on this point is that there will be no impact on groundwater because there is allegedly no way the radioactive waste can escape from the storage containers. This assertion was rebutted by Sierra Club, which cited the NRC's own documents (see Petitioners' initial brief at p. 15-16).

As argued in Petitioners' initial brief, Sierra Club is not challenging the certificate of compliance for the container, but is challenging the adequacy of the discussion in the environmental report regarding impacts to groundwater, certainly within the scope of this licensing proceeding. See *id.* at 15 (NRC said "there is limited data to show that the cladding of spent fuel with burnups greater than 45,000 Mwd per metric tons of uranium will remain undamaged during the licensing period.").

VI. THE NRC ALLOWED AN INADEQUATE EXAMINATION AND EVALUATION OF ALTERNATIVES.

Respondents claim hardened on-site storage is not an alternative, but rather an aspect of the no action alternative. That argument fails for two

reasons. First, if it is an aspect of the no action alternative, it should have been discussed at part of the no action alternative, which must be discussed. 40 C.F.R. § 1502.14 (d). Second, it can be considered a slight modification, like an alternative alignment of a portion of a highway project. See, *Corridor H Alternatives, Inc. v. Slater*, 166 F.3d 368 (D.C. Cir. 1999). Either way, Respondents cannot ignore a discussion of hardened on-site storage.

Nor have Respondents justified their argument that hardened on-site storage would not satisfy the purpose and need for the project. The NRC has determined that spent fuel can be stored on site indefinitely.

Respondents are incorrect in asserting that Petitioners presupposed the reasonableness of their alternatives and failed to explain why they are "reasonable." Resp. Br. p. 63. Petitioners argued that an alternative "meaningfully compatible with the time-frame of the needs to which the underlying proposal is addressed" is logically a "reasonable alternative." *Carolina Entl. Study Grp. v. U.S.,* 510 F.2d 796, 801 (D.C. Cir. 1975). Pet. Br. p. 18. Each of the alternatives proposed by the Petitioners deals with circumstances "as they exist and are likely to exist." *Id*. By fixating on the Commission's word game of renaming Petitioners' alternatives as "improvements," Respondents ignored Petitioners' assertion that their

proposed alternatives, which were mostly versions of the proposed project with additional, environmentally protective features, fall well within the "rule of reason." Each of Petitioners' proposals are meaningfully compatible with the time-frame of the project's needs and are thus "reasonable."

VII. THE NRC DID NOT ADEQUATELY CONSIDER THE IMPACTS TO WILDLIFE FROM THE ISP FACILITY.

Petitioners' initial brief explained exactly how, why and where ISP's environmental report was inadequate in discussing the impact of the project on wildlife in the project area. Respondents simply rely on the licensing board decision and the Commission decision upholding the board. That is a self-serving argument.

Respondents offer nothing else to rebut the arguments made in Petitioners' initial brief.

VIII. THE NRC DID NOT ADEQUATELY CONSIDER THE IMPACTS OF LONG-TERM STORAGE OF SPENT FUEL AT THE ISP FACILITY.

Respondents' argument on this issue is based on a hope and a prayer. Respondents acknowledge that the storage containers are certified for a much shorter period of time than the expected life of the storage facility. They attempt to ignore this problem by blithely asserting that the container certification will need to be renewed, without any assurance that

recertification will be granted. What happens if recertification is not granted? Will there be thousands of tons of radioactive waste stranded at the ISP site without proper authorization? Will the NRC be intimidated into recertifying the containers? Neither the environmental report, the safety analysis report, nor the agency decisions below answer those questions. Rather than presuming recertification or relicensing, the license application documents must consider the possibility that there will be no recertification or relicensing and the consequences of that possibility.

Respondents also rely on the Continued Storage Rule, 10 C.F.R. § 51.23, and the Generic Environmental Impact Statement incorporated in the rule. Respondents' argument is that the rule establishes that waste can be safely stored indefinitely, so it doesn't matter if the waste is stored at the ISP site beyond the permitted life of the containers. If so, why does the NRC even bother with certification and licensing?

Finally, the NRC in desperation asserts that a dry transfer system might be the answer if the containers are not recertified or the facility is not relicensed, or the waste could be transferred to another storage facility. But there is no indication either alternative is or would be available.

IX. THE EIS DOES NOT CONTAIN AN ADEQUATE ANALYSIS OF LONG TERM STORAGE AT THE CONSOLIDATED INTERIM STORAGE FACILITY.

Respondents rely on the Continued Storage Rule, 10 C.F.R. § 51.23, to justify not discussing the likelihood that the "interim" storage facility will become a de facto permanent repository if no permanent repository is established. But if the facility is continuously relicensed, as the NRC speculates, the Continued Storage Rule would not apply. Also, as explained in Sierra Club's comments on the draft EIS (App. p. 2075), the Continued Storage Rule was based on several assumptions that do not apply here.

Respondents also imagine that if the ISP facility is not relicensed, ISP will magically construct and somehow obtain a license for another different facility. This argument defies NEPA's rule of reason. *Food and Water Watch v. FERC*, 28 F.4th 277 (D.C. Cir. 2022). Nor does the decision in *New York v. NRC*, 824 F.3d 1012, 1023 (D.C. Cir. 2016), answer this question, as alleged in NRC's brief. The observation by the court in *New York* was simply that the anticipated period of 100 years before replacement of the dry storage system was reasonable. That does not contemplate the reactor owner constructing an entirely new facility if the ISP facility is not relicensed.

Respondents also brush aside Petitioners' argument about the impact of high burnup fuel. As noted in Petitioners' initial brief, a report by Robert Alvarez was presented in comments on the draft EIS (App. p. 2371). Mr. Alvarez stated that once it is used, high burnup significantly boosts the radioactivity in spent fuel and its commensurate decay heat. The concern is the damage that high burnup fuel may have on the cladding of the fuel. Mr. Alvarez observed that even the NRC admits there is limited data to show that the cladding of high burnup fuel will remain undamaged during the licensing period. ISP recognizes the concerns and uncertainties regarding high burnup fuel because ISP claims that the fuel will be canned inside the canister. But, as Mr. Alvarez states, the ISP license application claims the ISP facility will not accept high burnup fuel unless it is considered damaged and placed in a more expensive double-shell canister. In other words, the fuel will be stranded for decades, since there is no imminent determination of how to assess long-term integrity. Therefore, the Nuclear Waste Technical Review Board recommends "that a validation inspection program of both low and high-burnup fuels be instituted after 15 and 30 years of storage."

Finally, Respondents assure the Court that the Continued Storage EIS excuses the presence of a dry transfer system to move spent fuel around during

the facility's early decades. They elide both the risks that might befall the site and the ultimate obligation to move 40,000 tons of spent fuel into standardized canisters for delivery to a final repository. Pet. Br. p. 26, 27. The Continued Storage EIS says a dry transfer system would "help reduce risks associated with unplanned events or unforeseen conditions and facilitate storage reconfiguration." (App. p. 2353). But Respondents perish those thoughts, denying any prospective release of radioactive material during normal operations. Resp. Br. p. 76.

The site-specific needs of the ISP facility converted dry transfer capability into a site-specific issue, yet Respondents cling to a false generic bypass to sidestep their NEPA responsibilities. However, "the NRC always retains the burden of persuasion under NEPA to consider fully the environmental impacts and alternatives for its proposed action." *New York*, 824 F.3d at 1022. Apparently that isn't so when it comes to dry transfer capability.

X. THE EIS DOES NOT DISCUSS THAT THE CONSOLIDATED INTERIM STORAGE FACILITY IS ILLEGAL UNDER THE NUCLEAR WASTE POLICY ACT.

Respondents acknowledge that the Nuclear Waste Policy Act prohibits the Department of Energy from taking title to the nuclear waste. The other alternative of reactor owners retaining title is pure speculation. The EIS does not discuss why it is assumed that reactor owners will retain title. An EIS may rely only on reasonable assumptions, *La. Ass'n. Of Independent Producers & Royalty Owners v. FERC*, 958 F.2d 110 (D.C. Cir. 1992), or educated assumptions, *Birkhead v. FERC*, 925 F.3d 510 (D.C. Cir. 2019). Assuming that reactor owners will want to retain title to the waste disposed of at the ISP facility is neither.

XI. The EIS Does Not Adequately Discuss the Impacts of Transportation of the Nuclear Waste to the Facility.

Intervenor ISP claims that Petitioners identified no specific obligation to identify transportation routes and that "precise transportation routes are unknowable at this point . . ." (ISP Br. p. 43). ISP cites *County of Suffolk v. Sec'y of Interior*, 562 F.2d 1368, 1379 (2nd Cir. 1977) to make its point that "the use of representative routes is fully consistent with NEPA." But ISP's distortion of *Suffolk* fails in its mission. The Second Circuit allowed use of representative oil pipeline routes from a 50X50 mile offshore area where oil was suspected but not verified as being present. The panel noted that where information only becomes available in the future "and the Government

reserves the power to make such a . . . change after the information is . . . **incorporated in a further EIS,** it cannot be said that deferment violates the 'rule of reason.'" (emphasis added). But there is no "further EIS" planned for this facility. Moreover, the locations of all rail lines the spent fuel will travel are known and finite, and the originating nuclear plants and ultimate destination are also all known. This particular NEPA process is the only one that will be undertaken for the ISP facility and its transportation component and all of the most likely routes must be disclosed.

Also, Respondents failed to respond to Petitioners' discussion of the 2019 report of the Nuclear Waste Technical Review Board in Petitioners' initial brief. The Board determined that nuclear waste, if repackaged into smaller containers, could be transported to a storage facility by 2060, but if not repackaged, could not be moved until 2100. So the waste could not be transported during the licensing period for this facility. The EIS makes no reference to this fact, even though it was addressed in comments on the draft EIS (App. p.2084). The NRC proposes to make an "irreversible and irretrievable commitment of the availability of resources" to a project at a particular site in Texas. 42 U.S.C. § 4332(C)(v). The missing information is

missing only because the agency is unwilling to disclose the transportation routes in detail within the EIS, not because it is unknowable.

XII. THE EIS PRESENTS AN INADEQUATE DISCUSSION OF ALTERNATIVES.

Respondents claim that Petitioners did not address the fact that Hardened On-Site Storage would not satisfy the purpose and need for the project. That is incorrect. Petitioners' Brief, p. 35-36, clearly discusses why Hardened On-Site Storage would satisfy the stated purpose and need for the project. Sierra Club's comments on the draft EIS noted that the stated purpose of the project was to provide an option for storing nuclear waste until a permanent repository is available. Petitioners have explained why Hardened On-Site Storage would satisfy this purpose.

XIII. THE FACILITY WILL HAVE AN IMPACT ON GEOLOGY AND GROUNDWATER THAT IS NOT ADEQUATELY EXAMINED OR ANALYZED IN THE EIS.

As noted in Petitioners' initial Brief, the EIS relies almost exclusively on the statements and conclusions in ISP's environmental report. Therefore, it is appropriate for Petitioners to rely on the challenges to the environmental report by Sierra Club's expert, Dr. Patricia Bobeck. Respondents claim that Petitioners cannot ask the Court to refer to Dr. Bobeck's report. But Dr. Bobeck's report is part of the administrative record. Sierra Club's comments

on this issue (App. p. 2094) summarized in detail Dr. Bobeck's findings and conclusions.

The NRC's reference to the statement in *Carducci v. Regan*, 714 F.2d 171 (D.C. Cir. 1983), that courts are not self-directed boards of legal inquiry and research is taken out of context. In *Carducci* the issue was not briefed or argued. The full quote from that case is:

> Of course not all legal arguments bearing upon the issue in question will always be identified by counsel, and we are not precluded from supplementing the contentions of counsel through our own deliberation and research. **But where counsel has made no attempt to address the issue, we will not remedy the defect, especially where, as here, "important questions of far-reaching significance" are involved.** *Alabama Power Co. v. Gorsuch*, 672 F.2d 1, 7 (D.C.Cir.1982). We therefore decline to entertain appellant's asserted but unanalyzed constitutional claim. (emphasis added).

In this case, Petitioner's specifically referred to Dr. Bobeck's report and presented argument on it. Counsel certainly "attempt[ed] to address the issue."

XIV. THE EIS CONDUCTS AN INADEQUATE DISCUSSION OF THE LIKELIHOOD AND IMPACTS OF EARTHQUAKES ON THE FACILITY.

Petitioners noted in their opening brief that the EIS relies on historic earthquake data and not on the more recent studies showing the effect of recent fracking activity in the area. Respondents reply that there is mention in the

EIS of those recent studies. But those references are merely passing comments upon which the EIS does not rely for minimizing the impact of earthquakes. An agency cannot take a hard look and then ignore what it saw. *Audubon Society of Central Arkansas v. Dailey*, 977 F.2d 428 (8th Cir. 1992).

Beyond that, it is not even clear that the EIS took a hard look at the earthquake potential highlighted by the studies relied on by Petitioners. Respondents claim that the study by Stanford researchers shows an earthquake potential of less than 10 percent. But that conclusion is not at all clear from the study, which shows only the increase in faulting activity in the area of the ISP facility. The impact of that increase is not adequately discussed and analyzed in the EIS.

XV. THE EIS DOES NOT CONTAIN AN ADEQUATE DISCUSSION OF THE ECOLOGICAL IMPACTS OF THE FACILITY.

With respect to the Texas horned lizard, the NRC points to studies conducted at or near the ISP site. The surveys were conducted in October of 2018 and April of 2019 (App. p. 1426, 1428). As explained in Petitioners' initial brief, those studies are flawed. Even so, they do establish that the prime habitat for the horned lizard is present at the ISP site. Likewise, habitat exists at the site for the dunes sagebrush lizard.

In the end, the EIS relies on purported mitigation measures in order to brush aside the impacts to the species. Although an EIS need not mandate the adoption of any specific mitigation measures, it must consider and show why the measures proposed are adequate. *Sierra Club v. FERC*, No. 20-1427 (D.C. Cir. 2022). This EIS fails to do that.

CONCLUSION

Based on the foregoing, the Court should reverse the actions of the Respondents and declare that the Environmental Impact Statement is defective, and grant all other relief requested in this action.

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of August, 2022, I filed the foregoing Petitioners' Reply Brief in the Court's electronic case filing system, which according to its protocols would automatically be served upon all counsel of record.

/s/ Wallace L. Taylor
Wallace L. Taylor
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CERTIFICATE OF COMPLIANCE

The foregoing Petitioners' Proof Reply Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5); the type-style requirements of Fed. R. App. P. 32(a)(6); the length limitation set forth in Fed.R.App.P. 27(d)(2)(a); and the applicable rules for the U.S. Court of Appeals for the District of Columbia Circuit. The Reply Brief was prepared in 14-point, double spaced Times New Roman font using Word. The Reply Brief contains 4,999 words.

/s/ Wallace L. Taylor
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