

No. 21-60743

**In the United States Court of Appeals
FOR THE FIFTH CIRCUIT**

STATE OF TEXAS; GREG ABBOTT, GOVERNOR OF THE STATE OF TEXAS;
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY; FASKEN LAND AND
MINERALS, LIMITED; PERMIAN BASIN LAND AND ROYALTY OWNERS,

Petitioners

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION;
UNITED STATES OF AMERICA,

Respondents

On Petition for Review of Action by the United States Nuclear Regulatory
Commission

**MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*
HOLTEC INTERNATIONAL IN SUPPORT OF FEDERAL
RESPONDENTS' AND INTERVENORS' PETITIONS FOR
REHEARING *EN BANC***

JAY E. SILBERG
ANNE LEIDICH
BEN BERNELL
PILLSBURY WINTHROP SHAW PITTMAN
LLP
401 Congress Avenue
Austin, TX 78701
(512) 580-9600
jay.silberg@pillsburylaw.com
anne.leidich@pillsburylaw.com
ben.bernell@pillsburylaw.com

Counsel for Holtec International

CERTIFICATE OF INTERESTED PERSONS

No. 21-60743

STATE OF TEXAS; GREG ABBOTT, GOVERNOR OF THE STATE OF TEXAS;
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY; FASKEN LAND AND
MINERALS, LIMITED; PERMIAN BASIN LAND AND ROYALTY OWNERS,

Petitioners

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION;
UNITED STATES OF AMERICA,

Respondents

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made so the judges of this Court may evaluate possible disqualification or recusal.

Petitioners

- State of Texas; Greg Abbott, Governor of the State of Texas; and Texas Commission on Environmental Quality (collectively “Texas”)

- Counsel for Texas:

Michael Abrams

Ryan Baasch

OFFICE OF THE ATTORNEY GENERAL, STATE OF TEXAS

- Fasken Land and Minerals, Limited; Permian Basin Land and Royalty Owners (together, “Fasken”)
 - Counsel for Fasken:

Allan Kanner
Annemieke M. Tennis
KANNER & WHITELEY, L.L.C.

Federal Respondents

- U.S. Nuclear Regulatory Commission
 - Counsel for U.S. Nuclear Regulatory Commission:

Andrew Paul Averbach
U.S. NUCLEAR REGULATORY COMMISSION
- United States of America
 - Counsel for United States of America:

Justin Heminger
U.S. DEPARTMENT OF JUSTICE

Intervenor-Respondent

- Interim Storage Partners, LLC
 - Counsel for Interim Storage Partners, LLC:

Brad Fagg
Timothy P. Matthews
Ryan K. Lighty
MORGAN, LEWIS & BOCKIUS LLP

Amicus Curiae

- Holtec International

Holtec International is a corporation organized and existing under the laws of the State of New Jersey with its headquarters in Florida. Holtec International has received a U.S. Nuclear Regulatory Commission

license to construct and operate an away-from-reactor spent fuel storage site in Lea County, New Mexico. Holtec International is not a publicly held company, and no other publicly held company has 10 percent or more equity interest in Holtec International.

- Counsel for Holtec International

/s/ Ben Bernell _____

Ben Bernell

Attorney of Record for Holtec International

Dated: October 31, 2023

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, the proposed *amicus*, Holtec International (“Holtec”), hereby moves the Court for leave to file the attached brief of *amicus curiae* in support of Federal Respondents’ and Intervenors’ Petitions for Rehearing En Banc.

All of Petitioners, Respondents, and Intervenor have consented to this Motion for Leave. No party to this appeal has opposed this Motion for Leave.

While this Motion for Leave is unopposed, Holtec further submits that it is supported by good cause. Specifically, Holtec submits that its brief will assist the Court because Holtec is uniquely positioned to advise on a major reason that the panel decision in *Texas v. Nuclear Regulatory Comm’n*, 78 F.4th 827 (5th Cir. 2023) (“*Texas*”) should be reconsidered *en banc*, particularly the wide-ranging impact of the *Texas* decision on other facilities located within the jurisdiction of other circuit courts.

Holtec holds a United States Nuclear Regulatory Commission (“Commission”) license for offsite spent fuel storage that is at risk of vacatur dependent on the resolution of this proceeding. *See* Initial Brief of Petitioners Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners (No. 23-60377) at 16 (Oct. 2, 2023) (“The Court’s

analysis in *Texas* applies equally here. . . . Accordingly, Petitioners request that the Court grant their Petition for Review and vacate the Holtec License improperly issued by the NRC.”). Yet the Tenth Circuit, where Holtec’s facility is located, has previously rejected challenges like those raised in *Texas* on jurisdictional grounds, *see State ex rel. Balderas v. Nuclear Regulatory Comm’n*, 59 F.4th 1112, 1123-24 (10th Cir. 2023) (rejecting *ultra vires* challenge to Commission authority for failing to comply with the Hobbs Act), and has affirmed the Commission’s authority to issue licenses for privately-owned offsite spent fuel storage. *See Skull Valley Band of Goshute Indians v. Nielson*, 376 F. 3d 1223, 1232 (10th Cir. 2004).

Despite this Tenth Circuit precedent, the panel decision in *Texas* puts Holtec’s license at potential risk of vacatur by the Fifth Circuit, without any ties between the license and the Circuit. As a result, Holtec has a strong interest in ensuring that the Commission’s authority to license offsite spent fuel storage is settled and the circuit split created by the panel decision is resolved, for the sake of its own facility license.

And Holtec represents only one of potentially many at-risk licenses. As set forth in Holtec’s attached *amicus curiae* brief in support of *en banc*

review, if taken to its logical conclusions, the panel decision would undermine the Commission's ability to issue numerous facility and materials licenses at any location in the United States.

For these reasons, Holtec urges the Court to grant this motion for leave to file the attached brief *amicus curiae*.

Dated: October 31, 2023

Respectfully submitted,

/s/ Ben Bernell

JAY E. SILBERG
ANNE LEIDICH
BEN BERNELL
PILLSBURY WINTHROP SHAW PITTMAN
LLP
401 Congress Avenue
Austin, TX 78701
(512) 580-9600
jay.silberg@pillsburylaw.com
anne.leidich@pillsburylaw.com
ben.bernell@pillsburylaw.com

Counsel for Holtec International

CERTIFICATE OF SERVICE

On October 31, 2023, this Motion for Leave was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Ben Bernell _____

Ben Bernell

Attorney of Record for Holtec International

CERTIFICATE OF COMPLIANCE

This Motion for Leave complies with the type-volume limit of FED. R. APP. P. 32(g)(1) and FED. R. APP. P. 27(d)(2)(A) because, excluding the parts of the brief exempted by FED. R. APP. P. 32(f) and FED. R. APP. P. 27(d)(2), this Motion for Leave contains 459 words. This Motion for Leave also complies with the typeface requirements of FED. R. APP. P. 32(a)(5)(A) and Circuit Rule 32.1 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 (body) and 12-point (footnotes) Century font.

/s/ Ben Bernell
Ben Bernell
Attorney of Record for Holtec International

No. 21-60743

**In the United States Court of Appeals
FOR THE FIFTH CIRCUIT**

STATE OF TEXAS; GREG ABBOTT, GOVERNOR OF THE STATE OF TEXAS;
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY; FASKEN LAND AND
MINERALS, LIMITED; PERMIAN BASIN LAND AND ROYALTY OWNERS,

Petitioners

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION;
UNITED STATES OF AMERICA,

Respondents

On Petition for Review of Action by the United States Nuclear Regulatory
Commission

**BRIEF OF *AMICUS CURIAE* HOLTEC INTERNATIONAL IN
SUPPORT OF FEDERAL RESPONDENTS' AND INTERVENORS'
PETITIONS FOR REHEARING *EN BANC***

JAY E. SILBERG
ANNE LEIDICH
BEN BERNELL
PILLSBURY WINTHROP SHAW PITTMAN
LLP
401 Congress Avenue
Austin, TX 78701
(512) 580-9600
jay.silberg@pillsburylaw.com
anne.leidich@pillsburylaw.com
ben.bernell@pillsburylaw.com

Counsel for Holtec International

CERTIFICATE OF INTERESTED PERSONS

No. 21-60743

STATE OF TEXAS; GREG ABBOTT, GOVERNOR OF THE STATE OF TEXAS;
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY; FASKEN LAND AND
MINERALS, LIMITED; PERMIAN BASIN LAND AND ROYALTY OWNERS,

Petitioners

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION;
UNITED STATES OF AMERICA,

Respondents

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Petitioners

- State of Texas; Greg Abbott, Governor of the State of Texas; and Texas Commission on Environmental Quality (collectively “Texas”)
 - Counsel for Texas:

Michael Abrams
Ryan Baasch
OFFICE OF THE ATTORNEY GENERAL, STATE OF TEXAS

- Fasken Land and Minerals, Limited; Permian Basin Land and Royalty Owners (together, “Fasken”)
 - Counsel for Fasken:

Allan Kanner
Annemieke M. Tennis
KANNER & WHITELEY, L.L.C.

Federal Respondents

- U.S. Nuclear Regulatory Commission
 - Counsel for U.S. Nuclear Regulatory Commission:

Andrew Paul Averbach
U.S. NUCLEAR REGULATORY COMMISSION
- United States of America
 - Counsel for United States of America:

Justin Heminger
U.S. DEPARTMENT OF JUSTICE

Intervenor-Respondent

- Interim Storage Partners, LLC
 - Counsel for Interim Storage Partners, LLC:

Brad Fagg
Timothy P. Matthews
Ryan K. Lighty
MORGAN, LEWIS & BOCKIUS LLP

Amicus Curiae

- Holtec International

Holtec International is a corporation organized and existing under the laws of the State of New Jersey with its headquarters in Florida. Holtec International has received a United States Nuclear Regulatory

Commission license to construct and operate an away-from-reactor spent fuel storage site in Lea County, New Mexico. Holtec International is not a publicly held company, and no other publicly held company has 10 percent or more equity interest in Holtec International.

- Counsel for Holtec International

/s/ Ben Bernell _____

Ben Bernell

Attorney of Record for Holtec International

Dated: October 31, 2023

TABLE OF CONTENTS

	Page
CERTIFICATE OF INTERESTED PERSONS	i
INTERESTS OF <i>AMICUS CURIAE</i>	1
ARGUMENT	2
I. The panel decision departs from well-established precedent and creates a split with the other circuits by throttling the Commission’s unique authority under the AEA to license the use of radioactive materials, contrary to the text and history of the AEA.	2
A. The panel decision improperly restricts the Commission’s authority to issue special nuclear materials licenses.....	4
B. The panel erroneously limited the Commission’s authority to issue byproduct materials licenses.....	6
II. The panel misinterprets the NWPA, ignores its legislative history, and directly conflicts with other circuit courts.	9
CONCLUSION.....	14
CERTIFICATE OF SERVICE	15
CERTIFICATE OF COMPLIANCE.....	15

TABLE OF AUTHORITIES

<u>Cases</u>	Page(s)
<i>Bullcreek v. Nuclear Regulatory Commission</i> , 359 F.3d 536 (D.C. Cir. 2004)	13
<i>Carstens v. Nuclear Regulatory Comm’n</i> , 742 F.2d 1546 (D.C. Cir. 1984), cert. denied, 471 U.S. 1136 (1985)	3
<i>Detroit Edison Co. v. Nuclear Regulatory Comm’n</i> , 630 F.2d 450 (6th Cir. 1980)	3
<i>Duke Power Co. v. Nuclear Regulatory Comm’n</i> , 770 F.2d 386 (4th Cir. 1985)	3
<i>Environmental Defense Fund v. Nuclear Regulatory Comm’n</i> , 902 F.2d 785 (10th Cir. 1990)	3
<i>West Virginia v. EPA</i> , 142 S. Ct. 2587 (2022)	13
<i>Iowa Elec. Light & Power v. Local Union 204 of Int’l Bhd. Of Elec. Workers</i> , 834 F.2d 1424 (8th Cir. 1987)	3
<i>Illinois v. Nuclear Regulatory Comm’n</i> , 591 F.2d 12 (7th Cir. 1979)	3
<i>Texas v. Nuclear Regulatory Comm’n</i> , 78 F.4th 827 (5th Cir. 2023)	<i>passim</i>
<i>Public Citizen v. Nuclear Regulatory Comm’n</i> , 573 F.3d 916 (9th Cir. 2009)	4
<i>Public Serv. Co. of New Hampshire v. Nuclear Regulatory Comm’n</i> , 82 F.2d 77 (1st Cir. 1978), cert. denied, 439 U.S. 1046 (1978)	3
<i>Siegel v. Atomic Energy Comm’n</i> , 400 F.2d 778 (D.C. Cir. 1968)	3

Westinghouse Elec. Corp. v. Nuclear Regulatory Comm’n,
598 F.2d 759 (3rd Cir. 1979)..... 3

Statutes and Codes

United States Constitution

Title 42, Section 2014(aa) 7
 Title 42, Section 2014(e)(1) 8
 Title 42, Section 2073(a)(1)-(3) 6
 Title 42, Section 2073(a)(4)..... 5
 Title 42, Section 2073(a)(4)..... 5
 Title 42, Section 2111(b) 7
 Title 42, Section 2111(b)(2)..... 8
 Title 42, Section 10151–10157..... 10
 Title 42, Section 10155(h)..... 12

Rules and Regulations

Code of Federal Regulations

Title 10, Part 70, “Domestic Licensing of Special Nuclear Material,”
..... 10
 Title 10, Part 72 10

Federal Rules of Appellate Procedure

Section 29(a)(4)(E) 1
 Section 32(a)(5)(A) 15
 Section 32(a)(6) 15
 Section 32(a)(7)(B) 15
 Section 32(f) 15

Other Authorities

Federal Register

Volume 45, Page 74,693, 74,699 (Nov. 12, 1980) (to be codified at 10
C.F.R. pt. 72)..... 10
 Volume 72, Page 55,864, 55,880 (Oct. 29, 2009) 9
 Volume 72, Page 55864 (Oct. 1, 2007) 8
 Volume 80, Page 14,416 (March 19, 2015) 6

Legislative History

128 Cong. Rec. 32,560 (1982) (expressing pleasure that “the compromise bill prohibits the Federal Government from taking over the interim spent fuel storage facility in Morris, Ill.”) 11

128 Cong. Rec. 32,946 (1982) 12

Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 806-807 (2005)8

Joint Committee on Atomic Energy, Amending the Atomic Energy Act of 1954..... 5

Licensing Uranium Enrichment Plants: Oversight Hearing Before the Subcommittee on Energy and the Environment of the Committee on Interior and Insular Affairs, 101st Cong. 36, 212 (1990) 6

INTERESTS OF *AMICUS CURIAE*

Holtec International (“Holtec”) has an interest in this proceeding because it holds a United States Nuclear Regulatory Commission (“Commission”) license for away-from-reactor spent fuel storage that is substantially the same as the license held by Intervenor, Interim Storage Partners, LLC, and that is at risk of vacatur dependent on the resolution of this proceeding. *See* Initial Brief of Petitioners Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners (No. 23-60377) at 16 (Oct. 2, 2023) (“The Court’s analysis in *Texas* applies equally here. . . . Accordingly, Petitioners request that the Court grant their Petition for Review and vacate the Holtec License improperly issued by the NRC.”).

Pursuant to Fed. R. App. P. 29(a)(4)(E), *amicus* represents that no party’s counsel authored the brief, neither the parties nor their counsel contributed money intended to fund preparing or submitting the brief, and no person—other than *amicus*—contributed money that was intended to fund preparing or submitting the brief.

ARGUMENT

The panel decision in *Texas v. Nuclear Regulatory Comm’n*, 78 F.4th 827 (5th Cir. 2023) (“*Texas*”) created two new circuit splits, each unsettling the previously well-established tenets of Commission authority.¹ The first circuit split casts doubt on the Commission’s unique authority under the Atomic Energy Act (“AEA”) to license the use of radioactive materials and away-from-reactor (“AFR”) spent fuel storage and deviates from the text and legislative history of the AEA. The second circuit split conflicts with established interpretations of the Nuclear Waste Policy Act (“NWPA”) and deviates from the NWPA’s text and legislative history. This Court should grant review of these issues to resolve these uncertainties and create a uniform view of the Commission’s authority under the AEA and NWPA.

I. The panel decision departs from well-established precedent and creates a split with the other circuits by throttling the Commission’s unique authority under the AEA to license the use of radioactive materials, contrary to the text and history of the AEA.

The panel decision in *Texas* departs significantly from nearly every other circuit court by stifling the Commission’s authority under the AEA,

¹ Federal Respondents have already comprehensively addressed the panel decision’s remaining circuit split erroneously recognizing an *ultra vires* exception to the requirement that parties participate in proceedings before the agency.

which has long been considered “virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives.” *Siegel v. Atomic Energy Comm’n*, 400 F.2d 778, 783 (D.C. Cir. 1968); *Carstens v. Nuclear Regulatory Comm’n*, 742 F.2d 1546, 1551 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1136 (1985). *E.g.*, *Public Serv. Co. of New Hampshire v. Nuclear Regulatory Comm’n*, 582 F.2d 77, 82 (1st Cir. 1978), *cert. denied*, 439 U.S. 1046 (1978); *Westinghouse Elec. Corp. v. Nuclear Regulatory Comm’n*, 598 F.2d 759, 771 (3rd Cir. 1979); *Illinois v. Nuclear Regulatory Comm’n*, 591 F.2d 12, 16 (7th Cir. 1979); *Detroit Edison Co. v. Nuclear Regulatory Comm’n*, 630 F.2d 450, 453 (6th Cir. 1980); *Duke Power Co. v. Nuclear Regulatory Comm’n*, 770 F.2d 386, 390 (4th Cir. 1985); *Iowa Elec. Light & Power v. Local Union 204 of Int’l Bhd. Of Elec. Workers*, 834 F.2d 1424, 1428 (8th Cir. 1987); *Environmental Defense Fund v. Nuclear Regulatory Comm’n*, 902 F.2d 785, 788-789 (10th Cir. 1990); *Public Citizen v. Nuclear Regulatory Comm’n*, 573 F.3d 916, 927 (9th Cir. 2009).

Instead of adhering to this nearly universal precedent, the panel decision casts doubt on the Commission’s “virtually unique” authority

under the AEA through a crabbed reading of the Commission’s statutory authority to license the constituent materials stored in AFR facilities, including “special nuclear materials” and “byproduct materials.” In so doing, the panel decision misreads the plain language of the AEA. This puts the Commission’s previously certain authority into question and subject to a significant circuit split.

A. The panel decision improperly restricts the Commission’s authority to issue special nuclear materials licenses.

The panel decision recognized that the Commission is authorized to issue four categories of special nuclear materials licenses: (1) “for the conduct of research and development activities of the types specified in section 2051,” (2) “for use in the conduct of research and development activities or in medical therapy under a license issued pursuant to section 2134 [for utilization and production facilities used for research and development or medical therapy],” (3) “for use under a license issued pursuant to section 2133 of this title [for utilization or production facilities],” and (4) “for such other uses as the Commission determines to be appropriate to carry out the purposes of this chapter.” *See Texas*, 78 F.4th at 840. Mysteriously, the panel then found that “the Act authorizes

the Commission to issue such licenses only for certain enumerated purposes,” thus reading the fourth category out of the statute. *See id.*

This abridged reading of the AEA inexplicably eliminates the Commission’s broad grant of authority to issue licenses “for such other uses as the Commission determines to be appropriate.” 42 U.S.C. § 2073(a)(4). In addition to ignoring the AEA’s plain text, the decision also ignores the AEA’s legislative history. In 1958, Congress added 42 USC § 2073(a)(4) specifically “to authorize the Commission to issue licenses for the possession of special nuclear material within the United States *for uses which do not fall expressly within the present provisions of subsection [§ 2073(a)].*” Joint Committee on Atomic Energy, Amending the Atomic Energy Act of 1954, as Amended, S. Rep. No. 85-1944, at 1 (2d Sess. 1958) (emphasis added).

This arbitrary deletion from the AEA’s text abruptly takes some existing special nuclear materials licenses outside the scope of the Commission’s authority. For example, the Commission issues licenses for both nuclear fuel fabrication and enrichment facilities that fall outside of what the panel decision considers the “enumerated purposes” in 42 U.S.C. § 2073(a)(1)-(3). These facilities do not support research and

development, they are not for medical purposes, and (contrary to the Court's dicta) they are not utilization or production facilities.² As such, these special nuclear materials licenses are now subject to attack under the panel's stated rationale. *See e.g.*, Uranium Enrichment Facility, 80 Fed. Reg. 14,416 (March 19, 2015) (discussing special nuclear materials license for URENCO uranium enrichment facility); Notice of License Renewal Request, 72 Fed. Reg. 33,539 (June 18, 2007) (discussing special nuclear materials license for GNF-A fuel manufacturing facility).

B. The panel erroneously limited the Commission's authority to issue byproduct materials licenses.

The panel decision's reading of the Commission's authority over byproduct materials is equally flawed and contrary to the plain language of the AEA. The panel found that the Commission's authority to dispose of byproduct materials is limited to those that "emit radiation for significantly less time than spent nuclear fuel," *Texas*, 78 F.4th at 841, a limitation nowhere found in the AEA. The panel derived this restriction

² Congress amended the AEA to *remove* uranium enrichment facilities from the definition of a production facility so that the Commission could license uranium enrichment facilities via special nuclear materials licenses. *See Licensing Uranium Enrichment Plants: Oversight Hearing Before the Subcommittee on Energy and the Environment of the Committee on Interior and Insular Affairs*, 101st Cong. 36, 212 (1990).

on the Commission’s authority to license the *disposal* of certain byproduct materials, under 42 U.S.C. § 2111(b), which “cross-references the definition of byproduct materials in § 2014(e)(3)–(4), which in turn refers to radium-226 and other material that ‘would pose a threat similar to the threat posed by . . . radium-226 to the public health and safety.’” *Id.* Thus, because some isotopes contained in spent nuclear fuel—like plutonium-239—are unlike radium-226, the panel reasoned that they must not be covered as byproduct material. *Id.*

Since the NRC licenses at issue here are not for *disposal*, the panel’s argument is irrelevant. Even if this argument were relevant, it bears no relationship to the text or history of the AEA and would leave the exact authority of the Commission to issue byproduct materials licenses in limbo.

First, plutonium-239 cannot be used to characterize the bounds of byproduct materials because it is already explicitly defined by the AEA as special nuclear material. 42 U.S.C. § 2014(aa). Second, the panel’s rewriting of the AEA’s definition of byproduct material based on half-life has no support in the language of the AEA itself and ignores the

Commission's clear authority over any material made radioactive in a utilization facility. *See* 42 U.S.C. § 2014(e)(1).

Third, the panel's use of radium-226 as the model byproduct material is pure invention. While the Commission has always had authority over materials made radioactive in a utilization facility (including radium-226), radium-226 is also naturally occurring and the Commission's jurisdiction over naturally-occurring radium-226 was uncertain. This uncertainty led Congress in 2005 to give the Commission explicit authority over naturally-occurring radium-226 to close the regulatory gap. *See* Energy Policy Act of 2005, Pub. L. No. 109–58, 119 Stat. 806-807 (2005).

In adding radium-226 to the AEA, Congress did not reduce the Commission's authority over radioactive materials, instead it *expanded* it. *See* Requirements for Expanded Definition of Byproduct Material: Final Rule, 72 Fed. Reg. 55864 (Oct. 1, 2007) (noting that AEA revisions “plac[e] additional byproduct material under the [Commission's] jurisdiction”).

The panel's focus on the disposal provisions for radium-226, 42 USC § 2111(b)(2), to define byproduct material is similarly misplaced. The

AEA specifically addressed the disposal of radium-226 to clarify that the Commission's new authority over radium-226 would not alter the pre-existing ability "to dispose of the newly added byproduct material at a disposal facility in accordance with [non-nuclear hazardous waste laws]." Requirements for Expanded Definition of Byproduct Material, 72 Fed. Reg. 55,864, 55,880 (Oct. 29, 2009).

Limiting the Commission's authority over special nuclear materials to "enumerated purposes" and over byproduct materials to materials similar to radium-226 is clearly inconsistent with the text and legislative history of the AEA. Moreover, the panel decision leaves the Commission's authority in doubt, contrary to the other circuit courts that have broadly construed the Commission's authority, and places numerous Commission licenses at risk of vacatur. The court should grant the petition for rehearing *en banc* to correct this erroneous interpretation.

II. The panel misinterprets the NWPA, ignores its legislative history, and directly conflicts with other circuit courts.

Well before enactment of the NWPA, the Commission recognized and codified its ability to license privately-owned interim spent fuel storage facilities, whether at reactor or AFR sites. *See* ISP Petition for

Rehearing En Banc at 6-7. This authority was based on the Commission's broad statutory authority over special nuclear material. The privately-owned AFR spent fuel storage facility at Morris, Illinois was initially licensed under 10 C.F.R. Part 70, "Domestic Licensing of Special Nuclear Material," before the development of the Commission's specific spent fuel storage regulations in 10 C.F.R. Part 72. *See* Storage of Spent Fuel in an Independent Spent Fuel Storage Installation: Final Rule, 45 Fed. Reg. 74,693, 74,699 (Nov. 12, 1980) (to be codified at 10 C.F.R. pt. 72).

While the panel is correct in saying that the NWPA gives the Federal Government complete responsibility for the *disposal* of spent nuclear fuel, *Texas*, 78 F.4th at 842-843, the panel is wholly incorrect in finding that the NWPA gave the Federal Government complete responsibility for the *interim storage* of spent fuel, whether at reactor sites or elsewhere. The NWPA merely created two categories of limited *federally-owned* interim spent fuel storage facilities—Federal Interim Storage, 42 U.S.C. §§ 10151–10157, and Monitored Retrievable Storage Facilities, *id.* at §§ 10161–10169. In both cases, the NWPA made clear that these were *Federal* facilities, not private ones.

The NWPA thus created a comprehensive statutory scheme for addressing spent nuclear fuel accumulation *by the Federal Government*, prioritizing Federal Government construction of the permanent repository and limiting the amount of Federally-owned temporary storage. Nothing in the NWPA remotely suggests that Congress intended to eliminate the private ownership of AFR spent fuel storage or to erase the Commission's existing regulatory authority over private facilities.

In fact, the panel's interpretation that the NWPA bars the Commission from licensing privately-owned AFR storage facilities, turns the NWPA upside down. During consideration of the NWPA, Congress explicitly recognized the existence and licensing of privately-owned AFR facilities. In particular, the Morris, Illinois AFR storage facility was explicitly discussed in the Congressional debates, as an Illinois Congressman worked to prevent Federal Government ownership of the facility. *See* 128 Cong. Rec. 32,560 (1982) (expressing pleasure that "the compromise bill prohibits the Federal Government from taking over the interim spent fuel storage facility in Morris, Ill.").

This debate led to the NWPA's limitation on the "use, purchase, lease, or other acquisition" of AFR storage facilities not already owned by the Federal Government. 42 USC § 10155(h). A Senate bill preceding the NWPA would have "grant[ed] the Secretary of Energy the authority to 'construct, acquire or lease one or more [AFR] facilities.'" 128 Cong. Rec. 32,946 (1982). The Illinois Congressman objected and the ultimate NWPA language was intended "to prohibit the Secretary [of Energy] from providing capacity for the storage of spent nuclear fuel from civilian nuclear power reactors at [Morris, Ill., West Valley, N.Y., and Barnwell, S.C]." *See id.* at 32560, 32946. And so, under the NWPA the interim storage of spent fuel remained "a private sector responsibility while the Federal Government gets on with the business of finding a more permanent solution." *Id.*

Nowhere do the debates suggest that the Morris license would become invalid after the NWPA was enacted. In fact, the Illinois Congressman recognized that Morris would continue to operate and delays in permanent disposal would "put[] even greater pressure on the AFR facility at Morris." *Id.* at 32945. Nor is there any hint that after the NWPA became law, the Morris facility would become the last of its

kind. Indeed, other such facilities were licensed after the NWPA was enacted and prior to the Commission licenses for the Interim Storage Partners and Holtec HI-STORE facilities. *See* ISP Petition for Rehearing En Banc at 7. If anything, an interpretation that the NWPA eradicated an existing Commission license without explicit Congressional intent would itself run afoul of the “major questions” doctrine. *See West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

In deciding that the NWPA prohibits the licensing of privately owned offsite storage facilities, the panel decision also conflicts directly with the DC Circuit and the Tenth Circuit, creating an inconsistency in the governing law of the circuits. *Skull Valley Band of Goshute Indians*, 376 F.3d at 1232; *Bullcreek v. Nuclear Regulatory Commission*, 359 F.3d 536, 538-43 (D.C. Cir. 2004). This inconsistency is of particular importance to Holtec. One of the Petitioners here would have the court vacate Holtec’s license, even though that license is currently under review in the D.C. Circuit and the facility is located in the Tenth Circuit, simply because its license is being challenged in the Fifth Circuit (a circuit with which the Holtec facility has no other connection). This inconsistency between the circuits is a further demonstration that this

panel decision involves questions of exceptional importance that must be resolved to allow for the efficient resolution of licensing decisions at the Commission.

CONCLUSION

The petition for rehearing *en banc* should be granted.

Dated: October 31, 2023

Respectfully submitted,

s/ Ben Bernell

JAY E. SILBERG
ANNE LEIDICH
BEN BERNELL
PILLSBURY WINTHROP SHAW PITTMAN
LLP
401 Congress Avenue
Austin, TX 78701
(512) 580-9600
jay.silberg@pillsburylaw.com
anne.leidich@pillsburylaw.com
ben.bernell@pillsburylaw.com

Counsel for Holtec International

CERTIFICATE OF SERVICE

On October 31, 2023, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court.

/s/ Ben Bernell _____

Ben Bernell

Attorney of Record for Holtec International

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of FED. R. APP. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by FED. R. APP. P. 32(f) and Circuit Rule 32.2, this brief contains 2,541 words. This brief also complies with the typeface requirements of FED. R. APP. P. 32(a)(5)(A) and Circuit Rule 32.1 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 (body) and 12-point (footnotes) Century font.

/s/ Ben Bernell

Ben Bernell

Attorney of Record for Holtec International