No. 23-60377

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FASKEN LAND AND MINERALS, LIMITED;
PERMIAN BASIN LAND AND ROYALTY OWNERS,
Petitioners,

v.

NUCLEAR REGULATORY COMMISSION;
UNITED STATES OF AMERICA,
Respondents.

On Petition for Review of an Order
of the Nuclear Regulatory Commission

BRIEF FOR RESPONDENTS

TODD KIM
Assistant Attorney General

JUSTIN D. HEMINGER
Senior Litigation Counsel
Environment and Natural
Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
(202) 514-5442
justin.heminger@usdoj.gov

BROOKE P. CLARK
General Counsel

ANDREW P. AVERBACH
Solicitor
Office of the General Counsel
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852
(301) 415-1956
andrew.averbach@nrc.gov

CERTIFICATE OF INTERESTED PERSONS

No. 23-60377
Fasken Land and Minerals, Ltd.
v.
Nuclear Regulatory Commission.

Under Circuit Rule 28.2.1, Respondents are governmental parties that need not furnish a certificate of interested persons.

/s/ *Andrew P. Averbach*
ANDREW P. AVERBACH

Counsel for Respondent
U.S. Nuclear Regulatory Commission

STATEMENT REGARDING ORAL ARGUMENT

Respondents do not currently think that oral argument would be appropriate or helpful to the Court in ensuring full deliberation of the issues presented. The disposition of most of the jurisdictional and merits issues raised in Petitioners' initial brief is controlled by the panel decision in *Texas v. Nuclear Regulatory Commission*, 78 F.4th 827 (5th Cir. 2023). But *Texas* is the subject of two pending petitions for rehearing en banc. If the Court grants either petition for rehearing and vacates the panel decision in *Texas*, the subsequent decision of the full Court likely would resolve all or nearly all of the issues presented in Petitioners' initial brief. If the Court denies the petitions for rehearing, the law of the Circuit will control this case by dictating that the Court has jurisdiction to hear it and that the Commission lacked authority to issue the license at issue.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Administrative Decisions

Statutes and Regulations

Federal Register Notices

GLOSSARY

AEA	Atomic Energy Act
DOE	U.S. Department of Energy
EIS	Environmental Impact Statement
EPA	U.S. Environmental Protection Agency
ISP	Interim Storage Partners LLC
NEPA	National Environmental Policy Act
NRC	U.S. Nuclear Regulatory Commission
NWPA	Nuclear Waste Policy Act

INTRODUCTION

This case involves a license the United States Nuclear Regulatory Commission ("NRC") issued to Intervenor Holtec, International ("Holtec") for the temporary storage of spent nuclear fuel at a facility in Lea County, New Mexico. The panel's disposition of the arguments that Petitioners Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners (collectively, "Fasken") raise largely depends on this Court's resolution of pending petitions for rehearing en banc in a related case to which Fasken is a party, *Texas v. NRC*, 78 F.4th 827 (5th Cir. 2023).

Texas involved a materially identical license in a materially identical procedural posture. In *Texas*, this Court held that it had jurisdiction to consider challenges to the license and that the NRC lacked authority to issue it. Federal Respondents are aware of no material difference between *Texas* and this case as to jurisdiction or the merits. Thus, absent the Court granting rehearing en banc in *Texas* or granting Federal Respondents' request to transfer this case to the D.C. Circuit, the panel's consideration of this case will be controlled by this existing precedent. Specifically, under *Texas*, the Court is bound to

hold that (1) Fasken has Article III standing; (2) the Court has statutory subject-matter jurisdiction to consider Fasken's primary argument; and (3) the NRC lacked statutory authority to issue the license to Holtec.

Federal Respondents petitioned for rehearing en banc in *Texas*, as did the intervenor licensee. The Court has requested responses to the petitions that are due on December 11, 2023, after this brief is filed.

Given its pending rehearing petition, Federal Respondents requested a temporary stay of proceedings in this case until the mandate issues in *Texas*. Although the Court denied that motion and directed Federal Respondents to file this brief, the circumstances justifying a stay still exist.

If this Court denies the motion to transfer the Petition to the D.C. Circuit, there are two possible paths. If the panel decision in *Texas* remains intact, the panel in this case will be bound to follow *Texas* and grant the petition. If the panel decision in *Texas* is vacated, however, resolution of this case will necessarily depend upon a subsequent decision by this Court (and supplemental briefing may be required). In either scenario, one or more parties in *Texas* or in this case may seek

further review in a petition for certiorari. To account for these alternative outcomes, Federal Respondents submit the following Brief to preserve their arguments and to explain why, if the panel decision in *Texas* is vacated, Fasken's Petition should be dismissed or denied.

STATEMENT OF JURISDICTION

Fasken sought to intervene in the NRC's adjudicatory proceeding challenging issuance of a license to Holtec. The NRC denied Fasken's request to intervene, and Fasken is challenging the orders denying intervention in the D.C. Circuit. Because Fasken was not admitted to the adjudicatory proceeding and because its Petition before this Court seeks review solely of the license issued to Holtec, Fasken is not a "party aggrieved" by the license within the plain meaning of the Administrative Orders Review Act (commonly known as the Hobbs Act), 28 U.S.C. § 2344.

On this basis, Federal Respondents moved to dismiss this Petition for Review for lack of subject-matter jurisdiction before this Court decided *Texas*. In *Texas*, however, this Court held that an *ultra vires* exception to the Hobbs Act's party-aggrieved requirement permits a petitioner to file a direct challenge to an agency's statutory authority

even when the petitioner has not intervened in the agency proceeding. As Federal Respondents have explained in their petition for rehearing in *Texas*, the *ultra vires* exception conflicts with the Hobbs Act's plain text, is based on a mistake, and has been expressly rejected by four circuits. The Court has carried Federal Respondents' motion to dismiss with the case. Order, ECF No. 49-1 (Sept. 13, 2023). If the panel decision in *Texas* stands, it controls this Court's disposition of the "party aggrieved" question.

The panel decision in *Texas* also controls on the issue of Fasken's Article III standing. The United States has not argued that the holding of the *Texas* panel as to standing warrants en banc review.

STATEMENT OF THE ISSUES

1. Whether the Court should stay this case until the mandate issues in *Texas*, a related and materially identical case in which the United States has petitioned for rehearing en banc.

2. Whether the Court has subject-matter jurisdiction to consider Fasken's challenge to the license, when the Hobbs Act's plain text grants jurisdiction only when a petitioner is a "*party* aggrieved"

and here, the NRC denied Fasken's request to become a party to the agency proceeding.

3. Whether the NRC has authority under the Atomic Energy Act to license the temporary storage of spent nuclear fuel away from the site of a nuclear reactor.

4. Whether the NRC acted consistently with the Nuclear Waste Policy Act's prohibition on the Department of Energy taking title to commercial spent fuel when the NRC issued a license that allows the temporary storage of spent fuel owned by *private* parties.

STATEMENT OF THE CASE

I. Statutory and regulatory background

A. The NRC's regulation of spent nuclear fuel

The NRC is an independent regulatory commission created by Congress. *See* Energy Reorganization Act of 1974, 42 U.S.C. § 5841. In the Atomic Energy Act ("AEA"), Congress conferred broad authority on the agency to license and regulate the civilian use of radioactive materials. *See* 42 U.S.C. §§ 2011-2296b-7. The AEA authorizes the NRC to license the construction and operation of *facilities* that produce or use nuclear material, including nuclear power plants. The AEA also

authorizes the NRC to license and regulate the storage of nuclear *material* that poses radiological hazards, including the storage of spent nuclear fuel (fuel that is still radioactive but is no longer useful in the production of electricity) before its ultimate disposal.

Congress granted the NRC authority to license parties to possess spent nuclear fuel in three AEA provisions governing the three types of nuclear material contained in spent fuel. 42 U.S.C. §§ 2073(a), 2093(a), 2111(a); *see also id.* § 2014 (defining each term). First, the AEA authorizes the NRC to issue licenses for the possession of "special nuclear material" such as plutonium. *Id.* § 2073(a). Second, it authorizes the issuance of licenses to possess "source material." *Id.* § 2093(a). And third, it authorizes the issuance of licenses for the possession of "byproduct material." *Id.* § 2111(a). As a consequence of the authority set forth in these provisions, "it has long been recognized that the AEA confers on the NRC authority to license and regulate the storage and disposal of [spent] fuel." *Bullcreek v. NRC*, 359 F.3d 536, 538 (D.C. Cir. 2004); *see also* 42 U.S.C. § 2201(b) (permitting the NRC to promulgate rules and regulations governing the possession of source, byproduct, and special nuclear material).

Consistent with this statutory authority, the agency has promulgated regulations allowing it to issue materials licenses permitting the temporary storage of spent fuel both at the site of nuclear reactors and at away-from-reactor locations. *See* 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, 74,696 (Nov. 12, 1980). In the ensuing 43 years, the agency has issued several such licenses pursuant to Part 72, both at and away from the site of reactors. As discussed below, this case pertains to a license that the agency issued pursuant to authority granted under the AEA and in accordance with its regulations in Part 72.

Temporary *storage* of spent fuel under the AEA is distinct from *disposal*. The Nuclear Waste Policy Act ("NWPA") establishes the federal government's policy to permanently dispose of high-level radioactive waste in a deep geologic repository. *See* 42 U.S.C. §§ 10101-10270. In the NWPA, Congress designated the U.S. Department of Energy ("DOE") as the agency responsible for designing, constructing, and operating a repository, *id.* § 10134(b); the U.S. Environmental Protection Agency ("EPA") as the agency responsible for developing

radiation protection standards for the repository, *id*. § 10141(a); and the NRC as the agency responsible for developing regulations to implement EPA's standards and for licensing and overseeing construction, operation, and closure of the repository, *id*. §§ 10134(c)-(d), 10141(b).

In addition to setting a policy of deep geologic disposal of spent nuclear fuel, the NWPA created two avenues for DOE to operate "interim" storage facilities prior to repository operations. *Id.* §§ 10151-10157 (interim storage program), §§ 10161-10169 (monitored retrievable storage program). These forms of federal interim storage by DOE were designed to operate in parallel with, and not to supplant, the operation of privately owned temporary fuel storage facilities, both at and away from the sites of nuclear reactors, authorized by the AEA and specifically contemplated by 10 C.F.R. Part 72. *See Bullcreek*, 359 F.3d at 543.

Although Congress designated Yucca Mountain, Nevada, as the site for a first spent fuel repository, 42 U.S.C. § 10172, DOE announced in 2010 that it considered the site untenable and attempted to withdraw its license application (a request that the NRC did not grant). Since that time, Congress has not provided additional funding for the

Yucca Mountain project and, while the NRC has spent substantially all the appropriated funds it has received and has completed its safety and environmental review of the repository, the project has stalled. *See Texas v. United States*, 891 F.3d 553, 565 (5th Cir. 2018) (dismissing petition for writ of mandamus brought by Texas, which sought to compel completion of proceedings for licensure of Yucca Mountain repository).

The NWPA allows DOE to enter into contracts to take title to spent nuclear fuel "following commencement of operation of a repository." 42 U.S.C. § 10222(a)(5)(A). Currently, DOE is unable to take title to commercial spent fuel because a repository has not been licensed or built. *Id.*; *see also id.* §§ 10156(a)(1) (setting 1990 deadline for DOE to enter contracts for fuel storage under federal interim storage program); 10168(d)(1) (prohibiting construction of a monitored retrievable storage facility until issuance by NRC of a license for the construction of a repository).

B. Avenues for participation in NRC's licensing proceedings

In the AEA, Congress provided interested persons with an opportunity to attempt to intervene in NRC licensing proceedings and

to object to the issuance of a license. Specifically, section 189a. of the AEA enables a person to request to intervene in the proceeding and request a hearing contesting the legal or factual basis for the agency's licensing decision. *See* 42 U.S.C. § 2239(a)(1).

Adjudicatory hearings are governed by the NRC's regulations. *See* 10 C.F.R. Part 2. To be admitted as a party to such a proceeding, a putative intervenor must, among other things, establish administrative standing and timely submit at least one "contention" setting forth an issue of law or fact to be controverted. *See id*. § 2.309(d), (f)(1). An admissible contention also must raise an issue, such as whether the underlying licensing action comports with applicable requirements within the NRC's statutory authority, that is within the scope of the licensing proceeding and is material to the agency's licensing decision. *See* 10 C.F.R. § 2.309(f)(1)(iii), (iv); *Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1443 (D.C. Cir. 1984).

II. Factual background

In March 2017, the NRC received an application for a license that would permit construction of a "consolidated interim spent fuel storage facility" (at times referred to as a "CISF") in Lea County, New Mexico.

See Holtec International's HI-STORE Consolidated Interim Storage Facility for Interim Storage of Spent Nuclear Fuel, 83 Fed. Reg. 32,919 (July 16, 2018). The facility, as proposed, would consist of an in-ground system for the storage of sealed canisters containing spent nuclear fuel in vertical modules. C.I. 1.4[1] at 2-13 (diagram). The NRC has certified this system as safe for use in storing spent nuclear fuel. *See* 83 Fed. Reg. at 32,919 (referencing HI-STORM UMAX Canister Storage System); 10 C.F.R. § 72.214 (including UMAX system among list of certified systems); List of Approved Spent Fuel Storage Casks: Holtec International HI-STORM Underground Maximum Capacity Canister Storage System, Certificate of Compliance No. 1040, 80 Fed. Reg. 12,073 (Mar. 6, 2015).

As originally conceived, Holtec's application contemplated that the facility would be used primarily for the temporary storage of spent

---

[1] "C.I. __" refers to the "Record ID" number associated with each document listed in the Revised Certified Index of Record that the NRC filed on August 18, 2023 (Document No. 37). A Record ID number followed by a period indicates that the document is part of a "package" in the NRC's ADAMS database (https://adams.nrc.gov/ehd/). The number after the period indicates the document within the publicly available package to which the cited material corresponds (i.e., C.I. 153.3 is the third document within the publicly available package for Record ID 153 in the certified index).

nuclear fuel to which DOE had acquired title. *See, e.g.*, C.I. 1.3 ¶ 17; C.I. 1.4 at 1-1. However, upon its recognition that the NWPA prohibited DOE from taking title to commercial spent fuel until a permanent repository is established, Holtec disclaimed any intent to store DOE titled fuel, absent a change in the NWPA. *Holtec International*, LBP-19-4, 89 N.R.C. 353, 381 (2019).

In August 2020, the NRC published a draft Environmental Impact Statement ("Draft EIS") evaluating the impacts of the proposed facility. C.I. 89. Fasken and persons associated with Fasken commented on the Draft EIS, expressing concerns about the potential impact that the facility would have on oil and gas operations in the Permian Basin. C.I. 115 at 41-43; C.I. 923.

The NRC issued its final EIS for the Holtec facility in July 2022 and a supplement in October 2022. C.I. 142, 144. In May 2023, the agency issued the materials license to Holtec, C.I. 153.3, along with a Final Safety Evaluation Report documenting its extensive analysis of the safety of the proposed facility, C.I. 154 at ES-3, and a Record of Decision documenting its NEPA review, Holtec International; HI-STORE Consolidated Interim Storage Facility, 88 Fed. Reg. 30,801,

30,801-02 (May 12, 2023). The license authorizes Holtec to store spent nuclear fuel for a term of 40 years, with the possibility of renewal, prior to the ultimate decommissioning of the site in accordance with NRC regulations. C.I. 153.3; 88 Fed. Reg. at 30,801; *see* 10 C.F.R. §§ 72.42(a), 72.54.

III. Procedural background

A. Adjudicatory proceedings before the Licensing Board and Commission

In July 2018, the NRC published a notice in the *Federal Register* announcing that Holtec had applied for a license to construct and operate a consolidated interim storage facility. 83 Fed. Reg. at 32,919. In September 2018, Fasken and another entity filed with the Commission "motions to dismiss" Holtec's application, asserting that the application violated the NWPA because it sought authorization to store spent fuel to which DOE, rather than private parties, held title. C.I. 46 at 19-22; C.I. 48 at 1-2. The Commission denied the motions but referred the underlying arguments about the NWPA to the Commission's Atomic Safety and Licensing Board Panel as contentions. C.I. 65 at 2-3.

Meanwhile, the Licensing Board that had been established for the Holtec proceeding considered the contentions filed by Fasken and several environmental organizations. The Licensing Board issued three orders declining to admit the contentions, including Fasken's.[2] Fasken and the organizations appealed to the Commission from those Licensing Board decisions, and the Commission issued three orders affirming the Board and denying the environmental organizations' and Fasken's requests to intervene.[3]

B. Proceedings in the courts of appeals

The environmental organizations and Fasken filed four petitions for review in the United States Court of Appeals for the D.C. Circuit

[2] *Holtec International*, LBP-19-4, 89 N.R.C. 353 (2019) (addressing admissibility of contentions raised by all putative intervenors, including Fasken); *Holtec International*, LBP-20-6, 91 N.R.C. 239 (2020) (addressing contentions raised by Sierra Club and Fasken); *Holtec International*, LBP-20-10, 92 N.R.C. 235 (2020) (addressing additional contentions raised by Fasken).

[3] *Holtec International,* CLI-20-4, 91 N.R.C. 167 (2020) (addressing appeal by all putative intervenors of LBP-19-4); *Holtec International*, CLI-21-4, 93 N.R.C. 119 (2021) (addressing appeal by Sierra Club of LBP-20-6); *Holtec International*, CLI-21-7, 93 N.R.C. 215 (2021) (addressing appeal by Fasken of LBP-20-10).

challenging the Commission's orders.[4] That court consolidated the petitions, and petitioners and Federal Respondents have submitted briefs, with Holtec's intervenor brief and the petitioners' replies due before the end of 2023.

Fasken's petition for review before the D.C. Circuit challenged three separate Commission orders: First, the Commission's October 2018 order that denied Fasken's motion to dismiss; second, the Commission's April 2020 Order that, among other things, denied contentions raised by Fasken and Beyond Nuclear asserting that the application should have been rejected because it originally contemplated entry of contracts for storage with DOE that would be illegal under the NWPA; and, third, the Commission's April 2021 Order that denied its motion to reopen the record to admit contentions relating to the ownership of subsurface mineral rights underneath the proposed Holtec facility. Petition for Review, *Fasken Land & Minerals*

[4] *Beyond Nuclear* v. *NRC*, No. 20-1187 (D.C. Cir.); *Don't Waste Michigan v. NRC*, No. 20-1225 (D.C. Cir.); *Sierra Club v. NRC*, No. 21-1104 (D.C. Cir.); *Fasken Land & Minerals, Ltd. v. NRC*, No. 21-1147 (D.C. Cir.).

Ltd. v. NRC, Case No. 21-1147, Document #1904236 (D.C. Cir. filed June 25, 2021).

Meanwhile, after the NRC issued the license to Holtec, Fasken petitioned for review of the license in this Court. In July 2023, Federal Respondents moved to dismiss Fasken's Petition for Review for lack of subject-matter jurisdiction. Federal Respondents explained in their motion that when a person is denied admission as a party to an NRC licensing proceeding, that person's sole avenue for judicial review is through a challenge to the NRC's decision denying that person party status. Because Fasken is pursuing that avenue before the D.C. Circuit, Federal Respondents argued that its Petition to this Court should be dismissed for lack of subject-matter jurisdiction or, alternatively, transferred to the D.C. Circuit. In September 2023, the Court ordered Federal Respondents' motion carried with the case.

C. Administrative and judicial proceedings concerning the Interim Storage Partners license

The licensing of the Holtec facility proceeded largely in parallel with the licensing of a similar proposed facility to temporarily store spent fuel to be built by Interim Storage Partners (ISP) in Andrews,

Texas, near the New Mexico border. The NRC issued a license to ISP in July 2021.

Beginning in 2021, Fasken and the environmental organizations that petitioned for review of the Holtec license filed seven petitions for review in the D.C. Circuit of both the Commission's denial of their petitions to intervene and the ISP license. The D.C. Circuit denied the petitions for review challenging the Commission's denial of their requests to intervene, and it dismissed, for lack of subject-matter jurisdiction, a challenge to the ISP license itself. *Don't Waste Michigan v. NRC*, No. 21-1048, 2023 WL 395030 (D.C. Cir. Jan. 25, 2023) (per curiam). The D.C. Circuit held (as we argued in our motion to dismiss here) that because petitioner Beyond Nuclear was denied leave to intervene in the NRC's licensing proceeding, it did not qualify as a "party aggrieved" by the order issuing the license. *Id.* at *3.

Both Fasken and the State of Texas challenged the ISP license in this Court, and the State of New Mexico challenged the license in the United States Court of Appeals for the Tenth Circuit. In January 2023, the Tenth Circuit dismissed New Mexico's petition for lack of subject-matter jurisdiction, ruling that New Mexico's failure to participate in

the adjudicatory proceeding prevented it from attaining party status under the Hobbs Act and precluded judicial review. *Balderas v. NRC*, 59 F.4th 1112 (10th Cir. 2023).

However, in August 2023, this Court granted Texas's and Fasken's petitions for review of the ISP license. The Court (a) disagreed with the Tenth Circuit's conclusion in *Balderas* that the *ultra vires* exception was neither legally sound nor appliable to this case; and (b) disagreed with both the D.C. Circuit and the Tenth Circuit's holdings that the NRC possesses statutory authority under the AEA to license away-from-reactor, temporary storage of spent nuclear fuel. *Texas v. NRC*, 78 F.4th 827 (5th Cir. 2023). Federal Respondents and ISP filed petitions for en banc review of this decision in October 2023. This Court requested responses from Texas and Fasken, which are due on December 11, 2023.

SUMMARY OF ARGUMENT

1. The Court's decision in *Texas* resolves the core issues in this case, and a panel of this Court would be bound by this controlling circuit precedent. But Federal Respondents and the Intervenor ISP have sought en banc rehearing in *Texas*. If the Court denies the petitions for rehearing, the primary jurisdictional and statutory authority issues that Fasken's arguments present here will be resolved. But if either petition for rehearing is granted and the panel decision in *Texas* is vacated, the proper resolution of this case will likely depend upon a subsequent decision by the full Court, and supplemental briefing in this case may be required.

Under these circumstances, a temporary stay of proceedings would conserve judicial and party resources and would not prejudice Fasken. Accordingly, if the Court does not grant Federal Respondents' motion to transfer, it should stay this case until the mandate issues in *Texas*.

2. Federal Respondents agree with Fasken that the Court's decision in *Texas* is the law of the circuit with respect to the issues of subject-matter jurisdiction and statutory authority to issue an away-

from-reactor storage license. But currently, *Texas* is subject to pending petitions for rehearing en banc. Federal Respondents present their position on these issues in this brief to (a) to address the situation in which this Court grants rehearing en banc in *Texas* and the panel decision is vacated; and (b) preserve their arguments should any party seek further review in *Texas* or in this case.

With respect to subject-matter jurisdiction, the Court has carried with the case Federal Respondents' motion to dismiss explaining that Fasken is not a party aggrieved within the Hobbs Act's plain meaning because the Commission denied Fasken's request to intervene in the agency proceeding and Fasken therefore cannot challenge the Holtec license.

With respect to the NRC's authority to issue licenses for the storage of spent nuclear fuel, this authority derives directly from three provisions in the AEA: 42 U.S.C. §§ 2073(a), 2093(a), and 2111. Those provisions authorize the agency to license the possession of special nuclear material, source material, and byproduct material, all of which are contained in spent fuel. This authority dates to the early days of the AEA, and in 1980, the NRC acted consistently with that authority

by promulgating regulations covering licensing for spent fuel storage both at reactors and away from reactors. Congress was aware of this regulatory program when it enacted the Nuclear Waste Policy Act in 1982. Although the NWPA created a new program for the *federal* government to temporarily store and ultimately dispose of spent fuel, Congress deliberately chose to leave untouched the preexisting AEA program for private temporary storage of spent fuel. Two circuits—the D.C. Circuit and the Tenth Circuit—reached precisely this conclusion, and a panel of this Court consciously created a split with those circuits when it reached a contrary conclusion in *Texas*.

Nor is the major questions doctrine implicated. The NRC's authority to license the safe, temporary storage of spent fuel lies at the heart of its statutory role and expertise. For decades, the NRC has routinely exercised this authority to issue materials licenses for storing spent fuel both at and away from reactors. This case does not belong in the small category of "extraordinary cases in which the history *and* the breadth of the authority that the agency has asserted, *and* the economic *and* political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority." *West*

West Virginia v. EPA, 142 S. Ct. 2587, 2608 (2022) (emphases added; alterations and quotation marks omitted). It therefore does not fall within the ambit of the major questions doctrine. But, even if it did, the clarity of the grant of authority to the agency, as set forth in the provisions authorizing it to license the possession of nuclear materials, resolves any concern that the NRC lacks authority to issue licenses of the type issued here.

3. The NRC acted consistently with the NWPA provision concerning DOE's ability to take title to commercial spent fuel. The NRC granted a license under its AEA authority that allows Holtec to temporarily store spent fuel to which *private* parties hold title, and Holtec represented to the agency that it would not store fuel to which DOE acquired title absent a change in legislation. Further, the Commission observed that Holtec can exercise the license in a manner that comports with the NWPA. Fasken asserts that Holtec's plan to store fuel owned by private parties is unrealistic from a business perspective, but even if that were true, it would not show the license violates the NWPA.

STANDARD OF REVIEW

Pursuant to the AEA, 42 U.S.C. § 2239(b), judicial review of a final order in a licensing proceeding is to be conducted "in the manner prescribed in" the Hobbs Act and the APA. Under the APA, an agency's decision "is valid unless it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Luminant Generation Co. v. EPA*, 714 F.3d 841, 850 (5th Cir. 2013) (quoting 5 U.S.C. § 706(2)(A)).

In considering the agency's resolution of the arguments that Fasken has raised, the Court should be mindful that "the Commission's licensing decisions are generally entitled to the highest judicial deference because of the unusually broad authority that Congress delegated to the agency under the Atomic Energy Act." *Massachusetts v. NRC*, 924 F.2d 311, 324 (D.C. Cir. 1991). And a "reviewing court must be 'most deferential' to the agency where, as here, its decision is based upon its evaluation of complex scientific data within its technical expertise." *BCCA Appeal Group v. EPA*, 355 F.3d 817, 824 (5th Cir. 2003) (quoting *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1983)).

ARGUMENT

I. The Court should stay proceedings in this case pending the mandate in *Texas v. NRC*.

Federal Respondents previously requested that proceedings in this case be temporarily stayed pending issuance of the mandate in *Texas* because the outcome of this case will almost certainly be dictated by the resolution of the pending petitions for rehearing en banc by Federal Respondents and Intervenor ISP in that case. Federal Respondents have identified two circuit splits warranting en banc rehearing of *Texas*—one concerning the Court's jurisdiction to consider Hobbs Act cases under an *ultra vires* exception, and one concerning the NRC's statutory authority to issue licenses for the away-from-reactor temporary storage of spent nuclear fuel. The Court has called for responses from Texas and Fasken.

Courts have "broad discretion to stay proceedings." *Clinton v. Jones*, 520 U.S. 681, 706 (1997); *Woodson v. Surgitek, Inc.*, 57 F.3d 1406, 1417 (5th Cir. 1995). This authority is "incidental to the power inherent in every court to control" its docket. *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). The Court may grant a stay when it

would serve "economy of time and effort for itself, for counsel, and for litigants." *Id.*

This Court recognizes that a "stay pending the outcome of litigation between the same parties involving the same or controlling issues is an acceptable means of avoiding unnecessary duplication of judicial machinery." *ACF Indus., Inc. v. Guinn*, 384 F.2d 15, 19 (5th Cir. 1967) (citing *Landis*). Because *Texas* is controlling on the core issues in this case and because this case involves several of the same parties as *Texas* (Fasken and Federal Respondents), this Court should stay the case until the mandate issues in *Texas*. At that point, either the Court will have denied the petitions for rehearing—in which case this Court can apply *Texas* and hold that the NRC was without authority to issue the Holtec license—or the Court will have granted rehearing en banc and the full Court will have issued a new decision that likely will dictate the outcome in this case. Either way, moving toward resolution of this case prior to issuance of the mandate in *Texas* is an inefficient use of resources for all parties involved.

A temporary stay would not prejudice any party. Federal Respondents understand from counsel for Holtec that construction at

the site has not begun and that additional permits remain to be issued by the State of New Mexico. Fasken claims that (1) a stay of proceedings would deny Petitioners the efficient resolution and closure on the issues in this case; and (2) Petitioners' property and mineral rights are stigmatized and thus of lesser value pending resolution of these issues. The first interest is inchoate and inherent in the judicial process. The second interest is unsupported and speculative, given that Holtec has not begun construction and needs additional permits from New Mexico. Neither asserted interest will be harmed by a temporary stay of proceedings until this Court's proceedings in *Texas* conclude.

II. The panel decision in *Texas* is binding precedent that dictates the resolution of most of Fasken's arguments, but if that decision is vacated, Fasken's Petition for Review should be dismissed or denied.

Texas is presently the law of the circuit and, if the panel decision remains intact, it dictates the resolution of most of Fasken's arguments in this case.

Specifically, Federal Respondents agree with Fasken that *Texas* means that the Court has subject-matter jurisdiction, under an *ultra vires* exception to the Hobbs Act's party-aggrieved requirement, to consider Fasken's argument (Br. 22-27, 31-38) that the NRC lacks

statutory authority to issue a license for the away-from-reactor temporary storage of spent nuclear fuel. *See Texas*, 78 F.4th at 839 (deeming statutory arguments advanced by State of Texas, and repeated by Fasken here, to fall within scope of *ultra vires* exception). Likewise, the analysis that *Texas* employed to conclude that Fasken had standing to challenge the ISP license based on the proximity of Fasken's interest in land and its use of transportation routes near the proposed facility dictates the same conclusion here, where Fasken has submitted comparable affidavits. *Id*. at 836. Finally, *Texas* held that the NRC lacks authority to issue a license, such as the one granted to Holtec in this case, that would permit the temporary storage of spent nuclear fuel away from the site of a nuclear reactor. *Id.* at 840. Thus, the result under *Texas* would be vacatur of the Holtec license.

Federal Respondents have sought rehearing en banc of the *Texas* panel decision based on the Hobbs Act and statutory-authority holdings. We present the arguments below (a) for consideration if our petition for rehearing is granted (though supplemental briefing may be required to account for any future decision in *Texas*); and (b) to preserve the

arguments should any party seek further review in *Texas* or in this case.

A. The Court lacks jurisdiction to consider Fasken's challenge to the license.

Federal Respondents explained in their Motion to Dismiss why this Court lacks jurisdiction to consider Fasken's arguments, and the Court has carried our motion with the case. We do not repeat the arguments contained in that motion or in our reply. However, we provide a few additional observations in further support of our motion.

First, the *Texas* panel considered itself to be bound by this Court's "rule of orderliness" to follow the *ultra vires* exception. 78 F.4th at 839 n.3. We disagree. In *Texas*, the panel extended the *ultra vires* exception that this Court had previously applied to only one Hobbs Act agency, the Interstate Commerce Commission, to a different agency, the NRC. *See American Trucking Ass'ns v. ICC*, 673 F.2d 82, 85 n.4 (5th Cir. 1982); *Wales Transp. v. ICC*, 728 F.2d 774, 776 n.1 (5th Cir. 1984).

The justification for the exception that the Court offered in *American Trucking* (and applied without further elaboration in *Wales Transportation*)—was not based on the text of the Hobbs Act at all. Rather, it was based on *American Trucking*'s mistaken reliance on case

law that predated Congress's decision in 1975 to subject the Interstate Commission Commerce's decisions to judicial review under the Hobbs Act. *See American Trucking*, 673 F.2d at 85 n.4 (citing three cases all decided before 1975—*Schwartz v. Alleghany Corp.*, 282 F. Supp. 161, 163 (S.D.N.Y. 1968); *Edward Hines Yellow Pine Tr. v. United States*, 263 U.S. 143, 147 (1923) and *Skinner & Eddy Corp. v. United States*, 249 U.S. 557, 563-64 (1919)—to support the claim that, under the *ultra vires* theory, a person may appeal a decision of the Interstate Commerce Commission even if not a party to the original agency proceeding); *see also* Pub. L. No. 93-584, §§ 3, 4, 88 Stat. 1917 (1975) (making decisions of the Interstate Commerce Commission subject to the Hobbs Act).

Thus, the fact that *American Trucking* and *Wales Transportation* referred generically to "agencies" rather than to the Interstate Commerce Commission specifically, *see Texas*, 78 F.4th at 839 n.3, does not mean that this Court has in fact concluded that the decisions of *other* Hobbs Act agencies, such as the NRC, are subject to review under an *ultra vires* exception. All that the Court decided in *American Trucking* and *Wales Transportation*, albeit mistakenly, is that the decisions of that agency were subject to a judge-made exception that

predated the applicability of the Hobbs Act. But the Court is not required by the rule of orderliness to *expand* the exception to final orders of the NRC. Rather, jurisdiction to review the NRC's decisions under the Hobbs Act also must be informed by the AEA provisions addressing agency proceedings and judicial review.

Second, the briefing that is now nearly complete before the D.C. Circuit confirms, as our motion to dismiss contends, that Fasken was given a full and fair opportunity to raise its arguments about the scope of NRC authority before the NRC and to seek judicial review of those arguments. Thus, even if an *ultra vires* exception could apply in some narrow circumstances, it would not apply here.

Our motion to dismiss noted that the petitioners in the D.C. Circuit asserted before the agency, as Fasken does here, that the agency lacks authority to issue licenses for the storage of spent fuel. *See, e.g.*, *Holtec International*, LBP-19-4, 89 N.R.C. 353, 383 (2019) (adjudicating Sierra Club's contention that "any away-from-reactor interim storage facility is necessarily unlawful under the AEA and/or the NWPA"). Since then, one of these petitioners has raised in its D.C. Circuit brief the issue of the agency's authority to issue licenses for away-from-

reactor temporary storage of spent nuclear fuel. *See* Opening Brief of Environmental Petitioners at 7-10, *Beyond Nuclear v. NRC*, Case No. 20-1187, Document #2015160 (D.C. Cir. Sept. 1, 2023).

Further, another petitioner has raised in the D.C. Circuit the same issue that Fasken raises before this Court related to the storage of spent fuel to which DOE acquires title. *See* Opening Brief of Beyond Nuclear at 17-22, *Beyond Nuclear v. NRC*, Case No. 20-1187, Document #2015101 (D.C. Cir. Sept. 1, 2023). And Fasken itself sought review of the agency's disposition of this argument by including the Commission's decisions on this issue in its petition for review in the D.C. Circuit. Petition for Review, *Fasken Land & Minerals Ltd. v. NRC,* Case No. 21-1147, Document #1904236 (D.C. Cir. filed June 25, 2021).

Simply stated, *ultra vires* review is not necessary to enable Fasken to protect itself against agency action. All the arguments that Fasken claims relate to agency authority could have been raised before the Commission, were in fact raised before the Commission, and have now been raised in the D.C. Circuit, where Fasken and other petitioners are seeking review of agency decisions that were properly challenged under the Hobbs Act's grant of subject-matter jurisdiction.

As the Supreme Court has held, even when an *ultra vires* exception might otherwise exist, it does not apply when the applicable statute provides a "meaningful and adequate opportunity for judicial review" or when Congress has spoken clearly and directly to judicial review. *Bd. of Governors of Federal Reserve System v. MCorp Fin., Inc.*, 502 U.S. 32, 43-44 (1991). Both are true here, as the Tenth Circuit explained in rejecting New Mexico's reliance on *Leedom v. Kyne*, 358 U.S. 184 (1958), to challenge the ISP license. *Balderas*, 59 F.4th at 1124. Thus, even if *ultra vires* review is appropriately recognized as a judge-made exception to the party-aggrieved requirement, it is not applicable here. *See, e.g.*, *American Airlines v. Herman*, 176 F.3d 283, 293-94 (5th Cir. 1999) (no *ultra vires* jurisdiction under *Leedom v. Kyne* where plaintiff had "meaningful and adequate means of vindicating its rights"). In short, this Court lacks subject-matter jurisdiction to consider Fasken's arguments.

B. Congress provided the Commission clear authority to license the temporary storage of spent fuel away from reactor sites.

1. The license is authorized by the AEA's plain language.

The preeminent canon of statutory interpretation requires the Court to presume that the "legislature says in a statute what it means and means in a statute what it says." *Asadi v. G.E. Energy (USA)*, 720 F.3d 620, 622 (5th Cir. 2013) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). "If the statutory text is unambiguous, [the Court's] inquiry begins and ends with the text." *Id.* "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

In this case, the AEA's plain text authorizes the Commission to issue licenses for temporary storage of spent fuel away from reactor sites, without restriction as to whether the storage takes place at or away from the site of a reactor. The AEA provides for licenses to possess three types of material—"special nuclear material," 42 U.S.C. § 2073(a), "source material," *id.* § 2093(a), and "byproduct material," *id.*

§ 2111(a); *see also id*. §§ 2014(aa), (z), (e) (defining the terms). Spent nuclear fuel contains each of these materials. And tying these three provisions together, the AEA authorizes the Commission to issue regulations governing the "possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary or desirable . . . to protect health or to minimize danger to life or property." 42 U.S.C. § 2201(b).

In particular, the AEA authorizes the Commission to license special nuclear material "for such other uses as the Commission determines to be appropriate to carry out the purposes" of the AEA. 42 U.S.C. § 2073(a)(4). A central purpose of the AEA is maximizing the generation of electricity from nuclear material. *See id*. § 2013(d). The Commission acted consistently with that purpose by promulgating the Part 72 regulations covering licensing of temporary storage of spent fuel both at reactors and away from reactors.

Similarly, the AEA authorizes the Commission to issue licenses to possess source material "for any other use approved by the Commission as an aid to science or industry." 42 U.S.C. § 2093(a)(4); *see also* 42 U.S.C. § 2111(a) (permitting the NRC to issue licenses for the

possession of byproduct material for "industrial uses"). Allowing nuclear reactor operators and other private parties to store spent fuel (including the source and byproduct material that spent fuel contains), whether at or away from reactor sites, aids the electric-generation industry. In other words, it is "an aid to industry" under § 2093(a)(4) and an "industrial use" under § 2111(a) because it provides more temporary storage space for spent fuel that must otherwise be stored in spent fuel pools with limited storage capacity. *See, e.g.*, *Yankee Atomic Elec. Co. v. United States*, 536 F.3d 1268, 1275 (Fed. Cir. 2008) (describing how plants need to maintain space in spent fuel pools for spent fuel discharged from reactor in order to continue to operate and generate electricity).

The Commission has for decades consistently exercised its AEA materials licensing authority to ensure the safe, temporary storage of spent nuclear fuel. In 1980, recognizing the need for more storage, the Commission relied on all four statutory provisions identified above to issue the Part 72 regulations providing a definitive framework for temporary storage of spent nuclear fuel, both at nuclear reactors and offsite. *See* Licensing Requirements for the Storage of Spent Fuel in an

Independent Spent Fuel Storage Installation, 45 Fed. Reg. 74,693, 74,694 (Nov. 12, 1980) (recognizing the demand for storage space in light of the cessation of programs for SNF reprocessing). The Holtec license is just one example over the last forty years in which the NRC has exercised its AEA authority to issue a license to private parties to store spent fuel away from operating reactor sites.[5]

The *Texas* panel dismissed § 2073(a)(4) and § 2093(a)(4) as catchall provisions limited to the uses listed elsewhere in their respective statutory sections (and, specifically, to research and development purposes). 78 F.4th at 840. But such an interpretation renders superfluous the distinct grants of authority in §§ 2073(a)(4) and

[5] *See* Interim Storage Partners, LLC; WCS Consolidated Interim Storage Facility; Issuance of Materials License and Record of Decision, 86 Fed. Reg. 51,926 (Sept. 17, 2021) (materials license for away-from-reactor spent fuel storage facility in Andrews, Texas); Notice of Issuance of Materials License SNM-2513 for the Private Fuel Storage Facility, 71 Fed. Reg. 10,068 (Feb. 28, 2006) (materials license for away-from-reactor spent fuel storage facility in Tooele County, Utah); General Electric Co. Morris Operation, Environmental Review and Evaluation, Negative Declaration, 47 Fed. Reg. 20,231 (May 11, 1982) (renewal of materials license SNM-2500 for away-from reactor spent fuel storage facility in Morris, Illinois); *see also* Public Service Co. of Colorado; Issuance of Materials License SNM-2504, Fort St. Vrain Independent Spent Fuel Storage; Installation at the Fort St. Vrain Nuclear Generating Station, 56 Fed. Reg. 57,539 (Nov. 12, 1991) (materials license awarded under 10 C.F.R. Part 72 at site of decommissioning reactor).

§ 2093(a)(4). Indeed, Congress added § 2073(a)(4) to the AEA in 1958 to *expand* the purposes for which special nuclear material licenses could be issued beyond those set forth in § 2073(a)(1)-(3). Pub. L. No. 85-681, § 1, 72 Stat. 632 (1958).

And proper interpretation of §§ 2073(a)(4) and 2093(a)(4) must take into account not only research and development, but also the provisions of the statute authorizing the issuance of licenses to use special nuclear material and source material under a license to operate a nuclear reactor. 42 U.S.C. §§ 2073(a)(3), 2093(a)(3). Temporary storage of spent nuclear fuel is sufficiently related to the operation of a nuclear reactor to permit it to fall within the range of activities for which Congress granted the NRC the *additional* authority (in section (a)(4) of each provision) to issue licenses.

Prior to *Texas*, no court had ever held that the NRC's longstanding practice of issuing licenses for away-from-reactor spent fuel storage, a product of the notice-and-comment rulemaking efforts that codified Part 72, is somehow not consistent with the AEA. Indeed, decades ago, the D.C. Circuit and Tenth Circuit both held that the AEA gave the Commission authority to issue such licenses and that the NWPA did not

repeal that authority. *See Bullcreek v. NRC*, 359 F.3d 536, 538-543 (D.C. Cir. 2004); *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1232 (10th Cir. 2004).

In *Bullcreek*, the D.C Circuit explained that the AEA "authorized the NRC to regulate the possession, use, and transfer of the constituent materials of spent nuclear fuel, including special nuclear material, source material, and byproduct material." 359 F.3d at 538. And it further recognized that the agency had promulgated its regulations for licensing both onsite and away-from-reactor storage "[p]ursuant to its AEA authority." *Id.* Likewise, in *Skull Valley*, the Tenth Circuit explained that it was "persuaded" by the D.C. Circuit's analysis and declined to revisit *Bullcreek*'s conclusion that the AEA "authorizes the NRC to license privately-owned, away-from-reactor storage facilities" for spent fuel. 376 F.3d at 1232.

Fasken's assertion that *Bullcreek* merely assumed the NRC's AEA authority existed, Br. 23-24, misreads that decision. In *Bullcreek*, the D.C. Circuit explained that:

- Congress was fully aware in 1982, when it passed the NWPA, that the NRC had promulgated 10 C.F.R. Part 72 in 1980 and that Part

72 allowed for both onsite and offsite storage of spent fuel, 359 F.3d at 543 ("Utah ignores that private away-from-reactor storage was already regulated by the NRC under the AEA prior to the NWPA.");

- Congress intended for a licensing program for private offsite storage pursuant to the AEA to exist in parallel with any program conducted by DOE pursuant to the NWPA, 359 F.3d at 543 (in enacting 42 U.S.C. § 10155(h), which stated that the NWPA did not itself authorize or encourage private storage facilities, "Congress limited the scope of the NWPA, but left untouched prior and subsequent statutes that authorized such facilities," 359 F.3d at 542); and
- Congress declined to disturb the Commission's authority to issue licenses for away-from-reactor storage as part of the compromise that led to passage of the NWPA, 359 F.3d at 543 (compromise "ensured that DOE would not take over private facilities to fulfill its NWPA obligations, and clarified that private generators were not obligated under the NWPA to exhaust all away-from-reactor options prior to receiving federal assistance").

Simply stated, *Bullcreek*'s recognition of the Commission's authority under the AEA to license away-from-reactor temporary storage facilities was an essential component of the D.C. Circuit's holding. That authority is firmly grounded in the AEA's plain text, and was embraced by the D.C. and Tenth Circuits in *Bullcreek* and *Skull Valley*. Other than relying on the panel decision in *Texas*, Fasken simply has no answer to these conclusions.

2. The NWPA did not repeal the Commission's AEA authority.

Fasken relies extensively on *Texas*'s conclusion that the NWPA foreclosed any authority the NRC had under the AEA to license an away-from-reactor temporary storage facility. Br. 24-30 (citing *Texas*, 78 F.4th at 843-44). But as in *Texas*, Fasken fails to cite to any provision in the NWPA effectuating such a revocation. Nor does Fasken confront the extensive analysis of this issue in *Bullcreek*, which correctly held that Congress did not repeal the NRC's preexisting AEA authority.

In *Bullcreek*, the D.C. Circuit surveyed the developments that led Congress to enact the NWPA in 1982 and concluded that "there is no basis to conclude that in enacting the NWPA Congress implicitly

repealed or superseded the NRC's authority." 359 F.3d at 543. The court also credited the NRC's thorough interpretation of the NWPA. *See id.* at 539-40, 542-543 (discussing *In the Matter of Private Fuel Storage*, 56 N.R.C. 390 (2002)). The court concluded that when Congress passed the NWPA, it left the "pre-existing regulatory scheme as it found it." *Id.* at 543. Thus, *Bullcreek* held that the NWPA did *not* disturb the NRC's preexisting AEA authority to license the temporary storage of spent fuel away from reactor sites. *Id.* at 542-43.

Repeating arguments raised by the State of Utah and rejected in *Bullcreek*, Fasken emphasizes 42 U.S.C. § 10155. Br. 26. That provision empowers the Secretary of Energy to construct an interim storage facility. That provision further provides that "[n]othing in [the NWPA] shall be construed to encourage, authorize, or require the private or Federal use . . . of any storage facility located away from the site of any civilian nuclear power reactor and not owned by the Federal Government." 42 U.S.C. § 10155(h). But the plain text of this provision refers only to the NWPA itself. *Id.* ("nothing *in this chapter*") (emphasis added). It says nothing about the agency's authority under *other*, preexisting legislation (i.e., the AEA) governing spent fuel storage. And

the provision begins with the clause "[n]otwithstanding any other provision of law," which necessarily covers the AEA. Fasken's argument thus fails for the same reasons articulated in *Bullcreek*—that § 10155(h) sets limits solely on the federal government's NWPA authority. 359 F.3d at 543; *see also In the Matter of Private Fuel Storage,* 56 N.R.C. 390 (2002).

The NWPA's structure also supports this interpretation. The NWPA established *federal* storage and disposal programs in which DOE plays a significant role. Given these new programs, Congress precisely delineated the NWPA's scope and "left untouched" the Commission's preexisting AEA authority. *Bullcreek*, 359 F.3d at 539, 542; *see* 42 U.S.C. § 10155(h).

When Congress passed the NWPA, it was aware of the Commission's Part 72 regulations and, as part of a legislative compromise permitting public and private storage programs to exist in parallel, Congress left the "pre-existing regulatory scheme as it found it." *Bullcreek*, 359 F.3d at 543. Thus, the NWPA did not disturb the Commission's preexisting AEA authority. *See id*. at 542-543; *Skull Valley*, 376 F.3d at 1232.

Moreover, because the NWPA was enacted *after* the AEA, Fasken's arguments also conflict with the rule against repeals by implication. *See Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020) (repeals by implication are not favored and are a rarity only found where Congress's intention to repeal is clear and manifest or the two laws are irreconcilable). If Congress's goal in § 10155(h) was to repeal the NRC's AEA authority unambiguously, it would have spoken clearly to the issue. Instead, Congress carved out "any other provision of law" and limited the provision to the NWPA itself.

Indeed, the Supreme Court itself recognized, shortly after the NWPA was enacted, that the NRC still retained this authority. *See Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 207, 217 (1983) (explaining that the Atomic Energy Commission, the NRC's predecessor, "was given exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, *possession* and use of nuclear materials" and recognizing, in the course of describing the NRC's authority under the AEA, that the NRC "has promulgated detailed regulations governing storage and disposal [of

spent fuel] away from the reactor" (emphasis added) (citing 10 C.F.R. Part 72)). Fasken's assertion that the NRC's preexisting authority was somehow clearly revoked flies in the face of this history.

3. The major questions doctrine is inapplicable to this case.

Fasken extensively argues (Br. 31-38) that the major questions doctrine precludes issuance of the Holtec license, but that doctrine does not apply. And, even if it did, it would not affect the Commission's authority because Congress has plainly provided the NRC with the statutory tools it needs to issue the license at issue.

In *West Virginia v. EPA*, the Supreme Court explained that in "ordinary cases," the traditional rules of statutory construction, including the "words of a statute" and "their place in the overall statutory scheme," define the scope of agency authority. 142 S. Ct. at 2607-08. Nonetheless, the Court recognized that there are "extraordinary cases" "in which the 'history *and* the breadth of the authority that [the agency] has asserted,' *and* the 'economic *and* political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority." *Id.* at 2608 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120,

159-160 (2000) (emphases added; alteration in original)). Yet none of the indicia that might turn a conventional dispute about statutory interpretation into an extraordinary one is present here.

In *West Virginia*, the Court observed that the Clean Air Act provision that the EPA relied on was "ancillary" to the Act's primary authority, that it had been employed only a "handful of times" since enactment of the statute in 1970, and that "[t]hings changed" when the EPA promulgated the Clean Power Plan, using an "obscure" provision to "drive a[n] . . . aggressive transformation in the domestic energy industry." *Id.* at 2602-04.

In contrast, the materials license issued here reflects a conventional exercise of the NRC's longstanding and exclusive authority over a matter that lies at the core of its expertise. In 1954, Congress established as one of the AEA's express purposes a program to control the "possession" of radiologically significant material by licensed parties. *See* 42 U.S.C. § 2013(c); see also 42 U.S.C. § 5844 (creating, upon establishment of NRC in 1974, an "Office of Nuclear Material Safety and Safeguards" responsible for regulating licensed materials).

Pursuant to the AEA's plain text, the agency has issued *thousands* of licenses for the possession of source, byproduct, and special nuclear materials,[6] refuting Fasken's assertions (Br. 33) that exercise of its materials licensing authority is "ancillary" to its mission or that the agency is merely dusting off "ancient" statutory provisions. And in 1980, the NRC promulgated regulations at 10 C.F.R. Part 72, governing the issuance of licenses for the storage of spent fuel both at and away from reactors, *see* 45 Fed. Reg. at 74,693, and it has periodically issued such licenses over the last 40 years.

Though Fasken asserts that the Holtec license reflects a "new and novel" purpose, Br. 34, this assertion is belied by the record. The agency's longstanding interpretation of the AEA and issuance of licenses pursuant to Part 72 for away-from-reactor storage demonstrate that the license issued to Holtec lies in the heartland of NRC's exclusive authority and practice.

Moreover, neither the authority to regulate temporary away-from-reactor storage sites generally nor the license here presents a question of "profound 'economic and political significance.'" Br. 34 (quoting

---

[6] *See* https://www.nrc.gov/materials.html (last visited Dec. 1, 2023).

Brown & Williamson, 529 U.S. at 160). Indeed, the question that Fasken identifies in its Brief (at page 3) is not whether NRC has the authority to license the storage of spent fuel (a conclusion that has "long been recognized," *Bullcreek*, 359 F.3d at 538-39, and that Fasken does not contest), but whether the agency may exercise that authority to issue licenses for storage away from the site of a reactor—a limitation that the AEA unambiguously does not impose.

And the license under review is for a single *temporary* storage facility. That fact renders wholly irrelevant Fasken's description (Br. 35) of the entire cost of the nationwide program for *permanent* disposal of nuclear waste. The NRC's Environmental Impact Statement shows that the Holtec facility will result only in a barely measurable increase in the use of railways to ship spent fuel to and from the facility, C.I. 142 at 4-12 to 4-14, and will have a primarily localized impact during construction and operation, *id.* at 4-1 to 4-106. This is far from the assertions of "extravagant statutory power over the national economy" that the Supreme Court has found must be met with "skepticism." *West Virginia*, 142 S. Ct. at 2609 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

Indeed, the impacts associated with away-from-reactor storage pale in comparison to the "extraordinary" regulatory actions the *West Virginia* Court identified as triggering the major questions doctrine. Those examples include a rule mandating vaccinations for a quarter of the population, *Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. 661 (2022); a rule granting permitting authority over millions of pollution sources, *Util. Air Regul. Grp.*, 573 at 324; and a rule imposing a moratorium on evictions that was applicable to at least 80% of the country and had an economic impact of approximately $50 billion, *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021). And *West Virginia* itself concerned a rule imposing many billions of dollars in compliance costs—much of which was borne by consumers—eliminating tens of thousands of jobs, and in one projection reducing the gross domestic product by at least a trillion 2009 dollars by 2040. 142 S. Ct. at 2604.

The *West Virginia* Court also observed that the clarity of Congress's grant of authority to EPA was undermined by Congress's repeated refusal to provide through legislation the authority that the agency claimed by rule. 142 S. Ct. at 2614. This is not the case here,

where, 40 years after the passage of Part 72, Congress has never indicated that NRC had strayed beyond its authority in licensing temporary away-from-reactor storage. Fasken identifies an unenacted bill as evidence of Congress's alleged intent to prohibit away-from-reactor, temporary storage of spent fuel by private parties. Br. 37. But that bill raised a completely separate legal issue—DOE's ability to pay for the storage of waste to which the government holds title. The license at issue here permits only the storage of privately owned fuel, and there is no dispute that the NWPA does not allow commercial spent fuel to which DOE has acquired title to be stored at this facility.

Moreover, just two years after the NRC's promulgation of Part 72, Congress enacted the Nuclear Waste Policy Act of 1982. As discussed in Section II.B.2. above (and as two courts of appeals have held), the NWPA did not disturb the NRC's pre-existing AEA authority, of which Congress was aware, to license spent fuel storage. To the extent Congress's intent may be discerned outside the AEA's text, the NWPA and the following 40 years of inaction is strong evidence that Congress acquiesced in the NRC's clear articulation in Part 72 of its AEA authority to license spent fuel storage, both at and away from reactors.

Cf. NRDC v. NRC, 582 F.2d 166, 171 (2d Cir. 1978) ("It is incredible that AEC and its successor NRC would have been violating the AEA for almost twenty years with no criticism or statutory amendment by Congress, which has been kept well informed of developments.").

Finally, even if the issue of whether the NRC is permitted to license away-from-reactor storage facilities were properly designated a major question, Congress has clearly and expressly conferred that authority upon the NRC. That authority is located in the three AEA provisions permitting the NRC to license possession of the three types of materials that spent fuel contains. 42 U.S.C. §§ 2073, 2092, 2111. These provisions are hardly "oblique" references, *West Virginia*, 142 S. Ct. at 2614; they reflect an unambiguous authorization for the agency to issue licenses for private parties to possess spent fuel.

Nor can it credibly be argued that, despite authorizing NRC to issue licenses for the possession of source, byproduct, and special nuclear material, Congress did not authorize the issuance of licenses for spent nuclear fuel. Fasken asserts (Br. 33) that the NRC's licensing authority extends only to "less radioactive constituent material." But the AEA authority granted to the NRC permits it to issue licenses for

the possession of "special nuclear material," 42 U.S.C. § 2073(a), the definition of which includes the possession of substances as hazardous as plutonium, *id.* § 2014(aa).

And the NRC has for decades issued licenses for the possession of one or more of the statutorily defined categories of regulated radiological material, permitting items of all shapes and sizes. For example, the NRC has long issued licenses for items such as gauges, irradiators, and radiographic devices because they contain one or more of the categories of radiologically significant materials that Congress specifically directed the agency to regulate. Congress did not need to identify these (and scores of other) items specifically when it provided the NRC the authority to ensure that the radiologically significant materials in them do not pose a health and safety risk, and it did not need to specifically mention the term "spent nuclear fuel" in the AEA when it conferred upon the NRC the authority to issue licenses for the possession of its radiological components.

III. The NRC acted consistently with the NWPA when it granted a license to temporarily store fuel owned by private parties.

Fasken also raises a separate NWPA argument not resolved by the *Texas* panel (although the issue was raised in *Texas*)—that the "inclusion of a condition allowing Holtec's CISF to store DOE-titled spent nuclear fuel violates the plain language of the NWPA." Br. 28. As noted above in Section II.A., the Court lacks subject-matter jurisdiction to consider this argument. In any event, the argument is unavailing for several reasons.

Most importantly, Fasken's arguments are belied by what actually happened in the NRC licensing proceeding. In its license application, Holtec originally contemplated that the facility would store fuel to which DOE owns title, and a term of its original proposed license anticipated that the owner of the fuel could be DOE or a private party. C.I. 1.3 ¶ 17 (proposed license condition requiring that the construction of the project "will be undertaken only after a definitive agreement with the prospective user/payer for storing the used fuel (USDOE and/or a nuclear plant owner) at the [facility] has been established"). But upon its recognition that DOE could not acquire title to the fuel to be stored,

Holtec expressly represented before the agency during the administrative adjudication that, absent a change in legislation, it was no longer seeking to store spent fuel to which DOE had obtained title from private parties. 89 N.R.C. at 381. And the license that Holtec obtained permits the storage of spent fuel owned by private parties, *see* C.I. 153.3 ¶ 15 (license)—activity that Fasken itself concedes (Br. 28) is a "legal option" under the license.

Indeed, the Commission correctly observed that under the terms of the license that Holtec was seeking, Holtec could lawfully enter into contracts with private parties for storage of spent fuel to which those private entities would retain title.[7] 91 N.R.C. at 176. The Commission properly concluded (and Fasken does not dispute) both that "the NWPA does not prohibit a nuclear power plant licensee from transferring spent nuclear fuel to another private entity," and that issuance of a license to Holtec would not itself effectuate or authorize any illegal transfer of fuel. *Id*. In short, the license lawfully authorizes Holtec to take possession of spent fuel to which private parties hold title, and, by

[7] Under the NWPA, private entities own title to the spent fuel they generate until it is accepted by DOE for permanent disposal. *See* 42 U.S.C. §§ 10143, 10222(a)(5)(A).

contrast, does *not* authorize Holtec to enter into what all parties to this litigation agree would be unlawful storage contracts with DOE. *Id.* There is nothing remarkable, let alone illegal, about such an arrangement.

Fasken asserts that a business model based on the storage of privately owned fuel would be "unrealistic," Br. 27-28, but this argument provides no basis to contest the *legality* of the license—and Fasken cites no authority in support. And even assuming the business model were unrealistic, that would have no bearing on whether the Commission complied with the NWPA in licensing the facility. As the Commission explained, its statutorily mandated role in a licensing proceeding is to assess the safety and legality of the proposed facility, not to grant or withhold a license based on the wisdom of a licensee's business judgment. *See* 91 N.R.C. at 175-76, 193.

Moreover, the Commission observed that Holtec had *agreed* during the adjudicatory proceeding that "it would be illegal under [the] NWPA for DOE to take title to the spent nuclear fuel at this time," and that Holtec merely "hope[d]" that Congress would amend the NWPA in the future so that this might be accomplished. 91 N.R.C. at 176. In

light of Holtec's acknowledgment to the Licensing Board that storage of DOE-titled fuel would contravene the NWPA and that, absent a change in legislation, it was committed to pursuing the license solely by contracting with private plant owners who own title to their spent fuel, 89 N.R.C. at 381, the Commission reasonably concluded that the license would be exercised in a manner consistent with the law.

Finally, contrary to Fasken's position (Br. 30), the Commission reasonably relied on the presumption of the regularity of government conduct to presume that DOE would not enter into a contract that violates the NPWA. *See id.* at 381-82 (citing *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926)). Of course, were DOE (or the NRC) to take action that allegedly contravened the NWPA, those actions would be subject to judicial review. *See* 42 U.S.C. § 10139(a)(1) (judicial review provision of NWPA); 5 U.S.C. § 704. In any event, the issue in an *ultra vires* case is whether the agency has clearly transgressed its statutory authority. And in this case, the license that the agency issued is fully consistent with the NWPA.

CONCLUSION

For the foregoing reasons, if the Court does not grant the Federal Respondents' motion to transfer, it should dismiss or, in the alternative, deny the Petition for Review.

/s/ Justin D. Heminger
TODD KIM
Assistant Attorney General

JUSTIN D. HEMINGER
Senior Litigation Counsel
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
(202) 514-5442
justin.heminger@usdoj.gov

/s/ Andrew P. Averbach
BROOKE P. CLARK
General Counsel

ANDREW P. AVERBACH
Solicitor
Office of the General Counsel
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852
(301) 415-1956
andrew.averbach@nrc.gov

December 1, 2023
DJ 90-13-3-17222

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. This document complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Rule 32(f), this document contains 10,767 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Century Schoolbook font.

s/ *Andrew P. Averbach*
ANDREW P. AVERBACH

Counsel for Respondent
U.S. Nuclear Regulatory Commission

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 5th Cir. R. 25.2.13;

(2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and

(3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and according to the program is free of viruses.

/s/ *Andrew P. Averbach*
ANDREW P. AVERBACH

Counsel for Respondent
U.S. Nuclear Regulatory Commission

CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2023, I electronically filed the foregoing using the court's CM/ECF system, which will notify all registered counsel.

/s/ *Andrew P. Averbach*
ANDREW P. AVERBACH

Counsel for Respondent
U.S. Nuclear Regulatory Commission

ADDENDUM

28 U.S.C § 2344

Review of orders; time; notice; contents of petition; service

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of—

(1) the nature of the proceedings as to which review is sought;

(2) the facts on which venue is based;

(3) the grounds on which relief is sought; and

(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

42 U.S.C. § 2013
Purpose of chapter

It is the purpose of this chapter to effectuate the policies set forth above by providing for—

(a) a program of conducting, assisting, and fostering research and development in order to encourage maximum scientific and industrial progress;

(b) a program for the dissemination of unclassified scientific and technical information and for the control, dissemination, and declassification of Restricted Data, subject to appropriate safeguards, so as to encourage scientific and industrial progress;

(c) a program for Government control of the possession, use, and production of atomic energy and special nuclear material, whether owned by the Government or others, so directed as to make the maximum contribution to the common defense and security and the national welfare, and to provide continued assurance of the Government's ability to enter into and enforce agreements with nations or groups of nations for the control of special nuclear materials and atomic weapons;

(d) a program to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public;

(e) a program of international cooperation to promote the common defense and security and to make available to cooperating nations the benefits of peaceful applications of atomic energy as widely as expanding technology and considerations of the common defense and security will permit; and

(f) a program of administration which will be consistent with the foregoing policies and programs, with international arrangements, and with agreements for cooperation, which will enable the Congress to be currently informed so as to take further legislative action as may be appropriate.

42 U.S.C. § 2014
Definitions

The intent of Congress in the definitions as given in this section should be construed from the words or phrases used in the definitions. As used in this chapter:

. . .

(e) The term "byproduct material" means—

(1) any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material;

(2) the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content;

(3)(A) any discrete source of radium-226 that is produced, extracted, or converted after extraction, before, on, or after August 8, 2005, for use for a commercial, medical, or research activity; or
(B) any material that--

(i) has been made radioactive by use of a particle accelerator; and

(ii) is produced, extracted, or converted after extraction, before, on, or after August 8, 2005, for use for a commercial, medical, or research activity; and

(4) any discrete source of naturally occurring radioactive material, other than source material, that—

(A) the Commission, in consultation with the Administrator of the Environmental Protection Agency, the Secretary of Energy, the Secretary of Homeland Security, and the head of any other appropriate Federal agency, determines would pose a threat similar to the threat posed by a discrete source

of radium-226 to the public health and safety or the common defense and security; and

(B) before, on, or after August 8, 2005, is extracted or converted after extraction for use in a commercial, medical, or research activity.

. . .

(z) The term "source material" means (1) uranium, thorium, or any other material which is determined by the Commission pursuant to the provisions of section 2091 of this title to be source material; or (2) ores containing one or more of the foregoing materials, in such concentration as the Commission may by regulation determine from time to time.

(aa) The term "special nuclear material" means (1) plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Commission, pursuant to the provisions of section 2071 of this title, determines to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material.

. . .

42 U.S.C. § 2073

Domestic distribution of special nuclear material

The Commission is authorized (i) to issue licenses to transfer or receive in interstate commerce, transfer, deliver, acquire, possess, own, receive possession of or title to, import, or export under the terms of an agreement for cooperation arranged pursuant to section 2153 of this title, special nuclear material, (ii) to make special nuclear material available for the period of the license, and, (iii) to distribute special nuclear material within the United States to qualified applicants requesting such material—

(1) for the conduct of research and development activities of the types specified in section 2051 of this title;

(2) for use in the conduct of research and development activities or in medical therapy under a license issued pursuant to section 2134 of this title;

(3) for use under a license issued pursuant to section 2133 of this title;

(4) for such other uses as the Commission determines to be appropriate to carry out the purposes of this chapter.

…

42 U.S.C. § 2093

Domestic distribution of source material

(a) License

The Commission is authorized to issue licenses for and to distribute source material within the United States to qualified applicants requesting such material—

(1) for the conduct of research and development activities of the types specified in section 2051 of this title;

(2) for use in the conduct of research and development activities or in medical therapy under a license issued pursuant to section 2134 of this title;

(3) for use under a license issued pursuant to section 2133 of this title; or

(4) for any other use approved by the Commission as an aid to science or industry.

42 U.S.C. § 2111
Domestic Distribution

(a) In general
No person may transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, own, possess, import, or export any byproduct material, except to the extent authorized by this section, section 2112 or section 2114 of this title. The Commission is authorized to issue general or specific licenses to applicants seeking to use byproduct material for research or development purposes, for medical therapy, industrial uses, agricultural uses, or such other useful applications as may be developed. The Commission may distribute, sell, loan, or lease such byproduct material as it owns to qualified applicants with or without charge: Provided, however, That, for byproduct material to be distributed by the Commission for a charge, the Commission shall establish prices on such equitable basis as, in the opinion of the Commission, (a) will provide reasonable compensation to the Government for such material, (b) will not discourage the use of such material or the development of sources of supply of such material independent of the Commission, and (c) will encourage research and development. In distributing such material, the Commission shall give preference to applicants proposing to use such material either in the conduct of research and development or in medical therapy. The Commission shall not permit the distribution of any byproduct material to any licensee, and shall recall or order the recall of any distributed material from any licensee, who is not equipped to observe or who fails to observe such safety standards to protect health as may be established by the Commission or who uses such material in violation of law or regulation of the Commission or in a manner other than as disclosed in the application therefor or approved by the Commission. The Commission is authorized to establish classes of byproduct material and to exempt certain classes or quantities of material or kinds of uses or users from the requirements for a license set forth in this section when it makes a finding that the exemption of such classes or quantities of such material or such kinds of uses or users will not constitute an unreasonable risk to the common defense and security and to the health and safety of the public.
…

42 U.S.C. § 2201
General duties of Commission

In the performance of its functions the Commission is authorized to—

. . .

(b) Standards governing use and possession of material
establish by rule, regulation, or order, such standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property; in addition, the Commission shall prescribe such regulations or orders as may be necessary or desirable to promote the Nation's common defense and security with regard to control, ownership, or possession of any equipment or device, or important component part especially designed for such equipment or device, capable of separating the isotopes of uranium or enriching uranium in the isotope 235;

…

42 U.S.C. § 2239
Hearings and judicial review

(a)(1)(A) In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties under sections1 2183, 2187, 2236(c) or 2238 of this title, 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. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application under section 2133 or 2134(b) of this title for a construction permit for a facility, and on any application under section 2134(c) of this title for a construction permit for a testing facility. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

(B)(i) Not less than 180 days before the date scheduled for initial loading of fuel into a plant by a licensee that has been issued a combined construction permit and operating license under section 2235(b) of this title, the Commission shall publish in the Federal Register notice of intended operation. That notice shall provide that any person whose interest may be affected by operation of the plant, may within 60 days request the Commission to hold a hearing on whether the facility as constructed complies, or on completion will comply, with the acceptance criteria of the license.

(ii) A request for hearing under clause (i) shall show, prima facie, that one or more of the acceptance criteria in the combined license have not been, or will not be met, and the specific operational consequences of nonconformance that would be contrary to providing reasonable assurance of adequate protection of the public health and safety.

(iii) After receiving a request for a hearing under clause (i), the Commission expeditiously shall either deny or grant the request. If the request is granted, the Commission shall determine, after considering petitioners' prima facie showing and any answers thereto, whether during a period of interim operation, there will be reasonable assurance of adequate protection of the public health and safety. If the Commission determines that there is such reasonable assurance, it shall allow operation during an interim period under the combined license.

(iv) The Commission, in its discretion, shall determine appropriate hearing procedures, whether informal or formal adjudicatory, for any hearing under clause (i), and shall state its reasons therefor.

(v) The Commission shall, to the maximum possible extent, render a decision on issues raised by the hearing request within 180 days of the publication of the notice provided by clause (i) or the anticipated date for initial loading of fuel into the reactor, whichever is later. Commencement of operation under a combined license is not subject to subparagraph (A).

(2)(A) The Commission may issue and make immediately effective any amendment to an operating license or any amendment to a combined construction and operating license, upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person. Such amendment may be issued and made immediately effective in advance of the holding and completion of any required hearing. In determining under this section whether such amendment involves no significant hazards consideration, the Commission shall consult with the State in which the facility

involved is located. In all other respects such amendment shall meet the requirements of this chapter.

(B) The Commission shall periodically (but not less frequently than once every thirty days) publish notice of any amendments issued, or proposed to be issued, as provided in subparagraph (A). Each such notice shall include all amendments issued, or proposed to be issued, since the date of publication of the last such periodic notice. Such notice shall, with respect to each amendment or proposed amendment (i) identify the facility involved; and (ii) provide a brief description of such amendment. Nothing in this subsection shall be construed to delay the effective date of any amendment.

(C) The Commission shall, during the ninety-day period following the effective date of this paragraph, promulgate regulations establishing (i) standards for determining whether any amendment to an operating license or any amendment to a combined construction and operating license involves no significant hazards consideration; (ii) criteria for providing or, in emergency situations, dispensing with prior notice and reasonable opportunity for public comment on any such determination, which criteria shall take into account the exigency of the need for the amendment involved; and (iii) procedures for consultation on any such determination with the State in which the facility involved is located.

(b) The following Commission actions shall be subject to judicial review in the manner prescribed in chapter 158 of Title 28 and chapter 7 of Title 5:

(1) Any final order entered in any proceeding of the kind specified in subsection (a).

(2) Any final order allowing or prohibiting a facility to begin operating under a combined construction and operating license.

(3) Any final order establishing by regulation standards to govern the Department of Energy's gaseous diffusion uranium

enrichment plants, including any such facilities leased to a corporation established under the USEC Privatization Act.

Any final determination under section 2297f(c) of this title relating to whether the gaseous diffusion plants, including any such facilities leased to a corporation established under the USEC Privatization Act, are in compliance with the Commission's standards governing the gaseous diffusion plants and all applicable laws.