United States Court of Appeals

for the

Fifth Circuit

Case No. 23-60377

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

Petitioners,

v.

NUCLEAR REGULATORY COMMISSION;
UNITED STATES OF AMERICA,

Respondents.

ON APPEAL FROM THE NUCLEAR
REGULATORY COMMISSION IN NO. 72-1051

INTERVENOR BRIEF FOR HOLTEC INTERNATIONAL

BENJAMIN L. BERNELL, ESQ.
PILLSBURY WINTHROP SHAW PITTMAN LLP
Attorney for Intervenor Holtec International
401 Congress Avenue, Suite 1700
Austin, Texas 78701
(512) 580-9600

CP COUNSEL PRESS (800) 4-APPEAL • (326091)

CERTIFICATE OF INTERESTED PERSONS

Counsel of record certifies that the following persons and entities as described in the fourth sentence of Fifth Circuit 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-Appellants	**Former or present counsel**
• Fasken Land and Minerals, Ltd. • Permian Basin Land and Royalty Owners	• Allan Kanner • Annemieke M. Tennis

Respondents-Appellees	**Former or present counsel**
• United States Nuclear Regulatory Commission • United States of America	• Andrew Averbach • Justin Heminger

Proposed Intervenor	**Former or present counsel**
• Holtec International	• Jay E. Silberg • Anne R. Leidich • Benjamin L. Bernell

/s/ *Benjamin L. Bernell*
Benjamin L. Bernell

STATEMENT REGARDING ORAL ARGUMENT

For the reasons set forth in the Respondents' Brief, Holtec International does not currently think that oral argument would be helpful to resolve the issues in this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

INTRODUCTION

This proceeding involves the issuance of a spent nuclear fuel storage license (the "License") by the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") under the Atomic Energy Act of 1954, as amended ("AEA"), and NRC regulations at 10 C.F.R. pt. 72. The License authorizes Holtec International ("Holtec"), a private company, to temporarily store spent nuclear fuel for up to forty years at a site in southeastern New Mexico.

The Petitioners here, Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners (collectively, "Fasken"), are pursuing four claims in this proceeding: (1) the AEA does not authorize the Commission to regulate away-from-reactor spent nuclear fuel storage, (2) the Nuclear Waste Policy Act ("NWPA") prevents the Commission from licensing away-from-reactor spent nuclear fuel storage, (3) the Commission has violated the "major questions" doctrine, and (4) the License is illegal because it incorporates the option to store spent fuel owned by the Department of Energy ("DOE") at the Holtec facility should Congress amend the NWPA to permit such storage. Of these four arguments, only the last—regarding use of the Holtec facility for DOE-owned spent fuel—is specific to the Holtec License. The other three arguments raise *ultra vires* claims generally challenging the NRC's statutory authority to issue any license for away-from-reactor spent fuel storage.

Fasken relies on a recent panel decision, *Texas v. NRC*, 78 F.4th 827 (5th Cir. 2023), which has pending petitions for rehearing *en banc*, to assert that it should win the first three of these arguments. Fasken also relies on the panel decision with respect to the fourth argument to assert that it may pursue its *ultra vires* claims without fulfilling the party-aggrieved requirements of the Hobbs Act, as an "exception" to that statute.

Holtec respectfully disagrees.

While *Texas* may control the substance of Fasken's *ultra vires* claims, Holtec believes that decision should be overturned in rehearing *en banc*. Consistent with that belief, Holtec filed an amicus brief supporting the Respondents' petition for rehearing *en banc*. Holtec believes this case should be stayed pending that petition for rehearing, as requested in the Respondents' motion for temporary stay. In the alternative, if this case is not stayed, it should be moved to the D.C. Circuit where venue is proper.

Nonetheless, in order to preserve its arguments and explain why this Petition should be dismissed, and because Fasken relies heavily on *Texas*, Holtec will demonstrate here why *Texas* was incorrectly decided.

Contrary to the *Texas* decision, the NRC has clear statutory authority to license spent nuclear fuel storage under the AEA through its expansive authority over special nuclear material, byproduct material, and source material. Whether

that storage is at-reactor or away-from-reactor is irrelevant under the AEA: the NRC's authority remains the same. Having summarily revoked that authority by excising key provisions of the AEA, ignoring Congressional intent, and inflating a single vague phrase in the NWPA, the panel decision itself violates the "major questions" doctrine. Indeed, both the legislative history and a plain reading of its text prove that the NWPA does not repeal, whether explicitly or impliedly, the NRC's long-standing authority under the AEA to license away-from-reactor spent fuel storage facilities.

STATEMENT OF JURISDICTION

Holtec agrees with the Statement of Jurisdiction set forth by Respondents. Fed-Br. at 15-16.[1] Moreover, for the reasons set forth herein, Fasken has not established that venue is proper in this Court, and this case should be transferred to the D.C. Circuit, as Respondents requested in their Motion to Dismiss. Fed-Mot. at 22-24.

STATEMENT OF THE ISSUES

1. Whether Petitioners can challenge an NRC decision without being "parties aggrieved" within the meaning of the Hobbs Act because the NRC is alleged to have acted *ultra vires*.

[1] For the convenience of the panel, Holtec cites the page numbers added by CM/ECF.

2. Whether venue is proper in the Fifth Circuit when the Holtec facility has no ties to the Fifth Circuit, Petitioners rely on the Hobbs Act to establish venue, and Petitioners' *ultra vires* claims are exceptions to the Hobbs Act.

3. Whether the AEA authorizes the NRC to issue licenses permitting the away-from-reactor storage of spent nuclear fuel.

4. Whether the "major questions" doctrine overturns the NRC's clear statutory authority over the away-from-reactor storage of spent nuclear fuel.

5. Whether the NWPA repeals the NRC's clear statutory authority over the away-from-reactor storage of spent nuclear fuel.

STATEMENT OF THE CASE

I. STATUTORY BACKGROUND

A. NRC's Authority Under the Atomic Energy Act

In the AEA, the "Atomic Energy Commission was given broad regulatory authority over the development of nuclear energy." *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 526 (1978). This authority was later transferred to the Nuclear Regulatory Commission (hereinafter, the "Commission" or "NRC") by the Energy Reorganization Act of 1974, 42 U.S.C. § 5801 *et seq*.

Congress intended that the Commission create a comprehensive regime for the United States government to manage nuclear materials and the civilian nuclear industry. In developing the AEA, Congress provided for federal "Government control of the possession, use, and production of atomic energy and special nuclear material," in part "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." 42 U.S.C. § 2013(c). Congress also provided for development of atomic energy "to the maximum extent consistent with the common defense and security and with the health and safety of the public." *Id.* at § 2013(d).

In order for the Federal Government to exercise complete control over atomic energy and nuclear material, the AEA needed to be flexible. Indeed,

> [i]n the Presidential Message recommending the legislation which culminated in the Atomic Energy Act of 1954, it was said that flexibility was a peculiar desideratum and that, absent an accumulation of experience with the new civilian industry hopefully to be brought into being, "it would be unwise to try to anticipate by law all of the many problems that are certain to arise."

Siegel v. Atomic Energy Comm'n, 400 F.2d 778, 783 (D.C. Cir. 1968) (citing H.R. Rep. No. 83-328, at 7 (2d. Sess. 1954)). As such, Congress enacted "a regulatory scheme which is 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*, 400 F.2d at 783.

This "comprehensive regulatory scheme created by the [AEA] embraces the production, possession, and use of three types of radioactive materials—source material, special nuclear material, and byproduct material." *Train v. Colorado Pub. Interest Research Grp., Inc.*, 426 U.S. 1, 6-7 (1976) (omitting footnotes); *see* 42 U.S.C. §§ 2071, 2091, 2111, 2201(b). Consistent with this scheme, Congress specifically authorized the Commission to

> 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.

42 U.S.C. § 2201(b). This authority over special nuclear material, source material, and byproduct material "confers on the NRC authority to license and regulate the storage and disposal of [spent nuclear] fuel." *Bullcreek v. Nuclear Regulatory Comm'n*, 359 F.3d 536, 538 (D.C. Cir. 2004).

B. NRC's History of Licensing Spent Nuclear Fuel Storage Facilities

Exercising its authority over radioactive materials, the Commission has been licensing away-from-reactor spent nuclear fuel storage facilities for decades, years before the NWPA's enactment and even before the Commission issued a separate regulation for licensing spent nuclear fuel storage. In the 1970s, General Electric

Company was issued a special nuclear materials license under 10 C.F.R. pt. 70, "Domestic Licensing of Special Nuclear Material," to store spent nuclear fuel at its away-from-reactor Morris, Illinois facility. *See* General Electric Co., Issuance of Facility License for Possession Only, 39 Fed. Reg. 32,345, 32,456 (Sept. 6, 1974) (regarding continuation of special nuclear materials license to receive and possess spent nuclear fuel); *see also People of State of Ill. v. Nuclear Regulatory Comm'n*, 591 F.2d 12 (7th Cir. 1979) (rejecting Illinois' challenge to the Morris special nuclear materials license).

The Commission later recognized that its special nuclear material licensing regulations, including Part 70, were "designed for relatively short-term possession in conjunction with operations," and there was a "need for a new regulation covering the requirements for extended spent fuel storage under static storage conditions involving no operations on such materials." Storage of Spent Fuel in an Independent Spent Fuel Storage Installation, 43 Fed. Reg. 46,309 (Oct. 6, 1978) (proposed 10 C.F.R. pt. 72). This led to the promulgation of 10 C.F.R. pt. 72. Licensing Requirements for the Storage of Spent Fuel in an Independent Fuel Storage Installation, 45 Fed. Reg. 74,693 (Nov. 12, 1980) (final 10 C.F.R. pt. 72). Subsequently, the GE Morris facility license was transitioned to a Part 72 license. *See* General Electric Co.; Renewal of Materials License for the Storage of Spent

Fuel, 47 Fed. Reg. 20,231 (May 11, 1982) (noting docket and license number change).

Since the development of 10 C.F.R. pt. 72, the NRC has issued numerous licenses for spent nuclear fuel storage facilities. *See* In the Matter of All Independent Spent Fuel Storage Installation Licensees Order Modifying License, 69 Fed. Reg. 52,314 (Aug. 25, 2004) (listing thirty-eight Part 72 licenses as of date of publication). Some Part 72-licensed spent fuel storage facilities are located at reactor sites, while other Part 72 licenses are for facilities at former nuclear power plant sites or away-from-reactor sites. *See, e.g.*, Sacramento Municipal Utility District; Rancho Seco Independent Spent Fuel Storage Installation; Renewal of Special Nuclear Materials License, 83 Fed. Reg. 42,527 (Aug. 22, 2018) (regarding spent nuclear fuel storage facility at decommissioned reactor site); Notice of Issuance of Materials License SNM-2513 for the Private Fuel Storage Facility, 71 Fed. Reg. 10,068 (Feb. 28, 2006) (issuing materials license for away-from-reactor spent nuclear fuel storage facility). Regardless of location, the NRC continues to license interim spent fuel storage facilities under 10 C.F.R. pt. 72.

C. The Nuclear Waste Policy Act

A few years after the Commission promulgated Part 72, and years after the GE Morris facility was first licensed, Congress passed the Nuclear Waste Policy Act in an effort to address the question of the Federal Government's role in the

final disposition of spent nuclear fuel. Under the NWPA, the Federal Government has responsibility for the ultimate disposal of spent nuclear fuel. 42 U.S.C. § 10131(b)(2). Congress also recognized that it might take time for the Federal Government to be ready to accept spent nuclear fuel for disposal. As a result, the NWPA included two options to allow the *Federal Government* to provide temporary storage for spent nuclear fuel, including the ability to provide interim storage for no more than 1900 metric tons of capacity, *id.* at § 10155(a), and the authorization to develop monitored retrievable storage facilities, *id.* at §§ 10161-69. The NWPA neither explicitly nor implicitly repealed the NRC's authority to license interim storage of spent nuclear fuel.

D. The Hobbs Act

The Hobbs Act governs judicial review over Commission orders, including those denying intervention in adjudication at the agency. *See* 42 U.S.C. § 2239(a)-(b); 28 U.S.C. §§ 2342, 2344.

II. FACTUAL BACKGROUND

A. Holtec's Application and Adjudicatory Proceeding

Holtec agrees with the factual background of the NRC proceeding as set forth by Respondents. Fed-Br. at 22-25.

B. Other Proceedings in the Federal Courts

The Commission decisions in the Holtec proceeding have been under review in the D.C. Circuit since 2020, where Fasken and other interested parties have appropriately filed petitions for review pursuant to the Hobbs Act.[2] These petitions were consolidated by the D.C. Circuit and initial briefs have been filed. *See Beyond Nuclear v. NRC*, No. 20-1187 (consolidated with No. 20-1225 (*Don't Waste Michigan v. NRC*), No. 21-1104 (*Sierra Club v. NRC),* and No. 21-147 (*Fasken v. NRC*)). Fasken's claims in this proceeding are already the subject of petitions and briefs in the D.C. Circuit. *See* Opening Brief of Environmental Petitioners at 19-22, *Beyond Nuclear v. NRC*, Case No. 20-1187, Document No. 2015160 (D.C. Cir. Sept. 1, 2023); Opening Brief of Beyond Nuclear at 31-36, *Beyond Nuclear v. NRC*, Case No. 20-1187, Document No. 2015101 (D.C. Cir. Sept. 1, 2023).

Holtec agrees with the factual background of the proceeding, which gave rise to the panel decision in *Texas*, as set forth by Respondents. Fed-Br. at 28-30.

SUMMARY OF ARGUMENT

Fasken argues that the Holtec license should be vacated (1) under the panel decision in *Texas v. NRC*, 78 F.4th 827 (5th Cir. 2023), because the NRC lacks the

[2] An earlier petition for review to the D.C. Circuit was dismissed on ripeness and finality grounds. Order, *Beyond Nuclear, Inc. v. NRC*, D.C. Cir. Case No. 18-1340 (June 13, 2019).

authority to issue licenses for away-from-reactor storage of spent nuclear fuel under the AEA, and is barred from doing so by the NWPA and the "major questions" doctrine, and (2) as illegal under the NWPA for contemplating the possibility of DOE ownership of fuel at the Holtec facility. Neither argument is correct.

First, while the *Texas* panel decision (if it is not overturned) may control the substance of Fasken's *ultra vires* claims and provide Fasken with an "exception" to the Hobbs Act requirements, it does *not* establish that this Circuit—which has no ties to the Holtec facility—is the proper venue for Fasken's claims. Fasken instead relies on the Hobbs Act to establish venue, the very Act from which it takes an "exception." At a minimum, Fasken's claims would be more appropriate for review in the U.S. Court of Appeals for the D.C. Circuit where other participants in the NRC proceeding (Beyond Nuclear, Don't Waste Michigan, and Sierra Club) have already raised the same claims. Further, while it is the governing law of this Court and the rules of *stare decisis* require this panel to follow the panel decision in *Texas*, Holtec must preserve its rights on appeal and believes that the panel decision's use of an *ultra vires* exception to the Hobbs Act is improper.

Holtec also disagrees with the panel decision regarding the NRC's statutory authority to issue the Holtec license, and must also preserve its rights to those issues on appeal. The panel decision in *Texas* misreads the text of the AEA and

eviscerates the NRC's clear authority over the constituents of spent nuclear fuel, particularly special nuclear material and byproduct material, thus evading the NRC's authority to "license and regulate the storage and disposal of [spent nuclear] fuel." *Bullcreek*, 359 F.3d at 538. Contrary to *Texas*, the AEA is clear: the NRC has full and unfettered authority to license the storage of spent nuclear fuel based on its expansive authority over special nuclear and byproduct material. Combined with the NRC's authority over source material, the NRC has full regulatory jurisdiction over all of the material in spent nuclear fuel. This authority is clear in the language of the AEA. The panel decision in *Texas* inexplicably limiting the NRC's express authority over this material—contrary to statutory authorization and Congressional direction—itself violates the "major questions" doctrine.

The panel in *Texas* also turns the NWPA on its head by finding that it circumscribes the NRC's authority to license away-from-reactor facilities. In fact, by its terms the NWPA addresses the *Federal Government's* responsibility over spent nuclear fuel. It does not constrict the NRC's authority over privately-owned spent nuclear fuel. The legislative history of the NWPA also demonstrates that Congress was aware of the NRC's licensing of away-from-reactor storage under the AEA, and it did not repeal that authority in enacting the NWPA. On the

contrary, the NWPA's legislative history shows that Congress expected away-from-reactor spent fuel nuclear storage to continue.

Finally, this Court should also reject Fasken's argument that the Holtec License is illegal because it recognizes the possibility that a future Congress might authorize DOE to store spent fuel at the Holtec facility. Holtec is not barred from contemplating DOE's potential future ownership of spent fuel in the event Congress amends the NWPA.

STANDARD FOR REVIEW

This Court reviews NRC decisions under the Administrative Procedure Act, and must affirm decisions that are not otherwise "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

ARGUMENT

I. This Case Should be Transferred to the D.C. Circuit or, at a Minimum, Stayed Pending Resolution of the Petitions for Rehearing *En Banc* in *Texas*.

This Court should transfer this case to the D.C. Circuit because (1) the claims at issue here are already pending before that court, and (2) Fasken has failed to demonstrate why venue is appropriate in this Circuit. However, if this case is not transferred, Holtec agrees with Respondents that, at a minimum, it should be stayed pending resolution of the petitions for rehearing *en banc* in *Texas*. Fed-Br. at 36-38.

As Respondents explain, other parties have raised the exact same claims against the license in the D.C. Circuit that Fasken has raised here. Meanwhile, Fasken chose to raise *different* claims against the license in the D.C. Circuit. Fasken wants to have it both ways—challenging the same license on different bases in different courts according to what it perceives to be the most favorable forum. The court should reject Fasken's brand of forum-shopping and transfer this case to the D.C. Circuit so that all similar challenges to the same license are addressed in one place.

Similarly, Fasken improperly relies on the Hobbs Act when it is convenient and requests an exemption to that Act when it is not. Fasken cites the Hobbs Act to establish venue in this Court. Fasken-Br. at 15. But when it comes to whether it has jurisdiction to bring its claims, Fasken asserts that *Texas* allows an "*ultra vires* exception to the [Hobbs Act's] party aggrieved status requirement where (1) 'the agency action is attacked as exceeding [its] power' and (2) for constitutional challenges of 'the statute conferring authority on the agency.'" Fasken-Br. at 14 (citing *Texas*, 78 F.4th at 837). This is an improper manipulation of the Hobbs Act so that Fasken can appear before this Court, especially when—unlike the facility in *Texas*—Holtec's proposed facility has no ties to this Circuit. For these reasons, this Court should transfer the case to the venue previously sought by the Respondents, the D.C. Circuit. *See* Fed-Mot. at 22-24.

Holtec also agrees with Respondents that Fasken's claims here are *ultra vires* challenges attacking the NRC's authority to issue the License, and they cannot be brought under the Hobbs Act, regardless of the panel decision in *Texas*. *See* Fed-Br. at 40-44.

II. The AEA Grants the Commission Authority to Regulate Spent Nuclear Fuel.

Arguing from the recent panel decision in *Texas*, Fasken asserts that the NRC lacks statutory authority under the AEA "to license a private, away-from-reactor storage facility for spent nuclear fuel," and thus to issue the Holtec License. Fasken-Br. at 32-33 (citing *Texas*, 78 F.4th at 844). The *Texas* case, however, was wrongly decided. It was only by purging the AEA of inconvenient provisions, and ignoring decades of agency practice, that the panel was able to eliminate the NRC's authority to "license and regulate the storage and disposal of [spent nuclear] fuel." *Bullcreek*, 359 F.3d at 538.

A. The Commission Has the Exclusive and Expansive Authority to Regulate Special Nuclear Material, Including Special Nuclear Material in Spent Nuclear Fuel.

Contrary to Fasken's allegations, Fasken-Br. at 32-34, the Commission has the clear, exclusive, and expansive authority to license spent fuel, including its constituent special nuclear material. Limiting the Commission's well-established authority over special nuclear material to only "enumerated purposes" ignores the

clear and explicit direction of Congress and reverses decades of Commission precedent sanctioned by Congress.

1. The Commission's Expansive Authority to License Special Nuclear Material Is Not Limited to "Enumerated Purposes."

The Commission has the sole and exclusive regulatory authority over special nuclear material in a quantity sufficient to form a critical mass. *E.g.*, 42 U.S.C. § 2021(b)(3); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 250 n.11 (1984). This gives the Commission exclusive authority over the special nuclear material in spent nuclear fuel in quantities that are capable of achieving criticality.

Yet, the panel decision in *Texas* eviscerates that authority by claiming that the Commission can issue special nuclear material licenses "only for certain enumerated purposes—none of which encompass storage or disposal of material as radioactive as spent nuclear fuel." *Texas*, 78 F.4th at 840. On the contrary, the AEA's grant of authority to the Commission over special nuclear material includes not only the three "enumerated purposes" of 42 U.S.C. § 2073(a)(1)-(3), but also the fourth, more broadly drawn one—"for such other uses as the Commission determines to be appropriate to carry out the purposes of this chapter." *Id.* at § 2073(a)(4). The panel's interpretation in *Texas* unjustifiably reads this broad grant of authority out of existence.

The panel claims that the "[p]rinciples of statutory interpretation require" this provision to be "read in light of the other, more specific purposes listed—namely for certain types of research and development." *Texas*, 78 F.4th at 840 (citing *U.S. v. Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011)).

This interpretation is demonstrably erroneous. The AEA in § 2073(a)(4) explicitly authorizes the Commission to issue licenses for the possession of special nuclear material for "such other uses as the Commission determines to be appropriate." By limiting this provision to the confines of the Commission's authority in subparts (a)(1)-(a)(3), the panel decision wrongly treats an entire statutory provision "as surplusage." *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

The panel's crabbed reading of the Commission's authority to issue special nuclear material licenses also directly contradicts the AEA's legislative history. In 1958, Congress deliberately expanded the AEA to add § 2073(a)(4) "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 53a* [*§ 2073(a)(1)-(3)*]." Joint Committee on Atomic Energy, Amending the Atomic Energy Act of 1954, H.R. Rep. No. 85-2272, at 1 (2d Sess. 1958) (emphasis added). This change allowed "licenses for incipient new [i]ndustrial uses." *Id.* Thus, Congress specifically intended to provide the Commission with authority to issue special nuclear materials licenses for uses

beyond those "enumerated purposes" already listed in the AEA. The panel's interpretation of § 2073(a)(4) eliminates Congress' deliberate intent in adding that provision in order to broaden the AEA authority.

The panel also errs by using language in the source material definition to circumscribe the definition of special nuclear material, equating two different statutory provisions with differing language. *Texas*, 78 F.4th at 841. It is well established that when Congress "uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (emphasis added). The special nuclear material provision includes authorization for the Commission to issue licenses "for such other uses as . . . appropriate," while the source material definition does not. *Compare* 42 U.S.C. § 2073(a)(4), *with* 42 U.S.C. § 2093(a). Consequently, the panel errs in reading the same meaning into both provisions.

2. Limiting the Commission's Authority over Special Nuclear Material to "Enumerated Purposes" Is Contrary to Decades of Agency Practice and the Acquiescence of Congress.

Even aside from the Commission's statutory authority over spent nuclear material discussed above, the panel's narrow reading of the Commission's ability to issue special nuclear material licenses to only "enumerated purposes" is contrary to decades of Commission practice, including its issuance of licenses for nuclear

fuel fabrication and enrichment facilities. These facilities do not support research and development, they are not for medical purposes, and—contrary to *dicta* in the panel decision—they do not qualify as utilization or production facilities.

Indeed, Congress has confirmed the Commission's authority to issue these special nuclear materials licenses. In 1991, Congress specifically amended the AEA to *remove* uranium enrichment from the definition of a production facility so that the Commission could license enrichment facilities under the regulations that apply to fuel fabrication facilities. *See also 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) (discussing "remov[ing] uranium enrichment facilities from the definition of a production facility"); 42 U.S.C. § 2014(v) ("production facility … shall not include any equipment or device … capable of separating the isotopes of uranium or enriching uranium in the isotope 235"). At the very least, this constitutes a "*de facto* acquiescence in and ratification of" the Commission's ability to issue special nuclear material licenses beyond the enumerated purposes in the AEA. *Power Reactor Dev. Co. v. Int'l Union of Elec. Radio and Mach. Workers*, 367 U.S. 396, 409 (1961). Yet, these special nuclear material licenses are now subject to attack under the panel's stated rationale, despite clear Congressional acceptance.

B. The Commission's Authority Over Byproduct Material Encompasses All of the Materials Made Radioactive in Spent Nuclear Fuel.

Contrary to Fasken's allegations, Fasken-Br. at 34, based on the decision in *Texas*, the Commission also has the clear authority to license the byproduct material constituents in spent nuclear fuel. The panel decision in *Texas* limiting the Commission's authority over the byproduct material in spent nuclear fuel is based on a false analogy to radium-226, and ignores the language of the AEA and the clear and explicit direction of Congress.

The AEA provides the Commission with explicit authority over all of the material made radioactive in a nuclear power plant. In fact, the AEA has *always*, since its passage in 1954, defined byproduct material as "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." The Atomic Energy Act of 1954, Pub. L. No. 83-703, 68 Stat. 919, 923 (1954) (defining byproduct material in the same terms as currently used in 42 U.S.C. § 2014(e)(1)). As a result, byproduct material under the AEA encompasses the "radioactive materials brought into being by nuclear fission and associated nuclear reactions." *Nuclear Waste Management: Oversight Hearings before the Subcommittee on Energy and the Environment of the Committee on Interior and Insular Affairs*, 95th Cong. 168-169 (1977). Thus, all of the radioactive material in

spent nuclear fuel is byproduct material, unless it otherwise qualifies as source or special nuclear material,[3] and all of it falls within the NRC's jurisdiction under the AEA. There are no exceptions.

Relying on the panel's decision in *Texas*, Fasken nonetheless argues that the Commission's authority over byproduct material is restricted "to license for the possession of much less radioactive components of broken down spent nuclear fuel." Fasken-Br. at 34. Presumably this refers to the panel's finding that the Commission's regulatory authority is limited to the types of byproduct material that "emit radiation for significantly less time than spent nuclear fuel." *Texas*, 78 F.4th at 841. The panel bases this finding on "the definition of byproduct materials in § 2014(e)(3)–(4)," which "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, the panel concludes that because some isotopes in spent nuclear fuel have much longer half-lives than radium-226, then they must not be byproduct material. *Id.*

This limitation on the Commission's authority over byproduct material contradicts both the plain text and the legislative history of the AEA. The AEA itself demonstrates why the panel's use of radium-226 as the model byproduct

[3] Contrary to *Texas*, 78 F.4th at 841, plutonium-239 is special nuclear material, not byproduct material. 42 USC § 2014(aa). The panel's reference to plutonium-239 to support its byproduct material argument is therefore misplaced.

material is pure invention. Byproduct material is defined in four subparts in 42 U.S.C. § 2014(e)(1)-(4). The panel ignores the first subpart[4]—the only one relevant to this case as it applies to material produced in a nuclear reactor—and focuses on § 2014(e)(3), which controls radium-226, and § 2014(e)(4), which refers to other material that "'would pose a threat similar to the threat posed by . . . radium-226 to the public health and safety.'" However, the panel fails to recognize that the Commission's authority over materials "similar to" radium-226 applies only to "discrete source[s] of *naturally occurring* radioactive material," 42 U.S.C. § 2014(e)(4), and is irrelevant to the Commission's authority over the radioactive material created by fission in nuclear reactors. *Id.* at § 2014(e)(1). This expansion of Commission authority into naturally occurring radioactive material, which only came about in the Energy Policy Act of 2005, Pub. L. No. 109–58, 119 Stat. 806-807 (2005), was not intended to, and did not, reduce the Commission's fifty-year old authority over materials irradiated in a nuclear reactor.

Moreover, the panel's reference to the Commission's authority over "types of byproduct material [that] may be disposed" under "42 U.S.C. § 2111(b)," *Texas*, 78 F.4th at 841, is irrelevant to the *temporary* storage of spent nuclear fuel at issue here. In fact, this provision of the AEA only exists to clarify that the

[4] "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, ..." 42 U.S.C. § 2014(e)(1).

Commission's new authority over radium-226 and naturally occurring radioactive material 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. 1, 2007). This provision simply has no relevance to the agency's foundational authority over byproduct material created by fission.

C. The "Major Questions" Doctrine Does Not Undermine the Commission's Clear Authority to License Facilities for the Storage of Spent Nuclear Fuel.

Fasken further relies on *Texas* to claim that the "[d]isposal of nuclear waste" triggers the "major questions" doctrine because it is "an issue of great 'economic and political significance.'" Fasken-Br. at 44 (citing *Texas*, 78 F.4th at 844). But it is not the Holtec License, for the temporary storage—not disposal—of spent nuclear fuel, that invokes the "major questions" doctrine in this case. By eradicating over fifty-years of established Commission authority, contrary to the plain text of the Commission's governing regulation and without explicit Congressional authorization, the panel decision itself runs afoul of the "major questions" doctrine. *See West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (regarding elements of "major questions" doctrine).

Under the "major questions" doctrine, 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 to an agency." *Id.* at 2607-2608. This boils down to a simple, fundamental question: "whether Congress in fact meant to confer the power the agency has asserted." *Id.* at 2608.

The "major questions" doctrine is applied where an agency goes *beyond* its statutory authority. For example, it applies when an agency "claim[s] to discover an unheralded power representing a transformative expansion of its regulatory authority in the vague language of a long-extant, but rarely used, statute designed as a gap filler," or for any change in regulatory authority that is "not only unprecedented" but "also effect[s] a 'fundamental revision of the statute.'" *Id.* at 2595-2596. After all, Congress does not "typically use oblique or elliptical language to empower an agency to make a 'radical or fundamental change' to a statutory scheme." *Id.* at 2609. Since "[a]gencies have only those powers given to them by Congress, and 'enabling legislation' is generally not an 'open book to which the agency [may] add pages and change the plot line,'" the courts "presume that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'" *Id.*

There is no question that licensing spent nuclear fuel storage, whether away-from-reactor or at reactor, is within the plain text of the most fundamental grants of

NRC authority. The Commission's authority over nuclear materials is a "comprehensive regulatory scheme" that "embraces the production, possession, and use of three types of radioactive materials—source material, special nuclear material, and byproduct material." *Train*, 426 U.S. at 6-7. By its terms, this is the authority to license all "uses [of special nuclear material] as . . . appropriate to carry out the purposes of [the Act]," 42 U.S.C. § 2073(a)(4), the authority to license source material, *id.* at § 2093, and the authority over byproduct material, *id.* at § 2111. This is not the vague language of a long-extant, but rarely used, statute designed as a gap filler.

Nor is the licensing of away-from-reactor spent nuclear fuel storage an unheralded power or even an unprecedented change in the Commission's regulatory authority. It is a well-established, decades-long agency practice to license facilities like GE Morris, a practice that has continued with the full awareness of Congress. 128 Cong. Rec. 32,945, 32,946 (1982). Yet Congress has never, in the intervening decades, amended the AEA or otherwise mandated that the Commission stop licensing these spent nuclear fuel storage facilities. Instead, it is the panel's decision in *Texas* that radically undercuts Commission authority, contrary to decades of precedent, through the oblique language of 42 U.S.C. § 10155(h), running headlong into the "major questions" doctrine.

III. The NWPA Does Not Abrogate the Commission's Authority to License Spent Nuclear Fuel Storage Facilities.

A. Legislative History Demonstrates that the NWPA Does Not Prohibit Privately-Owned Spent Nuclear Fuel Storage.

The panel in *Texas* incorrectly decides that the Commission's authority to license away-from-reactor spent nuclear fuel storage "cannot be reconciled with the [NWPA]." *Texas*, 78 F.4th at 842. On the contrary, Congress' primary goal in the NWPA was to establish a *Federal Government* program for disposing of spent nuclear fuel, including a limited amount of federal interim spent fuel storage. 42 U.S.C. §§ 10155 and 10161-10169. The NWPA thus created a comprehensive statutory scheme for the Federal Government to address spent nuclear fuel, prioritizing Federal Government construction of the permanent repository together with some specific categories of Federally-owned interim storage. Nothing in the NWPA remotely suggests that Congress intended to eliminate private at-reactor or away-from-reactor spent nuclear fuel storage or to erase the Commission's existing AEA regulatory authority over private storage facilities.

In fact, during consideration of the NWPA, Congress explicitly recognized that the Commission was licensing privately-owned away-from-reactor storage facilities. As the NRC Executive Director for Operations testified during Congress' development of the NWPA:

> The Commission has stated with the issuance of its regulation, 10 C.F.R. Part 72, which provides the licensing criteria for independent spent fuel storage installations, that there are no compelling safety or environmental reasons generally favoring either reactor sites or away-from-reactor sites. Thus, Part 72 establishes the licensing framework for such storage either at reactor sites or *away-from-reactors* using either wet or dry storage technologies.

Radioactive Waste Legislation: Hearings on H.R. 1993, H.R. 2800, H.R. 2840, H.R. 2881, and H.R. 3809 Before the Subcomm. On Energy and the Environment of the House Comm. On Interior and Insular Affairs, 97th Cong. 326 (1981) (emphasis added). Nowhere do the hearings or debates suggest that these licenses would become invalid after the NWPA was enacted or that new licenses would not be issued. During the debates, Rep. Corcoran of Illinois even recognized that the already-existing Morris, Illinois away-from-reactor storage facility would continue to operate and that delays in permanent disposal would "put[] even greater pressure on the [away-from-reactor] facility at Morris." 128 Cong. Rec. 32,945 (1982). There is no hint that after the NWPA became law, the Morris facility was expected to close or become the last of its kind.

The focus instead was on ownership of the Morris facility, as Rep. Corcoran worked to prevent the Federal Government from taking over 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."). A Senate bill preceding the NWPA would have "grant[ed] the

Secretary of Energy the authority to 'construct, acquire or lease one or more [away-from-reactor] facilities.'" 128 Cong. Rec. 32,946 (1982). Rep. Corcoran objected and Section 10155(h) was intended to address "the heart of the problem that many of us have, that is, the concern about whether or not private [away-from-reactor] storage facilities would be vulnerable to a federal takeover under [the NWPA]." 128 Cong. Rec. 28,033 (1982). Thus, Section 10155(h), and its limitation on the "use, purchase, lease, or other acquisition" of away-from-reactor storage facilities not already owned by the Federal Government, 42 U.S.C. § 10155(h), would "prohibit the Secretary [of Energy] from providing capacity for the storage of spent nuclear fuel" at private facilities like Morris, Ill., *see* 128 Cong. Rec. 32,560 (1982). Thus, the prohibition in Section 10155(h) was intended to constrain the Federal Government's ability to provide storage at away-from-reactor facilities, not the ability of private parties.

B. The NWPA Does Not Repeal the Commission's Authority to License Spent Nuclear Fuel Storage Under the AEA.

The NWPA also does not explicitly (or even impliedly) repeal the Commission's authority to license spent nuclear fuel facilities under the AEA.

Fasken points to Section 10155(h) and claims that it "discourage[s] the use of private, off-site storage." Fasken-Br. at 38. However, even if that provision constituted "discouragement" of private, off-site storage (which it does not), that is not enough to repeal the Commission's existing statutory authority. An "implied

repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'" *Branch v. Smith*, 538 U.S. 254, 273 (2003). In fact, the Supreme Court will "not infer a statutory repeal unless the later statute expressly contradicts the original act or unless such a construction is absolutely necessary in order that the words of the later statute shall have any meaning at all." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007).

Here, there is no contradiction. Both the NWPA and the AEA can be (and have been) given effect and meaning. Private industry can seek licensing for at-reactor or away-from-reactor interim storage under the AEA, *see, e.g.*, *Bullcreek, supra,* while the Federal Government can provide interim storage under the limitations of the NWPA. 42 U.S.C. §§ 10155(b)(l)(B), 10168(d). The Federal Government cannot, however, make use of private interim storage facilities absent the development of a permanent repository or an amendment to the NWPA. *Id.* at § 10155(h).

If Congress had intended to prohibit the use of private, away-from-reactor spent nuclear fuel storage facilities or to revoke the NRC's pre-existing authority to license such facilities, it would have simply said so in express terms in the NWPA. "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide

elephants in mouseholes." *Whitman v. Am. Trucking Associations, Inc.*, 531 U.S. 457, 467-68 (2001).

Instead, Congress used neutral language and limited the applicability of Section 10155(h) to only the NWPA. As Section 10155(h) states,

> Notwithstanding any other provision of law, *nothing in this chapter* shall be construed to encourage, authorize, or require the private or Federal use, purchase, lease, or other acquisition of any storage facility located away from the site of any civilian nuclear power reactor and not owned by the Federal Government on January 7, 1983.

This "chapter" is the NWPA, chapter 108 of title 42 of the U.S. Code, not the AEA, which is in chapter 23 of title 42. The *NWPA* does not encourage the private use of an away-from-reactor storage facility. This says nothing about the NRC's authority under the AEA, and that authority remains in place.

Thus, Congress neither repealed, nor intended to repeal, the NRC's authority for the licensing of off-site spent nuclear fuel storage under the AEA. Indeed, shortly after the NWPA's enactment, the Supreme Court rightly recognized the NRC's regulation of away-from-reactor storage of spent nuclear fuel. *Pac. Gas & Elec. Co. v. State Energy Res. & Dev. Comm.*, 461 U.S. 190, 217 (1983) ("NRC has promulgated detailed regulations governing storage and disposal away from the reactor. 10 CFR pt. 72 (1982)").

C. The Holtec License Is Not Prohibited by the NWPA Because It Contemplated Storage of DOE Spent Fuel Should the NWPA Be Amended

Apart from the decision in *Texas*, Fasken further argues that the Holtec License is illegal because it allegedly incorporates the option for the Department of Energy ("DOE") to store fuel at the Holtec facility. Fasken-Br. at 39-42. With respect to these claims, Holtec agrees with the responses set forth by Respondents. Fed-Br. at 64-67. During the NRC hearings on the Holtec License, all parties, as well as the NRC's Atomic Safety and Licensing Board and the Commission itself, agreed that DOE does not currently have the legal authority to store spent fuel at the Holtec facility. Moreover, as Fasken acknowledges, Holtec agrees that it would be illegal for DOE to take title of spent nuclear fuel at this time, Fasken-Br. at 41, and Holtec has further recognized that fact in this very brief. For Fasken's hypothetical to be anything more than a theoretical concern, multiple parties and multiple agencies would have to deliberately violate the law. That will not occur.

Nonetheless, this argument should also be rejected because there is a legal means for Holtec to utilize its license, which Fasken ignores. As the Commission summarized, "Holtec seeks a license that would allow it to enter into lawful customer contracts today, but also permit it to enter into additional customer contracts if and when they become lawful in the future." *Holtec International* (Hi-Store Consolidated Interim Storage Facility), CLI-20-4, 91 N.R.C. 167, at 176

(2020). Holtec can store spent nuclear fuel owned by private parties without running afoul of the NWPA. *See id.* Holtec has DOE as a potential customer because it hopes for a future legislative change. There is no bar against Holtec planning for a future where DOE may be permitted to store spent nuclear fuel at the facility. *Id*. Fasken does not (1) establish that this Commission decision was arbitrary or capricious in this regard or (2) otherwise provide authority for revoking the license on these grounds.

Finally, this argument further demonstrates exactly why this case should be moved to the D.C. Circuit: this same argument is also already being pursued against the Holtec License by another party to the NRC proceeding (Beyond Nuclear) in the D.C. Circuit, and a separate decision in this Court may result in a decision on the same license that directly conflicts with the D.C. Circuit. *See* Opening Brief of Beyond Nuclear at 17-22, *Beyond Nuclear v. NRC*, Case No. 20-1187, Document No. 2015101 (D.C. Cir. Sept. 1, 2023).

CONCLUSION

For the reasons set forth above, Fasken's Petition should be denied.

Dated: December 8, 2023

Respectfully submitted,

/s/ *Benjamin L. Bernell*
Benjamin L. Bernell
PILLSBURY WINTHROP SHAW PITTMAN, LLP
401 Congress Ave. Suite 1700
Austin, TX 78701
(512) 580-9600
ben.bernell@pillsburylaw.com

Jay E. Silberg
Anne R. Leidich
PILLSBURY WINTHROP SHAW PITTMAN, LLP
1200 Seventeenth St., NW
Washington, DC 20036
(202) 663-8000
jay.silberg@pillsburylaw.com
anne.leidich@pillsburylaw.com

Counsel for Holtec International

CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2023, a true and correct copy of the foregoing Intervenor Brief for Holtec International was served via electronic filing with the Clerk of Court and all registered ECF users.

Upon acceptance by the Court of the e-filed document, 7 paper copies will be filed with the Court within the time provided in the Court's rules via Federal Express.

Dated: December 8, 2023

s/ *Benjamin L. Bernell*
Benjamin L. Bernell
PILLSBURY WINTHROP SHAW PITTMAN, LLP
401 Congress Ave. Suite 1700
Austin, TX 78701
(512) 580-9600
ben.bernell@pillsburylaw.com

Jay E. Silberg
Anne R. Leidich
PILLSBURY WINTHROP SHAW PITTMAN, LLP
1200 Seventeenth St., NW
Washington, DC 20036
(202) 663-8000
jay.silberg@pillsburylaw.com
anne.leidich@pillsburylaw.com

Counsel for Holtec International

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because this pleading contains 7,217 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14-point Times New Roman font.

/s/ *Benjamin L. Bernell*