



**Regulatory Roundup: Streamline Permitting,
Alleviate Burdens, Maintain Safety and Promote
Energy Independence**

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Introduction and Overview

- The NRC has issued “possession” licenses for decades, and its authority to do so has been upheld in two Circuits.
- Texas and oil and gas interests (Fasken) challenged the NRC’s away-from-reactor “possession” license for the ISP spent nuclear fuel (“SNM”) storage project. Fifth Circuit overturned the ISP’s license, holding that the NRC lacks such authority.
- NRC and ISP sought rehearing en banc, but that was denied, 9-7.
- Holtec license also challenged by Fasken in Fifth Circuit, but Fifth Circuit reversed the NRC’s license for Holtec, too, on the same basis.
- The Supreme Court granted cert in ISP case and heard oral argument on March 5, 2025. Holtec case on hold.

Background - Blue Ribbon Commission on America's Nuclear Future, Bipartisan Policy Center

- The BRC was created in 2010 as an advisory committee to the Secretary of Energy.
- Final Report issued in 2012: www.brc.gov.
- In 2014, Bipartisan Policy Center, started by Republican and Democratic Senate Majority Leaders, took up issue.
- The BPC has finished Phases 1 and 2 of its “Nuclear Waste Initiative,” but did not issue a Report for Phase 1 – it was not possible to find consensus then.
- Instead, as part of Phase 1, the BPC issued a series of papers on contentious topics:

Background -- Continued

- <http://bipartisanpolicy.org/library/nuclear-waste-primer-series/>: Options for Consolidated Storage of Spent Nuclear Fuel; States Regulatory Authorities over Nuclear Waste Facilities; Restarting the Yucca Mountain Project – the Case for and Against; Ten Things You Need to Know About Nuclear Waste; Transporting Spent Nuclear Fuel in the United States – An Assessment of Current Capabilities and Future Challenges; Options for Near-Term Federal Action.

Background -- BPC Nuclear Waste Initiative – Phase 2

- In late 2015, BPC inaugurated Phase 2 of the Nuclear Waste Initiative, Advisory Council held its first meeting.
- Final Report for Phase 2 mostly about consent-based siting. One dispute – whether to repeal/amend AEA's preemption provisions. Environmental groups support repeal/amendment, others oppose.
- BPC's Phase 2 Final Report issued Sept. 27, 2016.
- Co-Chairs of Advisory Council, which is broad-based in membership, were former Democratic Congressman Norm Dicks (my colleague) and former Republican Governor Sonny Perdue of Georgia (later Secretary of Agriculture).

Storage Licenses

- The NRC (and AEC before it) have been issuing storage licenses for SNM (as well as for “source material” and “byproduct material”) for decades.
- Most have been at reactor sites, but a few have not – an example is include GE’s Morris, IL facility. *See People of the State of Illinois v. NRC*, 591 F.2d 12 (7th Cir. 1979) (rejecting challenge to GE away-from-reactor storage license).
- As the NRC sees it, there is no legal distinction between at-reactor storage and away-from-reactor storage licenses, because the statute gives NRC the authority to issue “possession” licenses regardless of what other facility may exist or have existed at the location proposed.

Away-from-Reactor Storage Facilities?

- ISP filed an application at NRC 2017 for a spent fuel storage facility in far-western TX, at its existing low-level waste site in Andrews County, on NM border.
- Holtec filed an application for such a facility at its NM/Eddy-Lea site (near WIPP).
- ISP received license in Sept. 2021; Holtec received its license in 2022.
- NRC relies on authority to issue “possession” licenses, for SNM under 42 U.S.C. § 2073(a), for “source material” under 42 U.S.C. § 2093(a), and for “byproduct material” under 42 U.S.C. § 2111(a), see 42 U.S.C. § 2014 for definition of terms, and authority to adopt rules for licenses under 42 U.S.C. § 2201(c).

Away-from-Reactor Storage Licenses

- This authority over SNM, source material, and byproduct material “confers on the NRC authority to license and regulate the storage of [spent nuclear] fuel.” *Bullcreek v. NRC*, 359 F.3d 536, 538 (D.C. Cir. 2004); see also *New Mexico ex rel. Balderas v. NRC*, 59 F.4th 1112, 1122 (10th Cir. 2023) (following *Bullcreek*); *Skull Valley Band of Goshute Indians v. Nielsen*, 376 F.3d 1223, 1232 (10th Cir. 2004)(same).
- Legal challenges as to ISP’s license were filed in DC (No. 21-1048) by environmental groups, Fifth (No. 21-60743) by TX and Fasken, and Tenth Circuit (No. 21-9593) by NM.
- In Firth and Tenth Circuits, NRC argued that TX and NM

Away-from-Reactor Storage Licenses

- cannot challenge NRC's actions because not parties below. Tenth Circuit agreed, Fifth Circuit disagreed.
- The DC and Tenth Circuits dismissed challenges to ISP's license, *Don't Waste Michigan v. NRC*, 2023 WL 395030 (D.C. Cir., Jan. 25, 2023), citing *Bullcreek, supra* ("the Commission to license and regulate the storage and disposal of [SNM]"); *Balderos, supra*, but the Fifth Circuit overturned NRC's action issuing the ISP license. *Texas v. NRC*, 78 F.4th 827 (5th Cir. 2023).
- The Commission has sole and exclusive authority over SNM in quantities sufficient to form a critical mass. 42 USC § 2021(b)(3); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 250 n. 11 (1984). This gives the Commission

Away-from-Reactor Storage Licenses?

- exclusive authority over SNM in spent fuel in quantities sufficient to achieve criticality.
- The Fifth Circuit construed the AEA, 42 USC § 2074(a)(4), as not enlarging the NRC's authority to license possession of SNF beyond that provided in subsections (a)(1)-(3). It claimed that NRC can issue such licenses "only for certain enumerated purposes – none of which encompasses storage or disposal of material as radioactive as [SNF]." *Texas, supra*, at 840.
- The Panel's conclusion is contrary to the statutory language itself in § 2074(a)(4) and the legislative history.

Away-from-Reactor Storage Facilities

- Statute authorizes possession licenses “for such other uses as the Commission determines to be appropriate.” When § 2074(a)(4) was added to the AEA in 1958, Congress deliberately expanded the AEA to add that for the possession of SNM within the United States *for use which do not fall expressly within the present provisions of subsection 53(a)* [subsection 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).
- The Fifth Circuit also decided that the NWPA did not grant NRC authority to issue a private “possession” license for SNM, and the “major questions doctrine” prevented NRC from doing so.

Away-from-Reactor Storage Licenses?

- The NWPA issue goes away if the NRC has statutory authority, and so does “major questions doctrine” issue.
- Two issues from NRC in the Supreme Court on certiorari—whether a party which did not satisfy NRC’s intervention standards may seek judicial review of NRC’s action in issuing a license, and whether NRC has statutory authority to issue a “possession” license for an away-from-reactor spent fuel storage facility.
- Case was argued on March 5, 2025.
- Court very concerned about the intervention issue, and whether NRC’s “admissible contention” rule permits the NRC, in effect, to decide who gets to litigate with it.

Away-from-Reactor Storage Licenses

- Court also concerned whether the fact that the statutory text does not refer to “spent nuclear fuel” suggests NRC lacks authority to issue a possession license for spent fuel storage facilities.
- The Court inquired about the Yucca Mountain Project, and whether the authority to issue a “possession” license for spent fuel storage might be constrained, given the NWPA, because the government is not pursuing the YM repository.
- Will ISFs ever get built – or not, like PFS?
- Other States may consider hosting ISFs, but political issues involve being a “de facto” repository, water, land rights, other environmental and safety issues.

Thank you. Questions?

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