Congressional Research Service
Informing the legislative debate since 1914

Legal Sidebar

Consolidated Interim Storage of Spent Nuclear Fuel: Recent Licensing Decisions

July 15, 2024

Storage of spent nuclear fuel (SNF) is a topic of perennial interest to Congress. The Nuclear Regulatory Commission (NRC) has issued three licenses for storage of SNF at privately owned, away-from-reactor consolidated interim storage facilities (CISFs). One of those licenses, granted in 2006, was terminated by the license holder. The U.S. Court of Appeals for the Fifth Circuit has vacated the other two licenses, for private facilities in Texas and New Mexico, in recent opinions. The Fifth Circuit's rulings have widened a split among the circuit courts regarding whether a party that did not participate in administrative proceedings before an agency may obtain judicial review of the agency action related to those proceedings. A separate challenge to certain NRC orders issued in the agency proceedings that led to the issuance of the license for the New Mexico facility is currently pending before the U.S. Court of Appeals for the D.C. Circuit.

In the case of the Texas CISF, petitions for certiorari filed by the NRC and the license holder are pending before the Supreme Court. The petitioners have asked the Court to resolve two disagreements between the Fifth Circuit and other circuit courts: (1) who is permitted to challenge NRC licensing decisions in federal court, and (2) whether the NRC has statutory authority to license private CISFs. In the case of the New Mexico CISF, the NRC and the license holder have also filed petitions for certiorari asking the Court to resolve the same questions.

Civilian Nuclear Waste Storage and Disposal

The Energy Reorganization Act of 1974 created the NRC and assigned to it certain regulatory authorities previously held by its predecessor agency, the Atomic Energy Commission, including responsibility for regulating certain uses of "source material" (uranium, thorium, and ores containing those elements at specified concentrations); "special nuclear material" (plutonium and enriched uranium, including materials artificially enriched by those materials); and "byproduct material" (other specified materials, including radioactive materials resulting from the production or use of special nuclear material). The NRC promulgated regulations for the licensing of waste storage facilities in 1980.

The Nuclear Waste Policy Act of 1982 (NWPA) required the Department of Energy (DOE) to take title to civilian SNF and to begin disposing of civilian SNF no later than January 31, 1998. Exercising authority

Congressional Research Service
https://crsreports.congress.gov
LSB11199

provided by the NWPA, DOE entered into contracts (known as the "standard contract") to take title to and begin disposing of civilian SNF no later than that date.

The NWPA contemplates a federal geologic repository for permanent disposal of SNF. The NWPA also authorizes DOE to construct a federal monitored retrievable storage (MRS) facility for long-term—but not necessarily permanent—storage of these materials that would permit retrieval for additional processing or disposal. Amendments to the NWPA in 1987 stipulated that the only permissible site for a permanent repository is Yucca Mountain, NV. The same amendments required DOE to obtain an NRC license for the construction of a permanent repository before beginning construction of any MRS facility.

Neither a permanent repository nor an MRS facility existed as of January 31, 1998. DOE applied for a construction license for a permanent repository at Yucca Mountain in 2008. It unsuccessfully attempted to withdraw that application in 2010. Although NRC staff completed a Safety Evaluation Report in 2015, the adjudicatory proceedings related to that application have been suspended since September 30, 2011. Congress has not appropriated funding for activities relating to a Yucca Mountain repository since FY2010, and NRC has issued no license. DOE therefore lacks the authority to construct either a permanent repository or an MRS.

Because the Yucca Mountain repository has not been built, DOE has been unable to comply with its obligations under the standard contract. This partial breach of contract has resulted in substantial litigation with DOE counterparties seeking to recover storage costs they would not have incurred had DOE taken title to the SNF when it was obligated to do so. Payments pursuant to DOE settlements and judgments in this litigation amounted to approximately $10.6 billion as of September 30, 2023. SNF from civilian nuclear reactors continues to be stored primarily on site at each plant that generated the waste, some of which are no longer in operation.

Private Fuel Storage, Inc., and *Bullcreek v. NRC*

With SNF continuing to accumulate at reactor sites, private entities proposed CISFs to hold this material. In 1997, Private Fuel Storage, Inc., applied for an NRC license to operate a CISF on the Goshute Reservation in Skull Valley, UT. Hearings are required in licensing proceedings, and individuals and entities who meet certain statutory requirements may intervene in the hearings. Utah officials sought to intervene in the NRC proceedings for the Private Fuel Storage license and petitioned to stay the licensing proceeding and amend the NRC's regulations governing such facilities. Utah argued that the NRC lacked jurisdiction over private, away-from-reactor storage facilities. After the NRC rejected Utah's petition, Utah, with other intervenors, petitioned for review in the D.C. Circuit.

Utah's primary argument was that a provision of the NWPA stripped the NRC of any authority over away-from-reactor private storage facilities. Utah relied on Section 10155 of the NWPA, which 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.

Utah argued that the "notwithstanding" language in this provision removed any preexisting NRC authority to license and regulate away-from-reactor private storage. Utah also argued that Section 10155 must apply to both federal and private facilities, because limiting other provisions of the NWPA to only federal facilities—specifically, provisions providing certain protections to states and localities that host storage facilities—would "make no sense."

In *Bullcreek v. Nuclear Regulatory Commission*, the D.C. Circuit rejected Utah's arguments. The court first acknowledged that the Atomic Energy Act (AEA) does not explicitly refer to storage or disposal of SNF, but the court stated that the act "has long been recognized" to grant the NRC authority to license and

regulate SNF storage and disposal facilities. The court then held that the words "nothing in this chapter" as used in Section 10155 of the NWPA limited the effect of that section to the NWPA itself and thus had no effect on the NRC's preexisting authority under the AEA. The court rejected Utah's interpretation, reading "notwithstanding any other provision of law" as used in Section 10155 to serve the purpose of eliminating reliance on an earlier draft of the provision that would have established additional requirements for private storage. Finally, the court rejected the argument that applying the NWPA's protections only to states and localities hosting federal storage facilities would lead to a nonsensical result, observing that, when passing the NWPA, Congress knew that the NRC already regulated private facilities.

In a later suit related to the Private Fuel Storage project, the U.S. Court of Appeals for the Tenth Circuit followed the *Bullcreek* opinion on the question of the NRC's authority to license away-from-reactor storage of SNF. The Tenth Circuit stated that it was "persuaded by" the *Bullcreek* opinion but added no further analysis on that issue.

The NRC ultimately granted a license for the Utah project in 2006 but observed that, because of the location of this project, the Bureau of Indian Affairs and the Bureau of Land Management would also have to approve the project. The project received neither of those approvals, and Private Fuel Storage eventually asked the NRC to terminate its license.

The Texas CISF

Waste Control Specialists LLC (WCS) submitted an application to the NRC in 2016 for a private CISF to be located in Andrews County, TX, near the New Mexico border. After requesting that the NRC suspend review of its application, WCS and an entity called Orano CIS LLC formed a joint venture, Interim Storage Partners LLC (ISP). In 2018, ISP submitted a revision of the WCS application, and the NRC resumed its review. New Mexico's governor, Environment Department, and Energy, Minerals and Natural Resources Department each submitted comments on the ISP application to the NRC, but they did not seek to intervene as a party in the licensing proceedings. Similarly, the Texas Commission on Environmental Quality and the governor of Texas submitted comments to the NRC, expressing concerns that licensing the CISF could "result in the State of Texas becoming the permanent solution for disposition of SNF," but neither sought to intervene in the NRC proceedings. Various groups, including two private entities with interests in resource extraction (collectively referred to as Fasken), sought to intervene in the NRC proceedings. The NRC granted one petition for intervention but denied the rest, including Fasken's. Texas passed a law in August 2021 prohibiting new SNF storage facilities. The NRC issued ISP a license for the proposed Texas facility in September 2021.

The Tenth Circuit Decision

New Mexico petitioned the Tenth Circuit for review of the NRC's decision to issue the ISP license, alleging, among other things, that the NRC did not have authority to issue the license. In a February 2023 decision, *Balderas v. NRC*, the court dismissed that petition for lack of jurisdiction, holding that New Mexico was unable to challenge the NRC decision under the Hobbs Act, 28 U.S.C. § 2342, and that no other basis for jurisdiction existed. The Hobbs Act gives the courts of appeals exclusive jurisdiction over certain final orders of the NRC and permits "[a]ny party aggrieved" by that final order to petition a court of appeal for review of the order. 28 U.S.C. §§ 2342, 2344.

The Tenth Circuit held that, because New Mexico could have intervened in the NRC licensing proceeding but did not, it was not an "aggrieved party" under the Hobbs Act. Merely submitting comments, the court ruled, was insufficient to achieve "aggrieved party" status. The court also rejected New Mexico's argument that, regardless of whether New Mexico was an "aggrieved party," the court had jurisdiction because the NRC acted *ultra vires*, or beyond its legal authority. The court did not decide whether the

NRC acted *ultra vires*, holding that even if the NRC had acted beyond its authority, the court still lacked jurisdiction because New Mexico had not intervened in the NRC proceeding. Following four other circuit courts, the Tenth Circuit explicitly declined to adopt the Fifth Circuit's 1981 holding in *American Trucking Associations, Inc. v. I.C.C.* that a person who was not party to the underlying agency proceeding may petition for review of the agency action if that action exceeded its authority.

The Fifth Circuit Decision

Independent of the New Mexico petition, Texas and Fasken petitioned the Fifth Circuit for review of the ISP licensing decision, arguing that the AEA did not give the NRC authority to issue licenses for private CISFs. Texas and Fasken also argued that the NWPA constitutes a comprehensive scheme for SNF storage that leaves no room for licensing or regulating private CISFs. In an August 2023 opinion, *Texas v. NRC*, the court ruled that the NRC did not have authority to license the facility and vacated the license.

Assessing whether the petitioners had the right to bring their petitions under the Hobbs Act, the court suggested that Texas, as a party that submitted comments in an NRC proceeding, and Fasken, as parties that sought to intervene but were denied, likely each qualified as a "party aggrieved" under that statute. Ultimately, however, the court held that it did not need to determine whether Texas and Fasken were "aggrieved parties" because, under the Fifth Circuit's precedent in *American Trucking Associations, Inc. v. I.C.C.*, a person need not have been a party to the underlying agency proceeding if his or her petition challenges the agency action as *ultra vires*.

Moving to the merits, the court held that the AEA granted the NRC authority to issue licenses for certain enumerated purposes but not for private storage or disposal. The court found the D.C. Circuit's *Bullcreek* opinion unpersuasive, because that opinion "essentially assumed" that the AEA authorized the NRC to license away-from-reactor storage facilities without identifying a basis for that assumption in statute. Pointing to statutory language directing DOE and the NRC to take certain actions to allow for storage of civilian SNF on site at civilian reactors, the court further held that, in the absence of a permanent repository, the NWPA authorizes storage of SNF only at federal facilities or on site at civilian reactors.

The court held that the AEA and NWPA, read together in this way, are not ambiguous. It further held, however, that even if the statutes were ambiguous, the NRC's interpretation of them would not be entitled to deference under the major questions doctrine, because disposal of nuclear waste is of such economic and political importance that delegation to an agency must be clear. The AEA, the court said, provides no such clear delegation.

The NRC petitioned for rehearing en banc before the entire Fifth Circuit. The Fifth Circuit denied this petition on March 14, 2024, with seven judges voting in favor of rehearing and nine voting against. Concurring and dissenting opinions both focused on jurisdiction under the Hobbs Act. The concurring judges argued that parties such as Fasken that sought to intervene in agency matters and were denied intervention by those agencies are "parties aggrieved" within the meaning of the Hobbs Act. Were that not so, the concurrence argued, an agency would control who may seek review of its decisions, thereby undermining the purpose of judicial review. The concurrence also argued in support of the Fifth Circuit's *ultra vires* exception. The dissent noted that four circuits have rejected the *ultra vires* exception and that no circuit has adopted it and argued that it should be abandoned because it is not rooted in statute.

The NRC and ISP separately petitioned the Supreme Court on June 12, 2024, to take up review of the decision in *Texas v. NRC* and resolve both disagreements. The petitions remain pending.

The New Mexico CISF

Another private entity, Holtec International, submitted an application to the NRC in 2017 for a private CISF in Lea County, NM, known as the HI-STORE CISF. Several environmental groups, as well as

Fasken, sought to intervene and challenge the license application on multiple grounds, including that the NRC lacked authority to issue a license for a CISF. The NRC issued final orders denying each petition for intervention. The environmental groups and Fasken petitioned the D.C. Circuit for review of those orders, asking the court to vacate the orders denying intervention and to order dismissal of the HI-STORE CISF application. The NRC did not challenge jurisdiction under the Hobbs Act in this matter because it agreed that, in the context of review of the orders denying their requests to intervene, the environmental groups and Fasken were aggrieved parties. The D.C. Circuit held its proceedings on the petitions in abeyance pending the completion of NRC proceedings. The NRC issued a license for the HI-STORE CISF on May 9, 2023, and proceedings in the D.C. Circuit resumed, with the court hearing oral arguments on March 5, 2024.

In July 2023, however, Fasken separately petitioned the Fifth Circuit for review of the NRC order issuing the HI-STORE CISF license, arguing that the NRC lacked authority to issue the license. The NRC moved to dismiss that petition, arguing as it did in *Texas v. NRC* that the court lacked subject matter jurisdiction under the Hobbs Act because Fasken was not an aggrieved party in the context of a final licensing order in a proceeding in which it was denied intervention. On March 27, 2024, the Fifth Circuit vacated the HI-STORE CISF license in an unpublished opinion, *Fasken Land and Minerals, Ltd. v. NRC*, observing that the parties agreed that the HI-STORE license was "materially identical" to the ISP license and that *Texas v. NRC* therefore controlled the outcome. Both the NRC and the license holder have filed petitions for certiorari in the Supreme Court.

Proceedings in the D.C. Circuit remain ongoing.

Considerations for Congress

The Fifth Circuit's decisions in *Texas v. NRC* and *Fasken Land and Minerals, Ltd. v. NRC* widen an existing circuit split on the *ultra vires* exception to the "aggrieved party" status requirement under the Hobbs Act. This means that in the Fifth Circuit, a party that did not participate in the proceedings of the NRC may obtain judicial review of an NRC decision if the party alleges that the decision exceeded the agency's statutory authority. Whether the decision in fact exceeded the NRC's authority would be determined by the reviewing court. That same party would be unable to obtain review under those same circumstances in other circuit courts. This circuit split applies not only to NRC orders but also to other agency actions covered by the Hobbs Act, including certain orders and regulations issued by the Federal Communication Commission, the U.S. Department of Agriculture, the Secretary of Transportation, the Federal Maritime Commission, or the Surface Transportation Board.

The Fifth Circuit's decisions also create a split among the circuit courts on the question of the NRC's statutory authority to issue licenses for CISFs. D.C. Circuit and Tenth Circuit precedent holds that the NRC has such authority, while Fifth Circuit authority holds that the NRC does not. Petitioners have asked the Supreme Court to address both questions.

The D.C. Circuit's HI-STORE CISF case could bring both of those disagreements into sharper relief. A D.C. Circuit opinion holding in favor of the NRC would reinforce disagreement between the D.C. Circuit and the Fifth Circuit on the existence of NRC authority to license CISFs. Further, if the D.C. Circuit were to hold that the NRC properly denied the petitions for intervention filed by the environmental groups and Fasken, Fasken would likely be unable to challenge the license itself under D.C. Circuit precedent, because it would not be an "aggrieved party" under the Hobbs Act. Such a decision would be at odds with

the Fifth Circuit's decision invalidating the license, which reached the question of the NRC's statutory authority only because it allowed Fasken to petition for review under the *ultra vires* exception.

Congress has the authority to resolve both questions by amending the underlying statutes. Congress could, for example, amend the Hobbs Act to explicitly include or exclude the *ultra vires* exception. Congress could also amend the NWPA or AEA to provide explicitly that the NRC may, or may not, license private CISFs. Along those lines, a pending bill would prohibit the use of federal funds for the furtherance of any agreement among private entities for consolidated interim storage of SNF.

Author Information

Jason O. Heflin
Legislative Attorney

Disclaimer