

Beyond Nuclear Files Federal Lawsuit Challenging High-Level Radioactive Waste Dump for Entire Inventory of US “Spent” Reactor Fuel

By [Beyond Nuclear](#)

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Today the non-profit organization [Beyond Nuclear](#) filed an appeal with the U.S. Court of Appeals for the District of Columbia Circuit requesting review of an April 23, 2020 [order](#) and an October 29, 2018 [order](#) by the U.S. Nuclear Regulatory Commission (NRC), rejecting challenges to Holtec International/Eddy-Lea Energy Alliance’s application to build a massive “consolidated interim storage facility” (CISF) for nuclear waste in southeastern New Mexico. Holtec proposes to store as much as 173,000 metric tons of highly radioactive irradiated or “spent” nuclear fuel – more than twice the amount of spent fuel currently stored at U.S. nuclear power reactors – in shallowly buried containers on the site.

But according to Beyond Nuclear’s petition, the NRC’s orders “violated the Nuclear Waste Policy Act and the Administrative Procedure Act by refusing to dismiss an administrative proceeding that contemplated issuance of a license permitting federal ownership of used reactor fuel at a commercial fuel storage facility.”

Since it contemplates that the federal government would become the owner of the spent fuel during transportation to and storage at its CISF, Holtec’s license application should have been dismissed at the outset, Beyond Nuclear’s appeal argues. Holtec has made no secret of the fact that it expects the federal government will take title to the waste, which would clear the way for it to be stored at its CISF, and this is indeed the point of building the facility. But that would directly violate the 1982 Nuclear Waste Policy Act (NWPA), which prohibits federal government ownership of spent fuel unless and until a permanent underground repository is up and running. No such repository has been licensed in the U.S. The U.S. Department of Energy’s (DOE) most recent estimate for the opening of a geologic repository is the year 2048 at the earliest.

In its April 23 decision, in which the NRC rejected challenges to the license application, the four NRC Commissioners admitted that the NWPA would indeed be violated if title to spent fuel were transferred to the federal government so it could be stored at the Holtec facility. But they refused to remove the license provision in the application which contemplates federal ownership of the spent fuel. Instead, they ruled that approving Holtec’s application in itself would not involve NRC in a violation of federal law, and that therefore they could go forward with approving the application, despite its illegal provision. According to the NRC’s decision, “the license itself would not violate the NWPA by transferring the title to the fuel, nor would it authorize Holtec or [the U.S. Department of Energy] to enter into storage contracts.” (page 7). The NRC Commissioners also noted with approval that “Holtec hopes that Congress will amend the law in the future.” (page 7).

“This NRC decision flagrantly violates the federal Administrative Procedure Act (APA), which prohibits an agency from acting contrary to the law as issued by Congress and signed by the President,” said Mindy Goldstein, an attorney for Beyond Nuclear. “The Commission lacks a legal or logical basis for its rationale that it may issue a license with an illegal provision, in the hopes that Holtec or the Department of Energy won’t complete the illegal activity it authorized. The buck must stop with the NRC.”

“Our claim is simple,” said attorney Diane Curran, another member of Beyond Nuclear’s legal team. “The NRC is not above the law, nor does it stand apart from it.”

According to a 1996 D.C. Circuit Court ruling, the NWPA is Congress’ “comprehensive scheme for the interim storage and permanent disposal of high-level radioactive waste generated by civilian nuclear power plants” [*Ind. Mich. Power Co. v. DOE*, 88 F.3d 1272, 1273 (D.C. Cir. 1996)]. The law establishes distinct roles for the federal government vs. the owners of facilities that generate spent fuel with respect to the storage and disposal of spent fuel. The “Federal Government has the responsibility to provide for the permanent disposal of ... spent nuclear fuel” but “the generators and owners of ... spent nuclear fuel have the primary responsibility to provide for, and the responsibility to pay the costs of, the interim storage of ... spent fuel until such ... spent fuel is accepted by the Secretary of Energy” [42 U.S.C. § 10131]. Section 111 of the NWPA specifically provides that the federal government will not take title to spent fuel until it has opened a repository [42 U.S.C. § 10131(a)(5)].

“When Congress passed the Nuclear Waste Policy Act and refused to allow nuclear reactor licensees to transfer ownership of their irradiated reactor fuel to the DOE until a permanent repository was up and running, it acted wisely,” said Kevin Kamps, radioactive waste specialist for Beyond Nuclear. “It is understood that spent fuel remains hazardous for millions of years, and that the only safe long-term strategy for safeguarding irradiated reactor fuel is to place it in a permanent repository for deep geologic isolation from the living environment. Today, the NWPA remains the public’s best protection against a so-called ‘interim’ storage facility becoming a de facto permanent, national, surface dump for radioactive waste. But if we ignore it or jettison the law, communities like southeastern New Mexico can be railroaded by the nuclear industry and its friends in government, and forced to accept mountains of forever deadly high-level radioactive waste other states are eager to offload.”

In addition to impacting New Mexico, shipping the waste to the CISF site would also endanger 43 other states plus the District of Columbia, because it would entail hauling 10,000 high risk, high-level radioactive waste shipments on their roads, rails, and waterways, posing risks of radioactive release all along the way.

Besides threatening public health and safety, evading federal law to license CISF facilities would also impact the public financially. Transferring title and liability for spent fuel from the nuclear utilities that generated it to DOE would mean that federal taxpayers would have to pay for its so-called “interim” storage, to the tune of many billions of dollars. That’s on top of the many billions ratepayers and taxpayers have already paid to fund a permanent geologic repository that hasn’t yet materialized.

But that’s not to say that Yucca Mountain would be an acceptable alternative to CISF.

“A deep geologic repository for permanent disposal should meet a long list of stringent criteria: legality, environmental justice, consent-based siting, scientific suitability, mitigation of transport risks, regional equity, intergenerational equity, and safeguards against nuclear weapons proliferation, including a ban on spent fuel reprocessing,” Kamps said. “But the Yucca Mountain dump, which is targeted at land owned by the Western Shoshone in Nevada, fails to meet any of those standards. That’s why a coalition of more than a thousand environmental, environmental justice, and public interest organizations, representing all 50 states, has opposed it for 33 years.”

Kamps noted that the U.S. Court of Appeals for the District of Columbia Circuit has upheld the NHPA before, including in the matter of inadequate standards for Yucca Mountain. In its landmark 2004 [decision](#) in *Nuclear Energy Institute v. Environmental Protection Agency*, it wrote, “Having the capacity to outlast human civilization as we know it and the potential to devastate public health and the environment, nuclear waste has vexed scientists, Congress, and regulatory agencies for the last half-century.” The Court found the U.S. Environmental Protection Agency’s insufficient 10,000-year standard for Yucca Mountain violated the NHPA’s requirement that the National Academy of Sciences’ recommendations must be followed, and ordered the EPA back to the drawing board. In 2008, the EPA issued a revised standard, acknowledging a *million-year* hazard associated with irradiated nuclear fuel and high-level radioactive waste. Even that standard falls short, Kamps said, because certain radioactive isotopes in spent fuel remain dangerous for much longer than that. Iodine-129, for example, is hazardous for 157 million years.

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