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July 25, 2022

VIA CM/ECF

Mark Langer
Clerk of Court
United States Court of Appeals for the
District of Columbia Circuit
E. Barrett Prettyman U.S. Courthouse
333 Constitution Avenue, NW
Washington, DC 20001

Re: *Don't Waste Michigan et al. v. Nuclear Regulatory Commission, et al.*,
No. 21-1048 (Consolidated)

Dear Mr. Langer:

On behalf of Intervenor/Respondent Interim Storage Partners, LLC, this is a response to the letter dated July 13, 2022, by counsel for petitioner Beyond Nuclear, Inc.

First, *West Virginia v. EPA*, 2022 WL 2347278 (U.S. June 30, 2022) has nothing to do with this appeal. No petitioner argues the “major questions doctrine” in this case, nor even suggests that the applicable statutory authority here does not authorize the NRC to issue the license at issue. Which, of course, it does. *See, Bullcreek v. Nuclear Regulatory Commission*, 359 F.3d 536, 542 (D.C. Cir. 2004) (“the NRC had authority under the AEA to regulate private away-from-reactor storage facilities.”). As explained in the briefs, it is simply incorrect to contend, as Beyond Nuclear does in its letter, that the NRC is “licensing ISP to store fuel owned by the [DOE].” *See* Resp. Br. at 26-29; ISP Br. at 21-22.

Second, even if *West Virginia* were somehow otherwise pertinent, the cited linchpin of the Supreme Court’s decision was the “newness” of the rule there challenged. “Things changed” upon promulgation of the new agency rule, and there was a lack of precedent for the challenged agency action. *West Virginia*, 2022 WL 2347278, at *7, 13. Here, the circumstances are the opposite—the rule that provides for licensing of away-from-reactor possession of spent nuclear fuel was openly and publicly promulgated in 1980. *See* 45 Fed. Reg. 74,693, 74,696 (Nov. 12, 1980). And, the NRC has consistently issued licenses of the sort now challenged for decades. *E.g.*, 47 Fed. Reg. 20,231 (May 11, 1980); 56 Fed. Reg. 57,539 (Nov. 12, 1991); 71 Fed. Reg. 10,068 (Feb. 28, 2006).

Third, the Supreme Court cited the fact that Congress had “considered and rejected” the newly-

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asserted agency position at issue in *West Virginia*, 2022 WL 2347278, at *16. Here, again, it's the opposite. Despite Congress being fully "aware" of the NRC's regulations, *Bullcreek*, 359 F.3d at 542, Congress never said a word about curtailing that authority.

For all of these reasons, *West Virginia* fails to support the petitioners in this case.

Respectfully submitted,

/s/ Brad Fagg

Brad Fagg
Counsel of Record for Intervenor
Interim Storage Partners, LLC

cc: counsel of Record (via CM/ECF)