IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DON'T WASTE MICHIGAN, et al.,	)	
	)	
Petitioners,	)	No. 21-1048 (consolidated with
	)	21-1055, 21-1056, 21-1179,
vs.	)	21-1227, 21-1229, 21-1230,
	)	21-1231)
UNITED STATES NUCLEAR	)	
REGULATORY COMMISSION, and	)	
UNITED STATES OF AMERICA,	)	SIERRA CLUB'S MOTION FOR
	)	SUPPLEMENTAL BRIEFING
Respondents,	)	
	)	
and	)	
	)	
INTERIM STORAGE PARTNERS,	)	
	)	
Intervenor.	)	

Comes now Sierra Club and in support of this Motion for Supplemental Briefing, states to the Court as follows:

1. Major questions in this case are the Nuclear Regulatory Commission's (NRC) authority under the Atomic Energy Act and the Nuclear Waste Policy Act to license Interim Storage Partners' (ISP) nuclear waste storage facility proposed to be established in Andrews County, Texas, and the legality of the Commission's rules forcing members of the public to engage in the Commission's contested case procedure as a substitute for

genuine public participation in order to raise issues under the National Environmental Policy Act (NEPA).

2. On June 30, 2022, the United States Supreme Court issued a decision in *West Virginia v. Environmental Protection Agency*, 142 S.Ct. 2587 (2022), establishing for the first time the existence of what the court calls the "major questions doctrine." Although the court cited to prior cases that it claimed supported its decision, *West Virginia* was the first case to actually refer to and rely on the major questions doctrine. Thus, Sierra Club did not have the opportunity to brief the major questions doctrine.

3. The essence of the major questions doctrine is that "administrative agencies must be able to point to 'clear congressional authorization' when they claim the power to make decisions of vast "economic and political importance." *Id.* (Gorsuch, J., concurring). In other words, "[e]xtraordinary grants of regulatory authority are rarely accomplished through 'modest words," 'vague terms.' or 'subtle device[s].'" *Id*. Certainly licensing the storage, perhaps forever, of thousands of tons of highly radioactive waste in one place is a decision "of vast 'economic and political importance.'"

4. With respect to the NRC's authority to license the ISP facility, Sierra Club has raised two issues. First, licensing the ISP facility violates the

Nuclear Waste Policy Act. Second, the Atomic Energy Act does not authorize the NRC to license the ISP facility. Sierra Club adopts the arguments made by Beyond Nuclear in its opening brief and reply brief and its letter pursuant to Federal Rule of Appellate Procedure 28(j), and in the amicus brief filed by the Natural Resources Defense Council as to why licensing of the ISP facility violates the Nuclear Waste Policy Act. Beyond Nuclear's 28(j) letter also explains why the Court should consider the implications of the *West Virginia* decision on the Nuclear Waste Policy Act argument.

Sierra Club also asserted in its petition to intervene in the agency proceeding below and in its appeal to the Nuclear Regulatory Commission that the agency had no authority under the Atomic Energy Act to license the ISP facility. Sierra Club also designated the agency's authority under the Atomic Energy Act as in issue in this Court. But because of the restriction on the length of the briefs imposed by the Court, Sierra Club did not brief that issue, so it was not voluntarily waived.

5. In any event, the *West Virginia* decision presents a new statement of the law not available to Sierra Club at the time of briefing in this case. The cases relied on by the *West Virginia* court never used the term "major

questions doctrine" and were based on general rules of statutory construction. The major questions doctrine was only used and articulated for the first time in *West Virginia.* In *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 120 S.Ct. 1291 (2000), tobacco companies challenged the regulation of tobacco products. The court's decision was based on application of the *Chevron* doctrine, *Chevron v. NRDC*, 467 U.S. 837, 104 S.Ct. 2778 (1984), not on any reference to a "major questions doctrine." Nor was the case decided on the basis of vague or indirect authority from Congress. It was based on congressional action directly precluding FDA authority.

The decision in *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 134 S.Ct. 2427 (2014), was also based on application of the *Chevron* doctrine and ordinary rules of statutory construction. Again, there was no mention of a "major questions doctrine."

Alabama Ass'n. of Realtors v. Dept. of Health and Human Services, 141 S.Ct. 2485 (2021), involved a challenge to the agency's moratorium on evictions of rental tenants during the COVID-19 pandemic. Rather than being authoritative precedent, the court's per curiam decision was issued

through what has been called the court's "shadow docket," without briefing or a formal opinion.

Finally, in the decision in *Gonzales v. Oregon*, 546 U.S. 243, 126 S.Ct. 904 (2006), the court again simply applied the *Chevron* doctrine. There was no mention of the "major questions doctrine."

6. And *West Virginia* applies here because, as noted above, storing thousands of tons of highly radioactive waste is a matter of great importance. Also, Congress has not clearly granted the NRC the authority to license such a storage facility. The NRC relies on the decision in *Bullcreek v. NRC*, 359 F.3d 536 (D.C. Cir. 2004). But that reliance is misplaced. In *Bullcreek* the State of Utah was opposing the decision of the NRC to license a storage facility for nuclear waste in Utah. Utah argued that the Nuclear Waste Policy Act superseded the NRC's alleged authority to license a storage facility away from a reactor site. Utah assumed that the NRC had the authority under the Atomic Energy Act to license an away-from-reactor storage facility. Utah's position was that, even assuming the NRC's licensing authority under the Atomic Energy Act, the Nuclear Waste Policy Act superseded that assumed authority.

The court in *Bullcreek* accepted Utah's assumption of licensing authority under the Atomic Energy Act and held that the Nuclear Waste Policy Act did not supersede that alleged authority. Significantly, the *Bullcreek* court acknowledged that "the AEA [Atomic Energy Act] does not specifically refer to the storage or disposal of spent nuclear fuel . . . ." *Id.* at 538. That is certainly not a clear congressional directive. The court cited some court decisions that assumed the NRC had that authority, but that is not enough to satisfy the major questions doctrine as set forth in *West Virginia v. EPA.*

7. With respect to the NRC's authority under the National Environmental Policy Act, Sierra Club and Don't Waste Michigan, et al. explained in detail in their Reply Brief why the NRC's procedure violates NEPA. In essence, under the NRC procedure, anyone who wants to eventually effectively comment on an environmental impact statement must first have raised a contention challenging the applicant's environmental report and been allowed to intervene in the contested case proceeding and then overcome the high burden of raising a new contention. But the *West Virginia* decision adds a new unanticipated layer to that argument. NEPA, 42 U.S.C. §§ 4321 et seq., requires federal agencies to take certain actions to

protect the environment and created the Council on Environmental Quality to implement those requirements. In furtherance thereof the Council on Environmental Quality promulgated regulations. 40 C.F.R. § 1500.1. Those regulations require agencies to request comments from the public, 40 C.F.R. § 1503.1(a)(4), and make diligent efforts to involve the public in implementing NEPA procedures, 40 C.F.R. § 1506.6.

As explained in Sierra Club's and Don't Waste Michigan's Reply Brief, the NRC's procedure of forcing the public into the agency's contested case procedure violates that requirement for public participation. The *West Virginia* decision further supports this argument because there is no clear directive from Congress that authorizes the NRC to restrict public participation in the NEPA process as the NRC regulations do.

8. It is also significant that the NRC, in a 5th Circuit case challenging the NRC's actions related to the ISP facility, filed a motion requesting supplemental briefing to address the implications of the *West Virginia* decision. That motion is hereto attached. The 5th Circuit granted that motion and briefs are due on August 3, 2022. It seems clear that if supplemental briefing is appropriate in the 5th Circuit, it should be appropriate in this Court.

WHEREFORE, Sierra Club requests that the Court enter an Order as follows:

a. The parties will file supplemental briefs addressing the impact of the decision in *West Virginia v. EPA* on the issues in this case;

b. Each party will file individual briefs, with all briefs due at the same time;

c. The opening briefs will be limited to 3,000 words and due 14 days after entry of the Order, and reply briefs will be limited to 1,500 words and due 14 days after the opening briefs.

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No. 21-60743

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS, GREG ABBOTT, Governor of Texas,
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY,
FASKEN LAND AND MINERALS, LIMITED, and
PERMIAN BASIN LAND AND ROYALTY OWNERS,
Petitioners,

v.

NUCLEAR REGULATORY COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

On Petition for Review of Action
by the Nuclear Regulatory Commission

**UNOPPOSED MOTION FOR LEAVE
TO FILE SUPPLEMENTAL BRIEFING**

Federal Respondents (the Nuclear Regulatory Commission and United States of America) and Intervenor Interim Storage Partners, LLC (ISP) seek leave for the parties to file short supplemental briefs addressing the Supreme Court's recent decision in *West Virginia v. EPA*, 2022 WL 2347278 (U.S. June 30, 2022). Petitioners State of Texas, Governor Greg Abbott, and the Texas Commission on Environmental Quality (the Texas Petitioners), and Petitioners Fasken Land and

Minerals, Limited, and Permian Basin Land and Royalty Owners (Fasken Petitioners) do not oppose this request.

1. On June 30, 2022, the Supreme Court issue its decision in *West Virginia*. On July 6, 2022, the Texas Petitioners filed a notice of supplemental authority under Fed. R. App. P. 28(j), contending that "*West Virginia* confirms that this case implicates the major questions doctrine." Texas Rule 28(j) Letter at 1.

2. Rather than filing a Rule 28(j) letter in response, Federal Respondents believe that the Court would benefit from supplemental briefing on whether the major questions doctrine articulated in *West Virginia* applies to this case.

Thus, Federal Respondents and Intervenor ISP request that the Court grant leave for each party (Federal Respondents, Texas Petitioners, Fasken Petitioners, and Intervenor ISP) to file a supplemental brief of no more than 10 pages by August 3, 2022.

Dated: July 11, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), it contains 210 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 27(d)(1)(E) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

/s/ *Andrew P. Averbach*
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CERTIFICATE OF SERVICE

I certify that on July 11, 2022, I served a copy of the foregoing **MOTION FOR LEAVE** upon counsel for the parties in this action by filing the document electronically through the CM/ECF system. This method of service is calculated to serve counsel at the following e-mail addresses:

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