

High Court Poised to Rule on Legality of Off-Site Nuclear Storage

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As June approaches, the Supreme Court is preparing to release opinions in more than 30 cases from this past term—including in an important energy case, *Nuclear Regulatory Commission v. Texas*. In that case, the Supreme Court heard oral argument on whether the Nuclear Regulatory Commission (NRC) has the authority to issue licenses to private entities to temporarily store spent nuclear material away from nuclear reactor sites.

Exactly how the justices will rule remains to be seen. But at argument, they seemed prepared to hand down an opinion with wide-reaching implications for nuclear waste storage in the United States.

***NRC v. Texas* Reaches the Supreme Court**

In this case, the NRC granted a 40-year license to a private entity, Interim Storage Partners (ISP), to store nuclear waste in Andrews County, Texas. The State of Texas and Fasken Land and Minerals, Ltd. (a corporate entity with major landholdings in Andrews County) challenged the NRC's action in federal court, arguing that the NRC exceeded its authority in issuing the license because private entities like ISP should not be allowed to store nuclear waste off-site, i.e., away from nuclear reactor sites.

The U.S. Court of Appeals for the Fifth Circuit agreed with Texas and Fasken and [vacated the license](#). The court held that the Nuclear Waste Policy Act of 1982 created a comprehensive statutory scheme for managing the nation's nuclear waste and contemplated that spent nuclear fuel be stored *onsite* at the reactor until it is moved to a permanent repository. Additionally, the Fifth Circuit noted that the Atomic Energy Act of 1954 authorizes the NRC to issue licenses for specific, limited purposes, such as for research and development. Because temporary storage of

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spent fuel is not among those purposes, the Fifth Circuit concluded, the statutes do not permit *temporary, off-site* storage.

At the NRC's request, the Supreme Court took up the case to decide two questions: 1. whether Texas and Fasken could obtain judicial review of the NRC's decision, and 2. whether the NRC has statutory authority to license private entities to temporarily store spent nuclear material away from nuclear reactor sites.

The Supreme Court Questions the NRC's Authority and the Fifth Circuit's Decision

At oral argument in March, the parties and justices spent a significant amount of time addressing the second question: whether the Atomic Energy Act of 1954 and the Nuclear Waste Policy Act of 1982 together permit the NRC to issue temporary, off-site storage licenses (as opposed to requiring that spent nuclear material be stored at the reactor site *or* at a permanent, off-site storage). In particular, they addressed 42 U.S.C. section 10151(a)(3), which makes it the federal government's "responsibility to provide" a specific amount of capacity for "interim storage" of spent nuclear fuel when adequate storage at onsite at the reactor cannot be reasonably provided.

During oral argument, the government's attorney, deputy solicitor general Malcolm Stewart, defended the NRC's license by arguing that Congress did not explicitly *bar* temporary off-site storage. Stewart also noted that the government identified eight locations where nuclear reactors have been decommissioned but waste is still being stored. According to Stewart, those storage locations are functionally equivalent to sites where there has never been an operating reactor.

The justices had a range of responses. Justice Thomas expressed skepticism that the NRC had statutory authority to authorize off-site storage at a *private* facility where there has never been a reactor. Other justices, assuming for the sake of argument that the law allows for interim off-site storage, expressed skepticism that the off-site storage facilities at issue in this case could accurately be described as "temporary" given that the NRC license spans multiple decades and is renewable. Justice Alito, for example, asked whether Interim Storage Partners' license would be considered permanent if it were renewed for *another* 40-year period (the government responded that it would still be temporary).

Not all the justices thought 40 years too long to be considered temporary or, to use the statutory language, "interim." Justice Sotomayor responded to the other justices' comments by stating: "I'm finding it curious that in a country that's celebrating its 250th year that some of my colleagues think that 40 years can't be temporary."

Some justices also questioned how off-site storage could be "temporary" when the United States currently lacks any permanent off-site storage facility. Legislation in the 1980s designated Nevada's Yucca Mountain as the sole repository for permanent nuclear waste storage. But in 2010, after decades of study and planning, the Department of Energy suspended the Yucca Mountain

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project, largely due to local political opposition. At oral argument, Justice Gorsuch referred to the Yucca Mountain site as “a hole in the ground,” and questioned how off-site storage could be considered interim “in any meaningful sense” considering “the Yucca Mountain project is dead” and no permanent solution is forthcoming.

Finally, Justice Kavanaugh expressed concern for private parties who may have heavily invested in establishing those off-site facilities. According to a July 2024 Congressional Research Service [report](#), the NRC has so far issued three licenses to private entities for off-site storage: the first was for a facility in Skull Valley, Utah (which the private owner later asked NRC to terminate); the second was for a facility in Lea County, New Mexico; and the third was for the ISP facility in Andrews County, Texas.

But as Fasken’s lawyer noted in response to Justice Kavanaugh’s concern about private reliance interests, no off-site storage facility has been built yet. The nation’s more than [90,000 metric tons of spent nuclear fuel](#) —a figure that grows by 2,000 metric tons a year—is still being held at nuclear power plant sites (including those where the reactors have been decommissioned) across the United States.

What’s Next?

When the Supreme Court grants certiorari on two questions, it does not always have to answer both. Here, for example, the Court could determine that neither Texas nor Fasken was statutorily authorized to challenge ISP’s license. In that case, the Court would not reach the second, potentially more consequential, question of whether the licenses were proper. But given the amount of time and engagement on that second question at argument, it seems likely the Court will in fact decide the issue.

If the Court reaches the merits and determines that the NRC lacks authority to issue off-site licenses, one interesting question will be whether the Court invalidates the already-issued NRC licenses. Conceivably, the court could write an opinion that circumscribes the NRC’s licensing authority but creates a carve-out for the already-licensed facilities, though no party has identified statutory authority for creating such a carve out.

If the Court invalidates the preexisting NRC licenses, that could chill private investment in nuclear projects. As an [amicus brief](#) filed by the Nuclear Energy Institute argues, members of the nuclear industry rely on NRC licensing decisions due to the scale of capital investments and because the government exercises a “virtually unique” degree of administrative supervision over commercial nuclear projects. In this particular case, even though no off-site storage facility has been constructed, ISP noted in its [brief](#) that it has “spent many years and millions of dollars to secure its license.”

Whatever the Court decides is also likely to influence the government's motivation (or lack thereof) to create a permanent off-site storage facility. Project 2025, which has been described as the Trump administration's policy blueprint, stated that "Yucca Mountain remains a viable option for waste management, and DOE should recommit to working with the Nuclear Regulatory Commission as it reviews DOE's permit application for a repository." Secretary of Energy Chris Wright, during confirmation proceedings, was equivocal when asked whether the administration might kick-start the government's effort to create a long-term nuclear waste storage facility in the Yucca Mountain. A decision that recognizes the NRC's power to issue off-site private storage licenses would dampen any urgency to establish a permanent solution at Yucca Mountain or otherwise. But a decision that curbs the NRC's licensing authority could spur the Trump administration to press ahead.

Those following this case will not need to wait long for the outcome. We can expect the Court to hand down its opinion by the end of June.