

*Beyond Nuclear, Inc. v. U.S. Nuclear Regul. Comm'n: Where Reasonable Decisions and Preparation Prevent Judicial Overreach*

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I. OVERVIEW

With increasing progression towards sustainable energy, many people only think about the benefits, while ignoring the work it requires and the potential legal challenges it could create. This is the case with nuclear energy, or more specifically, what happens to nuclear fuel after it is used to create power for the American electrical grid. While the production of nuclear energy is a cleaner alternative to burning fossil fuels, the production of nuclear energy requires increased precautions to avoid potentially catastrophic events. After its utilization in a reactor, spent nuclear fuel requires special storage facilities to house this highly radioactive byproduct of nuclear energy.<sup>1</sup> After nuclear fuel is used to create energy, the spent fuel remains highly radioactive, and the absence of proper storage facilities would also create problems for the environment.

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1. *Beyond Nuclear, Inc. v. U.S. Nuclear Regul. Comm'n*, 113 F.4th 956, 961 (D.C. Cir. 2024).

The Nuclear Regulatory Commission (NRC) is the American federal agency that regulates the use of these volatile nuclear materials.<sup>2</sup> Holtec International applied to the NRC to acquire a license so that it could build and operate a facility to store this volatile material in New Mexico.<sup>3</sup> Following Holtec's application, various environmental groups, including Beyond Nuclear, Sierra Club (the petitioners), and Fasken Land and Minerals and Permian Basin Land and Royalty Owners, requested intervention into the process and a hearing so the groups could fight against the granting of a license.<sup>4</sup> The contentions included (1) NRC's ability to grant away-from-reactor nuclear fuel storage under the Nuclear Waste Policy Act (NWPA), (2) NRC's authority to grant Holtec a license, (3) a false statement in the application, (4) failure to comply with National Environmental Policy Act (NEPA) guidelines, and (5) Fasken's ability to add a claim after the deadline as a non-party.<sup>5</sup> In the petitioners' NEPA contentions, they included various environmental reports as well as expert testimony, which included information similar to Holtec's environmental impact reports. Those environmental reports discussed seismic activity, hydrogeological characteristics of the site, and risks associated with the operation and transportation of the materials for the facility.<sup>6</sup> The NRC denied each of these requests for intervention on the basis that the contentions were inadmissible.<sup>7</sup> After the NRC denied the requests for intervention, the various environmental groups sought legal action, claiming that the NRC acted "unreasonably and contrary to law" by denying these requests.<sup>8</sup>

The Court of Appeals for the District of Columbia Circuit denied the request for judicial review and upheld the NRC's reasonable decision to deny intervention in Holtec's licensing proceeding.<sup>9</sup> The District of Columbia Circuit held that there was no genuine dispute of material fact, and that the NRC did not take any actions "unreasonably or contrary to law" as set out in statutes or previous cases.<sup>10</sup>

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2. U.S. Nuclear Regulatory Commission, <https://www.usa.gov/agencies/u-s-nuclear-regulatory-commission> (last visited Nov. 21, 2024).

3. *Beyond Nuclear, Inc.*, 113 F.4th at 961.

4. *Id.*

5. *Id.* at 956.

6. *Id.* at 966-968.

7. *Id.* at 962.

8. *Id.* at 961.

9. *Id.*

10. *Id.* at 970.

## II. BACKGROUND

### A. *How the Nuclear Regulatory Commission Has Jurisdiction to Decide in a Licensing Proceeding and Resolve a Dispute*

The District of Columbia Circuit previously found that the NRC has the power to license spent nuclear fuel storage facilities through a “series of intersecting statutory and regulatory requirements” in *Oglala Sioux Tribe v. Nuclear Regulatory Commission*.<sup>11</sup> Conditions to receive a license to construct and operate a nuclear storage facility are covered in the Atomic Energy Act (AEA) where it states that the NRC may grant licenses to entities who are suited to ensure safety standards are met, such as mitigating risk to life or property.<sup>12</sup> Furthermore, following NRC approval of an action, its licenses may contain prospective conditions if it views the conditions as reasonably applicable.<sup>13</sup> The NRC’s power to regulate procedures for licensing the facilities that store spent nuclear fuel was established in the AEA.<sup>14</sup> The NRC’s authority was further solidified in *Bullcreek v. Nuclear Regulatory Commission*, where the court held that the AEA secured the NRC’s authority to grant licenses for spent nuclear storage facilities.<sup>15</sup> There, the court reasoned that the NWPA by Congress did not take away NRC’s jurisdiction to grant such licenses since the language in the act did not cover the authorization of storage.<sup>16</sup>

In AEA, the act made clear that the NRC may hold a hearing to discuss disputes about a license applicant and has the power to grant final orders, which include denial of intervention, in these hearings.<sup>17</sup> Later in the hearing process, a new contention can be admissibly filed after the deadline only if the information covered in that contention was distinct and recently became accessible.<sup>18</sup>

### B. *Why the NRC Can Grant Away-from-Reactor Spent Nuclear Fuel Storage*

Another government agency that handles the authorization of licensing for spent nuclear fuel storage is the Department of Energy (DOE); however, the DOE is governed by the provisions set out in

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11. 45 F.4th 291, 296 (D.C. Cir. 2022).

12. 42 U.S.C. §2133(b)(2).

13. 10 C.F.R. §72.44(a).

14. *Bullcreek v. Nuclear Regul. Comm’n*, 359 F.3d 536, 539 (D.C. Cir. 2004).

15. *Id.*

16. *Id.*

17. 42 U.S.C. §2239.

18. 10 C.F.R. §2.309(c)(1).

NWPA.<sup>19</sup> Additionally, the DOE may not grant a license for away-from-reactor spent nuclear fuel storage facilities due to the NWPA.<sup>20</sup> Unlike the DOE, the NRC can grant licenses for nuclear storage facilities that are away-from-reactor.<sup>21</sup> This key difference comes from the District of Columbia Circuit's finding in *Bullcreek*, that the NRC's powers are grounded primarily in AEA and are not limited by § 10155(h) of the NWPA.<sup>22</sup> Meanwhile, the DOE is directly governed by the rules outlined in the NWPA.<sup>23</sup> The NWPA's language signaled that it did not authorize away-from-reactor facilities, but the court interpreted this language to mean that the NWPA also did not limit the authority created by other previous statutes.<sup>24</sup>

### C. Level of Scrutiny Used in Environmental Analysis of Reports Under NEPA

NEPA outlines that applicable federal action that may affect the environment must provide a detailed report, focusing on the impact on the environment and viability.<sup>25</sup> In federal code 10 C.F.R. § 2.105, the statute outlines that the NRC must post details on its website to establish notice about potential license applicants and their pertinent reports or data used in the application.<sup>26</sup>

First, when analyzing NEPA complaints that must exceed the arbitrary or capricious standard to be unlawful, the court will not “flyspeck” insignificant defects, which is to say the court will look for major deviations.<sup>27</sup> Additionally, NEPA requires that government agencies, such as the NRC, take a “hard look” at the environmental ramifications of significant actions.<sup>28</sup> In order to take that hard look at a significant government action before it occurs, the agency must look at an

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19. 42 U.S.C. §10155(a)(1).

20. *Id.* §10155(h) (“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”).

21. *Bullcreek v. Nuclear Regul. Comm'n*, 359 F.3d 536, 537-538 (D.C. Cir. 2004).

22. *Id.* at 542 (“Congress limited the scope of the NWPA, but left untouched prior and subsequent statutes that authorized such facilities”).

23. 42 U.S.C. §10131.

24. *Bullcreek*, 359 F.3d at 543.

25. 42 U.S.C. §4332(2)(C).

26. 10 C.F.R. §2.105.

27. *Nev. v. Dep't of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006).

28. *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

environmental impact statement.<sup>29</sup> According to NEPA, the NRC must base its environmental considerations of the proposed action on reports that cover the potential impact of the action and any alternatives that might exist.<sup>30</sup> The court will not want to overturn the NRC's discretionary decision when it reasonably supports it. Further, for a contention of an NRC decision to survive scrutiny, the petitioners must provide a clear statement that demonstrates a genuine issue of material law or fact in the decision.<sup>31</sup> Specifically, the petitioners must raise their contention in connection with the environmental report of the applicant.<sup>32</sup> Additionally, for a factual contention to be admissible, it must clearly indicate the contention through fact without depending on "merely conclusory statements and vague allegations."<sup>33</sup>

#### *D. Methods Petitioners Can Request Judicial Review of NRC's Decisions*

Additionally, 42 U.S.C. § 2239 outlines that judicial review is possible for any NRC final order.<sup>34</sup> Further, injured parties from the denial of intervention may request a judicial review of that order.<sup>35</sup> Additionally, a party seeking judicial review of an NRC final order must first file a petition for review by the NRC.<sup>36</sup> The court of appeals has jurisdiction to scrutinize final orders made reviewable by 42 U.S.C. § 2239 under the AEA.<sup>37</sup> In a review of the final order, the court may set aside the order if it finds that the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>38</sup> This is to say that the court must analyze if NRC used "reasoned decisionmaking" in a decision of a final order due to the failure to raise a contention regarding material fact.<sup>39</sup>

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29. Standing Rock Sioux Tribe v. United States Army Corps of Engineers, 985 F.3d 1032, 1039 (D.C. Cir. 2021); *see also* Sierra Club v. Peterson, 717 F.2d 1409, 1415 (D.C. Cir. 1983).

30. 10 C.F.R. §51.45(b), (c).

31. *Id.* §2.309(f)(1).

32. *Id.* §2.309(f)(2).

33. In re Ne. Nuclear Energy Co., 53 NRC 22, 27 (Jan. 17, 2001).

34. 42 U.S.C. §2239.

35. 28 U.S.C. §2344.

36. 10 C.F.R. §2.1212.

37. 28 U.S.C. §2342(4).

38. 5 U.S.C. §706.

39. Beyond Nuclear, Inc. v. Nuclear Regul. Comm'n, 704 F.3d 12, 21 (1st Cir. 2013).

### III. COURT'S DECISION

In the noted case, the United States Court of Appeals for the District of Columbia Circuit maintained its position that the NRC has the right to grant licenses to private entities to construct and operate facilities that will be used to store spent nuclear fuel following “a series of intersecting statutory and regulatory requirements.”<sup>40</sup> Further in the noted case, the United States Court of Appeals for the District of Columbia Circuit held that (1) the NRC was correct in its denial of the petition for intervention, (2) the court had jurisdiction to review NRC’s final order, (3) the environmental petitioners bear the burden of proof to show their contentions were significant to the proceeding, (4) the NRC did not violate the Nuclear Waste Policy Act, (5) the NRC correctly dismissed the environmental petitioners’ contentions because of a failure to state a significant fact or law in dispute, and (6) that the NRC reasonably dismissed Fasken’s contentions, filed later.<sup>41</sup>

Specifically, the United States Court of Appeals for the District of Columbia Circuit held that the NRC was correct in its denial of multiple environmental groups’ petitions for intervention in the process of granting Holtec’s license to construct and operate a spent nuclear fuel storage facility.<sup>42</sup> The court reasoned that through the hearing process, the petitioners did not make a contention that materially disputed any facts or laws related to this license proceeding.<sup>43</sup> To reach this conclusion, the court analyzed each contention *de novo* to ensure that every contention was dismissed reasonably and following applicable law.<sup>44</sup>

The court began by establishing that it had the jurisdiction to review the final order of dismissal by the NRC.<sup>45</sup> They used previous findings that denying intervention into a licensing proceeding is a “final reviewable order.”<sup>46</sup> The court established it had the jurisdiction under 28 U.S.C § 2344 since the environmental petitioners were an “aggrieved” party by the final order and filed a petition to review the order in a “timely” manner.<sup>47</sup> The court reasoned that the environmental petitioners

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40. *Beyond Nuclear, Inc. v. U.S. Nuclear Regul. Comm'n*, 113 F.4th 956, 962 (D.C. Cir. 2024) (Quoting *Oglala Sioux Tribe v. Nuclear Regul. Comm'n*, 45 F.4th 291, 296 (D.C. Cir. 2022)).

41. *Beyond Nuclear, Inc.*, 113 F.4th at 956.

42. *Id.* at 961.

43. *Id.*

44. *Id.* at 963.

45. *Id.* at 962.

46. *Id.*

47. *Id.*

were aggrieved because the denial of intervention in the proceeding could be a procedural injury, and the environmental petitioners had members who live close to the proposed facility who alleged the health risks of a nuclear facility could impact.<sup>48</sup>

Next, the court found that the burden of proof was on the potential intervenors, the environmental petitioners, to show that their contention was significant for the licensing determination.<sup>49</sup> Then, to support their stance, the environmental petitioners would need to produce their own facts or expert opinions.<sup>50</sup> Lastly, the environmental petitioners needed to provide substantial data to demonstrate the presence of a dispute with the license applicant, Holtec, regarding an issue of fact or law.<sup>51</sup>

Once they addressed the procedural steps, the court first looked at the contentions that the NRC violated the NWPA by licensing an away-from-reactor facility or the inclusion of a clause conditioning that Holtec would contract with DOE when it became legal.<sup>52</sup> The court held that NRC did not violate the NWPA in consideration of Holtec's license application to construct and operate a spent nuclear fuel facility.<sup>53</sup> The court reasoned the presence of Holtec's conditions in the application, which stated that Holtec would accept spent nuclear fuel from private sources and the DOE, if and when it became legal, was justifiable because NRC regulations allow for the granting of licenses based on conditional terms focused on possible future policy changes.<sup>54</sup> On the contention that Holtec made a material misrepresentation in their application, the court reasoned the condition that Holtec would contract with DOE if it became legal was irrelevant because licenses are granted based on safety, environmental, and legal standards, not based on potential business plans.<sup>55</sup> Additionally, the court reasoned NRC's dismissal of NWPA violations was justified because the environmental petitioners failed to state a disputed fact or law.<sup>56</sup> The court then denied the contention that NRC did not have the power to license away-from-reactor storage due to the NWPA.<sup>57</sup> The court reasoned that the NRC indeed had the right to license away-from-reactor spent nuclear storage under the AEA, and the

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48. *Id.*

49. *Id.* at 963.

50. *Id.*

51. *Id.*

52. *Id.* at 963-964.

53. *Id.* at 964.

54. *Id.*

55. *Id.* at 966.

56. *Id.*

57. *Id.* at 965.

NWPA did not limit that right.<sup>58</sup> The court looked at previous interpretations of the language used in the NWPA statute that was against away-from-reactor storage to find the statute did not “repeal or supersede” the NRC’s authority since the AEA explicitly authorized away-from-reactor spent nuclear fuel storage.<sup>59</sup>

The environmental petitioners’ remaining claim concerned whether the NRC’s denial of the petitioners’ environmental contentions violated NEPA guidelines.<sup>60</sup> The court upheld the NRC’s denial of the contention that Holtec insufficiently disclosed the risk of earthquakes to the proposed facility.<sup>61</sup> The court reasoned that the environmental petitioners’ contending report did not state any facts to show the prior impact analysis was unreasonable.<sup>62</sup> On the next group of contentions regarding the improper assessment of hydrogeological characteristics, the court found the NRC’s decision to deny the contention was reasonable.<sup>63</sup> The court reasoned that this group of contentions did not state any facts that contradicted Holtec’s report but only offered speculative conclusions.<sup>64</sup> For the environmental petitioners’ final challenge regarding their contentions of operational and transportation risks related to the facility, the court held that the NRC validly dismissed the contentions.<sup>65</sup> The court reasoned that the NRC justly denied these contentions due to a failure to raise a dispute of material fact from Holtec’s report and further speculated about how Holtec’s report was inadequate without providing any evidence.<sup>66</sup> For all of these NEPA-based claims, the court reasoned that the NRC was correct in its dismissal of the environmental impact report contentions because the environmental groups did not materially dispute the facts in Holtec’s Report.<sup>67</sup>

Lastly, in the examination of the claim that NRC dismissed Fasken’s later filed contention without any justifiable reason, the court held that the NRC correctly dismissed the contention.<sup>68</sup> The court held that Fasken’s

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58. *Id.*; see also *Bullcreek v. Nuclear Regul. Comm’n*, 359 F.3d 536, 543 (D.C. Cir. 2004).

59. *Beyond Nuclear, Inc.*, 113 F.4th at 965; see also *Bullcreek*, 359 F.3d at 543.

60. *Beyond Nuclear, Inc.*, 113 F.4th at 966.

61. *Id.*

62. *Id.* at 967.

63. *Id.*

64. *Id.*

65. *Id.* at 968-969.

66. *Id.*

67. *Id.* at 967-969.

68. *Id.* at 970.

contention was “procedurally defective, untimely, and immaterial” since it should have been filed at the start of the licensing proceeding.<sup>69</sup>

#### IV. ANALYSIS

The Court of Appeals for the District of Columbia Circuit’s decision to deny review and uphold the NRC’s denial of intervention in its licensing of Holtec’s away-from-reactor spent nuclear fuel storage facility was consistent with that circuit’s precedent and the governing statutes. The noted case correctly observed that the petitioners’ request to intervene failed to raise a genuine dispute of fact or law. The United States Court of Appeals for the District of Columbia Circuit consistently interprets the same applicable statutes and how these statutes work together to create the NRC’s authority.<sup>70</sup>

Although correct, this decision could create a chilling effect that would prevent future groups from raising contentions against projects that could affect the environment. The noted case and its predecessors have created a high standard for overturning final decisions made by government agencies, more specifically, the NRC. Since the noted case focused on the attempt to intervene in a licensing proceeding, and the court found that there was not a large enough discrepancy in the contention, it will affect a petitioner’s ability to hold the NRC accountable and consequently make intervention more difficult. Due to the high standard set in the noted case, it is not sufficient to have a contention that raises data that is new or contrary to the environmental report provided; the contention must indicate a monumental difference between the NRC’s considerations and a petitioner’s claim. Additionally, the requirement to bring forward concrete evidence in a proceeding such as the one included in the noted case is a difficult standard to meet because the discussion is of a proposed action, so it is very difficult to raise a factual argument that does not include speculation.

However, the decision in the noted case also incentivizes prospective license applicants to complete a thorough environmental report. Given the high standard of review necessary to overturn the NRC’s decision to grant a license and denial of intervention, which was reinforced in the noted case, the applicant is further incentivized to provide a detailed report of the potential impact. All the NRC needed to do was show the court that it came to its decision in a reasonable manner using the information

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69. *Id.*

70. *Id.* at 961; *see also* Bullcreek v. Nuclear Regul. Comm’n, 359 F.3d 543 (D.C. Cir. 2004).

provided and that it did not do so arbitrarily. This means that the NRC needs any justifiable reason to claim that there was no dispute, which in turn would protect the outcome of its decisions as long as the party offered sufficient information to the NRC. Following the court's interpretation of the NEPA's impact on NRC proceedings, potential petitioners would have a substantial hurdle to overcome the standard that the NRC arbitrarily or capriciously denied the dispute. In the noted case, the creation of new environmental reports that introduced new information without directly contradicting the original report was not enough to create a dispute of fact.

The legislative and judicial branches show a hesitation to overreach and overrule a NRC decision with their use of standards like "arbitrary and capricious" decision-making and to not "flyspeck" insignificant details on review. These standards aim to secure the NRC's discretionary power without limiting the decisions it makes. Additionally, as seen in the noted case, newer statutes, such as NWPA, utilize specific wording so that it does not limit the authority previously established.

Further, this high standard and its resulting chilling effect could limit the amount an environmental group or affected population successfully intervenes in an NRC proceeding and stops the construction of a potentially dangerous facility containing spent nuclear fuel. Given the dangerous and volatile nature of radioactive material, the bar should not be so high for potentially affected populations to contest the construction of a nuclear facility near their homes. The standard should be more accessible since if something were to go wrong with the facility, it could potentially make the surrounding region uninhabitable for many years. However, despite having this potential effect, the court analysis was reasonable according to United States law.

The court validly accepted that NRC's allowance of forward-looking conditions, in a license application, was consistent with both codified law and the *Oglala Sioux Tribe* ruling.<sup>71</sup> Holtec's condition that it would contract with the DOE to store the department's spent nuclear fuel, when it became lawful, was valid because it acknowledged that it would only happen once the laws changed. This clause simply allowed Holtec to adapt if the regulatory scheme changed. As a result, the court correctly concluded there was no dispute of law on this contention.

Next, the court decided correctly that NRC's grant of Holtec's license to build and operate a spent nuclear fuel facility away-from-reactor did not violate the terms set out in the NWPA. The noted case

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71. 45 F.4th 291, 304 (D.C. Cir. 2022); *see also* 10 C.F.R. §72.44(a).

stated the AEA granted statutory authority to the NRC to create such facilities; case law secured this authority.<sup>72</sup> District of Columbia Circuit established this idea in *Bullcreek* when it reasoned that Congress intentionally limited the scope of NWPA while not allowing it to supplant the authority set out in previous legislation, such as AEA.<sup>73</sup>

Later, the court correctly followed the NRC's discretion in finding that none of the petitioners' NEPA claims raised a genuine dispute of fact. The court found that Holtec correctly dismissed the dispute of fact in the environmental groups' seismic activity report because that report simply stated the presence of a fault near the proposed facility, but did not state an actual threat since there was no activity from that fault in over a million years.<sup>74</sup> Next, the court correctly upheld the decision that the environmental groups' hydrogeological contention did not raise a dispute of fact since it merely speculated about Holtec's report.<sup>75</sup> There, the court reasoned that "conclusory statements and vague allegations" do not raise an admissible factual contention.<sup>76</sup> The environmental groups' claim that Holtec's environmental report did not have enough supporting data was validly viewed as false, and the court accurately explained that the environmental groups' claim did not address any information from Holtec's report.<sup>77</sup> To rule mere speculation as admissible facts in environmental proceedings would set a dangerous precedent, causing injustice and inefficiency, so it is reasonable to deny that contention. Additionally, that speculation by the environmental groups was incorrect and unsupported as Holtec sufficiently collected data and the environmental groups disputed these findings without offering any data that proved the contrary.<sup>78</sup> The court was correct in its denial of the last environmental contention regarding the environmental risks of operating the facility since there was no dispute of law. The court correctly reasoned the environmental groups' contention that the report did not include specifics of a dry transfer system was flawed because no regulation required the use of a dry transfer system.<sup>79</sup> Additionally, the court correctly acknowledged that Holtec provided a site-specific environmental impact report and that the petitioners' contention to the

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72. *Beyond Nuclear, Inc.*, 113 F.4th at 964.

73. 359 F.3d at 542.

74. *Beyond Nuclear, Inc.*, 113 F.4th at 966-967.

75. *Id.* at 967.

76. *Id.* at 967; *see also* *In re Ne. Nuclear Energy Co.*, 53 NRC 22, 27 (Jan. 17, 2001).

77. *Beyond Nuclear, Inc.*, 113 F.4th at 967.

78. *Id.* at 968.

79. *Id.* at 964; *see also* 10 C.F.R. §51.23.

contrary was not supported by fact or law.<sup>80</sup> Specifically, the court observed that these site-specific legal and factual disputes were not supported by evidence or law.<sup>81</sup>

Finally, the court correctly ruled that the NRC's rejection of Fasken's untimely contention was reasonable. The court's reasoning followed NRC's regulations, which only permits untimely contentions when those contentions raise new information that was previously unavailable.<sup>82</sup> This ruling was straightforward and did not create a new interpretation of statutory law.

## V. CONCLUSION

In *Beyond Nuclear, Inc.*, the Court of Appeals for the District of Columbia Circuit used its precedent and various statutory regimes to uphold the NRC's decision and to deny the environmental petitioners' requests for intervention. The Court of Appeals for the District of Columbia Circuit had the benefit of various past cases involving the NRC, so the circuit had become familiar with how the statutes interact for agencies that cover energy policy. The court relied on the standards set in previous decisions to rule on a similar set of facts. The impact of this decision, however, incentivizes NRC license applicants to make their application as detailed as possible so that it is even harder to meet the high requirement set for a factual dispute to be genuine and material. The decision is also foreboding for environmental groups that may want to object to future actions being taken by the NRC because of the stringent standard on the production of facts necessary to create a valid dispute.

Justin S. Weiss\*

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80. *Beyond Nuclear, Inc.*, 113 F.4th at 968.

81. *Id.* at 969.

82. *Id.* at 970; *see also* 10 C.F.R. §2.309(c)(1).

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