In the United States Court of Appeals for the Fifth Circuit

No. 17-60191

STATE OF TEXAS,

Petitioner,

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF ENERGY; JAMES RICHARD "RICK" PERRY, IN HIS OFFICIAL CAPACITY AS UNITED STATES SECRETARY OF ENERGY; UNITED STATES NUCLEAR REGULATORY COMMISSION; KRISTINE L. SVINICKI, IN HER OFFICIAL CAPACITY AS CHAIRMAN OF THE UNITED STATES NUCLEAR REGULATORY COMMISSION; UNITED STATES NUCLEAR REGULATORY COMMISSION ATOMIC SAFETY AND LICENSING BOARD; THOMAS MOORE, PAUL RYERSON, AND RICHARD WARDWELL, IN THEIR OFFICIAL CAPACITIES AS UNITED STATES NUCLEAR REGULATORY COMMISSION ATOMIC SAFETY AND LICENSING BOARD JUDGES; UNITED STATES DEPARTMENT OF THE TREASURY; AND STEVEN T. MNUCHIN, IN HIS OFFICIAL CAPACITY AS UNITED STATES SECRETARY OF THE TREASURY,

Respondents.

Petition for Writ of Mandamus to the Nuclear Regulatory Commission

RESPONSE OF THE NUCLEAR ENERGY INSTITUTE AND NUCLEAR UTILITIES IN SUPPORT OF RESPONDENTS

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STATEMENT REGARDING ORAL ARGUMENT

The Nuclear Energy Institute and the nuclear utility intervenors agree with the Federal Respondents that the issues raised by the Texas Petition do not merit oral argument and can be most efficiently resolved on the basis of written submissions. NEI and the Nuclear Utilities are prepared to participate in oral argument should the Court determine oral argument will assist the Court in reaching a decision.

STATEMENT OF THE CASE

I. INTRODUCTION

The Nuclear Energy Institute, on behalf of itself and its members, and the nuclear utilities listed below who own and operate nuclear power plants[1] (collectively, "NEI") submit this Response in opposition to two prayers for relief requested by the State of Texas: Prayer No. 21 ("an order providing Petitioner with restitution from the Nuclear Waste Fund") and Prayer No. 22 ("an order disgorging the Nuclear Waste Fund"). If granted, these prayers would cause direct and significant harm to NEI's members, including the nuclear utilities that generate used nuclear fuel and have paid fees into the Nuclear Waste Fund.

NEI intervened on the side of the Federal Respondents in this case. While NEI may have similar views as the Federal Respondents on the Texas prayers for restitution and disgorgement,[2] NEI comes at these issues with a different perspective. As explained in its motion to intervene,[3] NEI's members include all entities licensed to generate electricity from civilian nuclear power reactors in the

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[1] The entities are Energy Northwest; Kansas Gas and Electric Company d/b/a Westar Energy; Kansas City Power & Light Company; Kansas Electric Power Cooperative, Inc.; Wolf Creek Nuclear Operating Corporation; Union Electric Company d/b/a Ameren; and Tennessee Valley Authority.

[2] *See, e.g.*, Response of Federal Respondents United States Department of Energy and United States Department of the Treasury, *et al.*, In Opposition to the Petition (June 30, 2017) (Document: 00514056859) ("DOE Response") at pp. 3-4 (arguing that Texas' prayers for restitution and disgorgement "are contingent, speculative, and unripe for consideration").

[3] Motion of the Nuclear Energy Institute and Nuclear Utilities for Leave to Intervene in Support of Respondents (Apr. 5, 2017) (Document: 00513940710) at pp. 2-3.

United States. These members have paid fees into the Nuclear Waste Fund in accordance with Nuclear Waste Policy Act ("NWPA" or the "Act") section 302(a)[4] and the "Standard Contract for the Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste," commonly referred to as the "Standard Contract."[5] The Nuclear Waste Fund is to pay the costs of the Federal Government's program to permanently dispose of the utilities' used nuclear fuel.[6]

NEI opposes Texas' prayers for restitution and disgorgement. If granted, those prayers would deplete the Nuclear Waste Fund and thus undermine the development and implementation of a nuclear waste disposal program, contrary to the plain language and purposes of the Act. Granting these two prayers could also (1) call into question the Federal Government's contractual obligation to dispose of utilities' used nuclear fuel; and (2) potentially increase the future fees that might have to be collected from NEI's utility members.

II. FACTUAL BACKGROUND

A. Nuclear Waste Policy Act and the Standard Contract

The NWPA codified the Federal Government's responsibility to dispose of used nuclear fuel generated by U.S. commercial nuclear power plants and the

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[4] 42 U.S.C. § 10222(a).

[5] The Standard Contract was adopted by rulemaking and is codified in the U.S. Department of Energy's (the "Department's" or "DOE's") regulations. *See* 10 C.F.R. Part 961.

[6] 42 U.S.C. § 10222(d)

utilities' obligation to pay the costs of disposal.[7] To that end, the NWPA authorized creation of the Standard Contract,[8] which details the Department's obligation to dispose of used nuclear fuel, and the obligation of the owners and operators of nuclear plants to offset disposal costs by paying fees into the Nuclear Waste Fund.[9]

The Act contains a series of provisions that in effect require those who own or generate used fuel to enter into Standard Contracts. The NWPA prohibits Respondent NRC from issuing or renewing a power reactor license unless the license applicant or licensee has entered into the Standard Contract.[10] The NWPA also prohibits DOE from disposing used fuel from a generator or owner that had not entered into a Standard Contract.[11] Based on these provisions, the "[NWPA] effectively made entry into such contracts mandatory for the utilities."[12]

Federal courts have repeatedly referred to the Government's obligation to dispose of used nuclear fuel and the utilities' obligation to pay for such disposal as

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[7] 42 U.S.C. § 10131(b)(2) and (4).
[8] *See* 42 U.S.C. § 10222(a)(1).
[9] 10 C.F.R. § 961.11, Articles IV.B. and VIII.
[10] 42 U.S.C. § 10222(b)(1)(A)(i).
[11] 42 U.S.C. § 10222(b)(2).
[12] *Maine Yankee Atomic Power Co. v. United States*, 225 F.3d 1336, 1337 (Fed. Cir. 2000).

a "quid pro quo" established by Congress.[13] "Under the plain language of the statute, the utilities anticipated paying fees 'in return for which the [Department]' had a commensurate duty . . . to begin disposing of the high-level radioactive waste or [used nuclear fuel] by a day certain."[14] To date, NEI's utility members have paid more than **$20 billion** in fees into the Nuclear Waste Fund, which has accrued over **$20 billion** in interest[15] since the utilities began paying the fee in 1983.

The NWPA also establishes multiple requirements governing the development of a disposal program for the nation's used nuclear fuel and high-level radioactive waste. Relevant here, NWPA section 160 designates Yucca Mountain, Nevada as the sole site to be characterized for a repository.[16]

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[13] *Indiana Michigan Power Co. v. U.S. Dep't of Energy*, 88 F.3d 1272, 1276 (D.C. Cir. 1996); *Northern States Power Co. v. U.S. Dep't of Energy*, 128 F.3d 754, 759 (D.C. Cir. 1997); *Alabama Power Co. v. U.S. Dep't of Energy*, 307 F.3d 1300, 1302 (11th Cir. 2002) ("The NWPA thus established a quid pro quo; the Government would provide a valuable service and utilities would pay money for this service"); *Yankee Atomic Elec. Co. v. U.S.*, 536 F.3d 1268, 1279 (Fed. Cir. 2008).

[14] *Indiana Michigan*, 88 F.3d at 1276.

[15] *See* U.S. Department of Energy Office of Inspector General Audit Report OI-FS-17-04, Department of Energy Nuclear Waste Fund's Fiscal Year 2016 Financial Statement Audit (Dec. 2016) at p. 27, *available at* https://www.energy.gov/sites/prod/files/2016/12/f34/OAI-FS-17-04.pdf.

[16] 42 U.S.C. § 10172.

B. DOE's Partial Breach of the Standard Contract

The NWPA requires that DOE begin to dispose of the utilities' used fuel "beginning not later than January 31, 1998."[17] Similarly, the Standard Contract states that the services to be provided by DOE under the contract shall begin "not later than January 31, 1998."[18] DOE missed these statutory and contractual milestones.[19]

Beginning in February 1998, utility signatories to the Standard Contract began to sue the United States for its breach in the U.S. Court of Federal Claims. The utilities had previously sought to compel the Department to comply with the January 31, 1998 statutory deadline by requesting that the U.S. Court of Appeals for the District of Columbia Circuit issue a mandamus order.[20] The court declined to grant all aspects of the utilities' mandamus request, explaining that the Standard Contract "provides a potentially adequate remedy if DOE fails to fulfill its obligations by the deadline."[21]

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[17] 42 U.S.C. § 10222 (a)(5)(B).

[18] 10 C.F.R. 961.11, Standard Contract, Art. II.

[19] *See Maine Yankee*, 225 F.3d 1336; *Northern States Power Co. v. United States*, 224 F.3d 1361 (Fed. Cir. 2000).

[20] *Northern States,* 128 F.3d 754.

[21] *Id.*, 128 F.3d at 756, 759. Notably, while declining to grant all aspects of the utilities' mandamus request, the court did issue a writ of mandamus "precluding DOE from excusing its own delay on the grounds that it has not yet prepared a permanent repository or interim storage facility." *Id.* at 761.

Following the D.C. Circuit's ruling, and the passing of the January 31, 1998 deadline, utilities have filed more than seventy breach of contract lawsuits in the Court of Federal Claims.[22] Each lawsuit has been for a partial breach of contract because a total breach claim is not permitted by the NWPA. The federal courts have emphasized that a partial breach is the appropriate cause of action "[i]f the injured party elects to or is required to await the balance of the other party's performance under the contract,"[23] which is the case here because the NWPA makes DOE exclusively responsible for the disposal of used fuel, thereby prohibiting utilities from pursuing alternative disposal remedies.[24] Indeed, the Federal Circuit has ruled that the Standard Contract, incorporating the NWPA's requirements, "compelled [plaintiffs] to bring an action for partial, not total, breach," stating that a total breach of the Standard Contract was "foreclosed by statute."[25] And notably, DOE has always acknowledged that its performance under

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[22] The Federal Circuit confirmed that the utilities' lawsuits were properly before the Court of Federal Claims. *Maine Yankee,* 225 F.3d 1336.

[23] *Indiana Michigan Power Co. v. U.S.,* 422 F.3d 1369, 1374 (Fed. Cir. 2005) (citing Restatement (Second) of Contracts, § 236 cmt. b.).

[24] *Id.*, citing NWPA sections 302(a)(4) and (b)(2); *Roedler v. DOE*, 255 F.3d 1347, 1350 (Fed. Cir. 2001).

[25] *Indiana Michigan,* 422 F.3d at 1374. *See also Yankee Atomic Electric Co. v. United States*, 536 F.3d 1268, 1280 (Fed. Cir. 2008) ("As this court has already acknowledged, the NWPA and the terms of the Standard Contract foreclose any claim for total breach").

the Standard Contract was merely delayed, and not that it was no longer obligated to perform.[26]

The courts are applying remedies as a result of the Federal Government's partial breach of the Standard Contract. The utility lawsuits have resulted in judgments (or settlement payments) from the Judgment Fund to nuclear utilities exceeding $6.1 billion.[27] The Department estimates its remaining liability to be approximately $24.7 billion, also to be paid out of the Judgment Fund.[28] These payments are intended to cover "the additional expenses [utilities] incurred in continuing to store the nuclear waste past the date on which the Department was obligated to remove it"[29] and until the Department fulfills its obligation.

C. NRC Licensing Proceeding on the Proposed Yucca Mountain Repository

As the nuclear utility partial breach claims proceeded, the Department moved forward with its plans to license and construct a geologic repository at

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[26] *See Indiana Michigan,* 422 F.3d at 1374 ("while the government did indicate that it would not meet the 1998 deadline, its actions did not portend an absolute refusal to perform the contract").

[27] *See* U.S. Department of Energy Office of Inspector General Audit Report OI-FS-17-04, Department of Energy Nuclear Waste Fund's Fiscal Year 2016 Financial Statement Audit (Dec. 2016) at p. 21, *available at* https://www.energy.gov/sites/prod/files/2016/12/f34/OAI-FS-17-04.pdf.

[28] *Id.* at p. 22. That estimate is optimistically based on the assumption that DOE begins removing used nuclear fuel from power reactor sites in the 2020s. *Id.*

[29] *See, e.g.*, *Maine Yankee,* 225 F.3d at 1342.

Yucca Mountain, Nevada. In June 2008, as required by the NWPA, DOE submitted to the NRC a construction authorization application for the Yucca Mountain repository.[30] In December 2008, various parties—including NEI, but not Texas—petitioned to intervene in the NRC licensing proceeding on the Yucca Mountain application. In the proceeding, NEI sought to actively support the licensing of the repository. In May 2009, the NRC Atomic Safety and Licensing Board designated to rule on intervention petitions admitted multiple parties, including NEI, into the proceeding, and approximately 300 contentions for adjudication.[31] On appeal, the Commission upheld almost all of the Licensing Board's decision.[32]

Months later, however, President Obama proposed eliminating all funding for the Yucca Mountain program, purportedly because Yucca Mountain "is not a workable option and that the Nation needs a better solution."[33] DOE subsequently filed a motion to withdraw, with prejudice, its Yucca Mountain application. NEI opposed the Department's motion. Texas, however, did not seek leave to intervene in the proceeding to oppose or otherwise respond to the withdrawal motion. The

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[30] Yucca Mountain; Notice of Receipt and Availability of Application, 73 Fed. Reg. 34,348 (June 17, 2008).

[31] U.S. Dep't of Energy (High-Level Waste Repository), LBP-09-06, 69 N.R.C. 367 (2009).

[32] U.S. Dep't of Energy (High-Level Waste Repository), CLI-09-14, 69 N.R.C. 580 (2009).

[33] Terminations, Reductions, and Savings, Budget of the U.S. Government, Fiscal Year 2011 (Feb. 1, 2010) at p. 62.

Licensing Board denied DOE's motion to withdraw the license application because (among other reasons) the NWPA does not give the DOE Secretary "the discretion to substitute his policy for the one established by Congress in the NWPA."[34] Over a year later, on appeal by the Department, the Commission found "itself evenly divided on whether to take the affirmative action of overturning or upholding the Board's decision."[35] The Commission nonetheless directed the Licensing Board to "complete all necessary and appropriate case management activities" "by the close of the current fiscal year" because of "budgetary limitations."[36] In accordance with the Commission's direction and "[i]n light of current fiscal constraints," the Licensing Board suspended the proceeding.[37]

In response to the NRC's termination of the Yucca Mountain licensing proceeding, the States of South Carolina and Washington (but again, not Texas) petitioned the U.S. Court of Appeals for the D.C. Circuit for a writ of mandamus to compel the NRC to proceed with the statutorily-mandated proceeding.[38] NEI participated in that litigation in support of petitioners. The court granted the writ,

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[34] U.S. Dep't of Energy (High-Level Waste Repository), LBP-10-11, 71 N.R.C. 609, 617 (2010).

[35] U.S. Dep't of Energy (High-Level Waste Repository), CLI-11-7, 74 N.R.C. 212, 212 (2011).

[36] *Id.*

[37] U.S. Dep't of Energy (High-Level Waste Repository), LBP-11-24, 74 N.R.C. 368, 368-70 (2011) (explaining that, although the NRC had "current appropriated Fiscal Year 2011 Nuclear Waste Funds [ ] that could be carried over into the next fiscal year," the Administration's Fiscal Year 2012 budget request provided for no full time employees for Yucca Mountain-related activities).

[38] *In re Aiken County*, 725 F.3d 255 (D.C. Cir. 2013).

holding that "unless and until Congress authoritatively says otherwise or there are no appropriated funds remaining, the [NRC] must promptly continue with the legally mandated licensing process."[39] At the time of the court's ruling, the NRC had approximately $11.1 million in appropriated yet unexpended funds for the licensing proceeding.[40] As a result of this ruling, the NRC solicited input from the parties to the licensing proceeding on how to move forward, including input from NEI (Texas, however, did not provide its views as it did not participate in the proceeding). Although the adjudicatory proceeding remained suspended (as it does to this day), the NRC determined to complete multiple licensing documents for the project, including the five-volume Safety Evaluation Report, which documents the results of the NRC staff's evaluation of whether the proposed repository design complies with applicable requirements.[41] Overall, the NRC staff concluded that the proposed repository would comply with applicable requirements.

D. Proposed Appropriations to Resume Yucca Mountain Program

Prospects for restarting Yucca Mountain have improved. On May 23, 2017, the Administration submitted its Fiscal Year 2018 budget request to Congress. The budget request for DOE includes "$120 million for the Yucca Mountain and

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[39] *Id.*, 725 F.3d at 267.

[40] *Id.*

[41] The NRC's Safety Evaluation Reports for the proposed Yucca Mountain repository are available at https://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1949/.

Interim Storage Program, including $30 million in defense funding [separate from the Nuclear Waste Fund] and $90 million from the Nuclear Waste Fund, to accelerate progress on fulfilling the Federal Government's obligations to address nuclear waste, enhance national security, and reduce future taxpayer burden."[42] The budget request for NRC "includes $30 million to support activities for the proposed Yucca Mountain deep geological repository for spent fuel and other high-level radioactive waste" to be appropriated from the Nuclear Waste Fund.[43] Both the U.S. Senate and U.S. House of Representatives have advanced bills to revitalize the used fuel disposal program, albeit taking different approaches.[44]

E. Continued Safe Storage of Used Nuclear Fuel

It is important that the Federal Government fulfill its disposal obligation to (among other reasons) reduce taxpayer liability for the breach of contract and to allow communities with shutdown reactors to recoup land presently occupied by used fuel storage facilities and put that land to beneficial use. In the meantime, the

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[42] *See* Department of Energy FY 2018 Congressional Budget Request, Budget in Brief (May 2017) at p. 5, *available at* https://energy.gov/sites/prod/files/2017/05/f34/FY2018BudgetinBrief_3.pdf

[43] *See* the NRC's Fiscal Year (FY) 2018 Congressional Budget Justification, *available at* https://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1100/v33/ (last visited July 17, 2017).

[44] Compare S. 1609 (Energy and Water Development Appropriations) section 307 (*available at* https://www.congress.gov/bill/115th-congress/senate-bill/1609/text), with H.R. 3266, Title III, Nuclear Waste Disposal (available at https://www.congress.gov/bill/115th-congress/house-bill/3266/text) and H.R. 3053, the "Nuclear Waste Policy Amendments Act of 2017" (available at https://www.congress.gov/bill/115th-congress/house-bill/3053/text).

continued, safe storage of used nuclear fuel at reactor sites is not in doubt. After discharge from a reactor core, used nuclear fuel is first stored in used fuel pools, which "are massive, extremely-robust structures designed to safely contain the spent fuel discharged from a nuclear reactor under a variety of normal, off-normal, and hypothetical accident conditions (e.g., loss of electrical power, floods, earthquakes, or tornadoes)."[45] Used nuclear fuel pools "are made of thick, reinforced, concrete walls and floors lined with welded, stainless-steel plates to form a leak-tight barrier. Racks fitted in the [pools] store the fuel assemblies in a controlled configuration (i.e., so that the fuel is both sub-critical and in a coolable geometry)."[46] The used fuel assemblies in the racks at the bottom of the pool are typically covered by 25 feet of water.[47] Multiple and redundant systems are in place to monitor, cool, and provide make-up water to the used fuel pools.[48] The March 2011 earthquake and tsunami that crippled the Fukushima Daiichi nuclear power plant in Japan demonstrated the robust strength of used fuel pools. "Despite a level 9.0 earthquake—the strongest in modern Japanese history—and a 45 foot-

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[45] NRC, Denial of Petitions for Rulemaking by the Attorney General of the Commonwealth of Massachusetts, and the Attorney General of California; 73 Fed. Reg. 46,204, 46,206 (Aug. 8, 2008).

[46] *Id.*

[47] *Id.*

[48] *Id.*

high tsunami, all seven used fuel pools withstood the earthquake and tsunami and protected the used fuel."[49]

After a period of time in used fuel pools, and in the absence of a national repository for disposal, used fuel may be moved to dry casks. "Dry cask storage systems are passive systems that are inherently robust, massive, and highly resistant to damage."[50] Experience with dry casks to date "indicates that spent fuel can be safely and effectively stored using passive dry cask storage technology" in light of the "robustness of the structural design of the dry cask storage system against a variety of challenges, both natural and human induced."[51] Dry casks are usually steel cylinders that are welded or bolted closed and which provide a "leak-tight confinement" of the used fuel.[52] Each steel cylinder is then packaged in either additional steel, concrete, or other material to shield workers, the public, and the environment from radiation.[53]

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[49] *See* NEI, Onsite Used Fuel Storage Safety and the Urgency for Used Fuel Solutions, *available at* https://www.nei.org/Master-Document-Folder/Backgrounders/Policy-Briefs/Onsite-Used-Fuel-Storage-Safety-and-the-Urgency-fo

[50] NRC, Continued Storage of Spent Nuclear Fuel, Final Rule, 79 Fed. Reg. 56,238, 56,252 (Sept. 19, 2014).

[51] *Id.*

[52] *See* NRC webpage "Dry Cask Storage," available at https://www.nrc.gov/waste/spent-fuel-storage/dry-cask-storage.html.

[53] *Id.*

ARGUMENT SUMMARY

NEI and its members have spent decades pressing the Federal Government to meet its statutory and contractual disposal obligations, all the while meeting their own reciprocal obligation to pay for such disposal. After years of delay, prevailing in dozens of partial breach damages lawsuits and settlements, and DOE's and NRC's on-again/off-again efforts to license the proposed Yucca Mountain repository, NEI and its members empathize with Texas' goal of resuming progress on a repository program.

Our empathy notwithstanding, the Court should reject Texas' prayers for restitution and disgorgement of the Nuclear Waste Fund because they are prohibited by the NWPA. Furthermore, if granted, these prayers would drain the Nuclear Waste Fund and derail the development of a national repository for used nuclear fuel, contrary to the plain language and purposes of the Act and contrary to the stated purpose of Texas' lawsuit. Granting the prayers could also, contrary to the purposes of the NWPA, (1) call into question the Federal Government's contractual obligation to dispose of utilities' used nuclear fuel; and (2) unfairly

increase the future fees that might have to be collected from NEI's utility members and their ratepayers.[54]

The Court also should reject Texas' restitution and disgorgement prayers on procedural grounds. For example, Texas' prayers are untimely because Texas raises them far beyond the 180 day deadline prescribed in the NWPA to challenge any act or failure to act. Texas also has failed to demonstrate it has standing to seek restitution or disgorgement.

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[54] Collection of the Nuclear Waste Fund fee is presently suspended in accordance with the D.C. Circuit's ruling in *Nat'l Ass'n of Regulatory Util. Comm'rs v. DOE*, 736 F.3d 517 (D.C. Cir. 2013). Because DOE had terminated the Yucca Mountain program, the D.C. Circuit held that there was no longer any repository program whose costs could be assessed, thus requiring that the fee (0.1 cents per kilowatt hour of electricity generated and sold) be set to zero "until such a time as either the Secretary chooses to comply with the Act as it is currently written [and implement Yucca Mountain], or until Congress enacts an alternative waste management plan." *Id.*, 736 F.3d at 521.

ARGUMENT

I. THE NWPA PROHIBITS TEXAS' REQUESTS FOR RESTITUTION AND DISGORGEMENT

The Court should rule that the NWPA bars Texas' restitution and disgorgement remedies. The Act established the statutory and contractual reciprocal obligations under which the Federal Government is responsible for the disposal of utilities' used nuclear fuel, and in return that the utilities are responsible for paying for that disposal. These mutual obligations are set forth in the Standard Contract. Contrary to this quid pro quo, Texas requests that the Court issue an order "providing Petitioner with restitution from the Nuclear Waste Fund" and "disgorging the Nuclear Waste Fund."[55] This result would be totally at odds with the NWPA and the Standard Contract.

Restitution and disgorgement are legal impossibilities under the NWPA. Restitution and disgorgement of the Nuclear Waste Fund are not possible without a total breach of the Standard Contract.[56] But the NWPA prohibits a total breach of the Standard Contract as there is no basis (absent an act of Congress) to revoke the Federal Government's obligation to dispose of used nuclear fuel.

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[55] Petition at 27.

[56] *See Hansen Bancorp, Inc. v. United States*, 367 F.3d 1297, 1309 (Fed. Cir. 2004) ("relief in restitution is 'available only if the breach gives rise to a claim for damages for total breach and not merely to a claim for damages for partial breach'") (quoting Restatement (Second) of Contracts, § 373 cmt. a).

When enacting the NWPA, Congress found that "the Federal Government has the responsibility to provide for the permanent disposal of high-level radioactive waste and such [used] nuclear fuel."[57] Consequently, Congress enacted the NWPA with the explicit purpose "to establish the Federal responsibility, and a definite Federal policy, for the disposal of such waste and [used] fuel."[58] The NWPA provides for the termination of that obligation only by completing it.

The Standard Contract mirrors the NWPA: "DOE has the responsibility for the disposal of [used] nuclear fuel and high-level radioactive waste of domestic origin from civilian nuclear power reactors."[59] Nothing in the Standard Contract suggests that the Government could walk away from its obligation to perform by terminating the contract. The Standard Contract does not contain a termination clause. The term of the contract extends until "DOE has accepted, transported from the Purchaser's site(s) and disposed of all" used nuclear fuel covered by the Standard Contract.[60] Standard Contract Article II states that the services to be provided by DOE "shall continue until such time as all [used nuclear fuel covered by the contract] has been disposed of."[61] Although the Standard Contract includes

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[57] 42 U.S.C. § 10131 (a)(4).
[58] *Id.* at § 10131 (b)(2).
[59] 10 C.F.R. § 961.11 (Standard Contract preamble).
[60] *Id.* at Art. III.
[61] *Id.* at Art. II.

a Delays Clause,[62] it does not provide for contract termination. Similarly, the Standard Contract affords DOE the right to "suspend" the contract in the event of a utility's failure to perform its obligations and to cure such failure, or in the event of certain national emergencies.[63] But as with delays, the suspension authority does not include the right to terminate the contract.

Significantly, federal courts have confirmed the Government's disposal obligation and held that there could *never* be a total breach of the Standard Contract. In *Indiana Michigan*, the Federal Circuit held that the NWPA required utilities to bring partial breach claims because a total breach lawsuit was "foreclosed by statute."[64] The court explained that, under the NWPA, DOE was exclusively responsible for used nuclear fuel collection and disposal, "thereby prohibiting [petitioner] or any other nuclear utility from seeking alternative disposal means."[65] The Federal Circuit reemphasized this conclusion in *Yankee Atomic*: "As this court has already acknowledged, the NWPA and the terms of the Standard Contract *foreclose any claim for total breach*."[66]

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[62] *See id.* at Art. IX.A. (covering unavoidable delays) and Art. IX.B (avoidable delays).
[63] *See id.* at Art. X.A.-X.B.
[64] *Indiana Michigan*, 422 F.3d at 1374.
[65] *Id.* (citing provisions of the NWPA and *Roedler*, 255 F.3d at 1350).
[66] *Yankee Atomic,* 536 F.3d at 1280 (emphasis added).

While defending the partial breach of contract claims, the Department has never argued it has the right to walk away from its underlying disposal obligation. Even following the Department's attempted withdrawal of the Yucca Mountain construction authorization application from the NRC licensing proceeding, the Department continued to affirm its disposal obligation. Most recently, the current Administration has reaffirmed the Government's obligation to dispose of utilities' used nuclear fuel by proposing an appropriation of $120 million from the Nuclear Waste Fund in Fiscal Year 2018 for DOE and the NRC to restart the Yucca Mountain program.

Texas' prayers for restitution and disgorgement are contrary to the NWPA statutory scheme for another reason. Under a total breach scenario—a hypothetical precursor to any restitution and disgorgement—there would no longer be a valid disposal contract with the Federal Government. This could undermine NRC licensing of nuclear power reactors. NWPA section 302(b)(1)[67] prohibits the NRC from issuing or renewing a nuclear power reactor license to a utility if that utility has not signed the Standard Contract.

Even if restitution or disgorgement were legally plausible, grant of those remedies would reduce, if not empty altogether, the Nuclear Waste Fund. That

[67] 42 U.S.C. § 10222(b)(1).

would undermine the current efforts to resume the Yucca Mountain program, and is entirely inconsistent with the statutory and contractual reciprocal obligations.

II. AN ORDER GRANTING TEXAS' REQUESTS FOR RESTITUTION AND DISGORGEMENT WOULD UNLAWFULLY FOIST INCREASED COSTS ON OTHER STATES AND NUCLEAR UTILITIES

Providing restitution or disgorgement would deplete the Nuclear Waste Fund to the disadvantage of the nuclear utilities charged to fund the used nuclear fuel disposal program. Texas in essence argues that the Court ought to rob Peter to pay Paul.[68] A reduction in the Nuclear Waste Fund caused by the Court ordering restitution or disgorgement could lead to utilities (and their consumers) having to make up the depleted funds. Under the NWPA, utilities pay the disposal program's full cost.[69] Consequently, restitution and disgorgement have the potential to unfairly impose future fees on NEI's utility members.

Such circumstances are similar to those present in the Eleventh Circuit's decision in *Alabama Power*. There, the Eleventh Circuit rejected a settlement agreement between the Department and a utility for the Department's failure to

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[68] Texas' prayers, if granted, could be particularly unjust to utilities because Texas nowhere states how much restitution or disgorgement should occur, or to whom such monies would be paid. Indeed, while restitution is intended to "compensate the victims of the wrongful acts," disgorgement "wrests ill-gotten gains from the hands of a wrongdoer" to prevent unjust enrichment, and "does not aim to compensate the victims of the wrongful acts." *See S.E.C. v. Huffman*, 996 F.2d 800, 802 (5th Cir. 1993).

[69] 42 U.S.C. § 10222(a)(4).

perform because the agreement unfairly shifted the Nuclear Waste Fund fee to non-settling utilities. The settlement agreement and others like it, if implemented, would have granted the utility an offset against its future Nuclear Waste Fund payments in exchange for the release of its breach of contract claim against the Department, thereby reducing the Fund.[70] The court ruled that such arrangement would increase the fees paid by other utilities to cover the costs of disposal, which would "thwart[] the quid pro quo arrangement in which each utility roughly pays the costs of disposing of its waste and no more."[71] The Court should reject Texas' prayers for restitution and disgorgement for the same reason.

III. THE COURT SHOULD REJECT TEXAS' PRAYERS FOR RESTITUTION AND DISGORGEMENT ON MULTIPLE PROCEDURAL GROUNDS

A. Texas' Prayers Are Untimely

NEI supported the State of Nevada's Countermotion to dismiss the Petition, arguing that Texas' claims are untimely and should be dismissed on that ground alone.[72] For the sake of brevity, NEI incorporates this argument by reference and

[70] *Alabama Power,* 307 F.3d at 1309, 1312.

[71] *Id.,* 307 F.3d at 1314.

[72] Response of the Nuclear Energy Institute and Nuclear Utilities in Support of Nevada's Countermotion (Jun. 22, 2017) (Document 00514045402) at pp. 3-7.

does not repeat it here. In addition, NEI also agrees with the Federal Respondents' arguments that Texas' claims are untimely.[73]

B. Texas Lacks Standing to Seek Restitution and Disgorgement

NEI agrees with the Federal Respondents that Texas has failed to demonstrate Article III standing for any of its claims.[74] Unlike Texas' prior foray into nuclear waste litigation to challenge the siting of a possible nuclear waste disposal site in Texas,[75] Texas appears to rely on its representation of Texas citizens as the basis for its standing here.[76] However, as argued by DOE,[77] Supreme Court precedent holds that a State does not have *parens patriae* standing to sue the Federal Government on behalf of its citizens.[78] The Ninth Circuit has applied that binding precedent to the NWPA in *Nevada v. Burford*.[79] In that case, the court held that the State of Nevada did not have *parens patriae* standing to

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[73] *See* DOE Response at p. 20 ("Even assuming the Petition had identified a reviewable, final action on consent-based siting, it does not identify an action that occurred within the 180-day limitations period") (footnote omitted); *see also* Response of the United States Nuclear Regulatory Commission, [*et al.*,] to Petition for Writ of Mandamus (Jun. 29, 2017) (Document: 00514054175) ("NRC Response") at pp. 3-4.

[74] DOE Response at pp. 10-16; NRC Response at 15-19.

[75] *See Texas v. U.S. Dep't of Energy*, 764 F.2d 278 (5th Cir. 1985).

[76] *See* Texas's Reply in Support of its Motion for a Declaratory Judgment and a Preliminary Injunction (Prayers 1 & 2) Against the Department of Energy and the Secretary of Energy (Document: 00514037666) (Jun. 16, 2017) ("Texas Reply") at pp. 13-14.

[77] DOE Response at 16.

[78] *Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923) ("It cannot be conceded that a state, as *parens patriae*, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof"); *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 610 n. 16 (1982) (citing *Mellon*).

[79] *Nevada v. Burford*, 918 F.2d 854 (9th Cir. 1990).

challenge the grant of a right-of-way to public land near Yucca Mountain by the Bureau of Land Management to DOE.[80] Under the same logic, Texas has no standing in its *parens patriae* capacity to sue the Federal Government here.

With respect to Texas' specific prayers for restitution and disgorgement of the Nuclear Waste Fund, Texas fails to allege any basis for standing. This failure alone warrants rejection of these prayers as petitioners must demonstrate standing for each claim and each request for relief.[81]

Texas is not a party to the Standard Contract and has not paid any fees into the Nuclear Waste Fund. And even if Texas intends to rely on its representation of Texas nuclear electric ratepayers for standing, that position is equally unavailing.[82] Texas ratepayers' electric rates may have been the source of payments into the Nuclear Waste Fund, but under persuasive Federal Circuit precedent, that does not support Texas' standing, or otherwise permit Texas to represent its ratepayers' interests, with respect to Texas' prayers for restitution or disgorgement. In *Roedler v. DOE,* rate-paying customers of a nuclear utility sought recovery from the United States of the Nuclear Waste Fund fees paid by the utility because of DOE's partial

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[80] *Id.*, 918 F.2d at 858.

[81] *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) ("[A] plaintiff must demonstrate standing separately for each form of relief sought") (internal quotation marks omitted)).

[82] *See* Texas Reply at p. 11.

breach of the Standard Contract.[83] The Federal Circuit rejected the claim, holding that the plaintiffs were not third party beneficiaries of the Standard Contract, since the Contract did not show an intent to provide a benefit to rate-paying customers.[84] Nor could they establish an "implied-in-fact" contract, as the express contract between DOE and the utility negates an "implied-in-fact" contract between the plaintiffs and the Government.[85] If ratepayers are not third party beneficiaries of, or implied parties to, the Standard Contract and consequently unable to seek recovery from the Nuclear Waste Fund, then Texas cannot stand in its ratepayers' shoes to seek the essentially identical relief of restitution and disgorgement of the Fund. Therefore, the Court should not countenance any claim by Texas that it can represent electric ratepayers vis-à-vis the Standard Contract.

C. Texas Brought its Claims for Restitution and Disgorgement to the Wrong Forum

The Fifth Circuit is the wrong forum for Texas' claims for restitution and disgorgement. Though Texas lacks standing to bring these claims (which in any event are untimely and substantively without merit), if they were to be filed anywhere, Texas should have filed them in the U.S. Court of Federal Claims, which has jurisdiction over money claims against the United States based on the

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[83] *See Roedler*, 255 F.3d 1347.
[84] *Id.* at 1352.
[85] *Id.* at 1353.

Constitution, federal statutes, executive regulations, and contracts.[86] The Court should therefore reject Texas' efforts to seek restitution and disgorgement in this forum.

D. Texas Has Not Exhausted Its Administrative Remedies

Texas has failed to exhaust its administrative remedies. The exhaustion doctrine is "well established in the jurisprudence of administrative law" and provides that any administrative remedy must be exhausted before seeking judicial relief.[87] This doctrine serves two purposes: *first*, to protect administrative agency authority, which allows an agency an opportunity to correct its own mistakes before being haled into Federal court; and *second*, to promote efficiency as agency proceedings are typically quicker and more economic than litigation in federal court.[88] Texas has not participated in the NRC licensing proceeding on the Yucca Mountain application, or otherwise raised its concerns to the NRC and DOE. And instead of first pursuing remedies with the Federal Respondents, Texas prematurely instituted this civil action. The Court should declare that Texas must pursue its requests for restitution and disgorgement elsewhere first.

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[86] 28 U.S.C.§ 1491(a)(1).

[87] *American Gen. Ins. Co. v. FTC*, 496 F.2d 197, 199 (5th Cir. 1974) (citing *McKart v. United States*, 396 U.S. 185, 193 (1969)).

[88] *Moussazadeh v. Texas Dept. of Criminal Justice*, 703 F.3d 781, 788 (5th Cir. 2012) (citing *Woodford v. Ngo*, 548 U.S. 81, 89 (2006)). *See also McCarthy v. Madigan*, 503 U.S. 140, 145 (1992) ("Exhaustion is required because it serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency").

E. Texas Has Failed to State a Claim for Mandamus Relief

To the extent the Court treats the Texas Petition as a mandamus petition,[89] it should be rejected because Texas has failed to state a proper claim for mandamus relief with respect to its prayers for restitution and disgorgement. Fifth Circuit precedent holds that "[m]andamus may only issue when (1) the plaintiff has a clear right to relief, (2) the defendant a clear duty to act, and (3) no other adequate remedy exists."[90] "Mandamus is only appropriate when the duty is so plainly described as to be free from doubt; thus, mandamus is not available to review discretionary acts of agency officials."[91] "'The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations.'"[92]

Texas has not met its "burden of showing that 'its right to issuance of the writ is clear and indisputable'"[93] with respect to its prayers for restitution and

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[89] *See* March 20, 2017 Letter from A. Lopez to Respondents' counsel stating that the Court "has requested a response to the above-referenced petition for writ of mandamus."

[90] *Wolcott v. Sebelius*, 635 F.3d 757, 768 (5th Cir. 2011) (citations omitted). *See also Northern States Power Co. v. U.S. Department of Energy*, 128 F.3d 754, 758 (D.C. Cir. 1997) ("Mandamus is proper only if (1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act, and (3) there is no other adequate remedy available to plaintiff") (quotation omitted).

[91] *Wolcott*, 635 F.3d at 768 (internal quotation omitted).

[92] *Northern States*, 128 F.3d at 758 (quoting *Allied Chemical Corp. v. Daifion, Inc.*, 449 U.S. 33, 34 (1980)).

[93] *Id.* at 758 (quoting *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988)

disgorgement. As previously explained in this Response, its prayers for restitution and disgorgement are prohibited by the NWPA.

Texas has also failed to demonstrate that no other adequate remedy exists. Texas has chosen not to pursue administrative remedies with the Respondent agencies. Before the Court orders mandamus relief, it should first direct Texas to seek the same remedies from the agencies themselves. And in fact, consistent with the D.C. Circuit's ruling in *Northern States*,[94] the Government's partial breach of the Standard Contract is being remedied. Nuclear utilities have recovered over $6 billion from the Judgment Fund in settlements and judgements for the Government's partial breach of the Standard Contract, and billions more are expected to be paid. Texas nowhere explains why receipt of damages from the Government's Judgement Fund is insufficient, or how restitution and disgorgement of the Nuclear Waste Fund would remedy any insufficiency.

Further, as a result of the D.C. Circuit's decision in *Nat'l Ass'n of Regulatory Util. Comm'rs*,[95] DOE is no longer able to collect the Nuclear Waste Fund fee, at least not until the nuclear waste program required by the NWPA is reinstated, or the NWPA is appropriately amended. Finally, the Department has

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[94] *Id.* at 759 (declining "to issue the broad writ of mandamus sought by petitioners because they are presented with another potentially adequate remedy").

[95] *Nat'l Ass'n of Regulatory Util. Comm'rs,* 736 F.3d at 521.

requested funding for the Yucca Mountain program, and Congress may well provide an adequate remedy for Texas' prayers.

CONCLUSION

The NWPA forbids Texas' prayers for restitution and disgorgement of the Nuclear Waste Fund. Those prayers, if granted, would undermine the development of a permanent repository for used nuclear fuel, and would otherwise adversely impact interests unique to nuclear utilities. Even if these prayers were plausible under the NWPA, Texas' claims are untimely, and it has no standing to pursue them. For these reasons and all of the other reasons set forth herein, the Court should reject Texas' prayers for restitution and disgorgement.

Respectfully Submitted,

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July 31, 2017

CERTIFICATE OF COMPLIANCE

1. This Motion complies with the type-volume limitation of F. R. App. P. 21(d)(1) because it contains 6,418 words except for the items excluded from the word count pursuant to F. R. App. P. 32(f), as determined by the word-count function of Microsoft Word 2010.

2. This Motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Fifth Circuit Rule 32.1 and the type style requirements of F. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 Times New Roman 14-point font text for the main body and 12-point font text for footnotes.

s/Jay E. Silberg
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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of July, 2017 an electronic copy of the foregoing response was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using electronic mail, with the understanding that the Clerk will complete service of this response using the appellate CM/ECF system.

s/Jay E. Silberg
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