

Justices' NRC Ruling Raises New Regulatory Questions

By **Andy Kriha, Elizabeth Craddock and Jason Hill** (July 1, 2025)

On June 18, in a 6-3 decision, the U.S. Supreme Court decided *Nuclear Regulatory Commission v. Texas*, which involved challenges to the U.S. Nuclear Regulatory Commission's decision to grant a license to a privately owned temporary nuclear waste storage facility that is not co-located with nuclear reactors.

Specifically, the court was tasked with determining whether the challengers were allowed to bring a lawsuit under a procedural statute known as the Hobbs Act — and, if so, determining whether the NRC has authority to issue such licenses under the Nuclear Waste Policy Act and Atomic Energy Act.

The court held that parties must be admitted to an NRC licensing proceeding as a prerequisite to challenging a final licensing order in court, and found that the challengers were thus not authorized to bring suit.

The majority also provided ample evidence in its decision of its likely support of the NRC's authority to license private, temporary storage facilities. However, because the decision was based on the procedural question at hand and not on the commission's licensing authority, that dicta is not binding.

With the three-member dissent arguing against such authority, significant regulatory uncertainty remains.

Hobbs Act

The Hobbs Act states that only "parties aggrieved" by an NRC proceeding may subsequently challenge the commission's decision in court. The commission argued that this language requires challengers to have been admitted as parties to the proceeding.

In this case, some of the challengers had attempted to gain admission to the NRC's proceeding but were denied by the commission. This decision was upheld on appeal by the U.S. Court of Appeals for the District of Columbia Circuit.

Other challengers had not attempted to gain admission to the NRC proceeding, but did submit comments during a public comment period regarding a related National Environmental Policy Act review, and separately wrote to the commission to express concerns about the project.

The challengers argued that any person aggrieved by an NRC decision is a "party" or, alternatively, that at most a party should only be required to participate in some fashion, including submitting comments or attempting to intervene in the proceeding.

The U.S. Court of Appeals for the Fifth Circuit, relying on an ultra vires exception to the Hobbs Act, held that any person, regardless of participation in the underlying agency



Andy Kriha



Elizabeth Craddock



Jason Hill

proceeding, may challenge an agency action on the basis that it exceeds the agency's statutory authority or is unconstitutional.

This holding split with four other courts of appeals, including a U.S. Court of Appeals for the Tenth Circuit opinion regarding the same waste storage licensing proceeding. With split decisions in the various circuit courts, the case came before the Supreme Court for review.

In its ruling, the majority of the high court held that each of the arguments raised in support of the challengers failed.

First, the court compared the phrase "party aggrieved" in the Hobbs Act to the similar phrase "person ... aggrieved" used in the Administrative Procedure Act, which was passed four years before the Hobbs Act. The court concluded that Congress must have had different standards in mind when deciding to use different language, and so "party" must be more specific than "person" in this instance.

The court further looked to the Atomic Energy Act, which says that when a person is affected by the proceeding and meets the criteria for admission, the commission "shall admit any such person as a party to such proceeding", further demonstrating the disparate meanings of the words "person" and "party."

Next, the court held that attempts by the challengers to assert that they qualified for intervention and should have been admitted as parties amounted to an impermissible collateral attack on the commission's decision to deny intervention, and the D.C. Circuit's opinion upholding that decision.

The court noted that the challengers did not appeal that D.C. Circuit decision to the Supreme Court, and left open the question of whether it would have agreed that the NRC lacks authority to deny participation in the underlying licensing proceeding.

Lastly, the court overruled the Fifth Circuit's ultra vires exception for two reasons. First, applicable Supreme Court precedent states that ultra vires exceptions are not available for a mere allegation that an agency action is extrastatutory.

Instead, the agency action must be "entirely in excess of its delegated powers and contrary to a specific prohibition in a statute." The court found the NRC's action did not rise to that level.

Second, the court held that ultra vires exceptions are unavailable when parties have another meaningful path to judicial review — in this case, pointing to the ability to appeal their denials of interventions.

Because the court found that all of the challengers' Hobbs Act arguments failed, it held that the challengers were ineligible to bring the lawsuit, and thus it did not need to reach the merits of the commission's waste facility licensing authority.

NRC Nuclear Waste Licensing Authority

Although the merits of the challenge were expressly left undecided in *NRC v. Texas*, both the majority and dissent left plenty of clues about how a decision might play out if the issue is raised in a future case.

The dissent argued that the text of the Nuclear Waste Policy Act should be the beginning

and end of the analysis. The NWPA expressly authorizes two locations for interim storage: at reactor sites and on federal property.

The NWPA further states that "nothing in [the NWPA] shall be construed to encourage [or] authorize" storage at any "facility located away from the site of any civilian nuclear power reactor and not owned by the Federal Government."

Further, the dissent reasoned that the Atomic Energy Act's grant of licensing authority for source, byproduct and special nuclear materials — the components of nuclear waste — is superseded in this instance by the more specific term for waste, "spent nuclear fuel."

According to the dissent, special nuclear material is handled by the more specific provisions of the NWPA and, following passage of the NWPA, was incorporated into the AEA and used as a separate term, distinct from its underlying components.

The dissent further argued that the NRC's authority to license specific uses of source, byproduct and special nuclear material does not extend to storage, and that a catchall for appropriate uses must be interpreted in light of the enumerated allowable uses, which are not similar to storage.

Lastly, the dissent determined that the fact that the NRC promulgated interim storage regulations under the AEA prior to passage of the NWPA is not evidence that those regulations remain valid following the NWPA's passage.

Despite going out of its way to say that it was not deciding the merits issue, the majority nonetheless devoted more than four pages of its opinion to explaining why the merits question does not weigh so clearly against the NRC's authority.

First, the majority pointed to the court's decision in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, from 1983 — one year after passage of the NWPA. This decision relied on the conclusion that the NRC regulates spent fuel storage under the AEA as a basis for concluding that nuclear waste disposal is a regulatory field occupied by federal law.

Further, the majority recited the history of the NRC's licensing of private, temporary, away-from-reactor storage facilities beginning in 1971, prior to the 1980 regulations specifically asserting authority under the AEA, and continuing beyond 1980.

As the majority pointed out, due mostly to the dismantling of former reactors at sites that still hold waste from those reactors, there are currently about 10 privately owned storage sites not co-located with reactors.

Contrary to the dissent's view that the NWPA, passed in 1982, superseded the 1980 regulations, the majority asserted that Congress was aware of and did not intend to disturb the 1980 regulations with passage of the NWPA.

The majority further asserted that under the dissent's reading, the logical — and absurd — conclusion is not that the NRC cannot license storage facilities and, therefore, they cannot be built, but rather that the NRC cannot license storage facilities and, therefore, they do not require a license in order to be built.

Given the above, it is a reasonable conclusion that if the current iteration of the Supreme Court were presented with the merits question, then the result would be a 6-3 decision in

favor of the NRC maintaining licensing authority over private, temporary, away-from-reactor storage facilities.

However, the majority made clear that it was not deciding the issue, and that its arguments merely demonstrate that by deciding on the Hobbs Act question, it is "not somehow assuming or buying into a premise that the Commission is wrong on the underlying merits."

For that reason, though, it is similarly reasonable to believe that at least some members of the majority have not yet made up their minds on the merits, and simply wanted to ensure there was no implication drawn about their views on the merits by virtue of deciding the case on procedure. Substantial uncertainty therefore remains, unless and until the merits issue is decided.

Implications

The decision on the Hobbs Act question reaffirms Congress' intent that challengers must fully litigate their claims in front of the NRC before seeking judicial relief. Though contested NRC licensing proceedings add significant time and expense to the licensing process for applicants, giving the agency an opportunity to address challenges before license issuance results in robustly supported licenses that are more likely to withstand judicial review.

In addition, the contested hearing process acts as a barrier to entry that prevents potential challengers from engaging in only token participation at the agency level, and then skipping straight to court in an attempt to further delay nuclear projects after license issuance.

The court did not decide the related question of whether the NRC has authority to prevent affected parties from intervening in licensing proceedings to begin with. The possibility thus remains that a future challenger will be able to secure a Supreme Court decision that severely limits the NRC's ability to prevent challengers from meeting the prerequisite of participating fully at the agency level.

Although courts typically do not decide merits questions when the case has already been disposed of on procedural grounds, failure to reach the merits question in this case creates new regulatory uncertainty where none had existed for decades before this case was initiated.

As the nuclear energy industry seeks to expand — sometimes to new types of sites with less available space — and as older reactors continue with the decommissioning process, availability of reliable off-site waste storage is critical. Absent new action from Congress or action by the executive branch to complete its statutorily mandated duty to provide a permanent repository, the NRC's authority under the AEA remains the only available avenue for such storage.

In this case, a three-justice dissent made clear that it does not believe the NRC has authority to act in this arena. Although a six-justice majority provided a detailed analysis in support of the NRC's authority, it made clear that its analysis was merely intended to rebut any possible implication that its decision on procedure could be viewed as direct support of the dissent's view on the merits.

Thus, significant uncertainty will remain until the court is presented with an opportunity to decide the merits, or Congress takes action.

Andy Kriha is an associate at Holland & Knight LLP.

Elizabeth Leoty Craddock is a partner at the firm. She formerly served as staff director of the Senate Committee on Energy and Natural Resources.

Jason Hill is a partner at the firm. He previously served at the U.S. Department of the Interior as the chief administrative judge of the Interior Board of Land Appeals, and at the U.S. Department of Justice as a trial attorney in the Natural Resources Section of the Environment and Natural Resources Division.

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