The Modern Energizer Bunny - Hopping into the Nuclear Energy Revolution: The Tenth Circuit's Analysis in New Mexico ex rel. Balderas v. U.S. Nuclear Regulatory Commission

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I. EXAMINING THE RABBIT HUTCH: NUCLEAR ENERGY’S PROMINENT ROLE IN ACHIEVING GLOBAL SUSTAINABILITY

U.S. Congressmember Michael K. Simpson confidently stated that the United States is “on the verge of a nuclear energy renaissance.” Nuclear energy, derived from the nucleus of an atom, significantly impacts environmental quality; the United States, being the largest producer of nuclear power and the second-highest contributor to global carbon dioxide (CO\textsubscript{2}) emissions, plays a crucial role in this context. Nuclear fuel production involves both nuclear fission and nuclear fusion, resulting in a low-carbon energy source that produces minimal emissions throughout its life cycle. Since the establishment of the first commercial nuclear power station in the United States in 1958, nuclear power has expanded globally, with 442 reactors operating in thirty-two countries and fifty-four under construction in nineteen countries.
Global warming and climate change represent some of the most challenging issues posed to today’s society; both primarily stem from energy production.\(^5\) Despite growing concerns about climate change, human and economic progress is directly linked to greenhouse gas emissions (GHGs), and therefore, directly correlates with climate change.\(^6\) Thus, the world must balance the contention between maintaining necessary energy levels for modern society while also protecting the environment.\(^7\) Strategies like decarbonizing power sources and shifting to renewable energy resources, which release little or no greenhouse gases, are green solutions that can keep up with modern demand.\(^8\) Refusing to adapt leads to “environmental degradation” which occurs when countries continue to produce energy from fossil sources despite having the opportunity to use renewable energy.\(^9\) Thus, the primary means to obtain economic development while maintaining both human and environmental demands should be exploring sustainable energy solutions.\(^10\)

Nuclear energy can ameliorate such difficulties, which are increasing at an exceptionally fast pace.\(^11\) Nuclear power is vital in
transitioning to a society with sustainable green growth due to its minimal carbon emissions, reduced energy dependence, and quick electricity generation and capacity over less land.\textsuperscript{12} In contrast to the intermittent nature of solar and wind energy – which require supplementary backup power during periods of darkness or wind breaks – nuclear energy is continuous and stable.\textsuperscript{13} Nevertheless, new nuclear reactor designs are set to complement wind and solar generation to achieve government goals in reducing carbon and climate change.\textsuperscript{14} Additionally, nuclear energy is known to be one of the least expensive solutions for efficient electricity generation, as compared to coal or natural gas.\textsuperscript{15}

Despite numerous benefits, various studies that produce contradictory results underscore the complexity of predictions regarding the relationship between nuclear energy consumption and CO\textsubscript{2} emissions.\textsuperscript{16} Nuclear plants still pose an environmental risk due to radioactive radiation and the potential for accidents, causing societal apprehension surrounding reactor control.\textsuperscript{17} One study finds that the “adverse impacts of nuclear energy on ecological quality” result from human error.\textsuperscript{18} The dichotomy between nuclear power’s benefits and risks can result in unintended external economic disasters, destroying people, land, and infrastructure.\textsuperscript{19}

Regardless, the use of the technology has rapidly increased in terms of total global energy consumption.\textsuperscript{20} As of 2021, nuclear

\begin{thebibliography}{99}
\item[12.] See id. (advocating for nuclear energy use as best option to assist environmental policies aimed at long-run ecological stability and security).
\item[13.] See Mathew, supra note 2, at 5 (suggesting preference over solar and wind power as nuclear power produces comparable or even one-third CO\textsubscript{2} emissions at a steadier pace).
\item[14.] NUCLEAR ENERGY INST., POLICY OPTIONS FOR STATES TO SUPPORT NEW NUCLEAR ENERGY 1 (2022) (acknowledging transition to clean energy system depends on nuclear carbon-free technology).
\item[15.] Sadiq et al., supra note 6, at 3674 (listing benefits of nuclear energy and role in obtaining environmental goals).
\item[16.] See, e.g., The Role of Consumption of Energy, supra note 9, at 873 (stating conclusion of study was negative relationship between CO\textsubscript{2} emission and nuclear energy consumption). One study found no connection between CO\textsubscript{2} emission and nuclear energy consumption for nuclear energy-consuming and developed countries. Id. (predicting variability and uncertainty in relationship between CO\textsubscript{2} and nuclear energy).
\item[17.] Sadiq et al., supra note 6, at 3673 (finding limits on energy consumption which produces potential issues).
\item[18.] Id. at 3674 (noting “operations inefficiency, technological incompetence, associated radioactive waste, and . . . developmental restrictions” can negatively impact ecological quality).
\item[19.] See The Role of Consumption of Energy, supra note 9, at 877-78 (recommend- ing use of nuclear power plants only when accounting for all necessary security measures against possible threats).
\item[20.] Do Nuclear Energy and Renewable Energy Surge Environmental Quality In The United States?, supra note 2, at 3 (specifying total nuclear and renewable energy

energy has reduced its total generating and operating costs in capital expenditures, operations, and fuel costs, partially explaining increased use.\textsuperscript{21} While reducing CO\(_2\) emissions by two gigatons per year, nuclear power has contributed to approximately twenty percent of all electricity generation in the United States over the last twenty years, making it the single largest contributor of non-fossil fuel power generation.\textsuperscript{22} Nuclear energy is crucial to reduce carbon emissions, and its continued and expanded use is vital in the United States’ pursuit of carbon neutrality.\textsuperscript{23} Nuclear power is beneficial because it provides an economically reliable, cost-effective clean energy, and without a more prominent role for nuclear energy, it will be extremely difficult, if not impossible, to combat climate change.\textsuperscript{24}

By deploying modern nuclear reactor technologies, governments can save energy, minimize waste, and safeguard uranium supplies for future generations.\textsuperscript{25} In \textit{New Mexico ex rel. Balderas v. U.S. Nuclear Regulatory Commission},\textsuperscript{26} the Nuclear Regulatory Commission (NRC) attempted broad governance.\textsuperscript{27} In this case, the Tenth Circuit Court of Appeals addressed a jurisdictional issue and contemplated whether the NRC, as a governmental entity, overstepped its duties in granting a license to “store spent nuclear fuel.”\textsuperscript{28} After carefully consuming increased by five percent in last decade, six percent in last twenty years, and fourteen percent in last forty years).

\textsuperscript{21} See \textit{Nuclear Energy Inst., Nuclear Costs in Context}, supra note 14, at 3-7 (revealing lowest costs since electric utility company began collecting industry-wide detail data in 2002).

\textsuperscript{22} See Mathew, supra note 2, at 4-5 (signaling nuclear energy will be imperative for achieving low carbon future).

\textsuperscript{23} See \textit{Do Nuclear Energy and Renewable Energy Surge Environmental Quality In The United States?}, supra note 2, at 11 (stressing broad importance that nuclear energy yields in affecting environment).

\textsuperscript{24} See Mathew, supra note 2, at 3, 8 (expressing nuclear power’s role in reducing total environmental footprint and stating nuclear power as necessity in combating climate change).

\textsuperscript{25} See Sadiq et al., supra note 6, at 3679 (suggesting government’s act to integrate new policies into modern legislation). Removing legislative barriers in states with antiquated restrictions on new nuclear reactor construction would serve as a step toward a decarbonized future. \textit{Id.} (suggesting positive collaboration between governments and private investors would enhance technological collaboration); see also \textit{Nuclear Energy Inst., Policy Options for States to Support New Nuclear Energy}, supra note 14, at 8 (suggesting green legislation is necessary to achieve greener future).

\textsuperscript{26} 59 F.4th 1112, 1115 (10th Cir. 2023) (introducing case discussed in this Note).

\textsuperscript{27} See \textit{id.} (describing NRC’s act of approving permit for storage of spent nuclear waste to promote nuclear infrastructural development).

\textsuperscript{28} See \textit{id.} (addressing New Mexico’s challenge of granted license to private company).
analyzing several statutes, the Tenth Circuit dismissed the petition for lack of jurisdiction and held that the NRC did not act *ultra vires.*

This Note analyzes the Tenth Circuit’s opinion and dismissal of New Mexico’s petition in *Balderas.* Part II analyzes the case’s factual overview, issue, New Mexico’s raised objections, and the NRC’s asserted defenses. Part III discusses the procedural history and general law relevant to *Balderas.* Part IV of this Note focuses on the Tenth Circuit’s legal analysis. Part V presents a critical analysis of the Tenth Circuit’s opinion introducing an affirmative intention-based framework effectively replacing an ambiguous, segmented variation in court requirements. Finally, Part VI discusses the impact of limiting the procedural and operational functionality of nuclear technology on current nuclear energy policies, as shown in *Balderas.*

II. Up Close and Personal in the Cage: A Comprehensive Presentation of Balderas’ Facts

The NRC controls the licensing of private facilities to store spent nuclear fuel. On September 17, 2021, the NRC granted Interim Storage Partners (Interim) a license to store spent nuclear fuel on New Mexico’s border. The Petitioners, the State of New Mexico

29. *Id.* at 1124 (dismissing New Mexico’s claims). Plaintiffs alleged the NRC acted *ultra vires*, Latin for “beyond the powers,” meaning it acted without requisite authority. *See Ultra Vires Definition, LexisNexis, https://www.lexisnexis.co.uk/legal/glossary/ultra-vires (last visited Dec. 20, 2023) (defining *ultra vires*); see also *Balderas*, 59 F.4th at 1123 (explaining New Mexico’s argument that NRC acted *ultra vires*).


31. For a discussion of facts and arguments within the noted case, see *infra* notes 36-58 and accompanying text.

32. For a discussion of background and case law, see *infra* notes 59-122 and accompanying text.

33. For a discussion of legal analysis, see *infra* notes 123-56 and accompanying text.

34. For a discussion of critical analysis, see *infra* notes 157-83 and accompanying text.

35. For a discussion of the case, and nuclear energy’s impact going forward, see *infra* notes 184-211 and accompanying text.


(New Mexico or the State), suing on behalf of Attorney General Hector H. Balderas and the New Mexico Environmental Department, challenged the license by invoking the Administrative Procedure Act (APA) and the National Environmental Policy Act (NEPA).38

The NRC issued a notice for interested parties to request a hearing to facilitate public participation.39 One year after the NRC issued the notice, the licensing proceeding ended, and New Mexico had not sent any hearing requests or petitions to intervene.40 Subsequently, the NRC drafted an environmental impact statement, then requested public commentary.41 Several representatives of New Mexico – the Governor, the Environmental Department, and the Energy, Minerals and Natural Resources Department – submitted a joint comment criticizing the draft, to which the NRC responded in the final version of its statement.42

On September 17, 2021, the NRC granted Interim a forty-year license to construct and operate a spent nuclear fuel storage facility.43 Following the license approval, New Mexico petitioned for a review of the NRC’s decision, but the NRC moved to dismiss for lack of jurisdiction.44 New Mexico defended its jurisdiction with the contention that it was an “aggrieved party” as defined by a combination of the Hobbs Act and the Atomic Energy Act.45 To be an “aggrieved party...
party,” New Mexico had to, at minimum, prove that it was a party by “interven[ing], request[ing] a hearing, or submit[ting] contentions.” New Mexico argued that public comments were its only means to address the NRC’s report. The State, however, could have asserted contentions or requested a hearing when Interim submitted its report. The court denied that New Mexico’s comment on the draft record of decision was sufficient to qualify it as a participant in the licensing proceeding. Thus, New Mexico could not establish jurisdiction under the Hobbs Act, Atomic Energy Act, or NEPA.

New Mexico also attempted to establish jurisdiction under the Nuclear Waste Policy Act (NWPA); the Act provides federal appellate jurisdiction over challenges to an environmental impact statement prepared with respect to certain agency action under Part A of the statute. Part A “establishes a schedule for siting, construction, and operation of a permanent federal repository;” however, Interim’s facility and license were neither permanent nor federal, and thus jurisdiction was not proper under NWPA.

Lastly, New Mexico contended that because the NRC acted ultra vires, its jurisdiction was proper. New Mexico had multiple opportunities to obtain judicial review, but by disregarding NRC proceedings, the State lost its opportunity to invoke this exception. In support of its argument, New Mexico relied on American Trucking Associations, Inc. v. Interstate Commerce Commission (American

46. *Balderas*, 59 F.4th at 1118 (explaining conclusion on aggrieved party status).

47. See *id.* at 1119-20 (recounting New Mexico’s arguments regarding commentary opportunities).

48. *Id.* (suggesting many of New Mexico’s criticisms were addressed in Interim’s report under NEPA; see also 10 C.F.R. § 51.20(b)(9) (2023) (requiring preparation of environmental impact statement before issuing spent fuel license).

49. See *Balderas*, 59 F.4th at 1118 (highlighting New Mexico’s failure to past commentary); see, e.g., Ohio Nuclear-Free Network v. U.S. Nuclear Regul. Comm’n, 53 F.4th 236, 240 (D.C. Cir. 2022) (concluding petitioners failed to become parties when they emailed letter but did not request hearing or submit contentions related to license).

50. See *Balderas*, 59 F.4th at 1119 (deciding New Mexico’s failure to participate appropriately barred their petition).


53. See *id.* at 1123 (addressing review of administrative actions when agency acts ultra vires).

54. See *id.* at 1123-24 (concluding NRC did not act ultra vires and New Mexico could not use exception regardless).
Trucking),\textsuperscript{55} which held review was permissible “if the agency action [was] ‘attacked as exceeding the power of the [NRC].’”\textsuperscript{56} The Balderas court declined to follow American Trucking, stating that American Trucking requires the petitioner to act affirmatively to support a jurisdictional argument, and while New Mexico could have acted, it did not.\textsuperscript{57} Ultimately, the court dismissed New Mexico’s petition for lack of jurisdiction based on its inaction.\textsuperscript{58}

III. Unveiling the Backstory: The Birth of the Modern Energizer Bunny

Following World War II, Congress established federal nuclear energy agencies to regulate the nuclear energy sector.\textsuperscript{59} The influence of these agencies resonates through case law that leads up to the noted case.\textsuperscript{60} Contextualizing the court’s analysis in Balderas requires a review of the relevant agency’s background and previous court decisions, offering diverse perspectives on the nuclear energy industry.\textsuperscript{61}

A. The Bunny’s Birth: NRC & Subsequent Acts

The government assigned nuclear regulation authority to the Atomic Energy Commission (AEC), established by the Atomic Energy Act of 1946, before the NRC’s creation.\textsuperscript{62} In 1954, Congress amended the Act to allow the development of commercial nuclear power and assigned the AEC to encourage the use and safety of nuclear power.\textsuperscript{63} By the 1960s, critics opposed the AEC’s regulations,

\begin{itemize}
\item \textsuperscript{55} 673 F.2d 82, 85 (5th Cir. 1982) (discussing ultra vires exception).
\item \textsuperscript{56} Balderas, 59 F.4th at 1123 (quoting Am. Trucking Ass’ns v. Interstate Com. Comm’n, 673 F.2d 82, 85 n.4 (5th Cir. 1982)) (adjudicating for exception’s application).
\item \textsuperscript{57} Id. at 1123-24 (finding American Trucking is not followed by many circuits, and unpersuasive in Fifth Circuit).
\item \textsuperscript{58} See id. at 1124 (dismissing for lack of jurisdiction).
\item \textsuperscript{59} For a discussion of nuclear energy’s legislative history in the United States, see infra notes 62-74 and accompanying text.
\item \textsuperscript{60} For a discussion of historical case law leading up to Balderas, see infra notes 75-122 and accompanying text.
\item \textsuperscript{61} For a discussion of both nuclear energy’s legislative history and relevant case law, see infra notes 62-122 and accompanying text.
\item \textsuperscript{63} Id. (referencing Atomic Energy Act of 1954); see also Atomic Energy Act, 42 U.S.C. §§ 2011-2296(b)(7) (defining modern policy actions in relation to atomic energy with overarching goal in promotion of world peace); see also Texas v. Nuclear Regul. Comm’n, 78 F.4th 827, 843 (5th Cir. 2023) (providing jurisdiction over nuclear plant licensing and regulation of power plant construction and operation under Atomic Energy Act).
\end{itemize}
claiming they were “insufficiently rigorous” with radiation protection standards, reactor safety, and plant siting regarding environmental protection.64 Due to these attacks, Congress abolished the agency and enacted the Energy Reorganization Act of 1974, creating the NRC as an independent agency tasked to oversee, but not promote, the nuclear industry.65 As an agency, the NRC’s mission is to “license and regulate [] civilian use of radioactive materials . . . .,” provide assurance of reasonable health and safety standards, and “promote the common defense and security” of the environment.66 In assuring regulation, the NRC complies with various environmental laws that require the agency to consider the environmental impacts of its activities.67

NEPA is arguably the most important of these environmental laws.68 Signed into law in 1970, NEPA requires federal agencies to evaluate the environmental impacts of their proposed actions prior to making decisions on permits and construction of both private and public facilities.69 NEPA mandates the NRC to fulfill various requirements, including the preparation of environmental statements following public comments.70 In addition, the NRC must comply with the NWPA of 1982.71 The NWPA directs the NRC to grant a license to operate a repository for nuclear waste storage or disposal only if it meets all regulatory standards and requirements.72

64. History, supra note 62 (stating the AEC’s programs stirred substantial controversy considering newness of nuclear energy).
67. Id. (referencing various environmental acts, including National Environmental Policy Act).
68. See National Environmental Policy Act, 42 U.S.C. § 4321 (promulgating general national policy that promotes environment, health and safety, and welfare to enrich understanding of ecological systems); see also National Environmental Policy Act, NEPA.gov, https://ceq.doc.gov/ [hereinafter NEPA Article] (last visited Apr. 1, 2024) (describing NEPA as “Magna Carta” of federal environmental law, marking significant milestone in environmental legislation).
70. See Balderas, 59 F.4th at 1116 (requiring NRC to prepare draft, notify public, and invite comments).
72. Summary of the Nuclear Waste Policy Act, U.S. Env’t Prot. Agency (June 22, 2023),
The Act additionally defines nuclear waste as “highly radioactive material resulting from the reprocessing of spent nuclear fuel . . .” or other material the NRC determines to require permanent isolation. 73 Similarly, NEPA and NWPA work together to establish strict, mandatory procedures that the NRC must follow regarding spent nuclear waste. 74

B. Growing Up: Historical Case Law of Nuclear Energy Leading to Balderas

In Gage v. U.S. Atomic Energy Commission, 75 a case decided in 1973, petitioners could have participated in the underlying rulemaking proceedings but chose not to; they instead challenged AEC rules implementing NEPA requirements. 76 The new regulation explicitly indicated that a utility planning to build a nuclear facility could only significantly change the proposal after the AEC reviewed it for environmental impacts. 77 A proper course of action involved the petitioners requesting a hearing to express their concerns instead of challenging the rule after its implementation. 78 The petitioners, however, did not participate in the administrative procedure available to them, and thus, their request was unenforceable, and the court dismissed it. 79

Prominent nuclear energy cases remained dormant until the turn of the century. 80 In 2004, the State of Utah in Bullcreek v. Nuclear Regulatory Commission 81 challenged the NRC. 82 The petitioners

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74. See NEPA Article, supra note 68 (summarizing mandate on all federal agencies, such as NRC, to comply with NEPA, and subsequently adhere to NWPA).
75. 479 F.2d 1214, 1215-16 (D.C. Cir. 1973) (describing instance where petitioners did not participate in proceedings).
76. See id. at 1216 (suggesting thirty-year gap in nuclear legislation occurred because of societal backlash).
77. See id. at 1214, 1215-16 (D.C. Cir. 1973) (describing instance where petitioners did not participate in proceedings).
78. See id. at 1221-22 (illustrating correct alternative method for petitioners).
79. See id. (describing court’s rationale for dismissing petition).
80. See Melissa Powers, The Past and Future of Energy Law, LEWIS & CLARK L. SCH. (2016), https://law.lclark.edu/live/news/33979-the-past-and-future-of-energy-law (explaining regulators refused to approve new nuclear energy investments due to various accidents). Specifically, at the time of the Three Mile Island nuclear accident, only about half of the planned global nuclear units were active, and legislative backlash stranded costs. Id. (suggesting thirty-year gap in nuclear legislation occurred because of societal backlash).
82. See id. (indicating statute’s language did not satisfy requirements for petitioners’ action).
argued that 42 U.S.C. § 10155(h) – which states that regulations regarding the storage of spent nuclear fuel will not apply to a storage facility located away from the site of a nuclear reactor – repealed the NRC’s authority to license the storage of private spent nuclear fuel at privately owned storage facilities. The court rejected a plain language interpretation of the statute and instead adopted the NRC’s view that the legislative history and Congress’s intent were more consistent with the statute’s overall language and denied petitions for review. Seven years later, in Beyond Nuclear v. U.S. Nuclear Regulatory Commission, environmental organizations attacked the NRC’s denial of a relicensing petition on the basis that wind power was not a reasonable alternate to their nuclear power plant. While the petitioners argued the NRC misapplied NEPA, the court held that the NRC’s decision constituted informed decision making that was neither “arbitrary or capricious.”

Shortly after, in National Resources Defense Council v. U.S. Nuclear Regulatory Commission (NRDC v. NRC), the court refuted the National Resources Defense Council’s (NRDC) attempt to avoid regulatory requirements by emphasizing the Atomic Energy Act’s mandate to grant a hearing to any affected party, but also recognizing that the Atomic Energy Act “does not confer the automatic right of intervention upon anyone.” While NEPA does not require a particular process, agencies must prepare an environmental impact statement before undertaking “major federal action,” which ensures agencies consider the environmental impact of its proposed actions and inform the public of its decision making processes. In response to a license renewal grant, a party must intervene in the proceeding by submitting a request for a hearing. Here, the court upheld

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83. Id. (referencing § 10155(h) of NWPA of 1982 which superseded authority under 1954 Act); see also 42 U.S.C. § 10155(h) (specifying location applicability of spent nuclear fuel storage facilities).

84. See Bullcreek, 359 F.3d at 543 (holding NRC’s interpretation gives full meaning to other words of statute).

85. 704 F.3d 12, 14 (1st Cir. 2013) (outlining petitioners’ argument).

86. Id. (assessing petitioners’ application downplaying alternate sources of electric energy).

87. Id. at 21 (denying petition for review).

88. 823 F.3d 641, 652 (D.C. Cir. 2016) (emphasizing party requirements for intervention).

89. Id. (quoting Union of Concerned Scientists v. U.S. Nuclear Regul. Comm’n, 920 F.2d 50, 55 (D.C. Cir. 1990)) (noting agency operating procedures are given deference where statute is silent).


91. Id. (stating requirements to challenge grant of license renewal); see also 10 C.F.R. § 2.309 (2012) (requiring filed contentions based on environmental report).
the NRC’s denial of the NRDC’s request, as the NRC’s actions sufficiently met NEPA’s requirements and stated the NRDC’s right to a hearing was not automatic or absolute.92

In Virginia Uranium, Inc. v. Warren,93 the most recent nuclear energy Supreme Court hearing, the Supreme Court supported the NRC’s regulatory powers, holding that the Atomic Energy Act gives the NRC “significant authority over the milling, transfer, use, and disposal of uranium, as well as the construction and operation of nuclear power plants.”94 Here, Virginia Uranium intended to mine to extract raw uranium and, once milled, convert it to a solid sold to facilities to produce fuel for nuclear reactors.95 The company alleged that since the NRC was the sole regulator in the field and the agency did not explicitly say anything about uranium mining, the company remained free to mine.96 While mining generally lies outside the NRC’s jurisdiction, the Atomic Energy Act grants the NRC authority to regulate mining on federal and private lands, if purchased or acquired by eminent domain.97

Additionally, the NRC may grant some of its authority to regulate nuclear material to States for health and safety reasons arising from radiation hazards.98 The Court, however, held that the Atomic Energy Act and NRC do not strip States of their power to regulate mining, even uranium mining, within their borders because Congress did not intend to limit State discretion.99 Thus, state law preempted the company’s actions in favor of NRC power.100

Stemming from the Supreme Court decision, In re Interim Storage Partners LLC101 involved an appeal to the Atomic Safety and Licensing Board’s (Board) decision regarding a license application to construct and operate a nuclear waste storage facility in Andrews

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92. NRDC v. NRC, 823 F.3d at 642, 652 (holding NRDC was not entitled to waiver and NRC’s actions were not arbitrary).
93. 139 S. Ct. 1894, 1900 (2019) (referencing Supreme Court’s most recent hearing on NRC’s regulation).
94. Id. (acknowledging NRC’s authority under Atomic Energy Act).
95. Id. (describing company’s plan).
96. Id. at 1901-02, 04 (stating company’s claim).
97. Id. at 1902 (indicating Atomic Energy Act exception).
98. Va. Uranium, Inc., 139 S. Ct. at 1902 (highlighting NRC’s discretionary authority to grant State power under 42 U.S.C. § 2021(b)).
99. Id. at 1900, 02 (holding Virginia law was not preempted as NRC has exclusive authority to regulate every aspect of nuclear energy, except for mining).
100. Id. at 1899 (explaining NRC’s extensive reach over state law).
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County, Texas.\footnote{102} The \textit{In re Interim} court affirmed the Board’s decision, which argued the joint petitioners did not reasonably contend and rejected the petitioners’ hearing requests attempting to deny the application.\footnote{103} One petitioner claimed that the application should be denied as it assumes that the U.S. Department of Energy will take ownership of the waste and contract with Interim to store it, which allegedly violates the NWPA.\footnote{104} The Board concluded with six additional contentions that the petitioners had not raised a genuine dispute that the application was unreasonable.\footnote{105}

The subsequent year, in \textit{Ohio Nuclear-Free Network v. U.S. Nuclear Regulatory Commission},\footnote{106} a case in which energy advocacy organizations challenged the NRC’s decision to issue an amended materials license, the court yet again found a lack of jurisdiction due to petitioners’ failure to intervene in the manner required by NRC regulations.\footnote{107} Here, petitioners emailed a letter to the NRC staff arguing the license violated federal law and did not request a hearing or intervene in the proceedings.\footnote{108} The court determined that the petitioners’ presentation of their views was inappropriately informal given their relationship with the NRC, and held that they could not satisfy the “aggrieved party” requirement under the Hobbs Act.\footnote{109}

These cases that precede the noted case all produce similar rulings regarding nuclear waste.\footnote{110} Indeed, the similarity held true until 2023, when the State of Texas challenged the NRC in \textit{Texas v. Nuclear Regulatory Commission (Texas)}.\footnote{111} This case stemmed from the thousands of metric tons of nuclear waste that has accumulated

\begin{itemize}
\item \begin{footnote}{102} Id. at *1-3 (regarding application for forty-year license to store five thousand metric tons of nuclear spent fuel with amendments to store up to forty thousand metric tons).\end{footnote}
\item \begin{footnote}{103} Id. at *3, *56 (affirming Board’s denial of hearing requests).\end{footnote}
\item \begin{footnote}{104} Id. at *5 (explaining petitioner’s argument against Board’s approval of application).\end{footnote}
\item \begin{footnote}{105} Id. at *9-10 (affirming Board’s decisions to dismiss contentions).\end{footnote}
\item \begin{footnote}{106} 53 F.4th 236, 237 (D.C. Cir. 2022) (finding jurisdiction lacked due to unconventional method).\end{footnote}
\item \begin{footnote}{107} Id. (highlighting claim NRC issued license without first preparing environmental impact statement, however, petitioners lacked jurisdiction).\end{footnote}
\item \begin{footnote}{108} Id. at 238 (concluding petitioners were not “aggrieved party” by sending letter to NRC).\end{footnote}
\item \begin{footnote}{109} Id. at 240 (citing Gage v. U.S. Atomic Energy Comm’n, 479 F.2d 1214, 1217 (D.C. Cir. 1973)) (asserting petitioners improperly intervened in manner required by 42 U.S.C. § 2239 and NRC’s regulations).\end{footnote}
\item \begin{footnote}{110} For a discussion of cases similar to Balderas, see \textit{supra} notes 73-122 and accompanying text.\end{footnote}
\item \begin{footnote}{111} 78 F.4th 827, 832 (5th Cir. 2023) (raising current litigation originated from ongoing nuclear power and waste regulation debate).\end{footnote}
\end{itemize}
over decades as a result of nuclear power generation.\textsuperscript{112} Although Congress mandated its permanent storage in a geologic repository, development stalled.\textsuperscript{113} To address the lack of storage, the NRC asserted its authority under the Atomic Energy Act to license storage facilities for spent nuclear fuel.\textsuperscript{114} The State of Texas actively participated through commentary and subsequently requested a review of the license; thus, the Fifth Circuit ruled that the Atomic Energy Act did not grant the NRC extensive authority to issue licenses to private parties for storing spent nuclear fuel.\textsuperscript{115}

In reaching this decision, the court concluded that, when viewed through the fairest lens, the State was an “aggrieved party” under the plain text of the Hobbs Act, as the Act did not distinguish between different types of agency proceedings.\textsuperscript{116} This decision contributed to the circuit split understanding of what an “aggrieved party” is; D.C. Circuit case law has construed the Hobbs Act to encompass participation in “the appropriate and available administrative procedures.”\textsuperscript{117} For example, one decision relied on the interpretation that the necessary participation level to reach party status varies based on the specific formalities of the conducted proceeding.\textsuperscript{118} Additionally, the court in \textit{Texas v. U.S. Nuclear Regulatory Commission (Texas)} relied on the 2022 Supreme Court ruling in \textit{West Virginia v. Environmental Protection Agency (West Virginia)},\textsuperscript{119} which held that decisions with a certain magnitude and level of consequence are for Congress or an agency acting under \textit{clear} delegation to decide.\textsuperscript{120} The Fifth Circuit court stated that while nuclear waste disposal significantly impacts the public on an economic and political level, the Atomic Energy Act did not confer clear delegation to the NRC.\textsuperscript{121}

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\textsuperscript{112} See \textit{id.} at 832-33 (explaining environmental consequences of nuclear energy).

\textsuperscript{113} See \textit{id.} at 833 (noting increase in nuclear waste buildup raises issues in modern environment).

\textsuperscript{114} \textit{Id.} (issuing license to Interim to use private facilities to store spent fuel).

\textsuperscript{115} \textit{Id.} at 844 (granting petition for review and vacating license).

\textsuperscript{116} \textit{Texas}, 78 F.4th at 838-39 (concluding additional degree of participation not contemplated in plain text of statute is not the fairest reading).

\textsuperscript{117} \textit{Id.} at 838 (quoting Gage v. U.S. Atomic Energy Comm’n, 479 F.2d 1214, 1217 (D.C. Cir. 1973)) (displaying precedent suggesting “aggrieved party” means more than facial text of statute).

\textsuperscript{118} \textit{Id.} at 839 (quoting Water Transp. Ass’n v. Interstate Com. Comm’n, 819 F.2d 1189, 1192 (D.C. Cir. 1987)) (emphasizing degree of participation varies case-by-case).

\textsuperscript{119} 142 S. Ct. 2587, 2607-08 (2022) (reiterating major questions doctrine).

\textsuperscript{120} \textit{See Texas}, 78 F.4th at 844 (emphasis added) (quoting \textit{West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022)}) (clarifying level of authority to authorize ecological decisions).

\textsuperscript{121} \textit{Id.} at 843-44 (quoting \textit{West Virginia v. EPA, 142 S. Ct. 2587, 2608 (2022)}) (signaling importance of nuclear waste and holding Atomic Energy Act does not
cumulative decisions from previous nuclear energy case law significantly influenced the court’s decision in the noted case.122

IV. Energizing the Court: A Narrative Analysis of the Arguments in Balderas

The noted case centers on New Mexico’s petition for jurisdiction regarding the NRC’s granted license to Interim Storage for the private storage of nuclear fuel.123 In response, the NRC moved to dismiss the State’s petition for lack of subject matter jurisdiction while New Mexico invoked the Hobbs Act, Atomic Energy Act, and the NWPA and claimed the NRC acted *ultra vires* to argue for jurisdiction to maintain its petition’s adequacy.124 The court ultimately granted the NRC’s motion to dismiss the petition for lack of jurisdiction and methodically walked through its rationale.125

A. The Initial Hop: New Mexico Lacked Jurisdiction Under the Hobbs Act

New Mexico mainly invoked the Hobbs Act in an attempt to obtain jurisdiction.126 In particular, the Hobbs Act creates federal appellate jurisdiction over the NRC’s final orders, but is only invokable by “aggrieved parties;” therefore, the court considered whether New Mexico qualified as an “aggrieved party.”127 Ultimately, the court relied on the Atomic Energy Act to conclude that New Mexico did not participate in the licensing proceeding and, thus, was not an “aggrieved party.”128

The Atomic Energy Act specifies how interested entities are to request a hearing; if done correctly, the NRC must grant the hearing and admit the entity as a party in the proceeding.129 New Mexico

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122. For a discussion of impactful case law leading up to Balderas, see supra notes 75-121 and accompanying text.
124. See id. (referring generally to each party’s stance).
125. See id. (foreshadowing analysis court utilizes to decide to hold for NRC).
126. See id. at 1116-17 (defining scope and ramifications of Hobbs Act).
127. See id. at 1117 (assessing party qualification based on participation level required in administrative proceeding and not bound by NRC’s definition of “aggrieved party”).
128. See Balderas, 59 F.4th at 1117-18 (combining statutes to produce rationale for whether party was “aggrieved”).
129. See id. (specifying regulations require interested entity to file written request and denote hearing contentions). Additionally, if an interested party unsuccessfully requests a hearing, the party can appeal to the NRC, given it has standing. Id. at 1118 (stating the requirements for parties who do not file correctly).
chose to merely comment instead of seeking leave to intervene, requesting a hearing, or submitting contentions; thus, the State missed the opportunity to participate as a party in the licensing proceeding and did not qualify as an “aggrieved party.”

New Mexico invoked case law that cited submission of comments as enough in rulemaking proceedings, arguing that “party status” is the same whether an agency conducted rulemaking or adjudicative proceedings. The court, however, asserted that New Mexico overlooked the NRC’s requirement for “appropriate participation,” regardless of the strict definition of a “party” in any proceeding, and therefore failed to follow specific formalities.

B. The Second Hop: New Mexico Objected Against the Wrong Report

Given the fact that NEPA required New Mexico to comment on Interim’s environmental report, not the NRC’s, the State did not follow formalities according to the Atomic Energy Act. To justify why public comments addressing the draft were its only solution, New Mexico claimed the adjudicatory proceeding closed before the NRC issued the draft environmental impact statement. The court rejected this argument, holding that New Mexico overlooked the order of operations between Interim’s environmental report and the NRC’s environmental impact statement.

Interim first submitted an environmental report to apply for a license, and afterward, the NRC drafted the environmental statement to conduct an evaluation. If New Mexico had environmental

130. Id. (highlighting New Mexico failed to qualify on personal omission).

131. Id. (citing ACA Int’l v. Fed. Commc’ns Comm’n, 885 F.3d 687, 711 (D.C. Cir. 2018)) (arguing action of submitting comments in any context of arguing against adverse outcome is enough to qualify); see also Brief of Petitioners, New Mexico ex rel. Balderas v. U.S. Nuclear Regul. Comm’n, 59 F.4th 1112 (10th Cir. 2023) (No. 21-9593), 2022 WL 792280, at *17 [hereinafter Petitioners’ Brief] (arguing NRC ignored New Mexico’s submission of extensive comments regarding crucial omissions and deficiencies in NRC’s environmental impact statement).

132. Balderas, 59 F.4th at 1118-19 (concluding New Mexico’s arguments still did not justify NRC from not following specificities).

133. See id. at 1119 (citing 10 C.F.R. § 2.309(f)(2) (2012)) (stating participants should file contentions based on application’s environmental report for issues arising under NEPA).

134. See id. (recounting New Mexico’s claim to court’s second reason for lacking jurisdiction); see also Petitioners’ Brief, supra note 131, at *13 (arguing NRC closed administrative proceeding before public solicitation of comments).

135. See Balderas, 59 F.4th at 1119 (providing basis for arguing New Mexico could have raised environmental objections by submitting contentions about Interim’s report).

136. See id. (describing order of procedural documents playing important role in court’s argument); see also Petitioners’ Brief, supra note 131, at *32 (arguing NRC’s
concerns, it could have indicated this in the initial stages by requesting a hearing when Interim originally submitted its report.\textsuperscript{137} New Mexico’s criticisms contained similarities within both reports.\textsuperscript{138} Moreover, Interim made their environmental report accessible when they requested a license; therefore, the State could have disputed the report regardless of the NRC’s administrative record timing.\textsuperscript{139}

C. The Third Hop: Inapplicableness of the Nuclear Waste Policy Act

New Mexico invoked the NWPA – which provides “federal appellate jurisdiction over challenges to an environmental impact statement” under Part A of the Act – referencing the operation of a “permanent federal repository.”\textsuperscript{140} Conversely, the NRC did not prepare the environmental impact statement concerning Part A as Interim’s facility was neither permanent nor federal.\textsuperscript{141} Due to Interim’s license expiring in forty years, the court ruled it was temporary.\textsuperscript{142} While New Mexico argued the facility was “de facto permanent” because of future uncertainties with the usage of the facility, the court rejected this argument because Interim would have to seek renewal where the NRC could potentially deny future use of the license.\textsuperscript{143}

In addition, the court explained that even if the facility was classified as permanent, it was owned by a private entity and not a federal repository per Part A.\textsuperscript{144} New Mexico argued that because preparation of environmental impact statement violated required standard).

\textsuperscript{137.} See Balderas, 59 F.4th at 1120 (determining New Mexico waited and missed opportunity to contend).

\textsuperscript{138.} See id. at 1120-21 (providing New Mexico’s criticisms as NRC’s assumption of permanent repository, assuming future transportation costs to repository). Additionally, New Mexico stated the NRC overlooked factors such as use of rail lines and possible terrorism, of which were arguable in context of Interim’s report. Id. (providing additional criticisms).

\textsuperscript{139.} See id. at 1121 (concluding New Mexico had additional effective options other than public commenting).

\textsuperscript{140.} See id. (illustrating New Mexico’s lack of applicability for Part A of Act); see also Petitioners’ Brief, supra note 131, at *4 (arguing passage of Interim’s license creates de facto permanent repository in violation of NWPA).

\textsuperscript{141.} See Balderas, 59 F.4th at 1121 (noting differences in Interim’s facility). But see id. (citing Bullcreek v. Nuclear Regul. Comm’n, 359 F.3d 536, 538 (D.C. Cir. 2004)) (defining “repository” as system licensed by NRC with intention for permanent deep geologic disposal of spent fuel (emphasis added)).

\textsuperscript{142.} See id. at 1122 (arguing Part A does not apply in this sense because license is temporary).

\textsuperscript{143.} See id. (emphasizing mere possibility of renewal does not meet standard of permanency); see also Petitioners’ Brief, supra note 131, at *18 (arguing NRC authorized a private, remote storage facility for spent fuel, amounting to a de facto permanent repository, violating NWPA).

\textsuperscript{144.} See Balderas, 59 F.4th at 1122 (explaining why NRC relied on Atomic Energy Act, which authorized regulation of “private use away-from-reactor spent
the license references the Department of Energy (DOE), it implies federal government use of the facility. Rejecting New Mexico’s argument, the court clarified that the license merely referred to the DOE’s funding to Interim, ensuring that if Interim owned the fuel, it must pay for the storage. New Mexico also argued that the environmental impact statement and issuance of the license were “inextricably linked” to actions related to the provisions of the NWPA. The court, however, denied this claim as the references did not show the issuance of an action under the Act, which resulted in a lack of jurisdiction.

D. The Final Hop: New Mexico Lacked Jurisdiction Even if the NRC Acted Ultra Vires

New Mexico’s final argument for jurisdiction centered around the NRC acting ultra vires, but the court disagreed. New Mexico’s reliance on the Fifth Circuit’s holding in American Trucking to support this claim, which permitted review when agency action exceeded its power, was “neither persuasive nor applicable.” A majority of other circuits have declined to follow the Fifth Circuit. Other circuits agree that non-parties should not be able to appeal orders that “exceed the power” of the agency because power must be granted, not assumed, through the Hobbs Act as the primary source to determine jurisdiction.

Additionally, the Balderas court declined to enforce the decision from American Trucking for public policy reasons; a party should not be entitled to remain silent while other interested parties speak and

fuel storage facilities” (citing Bullcreek v. Nuclear Regul. Comm’n, 359 F.3d 536, 538 (D.C. Cir. 2004)).

145. See id. (depicting New Mexico’s attempt to prove connection of federal government to Interim); see also Petitioners’ Brief, supra note 131, at *23 (referencing Department of Energy).

146. See Balderas, 59 F.4th at 1122 (hypothesizing if DOE owned facility, it would own any fuel and pay for storage).

147. See id. (pointing to NRC’s analysis relying on previous determinations when permanent repository would be available and assumption of relocation of spent fuel to permanent facility); see also Petitioners’ Brief, supra note 131, at *20 (arguing NRC’s reliance on linked, flawed, and implausible assumptions).

148. See Balderas, 59 F.4th at 1123 (explaining NRC did not draft report intending for permanent or federal operation required by Part A).

149. See id. (rejecting New Mexico’s final attempt to grasp jurisdiction).

150. See id. at 1124 (citing In re Chi. v. United States, 799 F.2d 317, 334-35 (7th Cir. 1986)) (explaining that other circuits declined to follow American Trucking because statute exclusively limits review to parties and characterizing holding as “unpersuasive dicta” (emphasis added)).

151. See id. at 1123-24 (highlighting differing stances other circuits have).

152. See id. at 1124 (comparing decision from American Trucking as applied in Balderas).
only then complain of “improper treatment.” The court required the interested party to act affirmatively, and thus, New Mexico improperly relied on American Trucking. Furthermore, the court stated that even if the NRC acted ultra vires, New Mexico could have obtained review by precisely following the formalities mentioned above. Regardless of whether it knew, having the opportunity prevented the State from invoking the ultra vires exception, emphasizing its lack of jurisdiction.

V. Energizing Reform: A Catalyst for Revitalizing Nuclear Statutes and Standards

One major challenge in nuclear energy cases is the jurisdictional specifications embedded in nuclear energy-related statutes. Within Balderas, for example, the court held that New Mexico could not be considered an “aggrieved party” partly due to the State’s engagement in legislative proceedings. By contrast, in Texas, the court concluded that Texas was an “aggrieved party,” though it similarly participated in agency proceedings by only submitting comments. Varying levels of participation to define “aggrieved” are required in different courts, leading to a circuit split. This practice leaves courts without clear precedent regarding the success of indirect, differing challenges from states that want to protect their land and oppose potential nuclear waste incidents.

153. See Balderas, 59 F.4th at 1124 (using American Trucking’s rationale of personal accountability against New Mexico).
154. See id. (utilizing American Trucking would contradict court’s reasoning).
155. See id. at 1123 (referencing gaps in New Mexico’s arguments where it could have acted).
156. See id. at 1124 (asserting New Mexico could have argued in licensing proceeding and Commission did not act ultra vires in first place).
157. See Strategic Plan, supra note 66, at 1 (clarifying how NRC must maintain compliance with nuclear acts such as NEPA, NWPA, Atomic Energy Act, amongst others).
158. See Balderas, 59 F.4th at 1117-18 (defining “aggrieved” within meaning of facts at issue). For a further discussion of the court’s analysis of New Mexico’s party status, see supra notes 129-32 and accompanying text.
159. See Texas v. Nuclear Regul. Comm’n, 78 F.4th 827, 837-39 (5th Cir. 2023) (concluding state was “aggrieved” by submitting comments in proceedings contradictory to Balderas).
160. Compare id. at 837-38 (ranging variations of standards from broadly “appropriate and available” participation to requirements hinging on necessary formality to achieve party status), with Balderas, 59 F.4th at 1124 (stating most circuit courts have declined to follow American Trucking, implying circuit split).
161. See West Virginia v. EPA, 42 S. Ct. 2587, 2608 (2022) (implying nuclear reactor litigation oppositions likely linked to “major subjects of public concern”).
A. The New Burrow: Reframing Statutes to Get into Court

Statutes such as the Atomic Energy Act and the NWPA need to be reformed, which compels the broadening of requirements for states to access the court and thwart cases. Thus, the court in Balderas should have limited the usage of statutes with procedural specificity until legislative expansion and reformation occurs. The promotion of legal opposition is necessary due to the widespread, long-lasting impact of nuclear plants and the future level of investment with increased private funding. The Supreme Court classified nuclear waste disposal as having “great economic and political significance” and Congress acknowledged it as one of the “major subjects of public concern;” thus, one should not consider the issue lightly.

From a high level, the NRC wields the control to regulate and license private facilities to store nuclear fuel, the Atomic Energy Act authorizes regulation of private use of spent fuel within facilities, and the NWPA controls “permanent federal repositories.” Given the varying levels of regulation, courts’ holdings become inconsistent.

The Atomic Energy Act is vague and does not designate who has clear authority when there is a clear challenge. The court in Texas interpreted this to mean that the NRC does not have broad authority to issue licenses for private parties to store spent nuclear fuel because


163. See id. (expressing Atomic Energy Act confers unclear delegation, implying requirements to reform inner-workings of grammatical intention).

164. See Sadiq et al., supra note 6, at 3673 (promoting use of nuclear energy as tomorrow’s clean energy source due to long-lasting, beneficial impact); see also John Kotek, What’s Next for Nuclear Energy in 2023?, NUCLEAR ENERGY INST. (Jan. 5, 2023), https://www.nei.org/news/2023/whats-next-for-nuclear-energy-in-2023 (explaining increasing trend of private nuclear investments). Massive mergers have led to billion-dollar venture capital deals, signaling ripe investment opportunities within the nuclear space. Id. (predicting future financial success in nuclear industry).


166. See New Mexico ex rel. Balderas v. U.S. Nuclear Regul. Comm’n, 59 F.4th 1112, 1115-17 (10th Cir. 2023) (defining NRC’s general control through the Atomic Energy Act and explaining NWPA governs establishment of federal spent fuel repositories); see also Texas, 78 F.4th at 832 (explaining commercial and civilian applications of nuclear energy with Atomic Energy Act adoption).

167. See, e.g., Balderas, 59 F.4th at 1121 (defining scope within NWPA, implying varying levels of regulation depending on which act court applies).

168. See Texas, 78 F.4th at 844 (mentioning split understanding in nuclear case law phrases).
these high-magnitude decisions are left only to any agency pursuant to clear delegation, and the Atomic Energy Act does not confer clear delegation to the NRC.\footnote{169. See id. (implying NRC should not have monopoly on nuclear energy legislation determination).} Comparatively, the Balderas court went out of its way, utilizing the Atomic Energy Act and the NWPA’s vague administrative procedures, to maintain Interim’s license to store spent fuel.\footnote{170. See Balderas, 59 F.4th at 1118 (implying statutory procedures independently vary depending on agency action).}

Additionally, the NWPA remains unclear by regulating only “permanent” repositories.\footnote{171. See id. at 1122 (raising argument due to vague wording regarding de facto permanence on New Mexico’s part).} The Balderas court confirms that because Interim will have to renew the license at some point in time, it cannot be considered permanent.\footnote{172. See id. (explaining that license renewal in forty years confirms temporary nature).} The statute, however, does not expand on what is meant by the use of “permanent,” and as a result of the nature of nuclear waste and its pervasive effects, the court potentially overlooked that the term “permanent” could encompass an arbitrary, abbreviated time frame.\footnote{173. See Petitioners’ Brief, supra note 131, at *17 (raising de facto permanence argument where NRC overlooks license could extend to one hundred years, longer than lifetime of most people, and thus, disregarding any meaning to permanence).} Thus, the Act is not entirely clear within the context of nuclear waste, necessitating reform.\footnote{174. See, e.g., West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022) (relying on clear delegation to encompass legal determination (emphasis added)).}

B. An Imperative Hop: An Affirmative, Intention-Based Framework

Without the Supreme Court’s clear delegation and understanding of nuclear-energy related statutes, the court in Balderas should have broadly evaluated whether New Mexico should be considered a party.\footnote{175. See Cameron Tarry Hughes, Article, Life After Sixty: Subsequent License Renewals and Criticisms of N.R.C. Licensing, 8 OIL & GAS, NAT. RES. & ENERGY J. 571, 601 (2023) (outlining solutions to resolve inherent issues with NRC governance and regulation process).} In contrast to the Tenth Circuit’s decision, in Gage, a group of petitioners supporting farmers whose land was seized for a nuclear facility were merely denied from intervening in the wrong proceedings.\footnote{176. See Gage v. U.S. Atomic Energy Comm’n, 479 F.2d 1214, 1215-16 (D.C. Cir. 1973) (holding technicalities governed as petitioners participated in AEC rules instead of underlying rulemaking proceedings).}

Further, in NRDC v. NRC, the court broadly and ambiguously stated that a party must have submitted “adequate
contentions” to be administered.\textsuperscript{177} Lastly, in \textit{Ohio Nuclear-Free Network}, the court required a formal presentation where a letter describing the intention to participate was insufficient.\textsuperscript{178}

Preventing New Mexico from participating in legal opposition proceedings because of a complex technicality in the law is inequitable considering the importance and lasting effects of nuclear energy.\textsuperscript{179} The \textit{Balderas} court required an affirmative act from an interested party to prevent unwanted public policy.\textsuperscript{180} Arguably, New Mexico cleared this hurdle by submitting comments, despite improper technicalities regarding where and when these comments were submitted.\textsuperscript{181} An affirmative, intention-based framework would foster the facilitation and allowance of parties in court, thus promoting positive public policy and judicial literacy instead of a segmented, court-by-court variation in requirements.\textsuperscript{182} While courts have expressly opposed conferring the “automatic right of intervention by anyone,” an objective standard can overcome this hurdle by explaining what a state should legally know regarding nuclear act legislation.\textsuperscript{183}

VI. The Bunny’s Drum Keeps Beating: The Impact of the Enduring Power Source

While a conservative and formalist adjudicative approach yields consistency, overemphasizing technicalities restrains legal flexibility to adapt to technological developments, such as those prominent in


\textsuperscript{178} See Ohio Nuclear-Free Network v. U.S. Nuclear Regul. Comm’n, 53 F.4th 236, 238 (D.C. Cir. 2022) (concluding letter from organization was informal merely because group was not stranger to situation).

\textsuperscript{179} See, e.g., New Mexico ex rel. Balderas v. U.S. Nuclear Regul. Comm’n, 59 F.4th 1112, 1117 (10th Cir. 2023) (noting participation determination was not bound by NRC’s definition but arbitrarily chosen by court); see also Hughes, supra note 175, at 601 (showing NRC arbitrarily chooses intervention requirements for parties, despite meeting prima facie standing requirements).

\textsuperscript{180} See Balderas, 59 F.4th at 1124 (requiring affirmative act to prevent parties from waiting to contest at last possible moment).

\textsuperscript{181} See Petitioners’ Brief, supra note 131, at *17 (explaining NRC ignored New Mexico’s extensive comments, underscoring NRC’s lack of collaboration and consultation with State).

\textsuperscript{182} For a discussion of contradictory holdings regarding whether a party is admitted to legal proceedings, see supra notes 59-122 and accompanying text.

nuclear energy. The Balderas court’s strict jurisdictional requirements hinder states from seeking legal remedies. This approach fails to acknowledge how strict procedural violations can diminish and prevent litigation, supporting the broader, modern goals of the legal system in providing fair and efficient solutions.

Since Virginia Uranium, Inc. v. Warren in 2019, the Supreme Court has not heard a nuclear energy case. Moreover, the Court has not publicized any explanation for its refusal. In doing so, the Supreme Court appears to uphold state sovereignty in nuclear regulation, allowing states to set energy goals that do not directly affect power markets, even if there is an indirect impact on interstate commerce. While the Supreme Court sets this judicial intent, the NRC inherently declines to follow it by invoking strict regulations for state participation in nuclear power plant proceedings directly linked to individual state energy goals. This is furthered in Balderas, where the court individually afforded the NRC substantial power in strictly preventing opposition to nuclear matters, absent exact correspondence with the given proceeding.

Industry scholars have long argued that because courts’ procedural requirements tend to restrict a holistic understanding of nuclear energy complaints, a different method of reviewing these

184. See West Virginia v. EPA, 142 S. Ct. 2587, 2608 (2022) (categorizing nuclear energy as technology of extreme importance with ability to change outlook of green future).
185. For a discussion of how Balderas restricted jurisdiction, see supra notes 123-56 and accompanying text.
186. See Hughes, supra note 175, at 599 (implying public perception in NRC’s rulings would improve with more transparent administration). For a discussion of how Balderas restricted jurisdiction, see supra notes 123-56 and accompanying text.
188. See id. (recounting how fossil fuel generators challenged the legality of certain subsidies, upheld by federal district and appellate courts before reaching Supreme Court).
189. See id. (recognizing state jurisdiction in setting power generation policy and carving out intent for states to drive legislation).
190. For an explanation of instances expanding on state jurisdictional denials from NRC, see supra notes 75-122 and accompanying text.
191. See New Mexico ex rel. Balderas v. U.S. Nuclear Regul. Comm’n, 59 F.4th 1112, 1115-16 (10th Cir. 2023) (granting NRC authority to privately license nuclear storage, conduct proceedings, and control hearing requirements); see also Va. Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1900 (2019) (establishing federal government gives NRC significant authority over milling, transfer, use, and disposal of uranium and construction and operation of nuclear power plants affording NRC with considerable authority over entire nuclear fuel life cycle).
concerns is needed.\textsuperscript{192} Despite science and technology rapidly advancing, nuclear energy regulatory and legal challenges persist and restrict the renewable energy source’s progress.\textsuperscript{193} The potential impact of broadening NRC regulations would yield significant participation improvements for interested, affected parties, like states, to intervene from an administrative and statutory level.\textsuperscript{194} The NRC’s main goal should emphasize efficiency and effectiveness through public participation, considering environmental issues to legitimize processes amongst the public.\textsuperscript{195}

To increase public participation and trust in the NRC’s decisions, the NRC could expand its scope to hear cases by looking for common environmental concerns in previously rejected complaints and ensuring that traditionally underrepresented communities’ perspectives are heard.\textsuperscript{196} The current content admissibility standards are “strict by design,” which limit hearings.\textsuperscript{197} Merely requiring a prima facie showing of safety or environmental issues instead of requiring specific evidence would give petitioners an honest chance at the NRC granting them a hearing.\textsuperscript{198} Bolstering public opinion of the NRC could lead to improved actual administration.\textsuperscript{199}


\textsuperscript{194} See Hughes, supra note 175, at 600-01 (proposing hearing procedures as most significant chance to increase public participation).

\textsuperscript{195} See id. at 602 (highlighting importance of public discourse and involvement with nuclear legislation in NRC’s regulations).

\textsuperscript{196} See id. at 600 (recommending NRC acknowledge and favor public participation in conjunction with efficiency). By revisiting complaints based on numerosity of contentions or attracting widespread perspectives, the NRC would essentially market themselves to gain knowledge in a positive manner to get ahead of potential petitioners. See id. (displaying how broadening NRC regulations would decrease “slippery slope” of heightened unnecessary litigation).

\textsuperscript{197} See id. at 600-01 (exhibiting NRC’s hardline preference for efficiency instead of democratic rulemaking).

\textsuperscript{198} See Hughes, supra note 175, at 600-01 (demonstrating NRC could merely expand time required to file petition to intervene in request for hearing). The NRC has already demonstrated its willingness to extend intervention time as it has expanded the time from thirty, to forty-five, to now sixty days. Id. at 601 (showing expansive trends of slight broadening of regulations, displaying feasibility).

\textsuperscript{199} Id. at 599 (exhibiting NRC can improve procedural contention guidelines inadvertently by improving public perception). Simple ill-informed, fear-based contentions should not be permitted to hold up the extension of reactor licenses or applications; therefore, public knowledge of the NRC’s operating standard matters. See id. (increasing efficiency from litigation perspective).
Ultimately, increasing legitimacy through broadening regulations would let public attention “fixate on solving the rest of the climate problem instead of re-hashing [the] settled science” of nuclear energy.200

Policymakers must prioritize investment in the long term to stimulate nuclear energy development, technology, and infrastructure.201 Specifically, the NRC must include states, residents near nuclear reactors, and grassroots organizations in nuclear energy regulation without withholding licenses due to anti-nuclear motivations.202 On the executive front, the Biden Administration’s Reduction Act of 2022, which aims to curb inflation, can potentially facilitate heightened transformative investments in the nuclear industry.203 Additionally, the United States is likely to pass the International Nuclear Energy Act of 2023, which will profoundly impact the state of nuclear energy.204 This bipartisan legislation intends to offset China and Russia’s growing influence on international nuclear energy development and create a civil nuclear export strategy in collaboration with allies.205 From this international perspective, nuclear energy has shifted the momentum and power within the Russian-Ukrainian war.206

While great variations in nuclear energy’s scalability exist, including international conflicts, overlooking this energy source’s impact

200. See id. at 602 (emphasizing nuclear energy as safe way to combat climate change and how license approvals and renewals are needed to keep nuclear energy as electricity source).

201. Sadiq et al., supra note 6, at 3678-79 (pointing out that nuclear energy creates lessened ecological and carbon footprint).

202. See Hughes, supra note 175, at 585, 599, 602 (highlighting need for NRC and all governmental agencies to broaden and involve all affected parties due to current state of development in nuclear energy).


205. See id. (recognizing second year of Russian-Ukrainian war concerns additional countries to reduce energy dependence on Russia and turn toward nuclear energy to meet energy needs).

from a state perspective would be naïve.\textsuperscript{207} Regardless of public concern, nuclear energy is a workable solution to address the climate change dilemma of balancing an increase in energy demand while preserving the environment.\textsuperscript{208} Nuclear energy’s unmatched benefits as an energy source through minimal carbon emissions, reduced energy dependence, and quick electricity generation prevent global economic degradation in the long term.\textsuperscript{209} The nation is on the verge of a nuclear energy renaissance, but judicial transparency and coordination can push us toward a complete nuclear resurgence.\textsuperscript{210} The technology is inevitable; therefore, by broadening requirements for increased judicial participation and lowering barriers to entry, courts will become more effective in achieving economic, scientific, and political results that directly impact climate change.\textsuperscript{211}

\textit{Jack A. Mansur*}

\begin{footnotesize}

\textsuperscript{207} For a discussion of economic, scientific, and political impacts of nuclear energy and power plants, see supra notes 1-29 and accompanying text.


\textsuperscript{209} For a discussion of nuclear energy’s benefits on the environment, see supra notes 1-25 and accompanying text.

\textsuperscript{210} See Nuclear Energy, supra note 1 (reiterating Congressmember Simpson’s observation of nuclear state).

\textsuperscript{211} For a discussion on the impact of broadening NRC legislation and requirements, see supra notes 184-210 and accompanying text.

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