

UNITED STATES COURT OF APPEALS

DISTRICT OF COLUMBIA CIRCUIT

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AGENCY DOCKETING STATEMENT

Administrative Agency Review Proceedings (To be completed by appellant/petitioner)

- 1. CASE NO. 19-1198 2. DATE DOCKETED: 09-25-2019
3. CASE NAME (lead parties only) Commonwealth of Massachusetts v. U.S. Nuclear Regulatory Commission
4. TYPE OF CASE: [X] Review [] Appeal [] Enforcement [] Complaint [] Tax Court
5. IS THIS CASE REQUIRED BY STATUTE TO BE EXPEDITED? [] Yes [X] No
6. CASE INFORMATION:
a. Identify agency whose order is to be reviewed: U. S. Nuclear Regulatory Commission
b. Give agency docket or order number(s): 50-293 & 72-1044
c. Give date(s) of order(s): August 20, 2019 & August 22, 2019
d. Has a request for rehearing or reconsideration been filed at the agency? [] Yes [X] No
e. Identify the basis of appellant's/petitioner's claim of standing. See D.C. Cir. Rule 15(c)(2): Please see attachment.
f. Are any other cases involving the same underlying agency order pending in this Court or any other? [] Yes [X] No
g. Are any other cases, to counsel's knowledge, pending before the agency, this Court, another Circuit Court, or the Supreme Court which involve substantially the same issues as the instant case presents? [] Yes [X] No
h. Have the parties attempted to resolve the issues in this case through arbitration, mediation, or any other alternative for dispute resolution? [] Yes [X] No

Signature /s/ Joseph Dorfler Date 10-28-2019
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ATTACH A CERTIFICATE OF SERVICE

Note: If counsel for any other party believes that the information submitted is inaccurate or incomplete, counsel may so advise the Clerk within 7 calendar days by letter, with copies to all other parties, specifically referring to the challenged statement.

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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COMMONWEALTH OF)		
MASSACHUSETTS,)		
)		
<i>Petitioner,</i>)		
)		
v.)	No. 19-1198	
)		
UNITED STATES NUCLEAR)		
REGULATORY COMMISSION)		
AND UNITED STATES OF)		
AMERICA,)		
)		
<i>Respondents.</i>)		
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Attachment to Agency Docketing Statement (6.e.)

Response to item 6(e): Basis of Petitioner’s Standing.

Petitioner Commonwealth of Massachusetts seeks judicial review of the following decisions of the Nuclear Regulatory Commission (NRC): (i) the August 22, 2019 order approving the direct and indirect transfer of the Pilgrim Nuclear Power Station’s (Pilgrim) NRC license from Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (collectively, Entergy) to Holtec Pilgrim, LLC and Holtec Decommissioning International, LLC (HDI) (License Transfer Approval) and the related license amendment (License Amendment),

Petition Attachments (Pet. Attach.) 1 & 2; (ii) the August 22, 2019 “Final No Significant Hazards Consideration” determination, Pet. Attach. 4, at 25, which made the License Transfer Approval and License Amendment immediately effective prior to a hearing requested by the Commonwealth; (iii) the August 22, 2019 Safety Evaluation related to the license transfer order and license amendment, Pet. Attach. 4; (iv) the August 22, 2019 determination that the License Transfer Approval and License Amendment were categorically excluded from any environmental review under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4347, Pet. Attach. 4, at 27, 33; (v) the August 22, 2019 decision to grant HDI an exemption from 10 C.F.R. § 50.82(a)(8)(i)(A) (restricting use of nuclear power plant decommissioning trust funds to radiological decontamination costs) (Trust Fund Exemption), Pet. Attach. 5; and (vi) the August 20, 2019 Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) under NEPA for the Trust Fund Exemption, Pet. Attach. 7.

To establish standing, the Commonwealth must show that it has suffered a cognizable injury, that the injury is fairly traceable to the NRC’s conduct, and that a favorable decision by this Court would be

likely to redress the injury. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). However, where, as is the case here, the Commonwealth “has been accorded a procedural right to protect [its] ... concrete interests,” the Commonwealth “can assert that right without meeting all the normal standards for redressability and immediacy.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992); *see Lemon v. Geren*, 514 F.3d 1312, 1315 (D.C. Cir. 2008) (a party suffers a procedural injury when an agency fails to follow a statutorily-mandated procedure if that procedure could change the agency’s mind in a particular matter); *Sugar Cane Growers Coop. v. Veneman*, 289 F.3d 89, 94-95 (D.C. Cir. 2002) (a party alleging a procedural injury “never has to prove that if he had received the procedure the substantive result would have been altered. All that is necessary is to show that the procedural step was connected to the substantive result.”).

In *Lujan*, for example, the Supreme Court described procedural injury by explaining that “one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency’s failure to prepare an environmental impact

statement,” 504 U.S. at 572 n.7, and this Court has defined “the archetypal procedural injury” as involving “an agency’s failure to prepare a statutorily required environmental impact statement before taking action with potential adverse consequences to the environment.” *National Parks Conservation Ass’n v. Manson*, 414 F.3d 1, 5 (D.C. Cir. 2005). In this case, like the example of the proposed dam in *Lujan*, the facility at issue—the Pilgrim Nuclear Power Station (Pilgrim)—is located in Plymouth, Massachusetts, and the radiological and non-radiological contamination at Pilgrim and the spent nuclear fuel that will be stored there, perhaps indefinitely, pose significant public health, safety, environmental, and financial risks to both the Commonwealth and its citizens. Consistent with *Lujan* and reflective of the important state interests implicated by nuclear reactor licensing proceedings, the NRC’s regulations grant states in which a nuclear power plant is located automatic standing to intervene in a proceeding before the NRC regarding the plant. 10 C.F.R. § 2.309(h)(2).

Here, the Commonwealth has standing because it has suffered injuries that are traceable to the challenged actions and that would be redressed by a favorable decision from this Court. On February 20,

2019, the Commonwealth filed with the NRC a timely petition (i) to intervene in a proceeding concerning a joint request by Pilgrim's then licensee, Entergy, and Holtec and HDI to transfer Pilgrim's license to a renamed entity known as Holtec Pilgrim, LLC and HDI, and (ii) for a hearing on that request and an interrelated request by HDI for an exemption to use Pilgrim's Decommissioning Trust Fund for purposes otherwise prohibited by the NRC's regulations. The Commission, pursuant to 10 C.F.R. § 2.310(j)(1), was required to issue a decision on the Commonwealth's petition, or inform the Commonwealth when it would do so, on or before May 16, 2019. As of this date, October 28, 2019, the Commission has not complied with either of those two mandated options.

Despite the pendency of the Commonwealth's petition (and a petition filed by another party), on August 22, 2019, the NRC, acting through its staff and with the Commissioners' tacit approval, issued the License Transfer Approval, License Amendment, and Trust Fund Exemption, Pet. Attach. 1, 2, 5. Without addressing any of the Commonwealth's previously expressed objections, the NRC, in the License Amendment, struck from Pilgrim's license a longstanding

condition that required Pilgrim's licensee to maintain access to a \$50 million contingency fund to cover the cost of decommissioning Pilgrim in the event of a funding shortfall. Also, without addressing any of the Commonwealth's previously expressed objections, the NRC, in the Trust Fund Exemption, authorized HDI to use Pilgrim's Decommissioning Trust Fund—a fund created from money collected from Massachusetts electric ratepayers—to pay for otherwise prohibited *non-*decommissioning costs, namely, site restoration and spent nuclear fuel management costs. Even though HDI will recover a significant portion of its spent fuel costs from the U.S. Department of Energy (DOE), the NRC did not require HDI to return any of the money it recovers from DOE to the Trust Fund. The NRC's decision not to do so effectively allows HDI to convert Massachusetts ratepayer funds collected to ensure the safe and complete radiological decontamination of Pilgrim into private profit before Holtec Pilgrim and HDI have fulfilled all of their legal obligations at the plant. Then, relying on its so-called “no significant hazards consideration” regulation, the NRC made the License Transfer Approval, License Amendment, and Trust Fund

Exemption immediately effective. Pet. Attach. 4, at 25. Entergy and Holtec effectuated the license transfer two business days later.

The Commonwealth suffered a procedural injury when the NRC made the License Transfer Approval, License Amendment, and Trust Fund Exemption immediately effective prior to a hearing on the issues raised in the Commonwealth's petition and comments on those actions.

In making its "Final No Significant Hazards Consideration" decision, the NRC relied on 10 C.F.R. § 2.1315(a), which provides that "[u]nless otherwise determined by the Commission ..., the Commission has determined that any amendment to [a plant's license] ... which does no more than conform the license to reflect the transfer action, involves ... 'no significant hazards consideration....'" *Id.* § 2.1315(a). But, by its plain terms, that regulation does not apply in this case because the NRC's decision to eliminate from Pilgrim's license the condition requiring the licensee to maintain a \$50 million contingency fund to cover decommissioning costs did *much* "more than conform the license to reflect the transfer action." *See id.* § 2.1315(a); *see also id.*

§ 2.1315(b) (referring only to "*administrative* amendments [that] are *necessary* to reflect the approved transfer" (emphasis added)). Indeed, it

made a *substantive* change that stripped from the license a vital funding assurance necessary to protect the Commonwealth and its citizens from public health, safety, environmental, and financial risks and it did so without affording the Commonwealth its right to a pre-effectiveness hearing. Thus, the NRC has violated the Commonwealth's procedural right to a pre-effectiveness hearing and that violation has injured the Commonwealth and its citizens by, among other things, transferring Pilgrim's license to entities that are neither financially nor technically qualified to hold it, thereby increasing the risk of public health, safety, environmental, and financial harms to the Commonwealth and its citizens. *See Sugar Cane Growers Coop.*, 289 F.3d at 94-95.

The Commonwealth also suffered a procedural injury caused by the NRC's violations of NEPA. First, the NRC unlawfully segmented its review of (i) the License Transfer Approval and License Amendment, (ii) the Trust Fund Exemption, and (iii) HDI's revised Post-Shutdown Decommissioning Activities Report (PSDAR) and site-specific cost estimate. Indeed, while these actions undeniably depend on one another, the NRC treated them as separate actions for purposes of

NEPA. In that regard, the NRC relied on one of its “categorical exclusions” to exempt the License Transfer Approval and License Amendment from any NEPA review whatsoever, Pet. Attach. 4, at 27, 33, and issued a separate and deficient EA and FONSI for the Trust Fund Exemption, Pet. Attach. 7. Second, even if not unlawfully segmented, the NRC’s decision to categorically exclude the License Transfer Approval and License Amendment violated NEPA for reasons that are similar to its unlawful invocation of the significant hazards consideration regulation: the decision to eliminate the license’s \$50 million contingency fund requirement for decommissioning costs took the action outside of the categorical exclusion’s scope, which covers only administrative amendments “*required* to reflect the approval.” 10 C.F.R. § 51.22(c)(21) (emphasis added).

Third, even if it was otherwise proper for the NRC to analyze the potential environmental consequences of the Trust Fund Exemption apart from the License Transfer Approval and License Amendment, the NRC’s EA and FONSI for the Trust Fund Exemption were deficient. Like its “Final No Significant Hazards Consideration” and its NEPA Categorical Exclusion determinations, the NRC treated the Trust Fund

Exemption as administrative in nature even though the Commission has previously made clear that decommissioning trust funds are the means by which the agency fulfills its “responsibility to protect public health and safety.” 46 Fed. Reg. 11,666, 11,667 (Feb. 10, 1981). In its EA and FONSI, the NRC failed to evaluate the potential direct and indirect environmental consequences of authorizing HDI to withdraw approximately \$500 million from Pilgrim’s Trust Fund for spent nuclear fuel costs without requiring HDI to return to the Trust Fund the portion of those funds that it recovers from DOE. The absence of such a requirement will leave Holtec Pilgrim and HDI without any committed funds to cover spent fuel costs after 2063—decades before its obligation to pay for those costs is virtually certain to end. Brewer 2d. Decl. ¶ 14. Indeed, Holtec Pilgrim and HDI are likely to come up as much as \$768 million short on their obligation to maintain safely Pilgrim’s spent fuel onsite. Brewer 2d. Decl. ¶ 14 & Ex. 3. Spent nuclear fuel, of course, “poses a dangerous, long-term health and environmental risk ... ‘for time spans seemingly beyond human comprehension.’” *New York v. NRC*, 681 F.3d 471, 474 (D.C. Cir. 2012) (quoting *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1258 (D.C. Cir. 2004) (per curiam)).

The Commonwealth has suffered harm from the NRC's actions because they will make it impossible for the new licensee to complete decommissioning successfully and manage Pilgrim's spent nuclear fuel onsite safely for decades or lead to irreversible consequences if regulatory or financial concerns, which are likely to arise, require a modified decommissioning approach. Brewer 2d Decl. ¶ 5. According to HDI's revised decommissioning schedule, it will draw over \$303 million from Pilgrim's Trust during the first seventeen months of the decommissioning, site restoration, and spent fuel management work, representing more than 29 percent of the money available in the Trust Fund if everything goes perfectly according to the licensee's ambitious plan. *Id.* ¶ 15. That substantial draw down, however, will leave insufficient funds in the Trust Fund to permit another entity to complete the work or alter the initiated approach outlined in the licensee's schedule should it falter. *Id.* That is because HDI's accelerate decommissioning approach for Pilgrim may leave the facility in such a state as to preclude a more conservative, long-term approach to decommissioning should HDI's ambitious plan prove unattainable. *See Id.* As a result, both the environment and local Massachusetts

residents will be exposed to increased safety and health hazards— harms that are “assum[ed to be] true for purposes of standing.” *City of Boston Delegation v. FERC*, 897 F.3d 241, 250 (D.C. Cir. 2018). Those harms are directly traceable to the NRC’s actions because but for the actions and their immediate effectiveness, the new licensee would not begin its ambitious decommissioning process.

The Commonwealth and its citizens will also suffer harm due to the immediate start of decommissioning activities by Holtec Pilgrim and HDI, including health, safety, and infrastructure harms inflicted by, among other things, frequent waste shipments over local roads, which will cause noise, dust, and air pollution emissions, increase the risk of accidents on local roads, and damage local transportation infrastructure. Brewer 2d Decl. ¶ 16. Based on assertions in HDI’s revised decommissioning plan, which appear to underestimate radioactive waste volume, *id.* ¶ 16 nn.13-14, HDI will need to transport at least 1,400 separate truckloads of radiological waste off-site, which is more than twice the volume the NRC previously evaluated in its Generic Environmental Impact Statement for decommissioning nuclear power plants. *Id.* ¶ 16. When shipments of non-radioactive waste are

added, the total number of truckloads will rise to as many as 2,800 to 4,200 total trips. *See id.* Additionally, Holtec Pilgrim and HDI are likely to remove and ship by truck legacy waste from Pilgrim during the first two to three months following the August 28, 2019 transfer of Pilgrim's license from Entergy to Holtec Pilgrim and HDI. *See id.* Because of the NRC's actions and their immediate effectiveness, waste shipments will thus begin immediately and cause immediate harm to local land state infrastructure and local health, safety, and the environment. *Id.*

The Commonwealth's injuries would be redressed by a decision from this Court (i) finding that the NRC's determination to make the License Transfer Approval, License Amendment, and Trust Fund Exemption immediately effective violated the NRC's own regulations and (ii) invalidating the "Final No Hazards Consideration" determination on the ground that it exceeded the regulation's scope and unlawfully deprived the Commonwealth of a pre-effectiveness hearing on those actions. The Commonwealth's injuries would also be redressed by a decision from this Court (i) finding that the NRC violated NEPA and (ii) invalidating the License Transfer Approval, License

Amendment, and Trust Fund Exemption on the grounds that the NRC failed to undertake an appropriate review of the potential direct and indirect environmental consequences of taking those interdependent actions, including the serious consequences of a decommissioning or spent nuclear fuel management funding shortfall. The Commonwealth's injuries would also be redressed by a decision from this Court (i) finding that the Trust Fund Exemption was arbitrary and capricious and not in accordance with law and (ii) invalidating the Trust Fund Exemption on the grounds that it violates the Administrative Procedure Act (APA) as a *de facto* amendment to the NRC's regulations without compliance with the APA's notice and comment procedures and otherwise unlawfully authorizes Holtec Pilgrim and HDI to convert Massachusetts ratepayer funds collected to decommission Pilgrim to private profit even though there already currently exists insufficient money in the Trust Fund to decommission and restore the Pilgrim site and manage its spent nuclear fuel onsite, likely for decades to come.

Respectfully submitted,

COMMONWEALTH OF
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Dated: October 28, 2019

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Agency Docketing Statement with the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on October 28, 2019, and that all parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system.

Dated: October 28, 2019

/s/ Joseph Dorfler

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