

No. 20-70899

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PUBLIC WATCHDOGS,
Petitioner,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

On Petition for Review of an Order of
the U.S. Nuclear Regulatory Commission

**RESPONDENTS' OPPOSED MOTION FOR 31-DAY EXTENSION OF TIME
TO RESPOND TO PETITIONER'S MOTION FOR TEMPORARY
INJUNCTIVE RELIEF**

JUSTIN D. HEMINGER
Senior Litigation Counsel
Environment and Natural Resources
Division
U.S. Department of Justice
justin.heminger@usdoj.gov
(202) 514-5442

ANDREW P. AVERBACH
Solicitor
JAMES E. ADLER
Senior Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission
andrew.averbach@nrc.gov
(301) 415-1956

Respondents U.S. Nuclear Regulatory Commission (NRC) and the United States of America¹ request that the Court grant a 31-day extension of time, until May 11, 2020, to respond to Public Watchdogs’ Motion for Temporary Injunctive Relief, Docket No. 2-1, (March 31, 2020) (“Motion for Temporary Injunctive Relief”). Counsel for Respondents sought Public Watchdogs’ consent to this extension, and counsel for Public Watchdogs stated that it opposes the extension unless the NRC agrees to halt the loading of spent nuclear fuel canisters at SONGS during the pendency of this action.

In support of this motion, Respondents state as follows:

1. Public Watchdogs filed its Petition for Review on March 30, 2020. The decision that it challenges—the agency’s determination on Public Watchdogs’ request, pursuant to 10 C.F.R. § 2.206, that the agency suspend decommissioning operations at San Onofre Nuclear Generating Station (SONGS)—was issued on February 26, 2020.²

¹ The Petition for Review filed in this matter does not name the United States as a respondent, but under the Hobbs Act, a challenge to a final order of the NRC is “against the United States.” 28 U.S.C. § 2344; *cf.* Fed. R. App. P. 15(a)(2)(B) (“even though not named in the petition, the United States is a respondent if required by statute”). Accordingly, the Department of Justice represents the United States, and the NRC has appeared as a matter of right. *See* 28 U.S.C. § 2348.

² Public Watchdogs did not file its motion for injunction until 34 days after the date of the NRC’s decision on its 2.206 petition. While Public Watchdogs asserts that the NRC decision “became final on March 23, 2020,” even if that were true (which

2. Public Watchdogs filed its Motion for Temporary Injunctive Relief on March 31, 2020. A response to this Motion is currently due on April 10, 2020.

3. Public Watchdogs' Motion is supported by over 2,700 pages. Both the United States, which is a necessary party to this action, *see note 1 supra*, and the NRC require substantial additional time to confer and respond to these arguments and materials that Public Watchdogs itself had more than thirty days to prepare. The Motion effectively raises all the issues that Public Watchdogs will raise in support of its brief on the merits, and ten days is an enormous burden, even under the most ideal circumstances, to prepare such a response and coordinate management review and approval at the NRC and the Department of Justice. But a request for an additional thirty-one days is more than reasonable given the complexity of the issues that Public Watchdogs has raised.

4. The additional requested time is also needed to provide time for preparation and review of the draft response by those who are teleworking and facing other challenges because of the coronavirus (COVID-19) pandemic, including technical personnel working for the NRC. The government attorneys involved in drafting and reviewing the NRC's response have exercised diligence but have faced and continue to face disruptions caused by the COVID-19

we do not concede), Public Watchdogs does not explain why it did not have its own papers ready to file promptly on March 23, if this matter were truly so time-sensitive.

pandemic. *See generally* Ninth Circuit’s March 17, 2020 COVID-19 Notice (as of Mar. 20, 2020).

5. Public Watchdogs’ primary legal theory supporting its Petition for Review appears to be that the agency’s response to Public Watchdogs’ administrative petition pursuant to 10 C.F.R. § 2.206 ignored Public Watchdogs’ complaints that the SONGS decommissioning plan is based on unreasonable estimates of when the Department of Energy will remove the spent nuclear fuel from SONGS to an offsite repository. But as the NRC will explain in its opposition, the NRC did not ignore this issue. In any event, the NRC has repeatedly explained that spent fuel can be stored safely at reactor sites in independent spent fuel storage installations such as the one licensed for use at SONGS for as long as is necessary—either until the fuel is accepted for disposal by the Department of Energy or some other entity, the term of the facility is renewed, or a new storage facility is constructed.³ Thus, the issue that Public Watchdogs has raised in its Motion pertaining to the SONGS decommissioning plan does not bear on the safety of the system for storing spent fuel there, and the loading of additional fuel into canisters for storage in a licensed system does not create a need to expedite Public Watchdogs’ Motion. Simply stated, the additional

³ See, e.g., CLI-15-4, DTE Electric Co. (Fermi Nuclear Power Plant, Unit 3), 81 N.R.C. 221, 240-42 (2015).

time that Respondents seek will not lead to any safety issue that the agency has not already considered, let alone create any harm that is connected to the legal theory upon which Public Watchdogs bases its petition.

6. Undoubtedly, Public Watchdogs considers the allegations of irreparable harm raised in connection with its petition to be serious, and Respondents will endeavor to respond to those allegations expeditiously. But Public Watchdogs' Motion for injunctive relief on the basis of allegedly exigent circumstances also fails to mention that this is the *fourth* time during the last thirty months that Public Watchdogs has sought injunctive relief from a federal court seeking to question the NRC's expert determination that the storage of spent fuel at SONGS does not present a health and safety hazard. As discussed below, this includes *two* other matters before this Court, including a pending appeal in which Public Watchdogs requested expedited consideration and which the Court has set for argument on June 3, 2020.

a. *Watchdogs I*. In November 2017, Public Watchdogs filed suit against various federal entities and private entities in federal district court seeking injunctive relief to stop decommissioning activities at SONGS. *See Public Watchdogs v. United States, et al.*, Complaint, Docket No. 1, Case No. 17-cv-2323-JLS (BGS) (S.D. Cal. Nov. 15, 2017) ("*Watchdogs I*"). Seven month later, after the defendants moved to dismiss and Public Watchdogs had amended its

complaint, Public Watchdogs voluntarily dismissed the action. *Watchdogs I*, Notice of Voluntary Dismissal, Docket No. 50 (S.D. Cal. July 3, 2019).

b. *Watchdogs II*. In August 2019, Public Watchdogs filed a new complaint in district court against the NRC and four private companies. *Public Watchdogs v. United States, et al.*, No. 19-cv-1635-JLS (MSB) (“*Watchdogs II*”), Complaint, Docket No. 1 (S.D. Cal. Aug. 29, 2019). Public Watchdogs also moved for a temporary restraining order or preliminary injunctive relief. After the defendants moved to dismiss and Public Watchdogs attempted to cure the jurisdictional defects in an amended complaint, the district court dismissed the case for lack of jurisdiction and denied the requested injunctive relief as moot.

Watchdogs II, Memorandum Opinion, Docket No. 60 (S.D. Cal. Dec. 3, 2019).

Public Watchdogs has appealed the district court’s decision to this Court (Case No 19-56531) and, on January 14, 2020, it moved for expedited briefing. Motion to Expedite Appeal, Docket No. 6 (Jan. 14, 2020). In that motion, to which the NRC consented, Public Watchdogs proposed a briefing schedule spanning over three months, with oral argument to follow (and now scheduled for June 3, 2020).

c. *Watchdogs III*. On September 24, 2019, while *Watchdogs II* was pending, Public Watchdogs filed a petition with the NRC under 10 C.F.R. § 2.206, requesting that the NRC immediately suspend decommissioning operations at SONGS. Less than thirty days later, Public Watchdogs filed an “emergency”

mandamus action with this Court, asserting that the agency had unreasonably delayed responding to its 2.206 petition and, again, that irreparable harm would result if a writ of mandamus did not issue. *Public Watchdogs v. NRC, et al.*, Emergency Petition for Writ of Mandamus, Docket No. 1, Case No. 19-72670 (9th Cir. Oct. 22, 2019) (*Watchdogs III*). After briefing (during which, as here, Public Watchdogs objected to the NRC's request for additional time to respond), this Court denied mandamus. *Watchdogs III*, Order 4, Docket No. 19 (9th Cir. Dec. 20, 2019) (*per curiam*).

7. In the face of this barrage of litigation from Public Watchdogs, the NRC has repeatedly determined, including in the decision that Public Watchdogs challenges here, that the storage of spent fuel in accordance with the license at SONGS does not present a safety hazard. There are only so many times that the NRC and the United States should be compelled to drop everything to respond to Public Watchdogs' request for expedited relief on the basis of an "emergency" that the agency, in its technical judgment, has determined does not exist. The agency has patiently and responsibly addressed the issues that Public Watchdogs has raised before the courts and in its administrative submissions under 10 C.F.R. § 2.206. But Public Watchdogs' repeated requests for expedited relief are taxing the agency's and judicial resources at a time of national crisis, when those resources are stretched thin.

8. Finally, even if Public Watchdogs were to prevail on this lawsuit, the remedy to which it would be entitled would not be a cessation of fuel loading activities into the licensed storage system at SONGS. The most extreme relief that the Court may award would be to vacate the NRC's response to Public Watchdogs' petition for review and remand the matter for the NRC to again consider Public Watchdogs' administrative petition. In other words, even if it prevailed in this petition for review, Public Watchdogs would not obtain the injunctive relief that it asks the Court to impose on a temporary basis in this Motion. Given that Public Watchdogs' assertions, even if true, would not justify the relief it requests on a *permanent* basis, there is no reason to require the briefing of this issue to be completed on a rushed schedule.

Accordingly, for the reasons set forth above, Respondents request that they be afforded an additional 31 days to respond to Public Watchdogs' Motion for Temporary Injunctive Relief, until May 11, 2020.

Respectfully submitted,

/s/ Justin D. Heminger
JUSTIN D. HEMINGER
Senior Litigation Counsel
Environment and Natural Resources
Division
U.S. Department of Justice
justin.heminger@usdoj.gov
(202) 514-5442

/s/ Andrew P. Averbach
ANDREW P. AVERBACH
Solicitor
JAMES E. ADLER
Senior Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission
andrew.averbach@nrc.gov
(301) 415-1956

April 2, 2020
DJ 90-13-3-16007

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 27(d) AND CIRCUIT RULE 27-1.(1)(d)

I certify that this filing complies with the requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I certify that this filing complies with the length limit of Fed. R. App. P. 27(d)(2)(A) because it contains 1,645 words, according to the word count of Microsoft Word. I further certify that this filing complies with the page limitation of Circuit Rule 27-1.1(d) because it does not exceed 20 pages, excluding the parts of the filing exempted under Fed. R. App. P. 27(a)(2)(B) and 32(f).

/s/ Andrew P. Averbach
Solicitor
U.S. Nuclear Regulatory Commission