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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GEORGE BERKA, Plaintiff, v. NUCLEAR REGULATORY COMMISSION, Defendant.	Case No. 1:17-cv-02836-APM MOTION TO DISMISS COMPLAINT FOR LACK OF JURISDICTION

Defendant, the Nuclear Regulation Commission ("NRC"), through undersigned counsel, respectfully moves to dismiss this action for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). For the reasons set forth in the accompanying Memorandum, the NRC's motion to dismiss should be granted.

Respectfully submitted this 1st day of June, 2018.

JEFFREY H. WOOD
Acting Assistant Attorney General

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Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of June, 2018, the foregoing was electronically filed with the Clerk of the Court and served using the CM/ECF system upon all parties and counsel of record.

JEFFREY H. WOOD
Acting Assistant Attorney General

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

GEORGE BERKA, Plaintiff, v. NUCLEAR REGULATORY COMMISSION, Defendant.	)	Case No. 1:17-cv-02836-APM MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COMPLAINT FOR LACK OF JURISDICTION

TABLE OF CONTENTS

I. INTRODUCTION 1

II. BACKGROUND 1

III. STANDARD OF REVIEW 4

IV. ARGUMENT 5

A. This Court lacks jurisdiction over Plaintiff's Complaint because the Courts of Appeals have exclusive jurisdiction to review NRC's denial of a petition for rulemaking. 5

B. Transfer in lieu of dismissal is not warranted because Plaintiff's Complaint is untimely. 8

V. CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Am. Petroleum Inst. v. SEC,
714 F.3d 1329 (D.C. Cir. 2013) 5

Anglers Conservation Network v. Pitzker,
809 F.3d 664 (D.C. Cir. 2016) 8

Anglers Conservation Network v. Pritzker,
70 F. Supp. 3d 427 (D.D.C. 2014) 8

Avia Dynamics, Inc. v. FAA,
641 F.3d 515 (D.C. Cir. 2011) 6, 9

Bennett v. Spear,
520 U.S. 154 (1997) 6, 7

Blue Ridge Envtl. Def. League v. NRC,
668 F.3d 747 (D.C. Cir. 2012) 5, 6, 7

City of Dania Beach v. FAA,
485 F.3d 1181 (D.C. Cir. 2007) 6

Ctr. for Auto Safety v. Skinner,
936 F.2d 1315 (D.C. Cir. 1991) 9

Fezekas v. Fed. Motor Carrier Safety Admin.,
No. Civ.A.03-3630, 2004 WL 551214 (E.D. La. Mar. 19, 2004) 9

Fox Television Stations, Inc. v. F.C.C.,
293 F.3d 537 (D.C. Cir. 2002) 8

Fox Television Stations, Inc. v. F.C.C.,
280 F.3d 1027 (D.C. Cir. 2002) 8

Gage v. Atomic Energy Comm'n,
479 F.2d 1214 (D.C. Cir 1973) 7

Honicker v. NRC,
590 F.2d 1207 (D.C. Cir. 1978) 5, 7

Kokkonen v. Guardian Life Ins. Co.,
511 U.S. 375 (1994) 4, 5

Nat. Res. Def. Council v. NRC,
666 F.2d 595 (D.C. Cir. 1981) 9

Nat'l Fed'n of Blind v. U.S. Dep't of Transp.,
78 F. Supp. 3d 407 (D.D.C. 2015) 9

Nat'l Fed'n of the Blind v. U.S. Dep't of Transp.,
827 F.3d 51 (D.C. Cir. 2016) 6

Nuclear Info. & Res. Serv. v. U.S. Dep't of Transp. Research & Special Programs Admin.,
457 F.3d 956 (9th Cir. 2006) 9

Oglesby v. Dep't of Army,
920 F.2d 57 (D.C. Cir. 1990) 6

Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998) 4

Telecomms. Research & Action Ctr. v. FCC,
750 F.2d 70 (D.C. Cir. 1984) 8

Ukiah Adventist Hosp. v. FTC,
981 F.2d 543 (D.C. Cir. 1992) 8

Vt. Dep't of Pub. Serv. v. United States,
684 F.3d 149 (D.C. Cir. 2012) 7

Weaver v. Fed. Motor Carrier Safety Admin.,
744 F.3d 142 (D.C. Cir. 2014) 6

STATUTES

5 U.S.C. § 553(e) 7, 8

28 U.S.C. § 1631 .... 8, 9

28 U.S.C. §§ 2342(4) 1, 5

28 U.S.C. § 2344 9

42 U.S.C. § 2239 5

42 U.S.C. § 2239(a)(1)(A) 1, 5

42 U.S.C. §§ 4321–4370m-12 3

42 U.S.C. § 7401 3

RULES

Fed. R. Civ. P. 12(b)(1) 9

REGULATIONS

10 C.F.R. § 2.802 .... 2, 7

10 C.F.R. §2.802(a) 2

10 C.F.R § 2.802(c) 2, 3, 7

10 C.F.R. § 2.802(c)(1) 3

10 C.F.R. § 2.802(c)(2) 3

10 C.F.R. § 2.802(c)(3) 3

10 C.F.R. § 52.110(b) 2, 3, 4, 6

OTHER AUTHORITIES

80 Fed. Reg. 60,513 (Oct. 7, 2015) 2

I. INTRODUCTION

Plaintiff George Berka seeks judicial review of the denial by the Nuclear Regulation Commission ("NRC") of his petition for rulemaking, which requested that NRC amend its regulations to permit shuttered nuclear power plants to restart operation without complying with NRC's latest safety standards. *See* Compl., ECF No. 1. Plaintiff, however, has bought this claim in the wrong court. The Administrative Orders Review Act, commonly referred to as the "Hobbs Act," confers jurisdiction upon the Courts of Appeals to review a challenge to a denial of a petition for rulemaking by the NRC if the challenge is filed by a "party aggrieved" within sixty days after the entry of the final order. 28 U.S.C. §§ 2342(4), 2344; 42 U.S.C. § 2239(a)(1)(A). Because Plaintiff's claims fall squarely within this grant of exclusive jurisdiction to the Courts of Appeals, this Court lacks jurisdiction, and the Complaint should be dismissed under Rule 12(b)(1) of the Federal Rules of Civil Procedure.

II. BACKGROUND

On January 28, 2015, Plaintiff submitted a petition for rulemaking to the NRC, requesting that "any nuclear power plant, which has shut down within the past [seven] years, and was operational at the time of shut-down, be permitted to simply re-start 'as-is' without having to be upgraded to the latest standards, as is currently required." Ex. 1, George Berka Pet. for Rulemaking (Jan. 28, 2015). Plaintiff failed to provide any amendatory language to the NRC regulations so as to effectuate his proposed "as-is" restart of decommissioned nuclear power plants in the January 2015 petition.

Under 10 C.F.R. § 2.802(a) (2015), "[a]ny interested person may petition the Commission to issue, amend or rescind any regulation."[1] Pursuant to 10 C.F.R § 2.802(c), a petition for rulemaking was required to:

> (1) Set forth a general solution to the problem or the substance or text of any proposed regulation or amendment, or specify the regulation which is to be revoked or amended;
>
> (2) State clearly and concisely the petitioner's grounds for and interest in the action requested;
>
> (3) Include a statement in support of the petition which shall set forth the specific issues involved, the petitioner's views or arguments with respect to those issues, relevant technical, scientific or other data involved which is reasonably available to the petitioner, and such other pertinent information as the petitioner deems necessary to support the action sought. In support of its petition, petitioner should note any specific cases of which petitioner is aware where the current rule is unduly burdensome, deficient, or needs to be strengthened.

On March 27, 2015, NRC's Executive Director of Operations responded to Plaintiff's petition and notified him that the petition did not meet any of the requirements set forth in 10 C.F.R. § 2.802. Ex. 2, Ltr. from Mark A. Satorius, NRC Exec. Dir. for Operations, to George Berka (Mar. 27, 2015). This letter also notified Plaintiff that he must supplement his petition within ninety days or his request would not be docketed as a petition for rulemaking. *Id.*; *see* 10 C.F.R. § 2.802 (2015).

On April 7, 2015, Plaintiff supplemented his petition by suggesting amendatory language to 10 C.F.R. § 52.110(b). Ex. 3, Ltr. from George Berka to NRC (April 7, 2015). Specifically, Plaintiff requested that NRC amend 10 C.F.R. § 52.110(b) to provide a licensee whose facility "had been shut down and de-fueled prior to January 1, 2008, was operational prior to shut-down,

---

[1] In November 2015, NRC amended its petition for rulemaking regulations. *See Revisions to the Petition for Rulemaking Process*, 80 Fed. Reg. 60,513 (Oct. 7, 2015) (final rule effective Nov. 6, 2015). Except as otherwise noted, references to 10 C.F.R. § 2.802 in this motion refer to the regulation in effect at the time of Plaintiff's petition.

and [for which] significant decommissioning activities[] [had] not commenced since shut-down," with the option to:

> (a) Reassemble the plant into an operational condition, have the NRC conduct a general inspection of the plant, re-load nuclear fuel into the reactor, and resume normal operation of the facility per 10 CFR 52, or
>
> (b) Request that the facility be placed in a "cold stand-by mode" for up to ten (10) years. From this mode, the facility may be reassembled, re-fueled, and re-started by the licensee at any time, and normal operation per 10 CFR 52 may resume, as specified in section (a) above. Extensions to the "cold stand-by mode" beyond (10) years would have to be requested in writing from the NRC by the licensee.

Id. at 1. Citing climate change concerns under the National Environmental Policy Act, 42 U.S.C. §§ 4321–4370m-12 and the Clean Air Act 42 U.S.C. § 7401, Plaintiff concluded that "allowing recently shuttered nuclear power plants to re-start, unmodified, offers a safe, affordable, realistic, timely, and effective solution to the problem of climate change, by restoring a significant amount of carbon-free electrical generating capacity to the electric grid." Ex. 3 at 3.

On June 19, 2015, NRC denied Plaintiff's petition for rulemaking, stating that the original petition, as well as the supplemental materials he provided, still did not satisfy the criteria under 10 C.F.R § 2.802(c). Ex. 4, Ltr. from Mark A. Satorius to George Berka (June 19, 2015). First, NRC determined that the petition did not meet the requirements of 10 C.F.R. § 2.802(c)(1) because Plaintiff did not adequately explain the alleged deficiencies in NRC's current regulatory framework. *Id.* at 1–2. Second, NRC found that Plaintiff's request failed to satisfy the requirements of 10 C.F.R. § 2.802(c)(2), stating that, while Plaintiff "express[ed] some high-level concerns about climate change, [he did] not provide specific information on [his] particular interest in allowing a decommissioned nuclear power plant to restart." *Id.* at 2. Finally, NRC concluded that Plaintiff's petition did not meet the requirements of 10 C.F.R. § 2.802(c)(3). *Id.* The NRC acknowledged that Plaintiff "provide[d] a few basic calculations

comparing the cost and time frame for restarting a nuclear power plant after shut down to the cost and time frame for replacing a similar electrical generating capacity with renewables or a new nuclear power plant," but concluded that the petition failed to "explain why the NRC's current regulatory requirements must, by their nature, impose these asserted costs on licensees." *Id.*

Plaintiff did not seek judicial review of the denial until more than two years later when, on December 18, 2017, he filed his Complaint in this Court. Although Plaintiff proposes some language that is different than his 2015 petition for rulemaking,[2] his general proposal remains the same—that NRC amend 10 C.F.R. § 52.110(b) to permit decommissioned nuclear power plants to resume operations without having to comply with "the latest standards." Compl. at 1; *see also* Ex. 1; Ex. 3 at 3. Indeed, Plaintiff asserts in his Complaint that NRC rejected this request when he made it the first time in 2015. Compl. at 4.

III. STANDARD OF REVIEW

Jurisdiction is a threshold issue that must be addressed before considering the merits of a case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–96, (1998). Federal Rule of Civil Procedure 12(b)(1) provides for dismissal of a claim for lack of subject matter jurisdiction. The burden of proving subject matter jurisdiction rests with plaintiff, the party invoking the federal court's jurisdiction. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). Federal

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[2] For example, Plaintiff's Complaint makes no mention of the "cold-stand-by mode" referenced in his April 7, 2015, letter supplementing his original petition for rulemaking. *See* Ex. 3 at 1. In his Complaint, Plaintiff also proposes new restarting standards for a facility that "had not been in an operational condition at the time of the retirement, had last operated more than twenty (20) calendar years prior to the retirement date, is not intact, and / or has had significant decommissioning and / or dismantling activities commence." Compl. at 1–2.

courts have limited jurisdiction and are presumed to lack jurisdiction unless a plaintiff establishes its existence. *Id.*

IV. ARGUMENT

A. This Court lacks jurisdiction over Plaintiff's Complaint because the Courts of Appeals have exclusive jurisdiction to review NRC's denial of a petition for rulemaking.

The NRC's 2015 denial of Plaintiff's petition for rulemaking, which requested that decommissioned nuclear power plants be permitted to restart on an as-is basis, constitutes a "final order" reviewable under the Hobbs Act. By statute, Congress has vested the Courts of Appeals with exclusive jurisdiction to review actions by NRC. 28 U.S.C. §§ 2342(4), 2344; 42 U.S.C. § 2239(a)(1)(A). Although "the normal default rule is that persons seeking review of agency action go first to district court," that default rule is superseded "when a direct-review statute specifically gives the court of appeals subject-matter jurisdiction to directly review agency action." *Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1332 (D.C. Cir. 2013) (citations omitted). The Hobbs Act constitutes such a direct-review statute. It vests in the Courts of Appeals the "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders" of NRC made reviewable by Section 189 of the Atomic Energy Act, 42 U.S.C. § 2239. 28 U.S.C. § 2342(4). Section 2239 allows for review of any "final order" by NRC that is entered in "any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees." 42 U.S.C. § 2239(a)(1)(A) & (B).

Under the Hobbs Act, "a 'final order' is one that imposes an obligation, denies a right, or fixes some legal relationship, usually at the consummation of an administrative process." *Honicker v. NRC*, 590 F.2d 1207, 1209 (D.C. Cir. 1978); *see also Blue Ridge Envtl. Def. League*

v. NRC, 668 F.3d 747, 753 (D.C. Cir. 2012).[3] For agency action to be "final" and subject to review, (1) the action must mark consummation of agency's decision-making process, rather than merely be tentative or interlocutory in nature, and (2) the action must be "one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citation omitted). In the D.C. Circuit, the term "order" in a direct-review statute "is interpreted to mean any agency action capable of review on the basis of the administrative record." *Nat'l Fed'n of the Blind v. U.S. Dep't of Transp.*, 827 F.3d 51, 54–55 (D.C. Cir. 2016) (internal quotations and citation omitted). The term "order" as used in the Hobbs Act and other similar direct-review statutes is "broadly construed" and "should be read 'expansively.'" *Avia Dynamics, Inc. v. FAA*, 641 F.3d 515, 520 (D.C. Cir. 2011) (citing *City of Dania Beach v. FAA*, 485 F.3d 1181, 1187 (D.C. Cir. 2007)).

The NRC's June 19, 2015, letter determining that Plaintiff's petition did not satisfy the § 2.802(c) criterion constitutes a final order. *Blue Ridge*, 668 F.3d at 753 (internal citations omitted). In his Complaint, Plaintiff again requests that NRC amend its regulations to permit decommissioned nuclear power plants to restart "as is"—as he did in his petition for rulemaking.[4] In fact, Plaintiff expressly states in his Complaint that he had "previously made the

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[3] While the Hobbs Act and the Administrative Procedure Act ("APA") use different terminology—"final order" versus "final agency action"—the D.C. Circuit has stated that the two terms are "equivalent for the purposes of being final and therefore permitting judicial review." *Weaver v. Fed. Motor Carrier Safety Admin.*, 744 F.3d 142, 146 (D.C. Cir. 2014).

[4] As mentioned *supra,* Plaintiff proposes slightly different amendatory language to 10 C.F.R. § 52.110(b) in this Complaint than the proposed language he set forth in his 2015 petition. Given these differences, Plaintiff may attempt to characterize the instant complaint as a new petition for rulemaking. If this was a new petition, Plaintiff would have failed to exhaust his administrative remedies before NRC because Plaintiff would have been required to file the new petition with NRC before seeking judicial review. *See, e.g.*, *Oglesby v. Dep't of Army*, 920 F.2d 57, 61 (D.C. Cir. 1990) ("Exhaustion of administrative remedies is generally required before filing suit in federal court so that the agency has an opportunity to exercise its discretion and expertise on the matter and to make a factual record to support its decision."). In any event, this

above request of the [NRC] in 2015 by submitting a 'Petition for Rule Making', asking that previously shuttered nuclear power plants be permitted to restart largely 'as they were'. *His request was denied*." Compl. at 4 (emphasis added). Thus, NRC's June 19, 2015 letter determining that Plaintiff's petition did not satisfy the 10 C.F.R. § 2.802(c) criterion represented the end of NRC's analysis of the issues arising from Plaintiff's 2015 petition for rulemaking. *Blue Ridge*, 668 F.3d at 753.[5] As such, NRC's denial of Plaintiff's 2015 petition had "direct and appreciable legal consequences" in that to obtain the requested relief, Plaintiff had to either appeal to the court of appeals within sixty days of the denial or file an entirely new petition for rulemaking with NRC. *See Bennett*, 520 U.S. at 178.

The D.C. Circuit has expressly held that the denial of a petition for rulemaking pursuant to 10 C.F.R. §§ 2.802 and 2.803, the two regulations at issue in this case, "would constitute a final order reviewable by this court." *Gage v. Atomic Energy Comm'n*, 479 F.2d 1214, 1222 n.27 (D.C. Cir 1973). This conclusion comports with a line of cases holding that denials of petitions for rulemaking bought before other agencies constitute final agency actions under the

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court would not have jurisdiction. Any issue on the requirement for exhaustion would be appropriate for resolution by the Court of Appeals. *See Vt. Dep't of Pub. Serv. v. United States*, 684 F.3d 149, 158 (D.C. Cir. 2012)

[5] Although the denial of Plaintiff's petition does not foreclose his ability to file a new, separate petition for rulemaking, the mere fact that the denial was without prejudice does not mean that the agency's decision on the specific petition is "merely tentative or interlocutory in nature." *See Bennett*, 520 U.S. at 177–78. Nor does it mean that Plaintiff's legal rights are not fixed as to his 2015 petition. *Id.*; see also *Honicker*, 590 F.2d at 1209 (holding that the order under review was not "final" for purposes of Hobbs Act jurisdiction because there was no statutory or regulatory authority giving the petitioner "a right to file an emergency petition for direct and immediate action by the Commission," and thus "the Commission [had] not denied petitioner any cognizable legal right."). In this case, the APA and NRC's implementing regulations provide interested parties with the right to petition the agency to initiate a rulemaking. See 5 U.S.C. § 553(e) ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."); see also 10 C.F.R. §§ 2.802, 2.803.

APA. *See also Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1037 (D.C. Cir. 2002), *opinion modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002) (holding that "[e]qually clear, an agency's denial of a petition to initiate a rulemaking for the repeal or modification of a rule is a final agency action subject to judicial review." (internal citations omitted)); *Anglers Conservation Network v. Pritzker*, 70 F. Supp. 3d 427, 441 (D.D.C. 2014), *aff'd*, 809 F.3d 664 (D.C. Cir. 2016) (noting that "…Plaintiffs are correct that an agency's final *denial of a rulemaking petition* under 5 U.S.C. § 553(e) is final agency action reviewable under the APA[.]" (emphasis added)). The NRC's denial of Plaintiff's petition for rulemaking was a final order, and thus the Courts of Appeals have exclusive jurisdiction.

In sum, this Court lacks jurisdiction to review Plaintiff's claims because NRC's June 19, 2015 letter, denying Plaintiff's petition for rulemaking, constitutes a final order reviewable under the Hobbs Act, which vests exclusive jurisdiction in the Courts of Appeals. Because Plaintiff's request seeks review of final agency action—namely, the denial of his request to initiate a rulemaking—the Hobbs Act grants exclusive jurisdiction over his claims to the Courts of Appeals. *See Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984) ("[W]here a statute commits review of agency action to the Court of Appeals, any suit seeking relief that might affect the Circuit Court's future jurisdiction is subject to the *exclusive* review of the Court of Appeals.").

B. Transfer in lieu of dismissal is not warranted because Plaintiff's Complaint is untimely.

The NRC seeks dismissal of Plaintiff's Complaint rather than transfer to the Courts of Appeals under 28 U.S.C. § 1631 because his claim is untimely. Generally, a court that lacks jurisdiction over a civil action must transfer the action to a court of competent jurisdiction "if it is in the interest of justice." 28 U.S.C. § 1631; *see Ukiah Adventist Hosp. v. FTC,* 981 F.2d 543,

549 (D.C. Cir. 1992). However, in this case, transfer to the D.C. Circuit would be futile because Plaintiff did not file for judicial review within sixty days of NRC's June 19, 2015 denial of his petition for rulemaking, as specifically required by the Hobbs Act. 28 U.S.C. § 2344.

Importantly, the D.C. Circuit has held that "[t]he 60 day period for seeking judicial review set forth in the Hobbs Act is jurisdictional in nature, and may not be enlarged or altered by the courts." *Nat. Res. Def. Council v. NRC,* 666 F.2d 595, 602 (D.C. Cir. 1981). As such, this case is distinguishable from other cases where a district court considered transfer in the interest of justice, notwithstanding an untimely petition, because the filing deadline at issue in was non-jurisdictional. *See, e.g.*, *Nat'l Fed'n of Blind v. U.S. Dep't of Transp*., 78 F. Supp. 3d 407, 415 (D.D.C. 2015) (finding that the issue of "[w]hether Plaintiffs' claims are timely is a question better suited for the D.C. Circuit to answer" because the filing deadline at issue did "not constitute a jurisdictional bar") (quoting *Avia Dynamics*, 641 F.3d at 519). In fact, the D.C. Circuit has stated that "the transfer provisions of 28 U.S.C. § 1631 are not applicable" where the plaintiff's claim was time-barred by the Hobbs Act when initially filed in district court. *Ctr. for Auto Safety v. Skinner*, 936 F.2d 1315, 1315 n.1 (D.C. Cir. 1991); *see, e.g.*, *Nuclear Info. & Res. Serv. v. U.S. Dep't of Transp. Research & Special Programs Admin.*, 457 F.3d 956, 962–63 (9th Cir. 2006) (upholding the district court's dismissal for lack of subject matter jurisdiction and noting that "transfer to the court of appeals would not have been permitted under § 1631" because the plaintiff did not file suit within the sixty days required by the Hobbs Act); *Fezekas v. Fed. Motor Carrier Safety Admin.*, No. Civ.A.03-3630, 2004 WL 551214, at *5 (E.D. La. Mar. 19, 2004) ("[U]nder the clear language of [28 U.S.C. § 2344] and applicable case law, the Court may not transfer this matter if the sixty-day period would have barred plaintiff from filing suit in

the Fifth Circuit Court of Appeals on the date that he filed suit here."). Accordingly, this court should dismiss Plaintiff's Complaint.

V. CONCLUSION

For the reasons stated above, the case should be dismissed for lack of subject matter jurisdiction.

Respectfully submitted this 1st day of June, 2018.

JEFFREY H. WOOD
Acting Assistant Attorney General

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Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of June, 2018, the foregoing was electronically filed with the Clerk of the Court and served using the CM/ECF system upon all parties and counsel of record.

JEFFREY H. WOOD
Acting Assistant Attorney General

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EXHIBIT 1

George Berka Pet. for Rulemaking (Jan. 28, 2015)

George Berka v. U.S. Nuclear Regulatory Commission
Case No. 1:17-cv-02836-APM
Memorandum in Support of Motion to Dismiss
Complaint for Lack of Jurisdiction

From: EXT-Berka, George <george.berka@boeing.com>

Sent: Wednesday, January 28, 2015 12:58 PM

To: RulemakingComments Resource

Subject: Petition for Rulemaking: Please Consider Allowing Recently Shut Nuclear Plants to Re-start "As-is".

Good Afternoon,

The purpose of this e-mail is to submit a petition for rulemaking. I would like to request that any nuclear power plant, which has shut down within the past (7) years, and was operational at the time of shut-down, be permitted to simply re-start "as-is" without having to be upgraded to the latest standards, as is currently required.

This change would allow the 4 plants that closed recently (Kewaunee, Vermont Yankee, San Onofre, and Crystal River) to be allowed to simply re-start, should their owners decide to pursue this approach. It would also reduce the risk of losing additional nuclear plants in the future.

I believe that this approach would be safe, which no additional risk to the public, since the plants operated satisfactorily prior to shut-down, were well maintained, and had good overall safety records. This approach would also spare the plant owners the enormous cost of upgrading the plants to the latest standards. Otherwise, re-starting the plants would probably be cost prohibitive.

I am requesting this change for the following reason:

Existing nuclear power plants are perhaps one of the best tools that the country currently has to help deal with climate change. They are here and ready to run now. Relatively little time and money (compared to a new build) needs to be invested to get them back on line. When compared to renewables, they have great capacity in a relatively compact footprint, and essentially constant output. They provide clean, carbon-free energy at over a 90% capacity factor. These are their important attributes that we should recognize, and strive to do everything we can, as a nation, to save them and keep them on-line. The carbon-free generating capacity that we lost as a result of the closures of Kewaunee, Vermont Yankee, San Onofre, and Crystal River negated a considerable amount of the climate progress that we made in recent years by adding renewables to the grid.

It would not be unreasonable to say that this is somewhat of a priority situation, if the country wants to get serious about doing something about climate change now, not tomorrow. It is also the "low hanging fruit", when compared to other options. Allowing these plants to re-start could restore a significant amount of clean, carbon-free capacity to the grid, today, and for literally "pennies on the dollar",

compared to building new nuclear, or trying to replace the same capacity with wind or solar sources. Replacing lost nuclear capacity with natural gas or coal fired generation should be considered poor practice from a climate standpoint.

In summary, this simple change could be considered a "win-win" for everyone, with no real negatives or downsides. It could potentially open the door for over 4,000 megawatts of clean, carbon-free electricity to be restored to the grid, without compromising public safety.

If you are tempted to simply dismiss this petition, please consider soliciting public comment on it first. You may find that many members of the public may be supportive of this petition, because they are starting to recognize the valuable contribution that existing nuclear power plants make in the clean electricity arena.

Thank you,
-George Berka
(203) 681-7035

EXHIBIT 2

Ltr. from Mark A. Satorius, NRC Exec. Dir. for Operations, to George Berka (Mar. 27, 2015)

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

March 27, 2015

Mr. George Berka
305 W. 6th Street
Wilmington, DE 19801

Dear Mr. Berka:

This letter is in response to your correspondence to the U.S. Nuclear Regulatory Commission (NRC) dated January 28, 2015.[1] In your correspondence, you requested that the NRC amend its regulations to allow "any nuclear power plant, which has shut down within the past (7) years, and was operational at the time of shut-down, be permitted to simply restart 'as-is' without having to be upgraded to the latest standards, as is currently required."

The NRC has carefully reviewed your request and has concluded that the information provided in your correspondence does not meet the Commission's criteria for a petition for rulemaking under section § 2.802(c) of Title 10 of the *Code of Federal Regulations* (see http://www.gpo.gov/fdsys/granule/CFR-2014-title10-vol1/CFR-2014-title10-vol1-sec2-802). As required by § 2.802(c), your request does not: (1) set forth a general solution to the problem or the substance or text of any proposed regulation or amendment, or specify the regulation which is to be revoked or amended; (2) state clearly and concisely the petitioner's grounds for and interest in the action requested; and (3) include relevant technical, scientific or other data involved which is reasonably available to the petitioner, and such other pertinent information as the petitioner deems necessary to support the action sought.

If you wish the NRC to consider your request that the agency amend its regulations, you must supplement your correspondence of January 28, 2015, as well as provide information about your organization and your authority for submitting the request on behalf of such organization. This information must be received by the NRC within 90 days of the date of this letter or your request will not be docketed as a petition for rulemaking.

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[1] NRC's Agencywide Documents Access and Management System Accession No. ML15041A414.

If you have any questions, please contact Cindy Bladey, Chief, Rules, Announcements, and Directives Branch, by phone at 301-415-3280 or (toll-free) at 1-800-368-5642, or by e-mail to Cindy.Bladey@nrc.gov.

Sincerely,

/RA/

Mark A. Satorius
Executive Director
for Operations

If you have any questions, please contact Cindy Bladey, Chief, Rules, Announcements, and Directives Branch, by phone at 301-415-3280 or (toll-free) at 1-800-368-5642, or by e-mail to Cindy.Bladey@nrc.gov.

Sincerely,

/RA/

Mark A. Satorius
Executive Director
for Operations

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OFFICE	NRR*	QTE*	ADM/DAS:DD	ADM/DAS:D	ADM:DD
NAME	TInverso	CHsu	SSchoenmann	DMeyer	SStewart-Clark
DATE	2/18/2015	2/20/2015	3/4/15	3/9/15	3/20/15
OFFICE	ADM:D	DEDCM	EDO		
NAME	CCarpenter (StStewart-Clark for)	DAsh	MSatorious		
DATE	3/20/15	3/27/15	3/ 27 /15		

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EXHIBIT 3

Ltr. from George Berka to NRC (April 7, 2015)

George Berka v. U.S. Nuclear Regulatory Commission
Case No. 1:17-cv-02836-APM
Memorandum in Support of Motion to Dismiss
Complaint for Lack of Jurisdiction

305 W. 6th St.
Wilmington, DE 19801
07-Apr-2015

U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Subject: Allowing Previously Shuttered Nuclear Plants to Restart Unmodified

Dear Ms. Bladey,

Following is my reply to Mr. Mark A. Satorius' letter dated 27-Mar-2015. The aim of this letter is to provide the additional information that Mr. Satorius had requested in order for this petition to be docketed. Please let me know if you have any additional questions.

(1) I am requesting that the following section of Title 10 of the Code of Federal Regulations be modified to read as follows:

Section 52.110(b)

Upon docketing of the certifications for permanent cessation of operations and permanent removal of fuel from the reactor vessel, or when a final legally effective order to permanently cease operations has come into effect, the 10 CFR part 52 license no longer authorizes operation of the reactor or emplacement or retention of fuel into the reactor vessel, **except as follows:**

(b)(1) If the facility had been shut down and de-fueled prior to January 1, 2008, was operational prior to shut – down, and significant decommissioning activities* have not commenced since shut - down, the licensee shall have the option to either:

(a) Reassemble the plant into an operational condition, have the NRC conduct a general inspection of the plant, re-load nuclear fuel into the reactor, and resume normal operation of the facility per 10 CFR 52, or

(b) Request that the facility be placed in a "cold stand-by mode" for up to ten (10) years. From this mode, the facility may be reassembled, re-fueled, and re-started by the licensee at any time, and normal operation per 10 CFR 52 may resume, as specified in section (a) above. Extensions to the "cold stand-by mode" beyond (10) years would have to be requested in writing from the NRC by the licensee.

*Note: "Significant Decommissioning Activities" are defined as those activities which are, for all intents and purposes irreversible, and which render the plant inoperable once performed. Examples of such activities would include disturbance of the reactor vessel or its primary cooling system, demolition of the containment structure, or demolition of any primary plant structure. In general, any mechanical disassembly and / or removal of plant sub-systems, would not constitute significant decommissioning, if the plant may be returned to an operational status by the reassembly and re-installation of those systems.

(2) The petitioner's grounds for requesting the above action are as follows: Climate change is a serious issue facing our nation. Its consequences have the potential to cause significant water shortages, limit the production of food, and contribute to more severe weather phenomena, such as hurricanes and floods. Together, these events have the potential to inflict billions of dollars in economic losses, as well as widespread human suffering.

We must strive to mitigate these events by reducing the amount of greenhouse gasses that we emit into the atmosphere. One of the most effective means of accomplishing this is by using nuclear power for electricity generation. However, in order to be effective, this solution must also be affordable and timely. The construction of new nuclear capacity is generally very expensive and lengthy, but the solution that the petitioner proposes is both cost – effective, and expedient.

This solution is to give the licensees of recently shuttered nuclear power plants the option to simply re-start these plants, without having to perform any modifications to them, as specified in the amendment to Section 52.110 (b), above. The petitioner's proposal has the potential to restore over 3,000 megawatts of carbon – free electrical generating capacity to the grid, at a fraction of the cost, and in a fraction of the time, that it would take to replace this capacity with renewables, or new nuclear builds.

The petitioner believes that the risk of his proposal to the public is generally negligible. This is because all of the nuclear plants that had shut down in the previous (8) years had excellent safety records (as have essentially all U.S. nuclear plants). No plant employee, or member of the public, as ever been harmed by the release of radiation in the U.S. in at least the past 30 years.
Therefore, allowing these recently – shuttered plants to restart, unmodified, would be akin to granting operating license extensions to existing plants. The risk level would be about the same, if not lower. The plants in question had been operating reliably for several decades, and one may say that they have proven their safety records through field experience. The most important thing would be to conduct a thorough safety inspection of each plant prior to re-start, to make sure that the plant has not been damaged by any decommissioning activities that may have already begun. If the plant is undamaged, there is no reason why it should not be permitted to re-start.

(3) Following are a few basic calculations to support the petitioner's position. The petitioner will compare the cost and time frame of his proposal to the cost and time frame of replacing a similar electrical generating capacity with renewables, or new nuclear builds. The analysis shows that permitting recently – shuttered nuclear plants to re-start is <u>several orders of magnitude more cost effective than building new capacity</u>, and can also be accomplished in a fraction of the time.

Assume that the total generating capacity of the San Onofre, Kewaunee, and Vermont Yankee nuclear plants was 3300 megawatts, and that their average capacity factor was 90 percent. When compared to the 392 megawatt Ivanpah solar plant, with its 12% capacity factor, it would take (63) Ivanpah plants to replace this capacity, at a cost of $139 billion.
3300 mW(0.90) = 2970 mW (nuclear plants)
392 mW (0.12) = 47 mW (Ivanpah)
2970 / 47 = 63 Ivanpahs required. Cost of Ivanpah plant was $2.2 billion.

Replacing this capacity with new nuclear builds:
Assume $8 billion for a new 1 gW plant
3.3 gW*($8 bil / gW) = $26.4 billion ←

Time Frame:
It is reasonable to assume that it would take at least (10) years to build (3) new nuclear plants to replace the lost capacity. Building (63) new Ivanpah solar plants would take at least that long, if not longer.

Comparison:

Now, let us assume that permitting Kewaunee, San Onofre and Vermont Yankee plants to re-start would only require safety inspections. If each plant received a 10,000 man-hour safety inspection, at a cost of $250 per hour, that would only amount to $2.5 million per plant, or $7.5 million for the (3) plants assuming that nothing else was needed for re-start. When compared to a new nuclear build, cost of a re-start is:

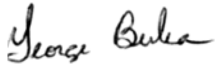
($7.5 million / $26.4k million)*100 = 0.028 % ←

When compared to Ivanpah,
($7.5 million / $139k million)*100 = 0.005 % ←

Time Frame:
The inspections required for a re-start could probably be accomplished in under (6) months, versus the (10) years required for a new build.
(0.5 year / 10 years)*100 = 5% ←

In summary, the petitioner believes that allowing recently shuttered nuclear power plants to re-start, unmodified, offers a safe, affordable, realistic, timely, and effective solution to the problem of climate change, by restoring a significant amount of carbon – free electrical generating capacity to the electric grid.

Regards,



George Berka

EXHIBIT 4

Ltr. from Mark A. Satorius to George Berka (June 19, 2015)

George Berka v. U.S. Nuclear Regulatory Commission
Case No. 1:17-cv-02836-APM
Memorandum in Support of Motion to Dismiss
Complaint for Lack of Jurisdiction

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

June 19, 2015

Mr. George Berka
305 W. 6th St.
Wilmington, DE 19801

Dear Mr. Berka:

By letter dated March 27, 2015,[1] I notified you that your January 28, 2015,[2] correspondence requesting that the U.S. Nuclear Regulatory Commission (NRC) amend its regulations did not meet the Commission's criteria under § 2.802(c) of Title 10 of the *Code of Federal Regulations* (10 CFR) for a petition for rulemaking (PRM). You requested that the NRC allow "any nuclear power plant, which has shut down within the past (7) years, and was operational at the time of shut-down, be permitted to simply restart 'as-is' without having to be upgraded to the latest standards, as is currently required." By correspondence dated April 7, 2015,[3] you provided supplemental information to your January 28, 2015, correspondence.

We have carefully reviewed all of your correspondence from January 2015 through April 2015 and have determined that your submissions do not meet the Commission's criteria under § 2.802(c) for a petition for rulemaking.

Section 2.802(c)(1) provides that a petition for rulemaking must "[s]et forth a general solution to the problem or the substance or text of any proposed regulation or amendment, or specify the regulation which is to be revoked or amended…" In your supplemental correspondence dated April 7, 2015, you request that the NRC amend its regulations in § 52.110(b) and provide licensees with the option to:

> (a) Reassemble the plant into an operational condition, have the NRC conduct a general inspection of the plant, re-load nuclear fuel into the reactor, and resume normal operation of the facility per 10 CFR [Part] 52, or
>
> (b) Request that the facility be placed in a "cold stand-by mode" for up to ten (10) years. From this mode, the facility may be reassembled, re-fueled, and re-started by the licensee at any time, and normal operation per 10 CFR [Part] 52 may resume, as specified in section (a) above. Extensions to the "cold stand-by mode" beyond (10) years would have to be requested in writing from the NRC by the licensee.

However, your request remains unacceptable for docketing for three reasons. First, your submission does not explain what technical (safety) or regulatory problem your proposed amendment would address, as required by § 2.802(c)(1). If your proposal is intended to provide

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[1] NRC's Agencywide Documents Access and Management System (ADAMS) Accession No. ML15042A336.
[2] ADAMS Accession No. ML15041A414.
[3] ADAMS Accession No. ML15142A724.

additional flexibility to nuclear power plant licensees as an alternative to decommissioning, your request does not explain why this flexibility is not already afforded to licensees by the NRC's existing regulatory requirements.

Second, your request does not meet the requirement in § 2.802(c)(3) for a description of "the specific issues involved, the petitioner's views or arguments with respect to those issues, relevant technical, scientific, or other data involved, which is reasonably available to the petitioner, and other such pertinent information the petitioner deems necessary to support the action sought." Your request provides a few basic calculations comparing the cost and time frame for restarting a nuclear power plant after shut down to the cost and time frame for replacing a similar electrical generating capacity with renewables or a new nuclear power plant. However, your request does not explain why the NRC's current regulatory requirements must, by their nature, impose these asserted costs on licensees.

Third, § 2.802(c)(2) provides that a petition for rulemaking must "[s]tate clearly and concisely the petitioner's grounds for and interest in the action requested." In your request, you express some high-level concerns about climate change, but you do not provide specific information on your particular interest in allowing a decommissioned nuclear power plant to restart.

For these reasons, your request will not be docketed as a petition for rulemaking. If you have any questions, please contact Cindy Bladey, Chief, Rules, Announcements, and Directives Branch, by phone at 1-800-368-5642, or by e-mail at Cindy.Bladey@nrc.gov.

Sincerely,

/RA Michael Weber for/

Mark A. Satorius
Executive Director
for Operations

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For these reasons, your request will not be docketed as a petition for rulemaking. If you have any questions, please contact Cindy Bladey, Chief, Rules, Announcements, and Directives Branch, by phone at 1-800-368-5642, or by e-mail at Cindy.Bladey@nrc.gov.

Sincerely,

/RA Michael Weber for/

Mark A. Satorius
Executive Director
for Operations

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DATE	6/19/15	06/19/15			

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GEORGE BERKA, Plaintiff, v. NUCLEAR REGULATORY COMMISSION, Defendant.	Case No. 1:17-cv-02836-APM

[PROPOSED] ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Pursuant to Federal Rule of Civil Procedure 12(b)(1), the Nuclear Regulation Commission (Defendant) moved for dismissal of the complaint in the above-captioned case. Based on the motion, memorandum in support, and references cited therein, the Court hereby GRANTS the motion. It is therefore

ORDERED that the complaint is dismissed.

Dated: ___________________

____
Honorable Amit P. Mehta United States District Judge