

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DOCKETING STATEMENT

Appeal Number	21-9593
Case Name	State of New Mexico, <i>ex rel.</i> Hector H. Balderas, Attorney General, et al. v. United States Nuclear Regulatory Commission, et al.
Party or Parties Filing Notice of Appeal Or Petition	State of New Mexico, <i>ex rel.</i> Hector H. Balderas, Attorney General and the New Mexico Environment Department
Appellee(s) or Respondent(s)	United States Nuclear Regulatory Commission and the United States of America
List all prior or related appeals in this court with appropriate citation(s).	Although there are no prior or related appeals in this court, the D.C. Circuit Court of Appeals is hearing a case over the same facility with the same Defendant in No. 21-1048, <i>Don't Waste Michigan, et al. v. U.S. Nuclear Regulatory Commission and the United States</i> (this has been Consolidated with case numbers 21-1055, 21-1056, 21-1179); the State of New Mexico has also filed a separate suit in district court case No. 21-9593, <i>Balderas v. United States Nuclear Regulatory Commission, et al.</i>

I. JURISDICTION OVER APPEAL OR PETITION FOR REVIEW

A. APPEAL FROM DISTRICT COURT

1. Date final judgment or order to be reviewed was **entered** on the district court docket: _____
2. Date notice of appeal was **filed**: _____
3. State the time limit for filing the notice of appeal (cite the specific provision of Fed. R. App. P. 4 or other statutory authority): _____
 - a. Was the United States or an officer or an agency of the

United States a party below? _____

- b.** Was a motion filed for an extension of time to file the notice of appeal? If so, give the filing date of the motion, the date of any order disposing of the motion, and the deadline for filing the notice of appeal: _____

4. Tolling Motions. *See* Fed. R. App. P. 4(a)(4)(A); 4(b)(3)(A).
- a. Give the filing date of any motion that tolls the time to appeal pursuant to Fed. R. App. P. 4(a)(4)(A) or 4(b)(3)(A):

- b. Has an order been entered by the district court disposing of any such motion, and, if so, when?

5. Is the order or judgment final (i.e. does it dispose of **all** claims by and against **all** parties)? *See* 28 U.S.C. § 1291. _____

(If your answer to Question 5 is no, please answer the following questions in this section.)

- a. If not, did the district court direct entry of judgment in accordance with Fed. R. Civ. P. 54(b)? When was this done?

- b. If the judgment or order is not a final disposition, is it appealable under 28 U.S.C. ' 1292(a)? _____
- c. If none of the above applies, what is the **specific** legal authority for determining that the judgment or order is appealable? _____

6. Cross Appeals.
- a. If this is a cross appeal, what relief do you seek beyond preserving the judgment below? *See United Fire & Cas. Co. v. Boulder Plaza Residential, LLC*, 633 F.3d 951, 958 (10th Cir. 2011) (addressing jurisdictional validity of conditional cross appeals).

- b. If you do not seek relief beyond an alternative basis for affirmance, what is the jurisdictional basis for your appeal? *See Breakthrough Mgt. Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1196-98 and n.18 (10th Cir. 2010) (discussing protective or conditional cross appeals). _____

B. REVIEW OF AGENCY ORDER (To be completed only in connection with petitions for review or applications for enforcement filed directly with the court of appeals.)

1. Date of the order to be reviewed: September 13, 2021 (Record of Decision and issuance of Materials License No. SNM-2515)
2. Date petition for review was filed: November 15, 2021
3. Specify the statute or other authority granting the Tenth Circuit Court of Appeals jurisdiction to review the order: 42 U.S.C. §§ 2239, 10139(a)(1)(D) and 4370m-6; 28 U.S.C. § 2342(4).
4. Specify the time limit for filing the petition (cite specific statutory section or other authority): Pursuant to 28 U.S.C. § 2344 “[a]ny party aggrieved by the final order [of the agency] may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies.”

C. APPEAL OF TAX COURT DECISION

1. Date of entry of decision appealed: _____
2. Date notice of appeal was filed: _____
(If notice was filed by mail, attach proof of postmark.)
3. State the time limit for filing notice of appeal (cite specific statutory section or other authority): _____
4. Was a timely motion to vacate or revise a decision made under the Tax Court’s Rules of Practice, and if so, when? *See* Fed. R. App. P. 13(a) _____

II. ADDITIONAL INFORMATION IN CRIMINAL APPEALS.

- A.** Does this appeal involve review under 18 U.S.C. ' 3742(a) or (b) of the sentence imposed? _____
- B.** If the answer to A (immediately above) is yes, does the defendant also challenge the judgment of conviction? _____
- C.** Describe the sentence imposed. _____

- D.** Was the sentence imposed after a plea of guilty? _____
- E.** If the answer to D (immediately above) is yes, did the plea agreement include a waiver of appeal and/or collateral challenges? _____
- F.** Is the defendant on probation or at liberty pending appeal? _____
- G.** If the defendant is incarcerated, what is the anticipated release date if the judgment of conviction is fully executed? _____

NOTE: In the event expedited review is requested and a motion to that effect is filed, the defendant shall consider whether a transcript of any portion of the trial court proceedings is necessary for the appeal. Necessary transcripts must be ordered by completing and delivering the transcript order form to the Clerk of the district court with a copy filed in the court of appeals.

III. GIVE A BRIEF DESCRIPTION OF THE NATURE OF THE UNDERLYING CASE AND RESULT BELOW.

On September 13, 2021, the United States Nuclear Regulatory Commission (“NRC”) granted Materials License No. SNM-2515 to Interim Storage Partners, LLC (“ISP”) for the construction and operation of a consolidated interim storage facility (“CISF”) to store high-level radioactive nuclear waste in Andrews County, Texas, less than a mile from the New Mexico border (“ISP CISF License”). In connection with its issuance of the ISP CISF license and corresponding Record of Decision, the NRC prepared an environmental impact study, issued a Draft Environmental Impact Statement in May 2020, and issued a Final Environmental Impact Statement on July 29, 2021.

The State of New Mexico maintains that the NRC failed to prepare a proper Final Environmental Impact Statement in violation of the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, (“NEPA”), and further acted arbitrarily, capriciously, and/or otherwise not in accordance with the law in issuing a flawed, inadequate and unlawful Record of Decision in connection with its issuance of the ISP CISF License in violation of the Administrative Procedures Act, 5 U.S.C. § 706(2). Specifically, the NRC failed on both the information-gathering and the public participation functions vital to NEPA and in granting the ISP CISF license over countless protests from the State and various New Mexico agencies (among myriad of other objections from members of the public). The State of New Mexico respectfully requests that the Court set aside and vacate the NRC’s Record of Decision and Materials License No. SNM-2515 until the agency is in accordance with the law and complies with mandatory NEPA requirements and conducts a comprehensive and lawful evaluation of the cumulative impacts of the ISP CISF on the human environment and on the State of New Mexico.

IV. IDENTIFY TO THE BEST OF YOUR ABILITY AT THIS STAGE OF THE PROCEEDINGS, THE ISSUES TO BE RAISED IN THIS APPEAL. You must attempt to identify the issues even if you were not counsel below. See 10th Cir. R. 3.4(B).

1. Whether the NRC’s Record of Decision and Final Environmental Impact Statement relating to the issuance of the ISP CISF License fails to satisfy both the information –gathering and the public participation functions required by NEPA, including but not limited to those requirements set forth in 42 U.S.C. §§ 4332 (C), (D), (E), and (G).
2. Whether the conclusions and determinations in the challenged Record of Decision and its issuance of the ISP CISF License are arbitrary and capricious

and/or are not otherwise in accordance with the law, including but not limited to 42 U.S.C. §§ 4332 (C), (D), (E), and (G) and 5 U.S.C. § 706(2).

Above is a preliminary listing of issues that the State of New Mexico may raise. The State of New Mexico respectfully reserves the right to modify this preliminary list of issues to be addressed in its forthcoming brief, as well as to address these and other issues in more detail in future pleadings.

V. ATTORNEY FILING DOCKETING STATEMENT:

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Firm: Office of the New Mexico Attorney General

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Address: 408 Galisteo Street, Santa Fe NM 87501

/s/ William Grantham

November 23, 2021

Signature

Date

NOTE: The Docketing Statement must be filed with the Clerk via the court’s Electronic Case Filing System (ECF). Instructions and information regarding ECF can be found on the court’s website, www.ca10.uscourts.gov.

The Docketing Statement must be accompanied by proof of service. The following Certificate of Service may be used.

CERTIFICATE OF SERVICE

I, William Grantham, hereby certify that on
[attorney for appellant/petitioner]

November 23, 2021, I served a copy of the foregoing **Docketing Statement**, to:
[date]

Counsel of record, at Jennifer.Najjar@usdoj.gov,
[counsel for/or appellee/respondent]

a.kanner@kanner-law.com, a.tennis@kanner-law.com, Andrew.Smith@usdoj.gov,
andrew.averbach@nrc.gov, and justin.heminger@usdoj.gov

_____, the last known address/email address, by

Email and Electronic ECF.
[state method of service]

/s/ William Grantham
Signature

November 23, 2021
Date

William Grantham
408 Galisteo Street
Santa Fe NM 87501