

LITIGATION STATUS REPORT
(As of January 24, 2022)

ACTIVE CASES¹

Balderas v. NRC, No. 1:21-cv-00284-JB-JFR (D.N.M.)

On March 29, 2021, the State of New Mexico filed an action in district court challenging the legality of the ongoing licensing proceedings for the consolidated interim storage facilities proposed by Holtec International and Interim Storage Partners (“ISP”). New Mexico raises many of the same legal arguments under the Nuclear Waste Policy Act, the Atomic Energy Act, and the National Environmental Policy Act that the parties, including New Mexico, have raised in proceedings before the agency and/or the D.C., Fifth, and Tenth Circuits, as described below in the descriptions of the *Beyond Nuclear* and *Don’t Waste Michigan* cases. On June 17, 2021, the Department of Justice, representing the NRC, filed a motion to dismiss the case for lack of jurisdiction, arguing that, under the Hobbs Act and the Atomic Energy Act (“AEA”), New Mexico is required to present its arguments in the form of contentions to the Commission and, if it is dissatisfied with the result of the adjudication before the agency, to seek judicial review before a court of appeals. New Mexico’s arguments, the motion contends, are therefore unexhausted and in the wrong court. New Mexico filed an opposition to the motion on July 19, 2021; the NRC’s reply was filed on August 16, 2021. A hearing on the motion to dismiss was held on January 20, 2022, and the agency awaits a decision from the court.

CONTACT: Andrew P. Averbach, OGC
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Berka v. NRC, No. 21-1134 (D.C. Cir.)

This case challenges the agency’s denial of a petition for rulemaking (PRM-50-117), in which the petitioner sought to streamline the process to reactivate nuclear power plants that have shut down. The agency denied the petition on May 3, 2021, determining that there was neither a need to streamline the process nor a demand by licensees for new procedures. The petition has been fully briefed and the agency awaits a decision from the D.C. Circuit. The court will not hold oral argument.

CONTACT: Jennifer Scro, OGC
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Beyond Nuclear v. NRC, No. 20-1187 (D.C. Cir) (consolidated with *Don’t Waste Michigan v. NRC*, No. 20-1225, *Sierra Club v. NRC*, No. 21-1104, and *Fasken Land & Minerals Ltd. v. NRC*, No. 21-1147)

This case concerns Holtec International’s application for a license to operate a consolidated interim spent fuel storage facility in Lea County, New Mexico. Beyond Nuclear and Don’t Waste Michigan (on behalf of several other co-petitioners) filed separate petitions for review, which were consolidated by the court, challenging the Commission’s decision in CLI-20-4 that (a) as to

¹ For statistical purposes, we counted as “active” any case pending before a court, or still subject to further judicial review, as of January 1, 2022. However, the narratives accompanying the cases listed in this report include any post-January 1 developments.

Beyond Nuclear (and Sierra Club and another set of petitioners known collectively as Fasken), rejected a contention that issuance of the license, inasmuch as it would permit the storage of fuel to which the Department of Energy holds title, would violate the Nuclear Waste Policy Act (“NWPA”); and (b) as to Don’t Waste Michigan, rejected a variety of contentions under the AEA and the National Environmental Policy Act (“NEPA”). On July 6, 2020, the NRC and the United States moved to hold the case in abeyance due to the ongoing adjudicatory proceedings before the Commission concerning contentions raised by Sierra Club and Fasken and the possibility that the license either might not be issued or might not permit action that Beyond Nuclear claims is illegal. The court granted the motion on October 8, 2020, and directed the parties to file motions to govern further proceedings within 30 days of the completion of proceedings before the agency. On April 16, 2021, Sierra Club filed a petition for review challenging both CLI-20-4 and CLI-21-4, which resolved the additional contentions that Sierra Club had raised; and on June 25, 2021, Fasken filed a petition for review challenging the resolution of its contentions, including the Commission’s decision in CLI-21-7. All of the petitions have since been consolidated by the Court. Although the adjudicatory proceedings before the agency are complete, the license for the facility has not been issued and the agency and the United States reported to the Court on April 29, 2021, that they understand the petitions for review to remain in abeyance pursuant to terms of the Court’s October 8, 2020, order. No party expressed a contrary viewpoint, and the court kept the case in abeyance and further directed the NRC to file quarterly status reports and the parties to file motions to govern further proceedings within 30 days of the completion of proceedings before the agency.

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Braxton v. Hanson, No. 20-cv-1126-AGB (N.D. Ga.)

This is a claim for retaliation under the Title VII of the Civil Rights Act brought in March 2020 by a current NRC employee. An amended complaint was filed on August 21, 2020. Discovery is complete, and the agency has moved for summary judgment. The parties consented to the referral of the case to a U.S. Magistrate Judge, and they await his decision on the motion.

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Criscione v. NRC, No. 19-cv-02087-CBD (D. Md.), *aff’d*, No. 20-2320 (4th Cir.), *cert. denied*, No. 21-813 (S. Ct.)

On July 16, 2019, Lawrence Criscione, an NRC employee, filed a complaint asserting whistleblower retaliation in the U.S. District Court for the District of Maryland. Mr. Criscione alleged that the NRC illegally retaliated against him and deprived him of his right to petition Congress. Mr. Criscione had filed a complaint in 2014 with the Department of Labor (DOL) containing many of the same allegations he raised in district court, but, because DOL did not finally resolve his claim within one year, he sought *de novo* consideration of his claims in district court pursuant to 42 U.S.C. § 5851(b)(4). On December 6, 2019, the Department of Justice

filed a motion to dismiss the case, asserting, among other things, that the United States had not waived its sovereign immunity with respect to claims against the NRC arising under the Energy Reorganization Act, and that certain alleged instances of retaliation alleged in the complaint were barred by the statute of limitations. On October 6, 2020, after Mr. Criscione had filed an amended complaint, the district court granted the motion to dismiss on sovereign immunity grounds, agreeing that the Energy Reorganization Act, despite prohibiting retaliation, does not unequivocally provide a right to sue the NRC. Mr. Criscione appealed the decision to the U.S. Court of Appeals for the Fourth Circuit, which suspended briefing pending resolution of *Peck v. NRC*, discussed below, in which the same sovereign immunity issue was raised. On May 3, 2021, following a decision by the Fourth Circuit in *Peck* that adopted the Government's sovereign immunity argument, the court affirmed the decision of the district court, and it subsequently denied a petition for rehearing *en banc*. Mr. Criscione and Dr. Peck filed a petition for a writ of certiorari to the Supreme Court on November 29, 2021. The Government waived its right to oppose the petition, and the Court denied the petition for certiorari on January 24, 2022.

CONTACT: Vinh D. Hoang, OGC
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Don't Waste Michigan v. NRC, No. 21-1048 (D.C. Cir.) (consolidated with *Beyond Nuclear v. NRC*, No. 21-1056, *Sierra Club v. NRC*, No. 21-1055, *Fasken Land and Minerals, Ltd. v. NRC*, No. 21-1179, *Beyond Nuclear v. NRC*, No. 21-1230, *Sierra Club v. NRC*, No. 21-1227, and *Don't Waste Michigan v. NRC*, No. 21-1231); *Sierra Club v. NRC*, No. 21-1229

Texas v. NRC, No. 21-60743 (5th Cir.) (consolidated with *Fasken Land and Minerals, Ltd. v. NRC*)

Balderas v. NRC, No. 21-9593 (10th Cir.)

These petitions relate to the application of ISP for a license to construct a consolidated interim storage facility in Andrews County, Texas. The NRC issued the license for the facility on September 13, 2021.

D.C. Circuit

On February 2, 2021, Don't Waste Michigan and several other environmental groups (referred to as "Joint Petitioners" in proceedings before the Board and Commission) filed a petition for review challenging the Commission's decisions in CLI-20-13 and CLI-20-14 in the D.C. Circuit. The petition was consolidated with a petition for review brought by Beyond Nuclear as well as a petition for review challenging CLI-20-15 brought by Sierra Club. In its three decisions, the Commission upheld the Atomic Safety and Licensing Board's determinations that each of the petitioners had failed to proffer an admissible contention. On March 5, 2021, with the consent of the parties, the court placed the cases in abeyance. On August 20, 2021, Fasken Land & Minerals filed a petition for review of the Commission's decisions in CLI-20-14 and CLI-21-9, which the court consolidated with the other petitions. The parties filed motions to govern future proceedings on October 12, 2021, proposing a briefing schedule that calls for the filing of briefs in the winter and spring of 2022. The court granted the motion, though it has since suspended briefing.

On November 15, 2021, Don't Waste Michigan, Beyond Nuclear, and Sierra Club filed petitions for review of the agency's issuance of the license (as opposed to the adjudicatory decisions that denied admission of their contentions); Fasken did not file such a petition in the D.C. Circuit but, as discussed below, it did file one in the Fifth Circuit. The court consolidated these petitions with the ones that had been previously filed and placed them on the same (now-suspended) briefing schedule. Don't Waste Michigan and Sierra Club also jointly filed a petition challenging the Environmental Impact Statement and the Record of Decision for the ISP facility, which the NRC has moved to consolidate with the others; the petitioners have opposed that request, which remains pending.

Fifth Circuit

On September 23, 2021, Texas (including the Governor and the Texas Council on Environmental Quality) filed a petition for review of the issuance of the license. The NRC filed a motion to dismiss the petition, asserting that Texas's failure to participate in the adjudicatory proceedings precluded the court from exercising jurisdiction under the Hobbs Act. The court issued an order on November 19, 2021, indicating that it would "carry" the motion with the case and will consider the jurisdictional arguments along with the merits. On November 15, 2021, Fasken filed a petition for review of the issuance of the license, asserting violations of NEPA. On December 2, 2021, the NRC filed a motion to dismiss the petition for lack of jurisdiction (because the license is not independently appealable), or, in the alternative, to transfer the case to the D.C. Circuit. On December 21, 2021, the court issued an order indicating that the motion would likewise be carried with the case. The briefs of Texas and Fasken are due on February 7, 2022, and the NRC's brief will be due 40 days after those briefs are filed.

Tenth Circuit

On November 15, 2021, New Mexico filed a petition for review of the issuance of the license, even though, like Texas, it did not participate in the adjudicatory proceedings before the agency. On December 8, 2021, the NRC filed a motion to dismiss the proceeding for lack of jurisdiction (and, specifically, failure to exhaust administrative remedies). The motion has been fully briefed, but, like the Fifth Circuit, the court has stated that it will consider the jurisdictional issues with the merits of the case. Briefing is expected to be completed during the spring of 2022.

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301-415-1956

Kandel v. United States, No. 06-cv-872 (Fed. Cl.)

This is a class-action suit brought against the United States by federal retirees seeking additional retirement benefits on account of the mishandling of annual leave at the time of retirement. The parties prepared a stipulation with respect to certain agencies, including NRC, for which sufficient information concerning the calculation of damages has been provided, and a partial settlement agreement has been reached. The proceedings remain ongoing.

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Ki v. NRC, No. 20-cv-00130-GHH (D. Md)

Plaintiff-employee filed a complaint against the NRC in U.S. District Court for the District of Maryland asserting claims of racial discrimination and a racially hostile work environment. The complaint seeks unspecified amounts in compensatory damages and other damages, court costs, expenses, attorneys' fees, prejudgment interest and post-judgment interest as well as any other relief the court deems proper. The court denied the agency's motion to dismiss or, in the alternative, for summary judgment, and the parties are engaged in discovery.

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Kotzalas v. NRC, No. 20-cv-02926-PWG (D. Md.)

On October 9, 2020, Margaret Kotzalas, now a former NRC employee, filed a sex discrimination and retaliation complaint in the U.S. District Court for the District of Maryland. Ms. Kotzalas alleges that the NRC retaliated against her after she engaged in protected activity. In August 2021, the Department of Justice filed a motion to dismiss on timeliness grounds. The agency awaits a decision from the court on this dispositive motion.

CONTACT: Jeremy Sutttenberg, OGC
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Nevada v. NRC, No. 09-1133 (D.C. Cir.)

This petition for review challenges NRC's "Yucca Mountain Rule," 10 C.F.R. Part 63, which implements an Environmental Protection Agency (EPA) rule establishing standards for reviewing the Yucca Mountain repository application. Given the suspension of adjudicatory proceedings before the Commission related to Yucca Mountain and the uncertainty surrounding the Yucca Mountain project (including the lack of new appropriations from Congress from the Nuclear Waste Fund), the case, as well as a companion case brought against EPA challenging the EPA standards, has been held in abeyance, subject to periodic status reports, since 2010. In these reports, the parties have advised the court of the resumption of the licensing process following the issuance of a writ of mandamus in *In re Aiken County*, 725 F.3d 255 (D.C. Cir. 2013), but they have continued to advise the court that the future of the project remains uncertain.

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Ohio Nuclear-Free Network v. NRC, No. 21-1162 (D.C. Cir.)

On August 2, 2021, Ohio Nuclear-Free Network and Beyond Nuclear filed a petition for review challenging a license amendment that was issued on June 11, 2021, concerning the license for the American Centrifuge Plant. The amendment permits the operation of a cascade of uranium enrichment centrifuges and the production of high-assay low-enriched uranium. Neither of the petitioners requested a hearing with respect to the license amendment. The NRC filed a motion to dismiss the case on September 20, 2021, asserting that the court lacks jurisdiction because the petitioners, having not participated in the proceeding, were not "parties aggrieved" within the

meaning of the Hobbs Act. The court elected to refer the motion to the merits panel considering the case. Briefing is expected to be completed during the spring of 2022.

CONTACT: Eric V. Michel, OGC
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Oglala Sioux Tribe v. NRC, No. 20-1489 (D.C. Cir)

On December 4, 2020, the Oglala Sioux Tribe and Aligning for Responsible Mining filed a petition for review challenging the Commission's actions, culminating in CLI-20-9, relating to the issuance of a materials license to Powertech for the Dewey-Burdock In Situ Uranium Recovery Facility. Before the Commission, petitioners raised a series of arguments arising under the National Environmental Policy Act, the National Historic Preservation Act, and the Atomic Energy Act. They had previously raised many of these arguments in a prior petition filed before the D.C. Circuit but, with the exception of their argument related to the effectiveness of the license in the absence of a completed environmental impact statement, the court declined to hear them because no final agency action had been undertaken. The petitioners filed their brief on April 19, 2021, asserting that the agency erred in its resolution of the petitioners' contentions relating to cultural resources as well as its evaluation of various environmental impacts, as explained in, among other decisions, CLI-16-20 and CLI-20-9. The agency filed its brief on June 3, 2021; Powertech's brief was filed on June 10, 2021; petitioners filed a reply brief on July 1, 2021. Oral argument was held on November 9, 2021, and we await a decision from the court.

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Ohngo Gaudadeh Devia v. NRC, Nos. 05-1419, 05-1420, 06-1087 (D.C. Cir.)

This is the caption for three consolidated lawsuits filed in the U.S. Court of Appeals for the D.C. Circuit by dissident Goshutes and the State of Utah challenging a series of Commission adjudicatory decisions authorizing issuance of a license for the proposed Private Fuel Storage (PFS) spent fuel storage facility. The case is fully briefed, but the court decided to hold the case in abeyance because PFS had failed to obtain necessary approvals from Department of the Interior (DOI) sub-agencies and the case was therefore not ripe for review. PFS went to federal district court to challenge the other agencies' decisions. PFS prevailed in 2010, obtaining a remand to DOI. Ever since, the parties have filed a series of joint status reports in the D.C. Circuit agreeing that the case should remain in abeyance pending further developments. The case has now been administratively stayed, pending further developments.

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Peck v. Department of Labor, No. 20-1154 (4th Cir.), *cert. denied*, No. 21-813 (S. Ct.)

On February 16, 2017, Dr. Michael Peck filed a whistleblower retaliation complaint under 42 U.S.C. § 5851 against the NRC before the Department of Labor (and, specifically, before the Occupational Safety and Health Administration). On December 19, 2019, the Department's

Administrative Review Board issued a decision affirming the dismissal of the complaint for lack of subject matter jurisdiction, ruling that Energy Reorganization Act does not constitute a waiver of sovereign immunity with respect to claims of whistleblower retaliation brought against the NRC. Dr. Peck petitioned for review of the decision in the Fourth Circuit, which issued an order on April 30, 2021, denying the petition and ruling, as the Government argued, that the United States had not waived its sovereign immunity for claims of this type. The opinion of the court contained language indicating a retaliation claim could be brought against individual agency employees responsible for whistleblower retaliation, and, on June 14, 2021, the Government filed a petition for rehearing requesting that the court strike this language. The court granted this petition and issued an order striking the language at issue on June 21, 2021; and, on July 13, 2021, it denied Dr. Peck's petition for panel rehearing and rehearing *en banc*. Dr. Peck and Mr. Criscione jointly filed a petition for a writ of certiorari to the Supreme Court on November 29, 2021, challenging the Fourth Circuit's determination. The Government waived its right to oppose the petition, and the Court denied the petition for certiorari on January 24, 2022.

CONTACT: Michael R. Gartman, OGC
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Tafazzoli v. Hanson, No. 8:19-cv-00321-DLB (D. Md.)

On February 3, 2019, Sheiba Tafazzoli, a former NRC employee, appealed a Final Agency Decision against her on a constructive discharge claim in the U.S. District Court in the District of Maryland. In addition to constructive discharge, she alleged gender, color, and disability discrimination, hostile work environment, retaliation for previous protected activity, and failure to provide reasonable accommodations. On December 6, 2019, the Department of Justice filed a motion to dismiss or for summary judgment. On November 30, 2020, the court dismissed seven counts, related to claims of disparate treatment and hostile work environment, with prejudice. Ms. Tafazzoli's constructive discharge claim was dismissed without prejudice for failure to exhaust administrative remedies. Three other counts survived the motion to dismiss, including two alleging retaliation and one alleging failure to accommodate. Discovery on these three counts remains ongoing.

CONTACT: Garrett Henderson, OGC
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CLOSED CASES

Aguirre v. NRC, Nos. 19-cv-495-BAS-BLM, 19-cv-587-BAS-BLM, 19-cv-1102-BAS-BLM (S.D. Cal.); *aff'd*, No. 21-15777 (9th Cir.).

On March 15, 2019, Michael J. Aguirre filed a complaint in federal district court challenging the agency's treatment of two requests made under the Freedom of Information Act (FOIA) for documents related to spent fuel storage at San Onofre Nuclear Generation Station (SONGS), and, specifically, certain documents related to spent fuel canister misalignment and the discovery of shim pins in an empty canister. The NRC denied Mr. Aguirre's request for expedited processing and administratively closed his requests for failure to make an advance payment for the materials requested and to respond to a request for clarification.

Mr. Aguirre filed a second complaint on March 29, 2019, in which he challenged the agency's response to a second FOIA request related to SONGS (in which Mr. Aguirre had requested communications between Southern California Edison (SCE) and the agency concerning enforcement action taken following a 2018 spent fuel canister misalignment incident). Mr. Aguirre made the FOIA request on March 19, 2019, and requested that the agency provide the requested material in advance of a March 25, 2019, webinar, in which he intended to participate. While the agency informed Mr. Aguirre that it would not honor his request for expedited treatment, it nonetheless completed the production. Mr. Aguirre filed a third complaint on June 12, 2019, challenging the agency's response to a FOIA request for documents reflecting consultations with SCE concerning any proprietary interest SCE may have in the documents he previously requested from the agency. The agency produced the requested documents. The Department of Justice filed motions to dismiss the first two complaints on June 13, 2019, asserting that Mr. Aguirre had not exhausted his administrative remedies before the agency and that his claims were premature. It filed a motion to dismiss the third complaint on August 26, 2019, asserting that Mr. Aguirre had not exhausted his administrative remedies and that, in any event, the case was moot. The court issued orders resolving the motions on February 18 and 19, 2020. In the first and second cases, the court granted summary judgment, ruling that Mr. Aguirre had failed to exhaust his administrative remedies. In the third case, the court dismissed the complaint but granted Mr. Aguirre leave to amend within 21 days "to the extent he can show that he has sufficiently exhausted his administrative remedies." On March 13, 2020, Mr. Aguirre filed an amended complaint in the third case, challenging the agency's response to three additional FOIA requests that had not previously been challenged but, again, not demonstrating that he had exhausted his remedies with respect to any of his requests. On March 24, 2020, the Department of Justice moved to dismiss the amended complaint or, in the alternative, for summary judgment, asserting failure to exhaust and that the amendment was not within the scope of the court's order granting leave to amend. The third case was dismissed on May 1, 2020. Mr. Aguirre appealed the decisions in each of the cases to the Ninth Circuit, which consolidated the cases. The Ninth Circuit affirmed the district court's decisions on August 8, 2021, agreeing that in each case, Mr. Aguirre had failed to exhaust his administrative remedies. The deadline for Mr. Aguirre to seek a writ of certiorari expired on November 6, 2021.

CONTACT: Andrew P. Averbach, OGC
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Friends of the Earth v. NRC, No. 20-1026 (D.C. Cir.)

On January 31, 2020, Friends of the Earth, Natural Resources Defense Council, and Miami Waterkeeper filed a petition for review challenging the issuance of a second license renewal of the operating license for Turkey Point Nuclear Generating Units 3 and 4. Although the proceeding before the Atomic Safety and Licensing Board Panel related to the license renewal has been terminated and the Commission has resolved one of the issues raised by petitioners (concerning the applicability of the Generic Environmental Impact Statement for reactor license renewals beyond an initial renewal term), appeals of other aspects of the Board's decisions remain pending before the Commission. The NRC filed a motion to dismiss for lack of finality on March 23, 2020. On June 8, 2020, the court referred the motion to dismiss to the merits panel and directed the parties to address in their briefs the issues presented in the motion to dismiss. Friends of the Earth filed its brief on July 27, 2020; the NRC filed its brief on September 14, 2020; and a reply was filed on October 23, 2020. Oral argument had been scheduled for February 17, 2021, but the court informed the parties that it would decide the case without oral argument, and on March 4, 2021, it issued a decision dismissing the case because, as the NRC had argued in both its motion to dismiss and in its brief, the petition for review was incurably premature. The deadline for Friends of the Earth to seek review before the Supreme Court expired on June 2, 2021.

CONTACT: Eric V. Michel, OGC
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Nuclear Energy Institute v. NRC, No. 19-1240 (D.C. Cir.)

On November 15, 2019, the Nuclear Energy Institute (NEI) filed a petition for review challenging the agency's conclusion, expressed in Regulatory Issue Summary 2016-11 and reaffirmed in a letter dated September 16, 2019, that the agency, rather than Agreement States, must approve requests from reactor licensees made pursuant to 10 C.F.R. § 20.2002 to dispose of low-level radioactive waste. The NRC filed a motion to dismiss on February 10, 2020, arguing that the agency's reaffirmation of its prior decision did not constitute final agency action reviewable under the Hobbs Act because the agency's interpretation of the regulation, to the extent it is challengeable at all, was articulated more than sixty days prior to the filing of the petition for review and had not been "reopened" as a result of NEI's request, made by letter, that the NRC reconsider its position. NEI filed its opposition on March 11, 2020; the NRC filed its response on April 2, 2020. On June 2, 2020, the court issued an order directing that the parties include arguments related to jurisdiction in the briefs and directed the clerk to issue a briefing schedule. NEI filed its brief on September 30, 2020; the NRC filed its answering brief on January 8, 2021; and NEI filed a reply on February 8, 2021. Oral argument was held on April 8, 2021, and on May 4, 2021, the Court issued a per curiam order dismissing the case for lack of jurisdiction. It ruled that the agency's letter of September 16, 2019, did not have legal effect, in and of itself, sufficient to constitute reviewable agency action under the Hobbs Act because it did not articulate a position that the agency had not previously expressed. The court did not reach the merits of the agency's position under 10 C.F.R. § 20.2002. NEI did not file a petition for rehearing and the deadline for NEI to seek review before the Supreme Court expired on August 2, 2021.

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Public Watchdogs v. NRC, No. 3:19-cv-01635-JLS-MSB (S.D. Cal), *aff'd*, No. 19-56531 (9th Cir.); *cert. denied*, No. 20-1676 (S. Ct).

On August 29, 2019, Public Watchdogs filed a complaint, together with a request for a temporary restraining order, challenging the agency's 2015 issuance of a license amendment regarding SONGS Units 2 and 3 and the use at SONGS of a dry cask storage system manufactured by Holtec International and maintained by Southern California Edison (SCE). Public Watchdogs raised claims against the NRC under the Administrative Procedure Act and against SCE, Holtec, and others under California law, and sought to suspend future loading of spent fuel into the Holtec system. The court did not issue immediate relief and directed that the defendants respond. On September 6, 2019, the Department of Justice filed a motion to dismiss the claim against the NRC for lack of jurisdiction, asserting that the case arose as a challenge to a licensing decision under the Hobbs Act, 28 U.S.C. § 2342, and that, as such, it could only have been brought in the court of appeals within sixty days of issuance of the amendment. On September 10, 2019, the Department of Justice filed a separate response to the request for injunctive relief, reasserting its jurisdictional arguments and contending that Public Watchdogs could not succeed on the merits, had failed to establish irreparable harm, and that the safety concerns that it raised were properly brought to the agency via a petition under 10 C.F.R. § 2.206 or 2.802. The other defendants also filed responses on September 20, 2019, asserting that the state law claims were barred for lack of jurisdiction and because they are preempted by the Atomic Energy Act, and arguing that permitting fuel loading to continue would not cause irreparable harm. A hearing on the outstanding motions was held on November 25, 2019, and the court issued a decision on December 3, 2019, dismissing the complaint with prejudice. The court found that the majority of the agency actions that Public Watchdogs challenged were reviewable solely under the Hobbs Act or were time-barred, and that the remainder were either enforcement decisions that were unreviewable as a matter of law or raised arguments that Public Watchdogs lacked standing to bring. The court also dismissed the claims against the private defendants for failure to state a claim upon which relief could be granted. On December 31, 2019, Public Watchdogs appealed the district court's decision to the Ninth Circuit. Oral argument was held on June 3, 2020. On December 29, 2020, the court issued an order affirming the district court's determination that it lacked jurisdiction to consider the allegations in the complaint against the NRC because they were either challenges to the NRC's licensing decisions or incidental to licensing and therefore required to be raised directly in the Court of Appeals under the Hobbs Act within 60 days. Public Watchdogs did not seek review before the Supreme Court of the dismissal of the claims against the NRC. It did, however, seek review of the dismissal of the claims against the private defendants, and the Supreme Court called for the views of the Solicitor General concerning the grant of certiorari. The Solicitor General filed a brief on behalf of the Government opposing certiorari on November 1, 2021, and, on December 6, 2021, the Court denied Public Watchdogs' petition.

CONTACT: Andrew P. Averbach, OGC
301-415-1956

Public Watchdogs v. NRC, No. 20-70899 (9th Cir.)

On March 30, 2020, Public Watchdogs filed a petition for review challenging the agency's decision to decline Public Watchdogs' request, made pursuant to 10 C.F.R. § 2.206, that the agency suspend decommissioning operations at San Onofre Nuclear Generating Station (SONGS). The following day, Public Watchdogs filed a request for temporary injunctive relief, seeking the same relief while the petition for review was pending. Public Watchdogs asserted that the agency had abdicated its statutory responsibility by permitting fuel to be stored in canisters that Public Watchdogs contends are unsafe and by approving a decommissioning plan for the site that assumes that the Department of Energy will commence accepting spent fuel at some point during this decade and will remove all spent fuel by 2049. The court denied the motion for injunctive relief on April 30, 2020, and directed the parties to file briefs on the merits. The court heard oral argument on September 1, 2020. On January 13, 2021, the court dismissed the petition for review on the ground that Public Watchdogs failed to overcome the presumption that the NRC's denial of the § 2.206 petition is unreviewable and, in particular, that Public Watchdogs failed to demonstrate that the agency had abdicated its statutory authority to protect the public health and safety. The deadline for Public Watchdogs to seek review before the Supreme Court expired on April 14, 2021.

CONTACT: James E. Adler, OGC
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New York v. NRC, No. 21-1037 (D.C. Cir. (consolidated with *Riverkeeper, Inc. v. NRC*, No. 21-1080 and *Town of Cortlandt v. NRC*, No. 21-1084)

On January 22, 2021, the State of New York filed a petition for review challenging the Commission's decision in CLI-21-1 denying admission of New York's contentions related to the transfer of the operating license for Indian Point Units 1, 2, and 3 to Holtec International. The petition also challenged the NRC's November 23, 2020, order provisionally approving the transfer and an exemption issued by the agency the same date pertaining to the use of the Indian Point decommissioning trust fund. The petition was consolidated with petitions for review brought by Riverkeeper and the Town of Cortlandt challenging the same decisions. The petitioners asserted that the agency violated the Atomic Energy Act, the Administrative Procedure Act, and unspecified NRC regulations and policies.

On April 15, 2021, the petitioners and the current and former licensee announced a global settlement of their dispute, which required approval by the New York State Public Service Commission. On May 28, 2021, the petitioners filed, and on June 3, 2021, the D.C. Circuit granted, a motion for the voluntary dismissal of each of the three petitions for review, thus ending the litigation.

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