

LITIGATION STATUS REPORT
(As of January 20, 2023)

ACTIVE CASES¹

Aguirre v. NRC, No. 22-cv-0080-JAH (BLM) (S.D. Cal.)

This case is the fourth Freedom of Information Act (FOIA) complaint that Michael Aguirre has filed challenging the agency's response to his request for documents related to the storage of spent nuclear fuel at the San Onofre Nuclear Generating Station. In this complaint, Mr. Aguirre challenges the agency's withholding of some or all of certain responsive documents on the grounds that they contain proprietary and/or personally identifiable information, or that their release would be likely to cause harm to one or more individuals. The Department of Justice filed a motion to dismiss or for summary judgment on March 31, 2022. That motion remains pending.

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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 licensing proceedings for the consolidated interim spent fuel storage facilities proposed by Holtec International (Holtec) and Interim Storage Partners (ISP). New Mexico raised many of the same legal arguments under the Nuclear Waste Policy Act (NWPA), the Atomic Energy Act (AEA), and the National Environmental Policy Act (NEPA), that various putative intervenors raised in proceedings before the agency and before the courts of appeals, as described in the *Friends of the Earth* and *Don't Waste Michigan* cases referenced below. On June 17, 2021, the Department of Justice, representing the NRC, moved to dismiss the case for lack of jurisdiction, arguing that, under the Hobbs Act and the Atomic Energy Act, New Mexico is required to present its arguments in the form of contentions to the agency 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 contended, are therefore unexhausted and in the wrong court. The court granted the motion to dismiss on March 10, 2022, stating that an opinion would follow. To date, however, no opinion has been issued, and the case remains open.

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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, 2023. However, the narratives accompanying the cases listed in this report include any post-January 1 developments.

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'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. Their petitions challenge the Commission's decision in CLI-20-4 that (a) as to 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; and (b) as to Don't Waste Michigan, rejected a variety of contentions under the AEA and 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 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. The agency and the United States reported to the court on April 29, 2021, that, notwithstanding the completion of the adjudicatory proceedings, they understand the petitions for review to remain in abeyance under the terms of the court's October 8, 2020, order. No party has expressed a contrary viewpoint, and the case has remained in abeyance, with the NRC filing quarterly status reports indicating that the license application remains under consideration.

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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, *Sierra Club v. NRC*, No. 21-1229, and *Don't Waste Michigan v. NRC*, No. 21-1231)

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.

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 directed the parties to brief these cases in accordance with the briefing schedule it had previously issued. 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 moved to consolidate with the others; the court granted that motion over petitioners' opposition on February 15, 2022. The case has been fully briefed; petitioners' arguments primarily relate to issues arising under NEPA and the question of whether the facility could hold fuel to which the Department of Energy owns title. Oral argument was held on November 10, 2022.

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 to ISP. The NRC moved 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 would 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 moved 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 parties completed their original round of briefing in May 2022. At the parties' request, however, the court ordered the submission of supplemental briefs on August 3, 2022, concerning Texas's assertion that licensure of an away-from-reactor storage facility is a "major question" requiring explicit congressional authorization. Oral argument was held on August 29, 2022. The NRC subsequently notified the court about the D.C. Circuit's decision in *Ohio Nuclear-Free Network v. NRC* (discussed below), which adopted the same jurisdictional arguments underlying the NRC's motion to dismiss.

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 moved to dismiss the proceeding for lack of jurisdiction (and, specifically, failure to exhaust administrative remedies). The court elected to consider the jurisdictional issues along with the merits of the case. The case has been fully briefed, and the court has advised the parties that it will decide the case without oral argument. The NRC has notified the court about the D.C. Circuit's decision in *Ohio Nuclear-Free Network*.

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Franovich v. Hanson, No. 22-cv-01008-GJH (D. Md.)

In this case, a former NRC employee filed a complaint asserting claims of sex-based discrimination, retaliation, hostile work environment, and constructive discharge. The complaint seeks plaintiff's reinstatement, as well as 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. In November 2022, the agency filed a motion to dismiss, which remains pending.

CONTACT: Garrett Henderson, OGC
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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 as administrative issues and post-trial motions are resolved.

CONTACT: Elva Bowden Berry, OGC
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Kelly v. Dorman, No.22-cv-00071-TWP-KMP (S.D. Ind.)

The *pro se* plaintiff in this case raised a series of grievances with the agency spanning a twenty-year period. His original complaint was dismissed *sua sponte* by the district court for lack of subject matter jurisdiction, but the court offered the plaintiff leave to amend his complaint. On December 10, 2022, a magistrate judge recommended dismissal of an amended complaint, but on January 10, 2023, the plaintiff filed a motion for leave to file a second amended complaint, which the court construed as an objection to the magistrate judge's report and recommendation. The agency awaits a decision from the court regarding plaintiff's objection.

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

In this case, an NRC employee filed a complaint against the agency 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. The parties jointly agreed to a stay of discovery and are participating in mediation efforts before a magistrate judge.

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

On October 9, 2020, the plaintiff, now a former NRC employee, filed a sex discrimination and retaliation complaint. The plaintiff 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 the complaint on timeliness grounds. On March 31, 2022, the court denied the government's motion to dismiss, and the parties are now engaged in discovery.

CONTACT: Jeremy Suttenger, 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 moved to dismiss the case on September 20, 2021, but the court elected to refer the motion to the merits panel considering the case. The court held oral argument on October 13, 2022, and, on November 15, 2022, it issued an opinion dismissing the petition for review for lack of jurisdiction and, specifically, due to petitioners' failure to participate in the adjudicatory proceeding by seeking to intervene. On December 30, 2022, petitioners filed a petition for rehearing en banc, which the court denied on January 17, 2023. Petitioners have until April 17, 2023, to seek Supreme Court review.

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 NEPA, the AEA, and the National Historic Preservation 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 asserted in their brief 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. Oral argument was held on November 9, 2021, and, on August 9, 2022, the court issued an order ruling in favor of the NRC on all issues. On September 23, 2022, petitioners filed a petition for rehearing en banc; the NRC and Powertech filed responses on November 18, 2022. The D.C. Circuit denied the petition on December 13, 2022, and petitioners have until March 13, 2023, to seek Supreme Court review.

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Tafazzoli v. Hanson, No. 8:19-cv-00321-DLB (D. Md.)

On February 3, 2019, 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.

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CLOSED CASES

Berka v. NRC, No. 21-1134 (D.C. Cir.)

This case challenged 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 court did not hold oral argument, and it dismissed the case for lack of standing on February 3, 2022. The deadline to file a petition for certiorari in the Supreme Court expired on May 4, 2022.

CONTACT: Jennifer Scro, OGC
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Braxton v. Hanson, No. 20-cv-1126-AGB (N.D. Ga.)

This is a claim of under the Title VII of the Civil Rights Act brought in March 2020 by a former NRC employee. An amended complaint was filed on August 21, 2020. Following discovery, the agency moved for summary judgment. On January 31, 2022, the court granted the motion, ruling that the plaintiff had neither established a prima facie hostile work environment claim nor demonstrated a causal nexus between the allegations in her complaint and any protected activity. No appeal was filed.

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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. 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.

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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.

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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 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 was fully briefed in 2010, but the court of appeals decided to hold it in abeyance, as not ripe for review, because PFS had failed to obtain necessary approvals from Department of the Interior sub-agencies. PFS went to federal district court to challenge the other agencies' decisions. PFS prevailed, obtaining a remand to DOI, but no action was taken. The parties subsequently advised the court via periodic status reports that PFS was still awaiting official action on the approvals, but in 2018 the court administratively closed the case pending further action.

In March 2022, Utah filed a motion to vacate the license and the underlying agency adjudicatory orders on the ground that the PFS project had been abandoned and the case was therefore moot. The NRC filed a response to the motion on May 9, 2022, asserting that the case was not moot because the license remained in effect and that, even if the case were moot, the proper remedy would be to vacate only those orders that are the subject of the petition for review. Utah filed a reply on May 16, 2022, in which it acknowledged the NRC's position concerning the proper remedy but maintained that the case was moot given the abandonment of the project and PFS's failure to obtain authorization to use the land for the facility. On July 28, 2022, the court issued an order dismissing the cases as moot but determining that none of the underlying decisions should be vacated. The court observed that the case had become moot as a consequence of the Skull Valley Band of Goshute Indians, which supported the vacatur motion, and that vacatur was therefore not warranted. Utah did not file a petition for rehearing, and its deadline to seek Supreme Court review passed on October 26, 2022.

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