

LITIGATION STATUS REPORT
(As of January 16, 2024)

ACTIVE CASES¹

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

This case is the fourth complaint that Michael Aguirre has filed challenging the agency's responses to his request for documents under the Freedom of Information Act (FOIA) 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 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. The court issued an order on March 6, 2023, upholding the agency's withholding of information and finding that it required additional information to reach a conclusion on the adequacy of the agency's search for phone records responsive to the FOIA request. The agency has since filed a motion to supplement the record and to dismiss the action, supported by a declaration demonstrating that it did not have any additional records (in particular, phone records reflecting calls between the agency and the licensee) in its possession, custody, or control at the time the FOIA request was made. The motion is currently 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 parties, including New Mexico, raised in proceedings before the agency and before the Courts of Appeals for the D.C, Fifth, and Tenth Circuits, as described below. On June 17, 2021, the Department of Justice (DOJ), representing the U.S. Nuclear Regulatory Commission (NRC), moved to dismiss the case for lack of jurisdiction, arguing that, under the Hobbs Act and the AEA, New Mexico was required to present its arguments in the form of contentions to the agency and, if 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, were 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 technically 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, 2024. 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)

Fasken Land & Minerals v. NRC, No. 23-60377 (5th Cir.)

These cases concern Holtec International's application for a license to operate a consolidated interim spent fuel storage facility in Lea County, New Mexico. The NRC granted the license on May 9, 2023.

D.C. Circuit

Beyond Nuclear and Don't Waste Michigan (on behalf of several other co-petitioners) filed separate petitions for review, which were been consolidated by the court, challenging the Commission's decision in CLI-20-4 that (a) rejected the contentions of Beyond Nuclear, Sierra Club, and another set of petitioners known collectively as Fasken, that issuance of the license would violate the NWPA because it would permit the storage of fuel to which the Department of Energy (DOE) holds title; and (b) rejected a variety of contentions under the AEA and NEPA raised by Don't Waste Michigan. 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 additional contentions raised by Sierra Club and Fasken and the possibility that the license either might not be issued or might not permit action claimed to be 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 were consolidated by the court.

Following issuance of the license on May 9, 2023, the parties jointly filed a motion to govern future proceedings. On June 16, 2023, the court removed the case from abeyance and ordered briefing. Briefing is complete, and we await the scheduling of oral argument.

Fifth Circuit

On July 27, 2023, Fasken filed a petition for review in the Fifth Circuit, challenging the issuance of the Holtec license itself, as distinct from the Commission's denial of its petition to intervene in the adjudicatory proceedings. On July 28, 2023, the NRC filed a motion to dismiss the petition, asserting that, under the Hobbs Act, the sole avenue for an entity denied party status to seek judicial review is to challenge the adjudicatory orders (in Fasken's case, CLI-20-4 and CLI-21-7) that denied the entity's petition to intervene. In the alternative, the NRC moved to transfer the petition to the D.C. Circuit, where Fasken's petition challenging the Commission's adjudicatory orders is pending. The court assigned the motion to the panel considering the case on the merits. The NRC moved to place the case in abeyance pending resolution of the petition for rehearing en banc in *Texas v NRC* (discussed below), but the court denied the motion and ordered briefing to move forward. Briefing is now complete, and we await action by the court.

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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 discrimination (gender), retaliation, constructive discharge, and a retaliatory investigation. The complaint seeks plaintiff's reinstatement as well as unspecified compensatory damages. In November 2022, the agency filed a motion to dismiss, which the court granted in part in August 2023, leaving only a claim of retaliation. The parties are now engaged in discovery, which is scheduled to close in April 2024.

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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 had been provided, and a partial settlement agreement was reached. On March 21, 2023, the judge issued an order directing the clerk's office to enter final judgment in accordance with the parties' approved settlement agreements and dismissing the complaint in this case. However, plaintiffs filed an application under the Equal Access to Justice Act on April 21, 2023, and the case remains open at this time.

CONTACT: Elva BowdenBerry, OGC
301-287-0974

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 and denied on February 26, 2023. Plaintiff appealed this decision to the Sixth Circuit on April 26, 2023. He filed his initial brief on July 27, 2023, and the agency filed its brief on October 5, 2023. The appeal is being handled for the agency by the U.S. Attorney for the Southern District of Indiana.

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Nevada v. NRC, No. 09-1133 (D.C. Cir.)

This petition for review challenges NRC's "Yucca Mountain Rule," Title 10 of the *Code of Federal Regulations* (10 CFR) 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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Texas v. NRC, No. 21-60743 (5th Cir.) (consolidated with *Fasken Land and Minerals, Ltd. v. NRC*)

This petition relates to the NRC issuance of a license to Interim Storage Partners, LLC, to construct and operate a consolidated interim storage facility on September 13, 2021.

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 opted to 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 considered with the merits.

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.

The court held oral argument on August 29, 2022. The court issued a decision on August 25, 2023, which denied NRC's motion to dismiss or transfer and ruled that the agency lacks authority under the AEA to issue a license for the away-from-reactor storage of spent fuel. The NRC and ISP filed petitions for rehearing en banc on October 21, 2023, challenging both the jurisdictional determination and the court's conclusions about the scope of the NRC's statutory authority to license away-from-reactor spent fuel storage facilities. Nuclear Energy Institute and Holtec have since filed amicus briefs supporting rehearing. Petitioners filed responses to the petitions on December 8, 2023, and we await a decision.

San Luis Obispo Mothers for Peace v. NRC, No. 23-852 (9th Cir);

This petition for review challenges the issuance of an exemption related to the application of Pacific Gas & Electric (PG&E) for a renewal of the operating license for Diablo Canyon Units 1 and 2. The exemption, which was issued on March 8, 2023, permits the applicant to submit its application for license renewal less than five years in advance of the expiration of the license term yet still to be considered in “timely renewal,” as otherwise would be required by 10 CFR § 2.109(b). Petitioners assert that issuance of the exemption violates the AEA, NEPA, and the Administrative Procedure Act because it extends the license term without required safety and environmental reviews and without the opportunity for a hearing. Petitioners’ opening brief was filed on June 30, 2023. The NRC filed its brief on August 29, 2023, asserting that the court lacks jurisdiction over the petition because it challenges an exemption rather than a licensing action under Section 189.a of the AEA, and defending the exemption on the merits. The licensee filed its brief on September 28, 2023, and petitioners filed a reply brief on October 19, 2023. The court held oral argument on January 10, 2024.

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San Luis Obispo Mothers for Peace v. NRC, No. 23-3884 (9th Cir)

This petition for review challenges the NRC’s order, issued by the Secretary on behalf of the Commission on October 2, 2023, not to grant a hearing related to the Staff’s approval of a request by PG&E to revise to the reactor vessel material surveillance capsule withdrawal schedule at Diablo Canyon Unit 1. The Secretary’s order determined that the revision did constitute a license amendment, and it referred the underlying issues to the Staff as a petition under 10 CFR § 2.206. Petitioner’s brief is due on March 20, 2024; and the NRC’s brief is due on April 19, 2024.

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CLOSED CASES

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)

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

These petitions relate to the NRC's issuance of a license to Interim Storage Partners, LLC, for the operation of a consolidated interim storage facility in Andrews County, Texas. Although litigation concerning the license is still pending before the Fifth Circuit (as described in the *Texas v. NRC* entry above), cases challenging the license and adjudicatory decisions relating to the license have been resolved the D.C. and Tenth Circuits.

D.C. Circuit

On February 2, 2021, Don't Waste Michigan and several other environmental groups 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 court held oral argument on November 10, 2022, and it issued an unpublished decision on January 25, 2023, denying the petitions for review challenging the non-admission of petitioners' contentions and dismissing the petitions filed after issuance of the license for lack of jurisdiction. The court found no error in the Commission's decisions not to admit various contentions under the NEPA or the NWPA, including Beyond Nuclear's contention that the "central premise" of the application was that the license would permit the storage of fuel to which the DOE owns title. Petitioners did not seek rehearing or Supreme Court review.

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, and it advised the parties that it would decide the case without oral argument. On February 10, 2023, the court issued a published decision dismissing the case for lack of jurisdiction (because New Mexico, having not participated in the adjudicatory proceedings concerning issuance of the license, was not a party aggrieved within the meaning of the Hobbs Act). New Mexico did not seek rehearing or Supreme Court review.

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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 sought unspecified amounts in compensatory damages and other damages. The court denied the agency's motion to dismiss or, in the alternative, for summary judgment, and the parties engaged in discovery. The parties jointly agreed to a stay of discovery and participated in mediation efforts before a magistrate judge. The parties reached a negotiated settlement on May 4, 2023.

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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 alleged 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. The parties engaged in initial discovery then jointly agreed to participate in mediation before a magistrate judge. The parties reached a negotiated settlement on June 14, 2023.

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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 court requested and the NRC and Powertech filed responses. The D.C. Circuit denied the petition on December 13, 2022, and petitioners did not seek Supreme Court review.

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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 permitted 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 did not 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. The case settled on November 17, 2023.

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