

LITIGATION STATUS REPORT (As of January 22, 2021)

ACTIVE CASES¹

Aguirre v. NRC, Nos. 19-cv-495-BAS-BLM, 19-cv-587-BAS-BLM, 19-cv-1102-BAS-BLM (S.D. Cal.)

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 (DOJ) 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. DOJ 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 NRC moved to dismiss the amended complaint or, in the alternative, for summary judgment, asserting failure to exhaust and that the amendment was not

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, 2020. However, the narratives accompanying the cases listed in this report include any post-January 1 developments.

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 for review. His brief was filed on August 12, 2020; the government's brief was filed on October 13, 2020, and a reply was filed on December 3, 2020. Oral argument has been scheduled for March 4, 2021.

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

Beyond Nuclear v. NRC, No. 20-1187 (D.C. Cir.); ***Don't Waste Michigan v. NRC***, No. 20-1225 (D.C. Cir.).

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) have filed separate petitions for review, which have been consolidated by the court, challenging the Commission's decision in CLI-20-04 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 Atomic Energy Act and the National Environmental Policy Act. 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.

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

Braxton v. Svinicki, 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 ongoing.

CONTACT: Elva Bowden Berry, OGC
301-287-0974

Criscione v. NRC, No. 19-cv-02087-CBD (D. Md.)

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 has been raised.

CONTACT: Vinh D. Hoang, OGC
301-287-9196

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. However, the proceeding before the Atomic Safety and Licensing Board Panel related to the license renewal had not been terminated as of the filing of the Petition for Review. And while the Commission has since resolved (in CLI-20-03) 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. Accordingly, 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 scheduled for February 17, 2021.

CONTACT: Eric Michel, OGC
301-415-0932

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.

CONTACT: Elva Bowden Berry, OGC
301-287-0974

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

This case involves a current NRC employee who filed a race and sexual harassment complaint in the U.S. District Court for the District of Maryland in January 2020. After the Department of Justice filed a motion to dismiss or for summary judgment, the plaintiff dropped the sexual harassment claim and filed an opposition to the motion to dismiss. The Department of Justice plans to file a response to the opposition.

CONTACT: Laura Shrum, OGC
301-287-9128

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. The Department of Justice has filed a letter to the court indicating its intention to file a dispositive motion in the case.

CONTACT: Jeremy Sutttenberg, OGC
301-287-9154

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.

CONTACT: Jeremy M. Sutttenberg, OGC
301-287-9154

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. NEI asserts that Agreement States can authorize requests to employ alternate disposal requests and that the agency's assertion of this authority contravenes its own regulations and the Atomic Energy Act. 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, 28 U.S.C. § 2342, 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 that the NRC reconsider its position. 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 brief on January 8, 2021; and a reply is due on February 8, 2021. Oral argument is expected to be held in the first half of 2021.

CONTACT: Jennifer Scro, OGC
301-287-9081

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.

CONTACT: Grace H. Kim, OGC
301-287-9153

Peck v. Department of Labor, No. 20-1154 (4th Cir.)

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 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 the Energy Reorganization Act does not constitute a waiver of sovereign immunity with respect to claims of whistleblower retaliation brought against the NRC. Dr. Peck appealed the decision to the Fourth Circuit, and briefing has been completed. Oral argument has been scheduled during the week of March 8, 2021.

CONTACT: Michael R. Gartman, OGC
301-287-0716

Public Watchdogs v. NRC, No. 3:19-cv-01635-JLS-MSB (S.D. Cal), *appeal docketed*, No. 19-56531 (9th Cir.)

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 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, DOJ 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 and that, as such, it could only have been brought in the court of appeals within sixty days of issuance of the license amendment. On September 10, 2019, DOJ 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, 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.

Public Watchdogs appealed the district court's decision to the U.S. Court of Appeals for the Ninth Circuit. 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 were required to be raised directly under the Hobbs Act in the court of appeals within 60 days. Public Watchdogs has until February 12, 2021, to seek rehearing before the Ninth Circuit, and if no petition is filed, until March 29, 2021, to seek review before the Supreme Court.

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 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 responsibility under the Atomic Energy Act 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 it directed the parties to file briefs on the merits. Public Watchdogs filed its brief on June 19, 2020; the NRC filed its answering brief on July 20, 2020. Intervenor Southern California Edison Company also filed its brief on July 20, 2020. Public Watchdogs filed its reply brief on August 10, 2020. The court heard oral argument on the case on September 1, 2020, and on January 13, 2021, it issued an order dismissing the petition. The court determined that Public Watchdogs's petition was a request for review of an enforcement decision by the agency that was unreviewable as a matter of law absent proof, which had not been provided, that the agency had abdicated its authority to protect the public health and safety. Public Watchdogs has until March 1, 2021, to seek rehearing before the Ninth Circuit, and if no petition is filed, until April 14, 2021, to seek review before the Supreme Court.

CONTACT: James E. Adler, OGC
301-287-9173

Tafazzoli v. NRC, No. PWG-19-0321 (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, DOJ 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 is proceeding to discovery on these three counts.

CONTACT: Garrett Henderson, OGC
301-287-9214

CLOSED CASES

Massachusetts v. NRC, No. 19-1198 (D.C. Cir); **Massachusetts v. NRC**, No. 20-1019 (D.C. Cir.)

On September 25, 2019, the Commonwealth of Massachusetts filed a petition for review (19-1198) challenging various actions of the NRC Staff related to the transfer of the license for the Pilgrim Nuclear Power Station, asserting violations of the Atomic Energy Act and the National Environmental Policy Act. Massachusetts challenged the license transfer order, an amendment to the Pilgrim license that removed certain requirements related to a contingency fund that the transferor was required to maintain, and an exemption that permitted the use of money in the decommissioning trust fund for non-decommissioning purposes. Massachusetts also filed a request to stay the applicability of these regulatory actions while they are being litigated before the Commission. The NRC and DOJ filed a response to the motion to stay, together with a motion to dismiss based on the lack of finality of the underlying decisions, on November 22, 2019, and briefing was completed on January 29, 2020. Because the Commission issued a ruling (CLI-19-11) on Massachusetts's request for a stay of the underlying actions on December 17, 2019, Massachusetts withdrew its request for a judicial stay. However, on January 22, 2020, Massachusetts filed a new petition for review (20-1019) challenging the Commission's decision in CLI-19-11, which had declined to stay the effectiveness of the license transfer, and the cases were consolidated. On June 30, 2020, prior to the filing of briefs but following Massachusetts's settlement of its dispute with the license transferee, the parties filed a joint motion to dismiss the consolidated petitions. The court entered an order granting the motion on July 22, 2020.

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

Miles v. NRC, No. 18-cv-04571 (N.D. Ill.)

On July 2, 2018, Daniel Miles appealed an Equal Employment Opportunity Commission (EEOC) decision involving his claims of discrimination to the U.S. District Court for the Northern District of Illinois. Mr. Miles sought class certification and a variety of remedies for himself. After the EEOC denied class certification, Mr. Miles did not participate in proceedings regarding his individual claims. On September 25, 2019 the Court dismissed the case. In December 2019, Miles appealed. The U.S. Court of Appeals for the Third Circuit affirmed the decision on appeal, and Mr. Miles filed a petition for rehearing *en banc*. On April 29, 2020, the Third Circuit denied the petition. Mr. Miles then filed a petition for writ of certiorari before the Supreme Court, which was denied on October 5, 2020.

CONTACT: Garrett Henderson, OGC
301-287-9214

In Re Public Watchdogs (No. 19-72670) (9th Cir.)

On October 21, 2019, Public Watchdogs filed a petition for a writ of mandamus in the U.S. Court of Appeals for the Ninth Circuit, asserting that the agency had failed to take timely action on Public Watchdogs' petition under 10 C.F.R. § 2.206, which had been filed with the agency on September 24, 2019. Public Watchdogs' petition before the agency sought to require the NRC to take action to halt the loading of spent fuel into canisters at SONGS, and its petition for review sought suspension of all decommissioning-related operations until the agency issues a decision on the 2.206 petition. On November 21, 2019, the court requested a response from the agency, which was filed on December 9, 2019. Public Watchdogs filed a reply on December 16, 2019. The court denied the mandamus petition on December 20, 2019. The deadline for filing a petition for certiorari before the Supreme Court passed on March 19, 2020.

CONTACT: James E. Adler, OGC
301-287-9173