

**UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT**

BEYOND NUCLEAR, INC.,

Petitioner,

V.

UNITED STATES NUCLEAR
REGULATORY COMMISSION and the
UNITED STATES OF AMERICA,

Respondents.

No. 20-1187,
consolidated with No. 20-1225

PETITIONERS' OPPOSITION TO RESPONDENTS'
MOTION TO HOLD CASE IN ABEYANCE

I. INTRODUCTION

Petitioners Beyond Nuclear, Inc. (“Beyond Nuclear”) and Don’t Waste Michigan, Citizens for Alternatives to Chemical Contamination, Public Citizen, Inc., San Luis Obispo Mothers for Peace, Nuclear Energy Information Service, Citizens’ Environmental Coalition, and Nuclear Issues Study Group (collectively, “Don’t Waste Michigan”) hereby jointly respond to Respondents’ Motion to Hold Case in Abeyance Pending Agency Resolution of Adjudicatory Proceedings (July 6, 2020) (“Motion”). Petitioners oppose Respondents’ Motion with respect to the claims presented by Beyond Nuclear in No. 20-1187. Those claims are ripe for review, and therefore they should be heard now. Without taking a position on

ripeness, Petitioners do not oppose holding the claims in No. 20-1225 in abeyance pending resolution by the U.S. Nuclear Regulatory Commission (“NRC” or “Commission”) of similar claims by other parties in the administrative proceeding below.

II. BACKGROUND

A. Administrative Proceeding Before the NRC

These consolidated cases arise from an NRC administrative proceeding to review a license application by Holtec International (“Holtec”) for an interim storage facility for spent (*i.e.*, used) nuclear reactor fuel. Holtec’s license application contemplates federal ownership of the spent reactor fuel to be stored at its facility, in violation of the Nuclear Waste Policy Act (“NWPA”), 42 U.S.C. §§ 10222(a)(5)(A) and 10143, which forbids federal ownership of such fuel until a permanent repository is operational.

1. Beyond Nuclear’s motion to dismiss the Holtec licensing proceeding

In September 2018, at the outset of the Holtec licensing proceeding, Beyond Nuclear moved the NRC Commissioners to dismiss the proceeding entirely, on the ground that the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 706(2)(A) and (C), prohibits the NRC from even considering an application that would violate the NWPA if implemented. In an October 29, 2018 order, the Commission denied Beyond Nuclear’s motion. The Commission declined to rule on the merits, and

instead referred Beyond Nuclear's claim to the Atomic Safety and Licensing Board (the "Licensing Board") for consideration as a "contention" in the administrative proceeding.

Beyond Nuclear petitioned this Court for review of the NRC's October 2018 order on December 27, 2018 (No. 18-1340). On June 13, 2019, this Court dismissed the case because the NRC's order "merely directs petitioner to raise its arguments within ongoing administrative proceedings" and is "not a final order of the Commission." Order, slip op. at 1. Moreover, this Court reasoned that because the administrative proceedings may resolve the NWPA and APA dispute underlying Beyond Nuclear's appeal, "the petition is not ripe for judicial review." *Id.* at 2.

2. Administrative proceeding

As directed by the Commission in the October 2018 order, Beyond Nuclear raised a contention before the Licensing Board that Holtec's license application violated the APA and the NWPA by contemplating federal ownership of the spent fuel to be stored at the facility. In the same administrative proceeding before the Licensing Board, Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners (collectively, "Fasken") and the Sierra Club raised contentions virtually identical to Beyond Nuclear's contention, *i.e.*, that Holtec's license application violated the APA and the NWPA. In addition, Fasken and the Sierra

Club raised other contentions regarding violations of the Atomic Energy Act, the National Historic Preservation Act, and the National Environmental Policy Act.

Don't Waste Michigan also raised multiple contentions under the APA, the NHPA, the Atomic Energy Act, and the National Environmental Policy Act. Unlike Beyond Nuclear, Fasken, and the Sierra Club, Don't Waste Michigan did not submit a contention directly asserting that Holtec's application violated the NHPA by contemplating federal ownership of spent fuel.

In CLI-20-04, the Commission conclusively resolved and disposed of the contentions by Beyond Nuclear, the Sierra Club, and Fasken that Holtec's license application violated the APA and NHPA. Slip op. at 4-8. Because Beyond Nuclear had no other contentions pending before the agency, it is undisputed that CLI-20-04 constituted a final decision against it. CLI-20-04 also conclusively resolved and disposed of all the contentions raised by Don't Waste Michigan, and thus constituted a final decision against it. Because CLI-20-04 remanded certain issues raised by Fasken and the Sierra Club back to the Licensing Board for consideration, however, CLI-20-04 was not a final decision against them.

B. Petitions for Review

In No. 20-1187, Beyond Nuclear sought review of the NRC's rulings in the October 2018 order and CLI-20-04 that Holtec's license application could be reviewed and approved, despite containing provisions that contravene the NHPA.

In No. 20-1225, *Don't Waste Michigan, et al.*, sought review of the NRC's rulings on its contentions asserting violations of the NWPA, the APA, the Atomic Energy Act, and the National Environmental Policy Act.

On its own motion, by order dated June 23, 2020, the court consolidated Beyond Nuclear's and Don't Waste Michigan's petitions for review.

By motions dated June 30, 2020 and July 2, 2020, respectively, Fasken and the Sierra Club moved to intervene in these consolidated cases, for the sole purpose of briefing the violations of the APA and NWPA charged by Beyond Nuclear. The motions are pending.

III. ARGUMENT

While Respondents do not challenge the Court's jurisdiction to hear Petitioners' claims, they argue that Petitioners' case is not ripe for review on prudential grounds. Motion at 2. But their arguments with respect to Beyond Nuclear's claims in No. 20-1187 do not meet the judicial standard for postponing review. Without taking a position on ripeness, however, Petitioners do not oppose holding the claims of Don't Waste Michigan (No. 20-1225) in abeyance pending resolution of Fasken's and the Sierra Club's claims in the administrative proceeding below.

A. Beyond Nuclear's Claims in No. 20-1187 Are Ripe for Review

In weighing arguments that review of final decisions should be postponed on prudential ripeness grounds, the court must begin with the principle that "a federal

court's obligation to hear and decide cases within its jurisdiction is virtually unflagging.” *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014) (citations omitted) (internal quotation marks omitted); *see also Sanchez v. Office of the State Superintendent of Education*, 959 F.3d 1121, 1124 (D.C. Cir. 2020) (observing that *Susan B. Anthony List* raises questions regarding “the continuing vitality of the prudential ripeness doctrine”). In order to postpone review, a case must be demonstrably unfit for review. *See Susan B. Anthony List*, 573 U.S. at 167. And review may not be delayed if it would pose a “hardship to the parties.” *Id.* Here, Respondents have failed to meet either prong of the test for an exception to the general rule that courts should review final orders.

1. Beyond Nuclear’s APA and NWPA claims are fit for review

In assessing fitness for review, a “purely legal” claim is “presumptively reviewable.” *Sanchez*, 959 F.3d at 1124 (*quoting Nat’l Ass’n of Home Builders*, 440 F.3d 459, 464 (D.C. Cir. 2006)). Beyond Nuclear’s APA and NWPA claims are purely legal, because they are based on undisputed statements in Holtec’s application. Thus, they are presumptively fit for review. *Sanchez*, 959 F.3d at 1124. Delaying review cannot be justified, because these claims “will not be clarified by further factual development.” *Susan B. Anthony List*, 573 U.S. at 167 (citation omitted).

Nevertheless, Respondents argue that Beyond Nuclear's purely legal claims are not fit for review because "other parties that are still involved in adjudicatory proceedings before the agency raised the same legal argument as Beyond Nuclear." Motion at 2-3. Respondents overlook the fact that both of these parties, Fasken and the Sierra Club, have moved for leave to intervene in No. 20-1187 on behalf of Beyond Nuclear, and they have waived their right to raise the APA and NWPA issues later on. They have eliminated the specter raised by Respondents that they will seek to litigate the same issue at the conclusion of their own administrative cases.¹

Respondents also argue that Beyond Nuclear's case is not fit for review because it is "entirely conceivable that the license that Holtec seeks will not be issued, either because of the ongoing adjudicatory challenges before the agency or

¹ Respondents assert that Fasken's and the Sierra Club's proposed intervention "arguably constitutes and end run around the Court's finality requirements because it would prematurely accelerate those parties' right to judicial review." Motion at 4. But Fasken and the Sierra Club have agreed to be bound by the decision in this case; therefore, it is unclear how basic principles of orderly judicial review would be defeated by allowing them to intervene.

In any event, the Court should be equally concerned by the irregularity of postponing Beyond Nuclear's "virtually unflagging" right to prompt review of a final decision. *Susan B. Anthony List*, 573 U.S. at 167. And, the interests of judicial efficiency promoted by Respondents (*see* Motion at 2) will be better served by a review this final decision now. If the purely legal issue is resolved in favor of Beyond Nuclear, it will obviate the need for Don't Waste Michigan, Fasken, or the Sierra Club to litigate any complex factual claims before this Court.

because of the NRC Staff's technical review of the application." Motion at 5.

According to Respondents, Beyond Nuclear's claims are based on "contingent future events that may not occur as anticipated, or indeed may not occur at all."

Motion at 6 (quoting *Devia*, 492 F.3d at 425 (quoting *Tex. v. United States*, 523 U.S. 296, 300 (1998))). But *Devia*'s broad application of the prudential reviewability standard has been called into question by the Supreme Court's subsequent ruling in *Susan B. Anthony List*, 573 U.S. 149, and by this Court's ruling in *Sanchez*, 959 F.3d 1121.

Equally important, Respondents sidestep the fact that one of Beyond Nuclear's key legal claims is not capable of resolution by completion of the administrative proceeding below. Beyond Nuclear's petition for review challenges the lawfulness of the NRC's *very conduct* of the Holtec licensing proceeding under the APA and the NWPA, not just the lawfulness of Holtec's application. The unlawfulness of the NRC's conduct of the Holtec licensing proceeding will not be redressed or resolved by any future decision the NRC may make to deny Holtec's application on other grounds. And there is no "more concrete setting" that may develop to legitimate the NRC's illegal conduct. *See* Motion at 6 (quoting *Devia*, 492 F.3d at 424).

2. Beyond Nuclear will suffer hardship if review is delayed

Respondents contend that Petitioners will endure no “legally cognizable hardship” if review of Beyond Nuclear’s case is postponed. Motion at 7 (quoting *Devia*, 492 F.3d at 427). As the Supreme Court observed in *Susan B. Anthony List*, however, an obligation to go through “costly [Ohio Elections] Commission proceedings” constitutes a cognizable hardship for purposes of evaluating prudential ripeness. 573 U.S. at 168. As long as the Holtec licensing proceeding continues, without any review to check its unlawful character, all interested members of the public who are concerned about the safety or environmental impacts of the Holtec project are saddled with the costly responsibility to participate in a legal proceeding whose very lawfulness is in question. The perception that the area of the Holtec facility may become host to an extremely large volume of nuclear waste may also depress local property values, thus affecting Beyond Nuclear’s members. *See Kelley v. Selin*, 42 F.3d 1501, 1509–10 (6th Cir. 1995) (finding that spent fuel storage near petitioners “has the potential to interrupt enjoyment of their lakefront property and to diminish its value”). *See also, e.g.*, Declaration of Jimi Gadzia, par. 12 (June 8, 2020); Declaration of Daniel C. Berry III, par. 12 & 13 (July 1, 2020); Declaration of Elizabeth Berry, par. 12 & 13 (July 1, 2020); Declaration of Gene Harbaugh, par. 6 (June 20, 2020); Declaration of Nick King, par. 6 (June 18, 2020); and Declaration of Margo Smith,

par. 9 & 10 (July 7, 2020), attached to Addendum to Petitioner's Docketing Statement for Beyond Nuclear v. NRC, No. 20-1187 consolidated with No. 20-1225 (July 9, 2020).

B. It is Reasonable to Hold Don't Waste Michigan's Claims in No. 20-1225 in Abeyance

While the NRC clearly has made a final decision against Don't Waste Michigan, and therefore its claims are reviewable, Petitioners agree with Respondents that it would be reasonable to hold those claims in abeyance pending the NRC's resolution of the administrative cases brought by Fasken and the Sierra Club. Don't Waste Michigan's claims are fact-specific in nature, as opposed to the purely legal claim brought by Beyond Nuclear, and may thus be more fit to be reviewed at a later date.

IV. CONCLUSION

For the foregoing reasons, Respondents' Motion should be denied with respect to Beyond Nuclear's petition for review in No. 20-1187. Petitioners do not object, however, to holding Don't Waste Michigan's claims in No. 20-1125 in abeyance pending the NRC's completion of the Holtec adjudication before the NRC.

Respectfully submitted,

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