

Case law

France

Decision Nos. 410109, 410622, 410624 of 25 October 2018 of the French Council of State (Conseil d'État)¹

Decree No. 2017-508 of 8 April 2017 provided for the revocation of the operating licence held by Électricité de France (EDF) for the Fessenheim Nuclear Power Plant (Bas-Rhin, France).² To comply with the 63.2 GW cap on total authorised nuclear electricity generating capacity in France, this licence revocation was due to take effect on the entry into service of the EPR unit (Flamanville 3) at the Flamanville Nuclear Power Plant site (Manche, France).

Pursuant to Article L. 311-5-5 of the Energy Code, a licence to operate a nuclear power plant cannot be granted if the grant of that licence would result in the cap on total authorised nuclear electricity generating capacity being exceeded. In assessing this total capacity, the administrative authority takes into account the revocations declared by decree at the request of a licensee. One of the notable effects of these provisions is that the revocation of a licence to operate an electricity generation facility can therefore only be issued at the request of the licensee.

The municipality of Fessenheim, as well as the trade unions, referred the matter to the French Council of State (Conseil d'État), which concluded that the decree of 8 April 2017 should be repealed on the grounds that the revocation of the licence to operate the Fessenheim Nuclear Power Plant had not been issued at EDF's request.

United States

Oglala Sioux Tribe v. US Nuclear Regulatory Commission, 896 F.3d 520 (DC Cir. 2018)

The Oglala Sioux Tribe filed a petition for review of a United States (US) Nuclear Regulatory Commission (NRC) decision issued during the NRC's administrative licensing adjudication for the Powertech (USA), Inc. Dewey-Burdock *in situ* uranium recovery project.³ The petitioners in the case challenged the Commission's rejection of several contentions raised in the NRC adjudication by the Tribe, which claimed that the NRC staff had failed to comply with the National Environmental Policy Act⁴ in several respects before issuing the Powertech licence. Petitioners also challenged the Commission's affirmance of the Atomic Safety and Licensing Board Panel's (ASLBP) decision to keep Powertech's already-issued licence in place despite the ASLBP's identification (which the Commission affirmed on appeal) of certain

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1. *Journal officiel "Lois et Décrets"* [Official Journal of Laws and Decrees] (J.O.L. et D.), 28 Oct. 2018, text no. 42.
 2. For more information, please see NEA (2018), "Decree No 2017-508 of 8 April 2017 revoking the licence to operate Fessenheim Nuclear Power Plant", *Nuclear Law Bulletin*, No. 100, OECD, Paris, p. 93.
 3. In 2009, Powertech applied for a licence to construct and operate a uranium mining project in the Black Hills region of South Dakota. The NRC granted the licence on 8 April 2014.
 4. National Environmental Policy Act of 1969, 42 United States Code (USC) 4321 et seq. (NEPA).

deficiencies related to: (1) the NRC staff's consideration of historic and cultural resources under NEPA and (2) its associated consultations with the Tribe under the National Historic Preservation Act of 1966.⁵ The NRC moved to dismiss the petition for lack of jurisdiction, asserting that the decision under review did not constitute final agency action because of the ongoing consideration by the ASLBP of the NEPA and NHPA issues related to the Tribe's historic and cultural resources.

On 20 July 2018, the DC Circuit Court issued its decision.⁶ The Court held that it lacked jurisdiction over most of the Tribe's NEPA challenges because the NRC adjudication was not yet complete. The Court did, however, exercise jurisdiction under the collateral order doctrine to consider one specific question: whether the Commission's decision to keep Powertech's licence in place pending completion of the NRC adjudication, despite the ASLBP's NEPA-noncompliance finding regarding the NRC staff's consideration of the Tribe's historic and cultural resources, violated NEPA.⁷ On that issue, the DC Circuit held that because the NRC had itself identified the NEPA-compliance deficiency and considered it to be "significant," the NRC erred in requiring the petitioners to show irreparable harm in order to obtain *vacatur* or suspension of Powertech's licence.⁸ The Court did not vacate the licence, however, citing various equitable considerations.⁹ Instead, the Court remanded the case to the Agency for further proceedings consistent with its opinion. The administrative adjudication remains ongoing; the views of the parties have been sought as to how the Agency should respond to the Court's remand.

Texas v. United States, 891 F.3d 553 (5th Cir. 2018)

Texas (Petitioner) petitioned for relief under the Nuclear Waste Policy Act¹⁰ alleging various federal entities and officials violated their obligations under the Act by neglecting to pursue the Yucca Mountain repository and instead pursuing a consent-based siting approach to building a repository.¹¹ Texas sought several remedies, including equitable relief to prohibit further consent-based siting and ordering completion of the licensing process for Yucca Mountain.¹² Nevada intervened and moved to dismiss.¹³ The Court of Appeals for the Fifth Circuit granted the motion to dismiss, holding that the deadline for action under the Nuclear Waste Policy Act was not jurisdictional, the continuing violations doctrine did not apply to equitably toll

5. National Historic Preservation Act of 1966, Public Law (Pub. L.) 89-665, as amended by Pub. L. No. 96-515, 54 USC 300101 et seq. (NHPA).

6. *Oglala Sioux Tribe v. US Nuclear Regulatory Commission*, 896 F.3d 520 (DC Cir. 2018).

7. *Ibid.*, p. 527. By the time the court decided the case, the licensing board had already granted an NRC Staff motion for summary disposition of the Tribe's NHPA-compliance contention. Based on that development, the court determined that it did not need to address in its decision whether NRC's decision to leave the licence in place pending the remaining NRC adjudicatory proceedings was also contrary to the NHPA.

8. *Ibid.*, p. 538.

9. *Ibid.*

10. 42 USC 10101 et seq.

11. Original Action under the Nuclear Waste Policy Act (Petition), *Texas v. United States*, 891 F.3d 553 (5th Cir. 2018), available at: www.nrc.gov/docs/ML1708/ML17081A109.pdf.

12. *Ibid.*, pp. 25-27. Texas sought numerous other ancillary remedies such as civil contempt and appointment of a special master.

13. Nevada's Opposition to Texas's Motion for a Declaratory Judgement and a Preliminary Injunction and Nevada's Opposed Countermotion to Dismiss, *Texas v. United States*, 891 F.3d 553 (5th Cir. 2018), available at: www.state.nv.us/nucwaste/news2017/pdf/DKT-15_nvResponse.pdf.

deadline and actions occurring within limitations period were not sufficiently final for judicial review.¹⁴

By way of background, the US Department of Energy (DOE) submitted its application to the US Nuclear Regulatory Commission (NRC) for a geologic repository at Yucca Mountain in 2008. In 2010, then-President Barack Obama established the Blue Ribbon Commission on America's Nuclear Future to review policies for managing the back-end of the nuclear fuel cycle including "all alternatives for the storage, processing, and disposal" of nuclear fuel and nuclear waste.¹⁵ One of the recommendations of the Blue Ribbon Commission in its final report was a "new, consent-based approach to siting future nuclear waste management facilities."¹⁶ Subsequent to this report, DOE issued a framework for transporting, storing and disposing used nuclear fuel.¹⁷ This framework included plans for DOE to initiate a consent-based siting process.¹⁸ More recently, DOE published a draft report on consent-based siting with a public comment period that ended in April 2017.¹⁹

On 3 March 2010, DOE filed a motion with the Atomic Safety and Licensing Board asking to withdraw its application.²⁰ The Board denied that request on 29 June 2010.²¹ In 2011, the NRC Commission announced that it was evenly divided as to whether the Commission should review, and reverse or uphold, the Board's denial of DOE's motion to withdraw.²² The Commission directed the Board to "complete all necessary and appropriate case management activities, including disposal of all matters currently pending before it and comprehensively documenting the full history of the adjudicatory proceeding."²³ Consistent with the Commission's direction, the Board suspended the adjudicatory proceeding on 30 September 2011, documenting the proceeding's history and citing fiscal constraints.²⁴ In 2013, the US Court of Appeals for the District of Columbia Circuit granted a *writ of mandamus*, directing the NRC to resume the licensing process.²⁵

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14. *Texas v. United States*, 891 F.3d 553 (5th Cir. 2018), available at: www.ca5.uscourts.gov/opinions/pub/17/17-60191-CV0.pdf.
 15. Obama, B. (2010), "Presidential Memorandum – Blue Ribbon Commission on America's Nuclear Future", <https://obamawhitehouse.archives.gov/the-press-office/presidential-memorandum-blue-ribbon-commission-americas-nuclear-future>.
 16. Blue Ribbon Commission on America's Nuclear Future (2012), *Report to the Secretary of Energy*, available at: www.energy.gov/sites/prod/files/2013/04/f0/brc_finalreport_jan2012.pdf, p. viii.
 17. US Department of Energy (2013), *Strategy for the Management and Disposal of Used Nuclear Fuel and High-Level Radioactive Waste*, available at: www.energy.gov/sites/prod/files/2013%201-15%20Nuclear_Waste_Report.pdf.
 18. *Ibid.*, p. 14
 19. Request for Public Comment on Draft Consent-Based Siting Process for Consolidated Storage and Disposal Facilities for Spent Nuclear Fuel and High-Level Radioactive Wastes, 82 Fed. Reg. 4333 (13 Jan. 2017).
 20. US Department of Energy (High Level Waste Repository), US Department of Energy's Motion to Withdraw, Docket No. 63-001 (3 March 2010), available at: www.energy.gov/sites/prod/files/edg/media/DOE_Motion_to_Withdraw.pdf.
 21. US Department of Energy (High Level Waste Repository), LBP-10-11, 71 NRC 609 (29 June 2010).
 22. See US Department of Energy (High-Level Waste Repository), CLI-11-07, 74 NRC 212, 212 (2011).
 23. *Ibid.*
 24. See US Department of Energy (High-Level Waste Repository), CLI-11-13, 74 NRC 635, 639 (2011); US Department of Energy (High-Level Waste Repository), LBP-11-24, 74 NRC 368, 370 (2011).
 25. Petition, *supra* note 11, pp. 18-24. In re Aiken County, 725 F.3d 255 (DC Cir. 2013). In granting the *writ of mandamus*, the Court stated, "unless and until Congress authoritatively says otherwise or there are no appropriated funds remaining, the Nuclear Regulatory Commission must promptly continue with the legally mandated licensing process." *Ibid.*, p. 267.

Petitioner contended that DOE's stated intent to use consent-based siting was a violation of the Nuclear Waste Policy Act, which, Petitioner contended, required DOE to pursue Yucca Mountain as the only repository.²⁶ Petitioner further contended that holding the NRC proceedings associated with Yucca Mountain in abeyance violated the Nuclear Waste Policy Act and the Court's decision in *In re Aiken County*. Specifically, Petitioner brought its claims for relief under 42 USC Section 10139(a)(1), which prescribes a 180-day statute of limitations. Because the majority of the Petitioner's claims challenged actions and omissions that occurred well beyond the 180-day limitations period, the Court first addressed whether the Nuclear Waste Policy Act's 180-day limitation imposed a limit on the Court's subject matter jurisdiction, ultimately concluding that the statutory deadline was not jurisdictional.²⁷ Next, the Court addressed whether the 180-day deadline could be tolled under a "continuing violations" theory.²⁸ In determining whether equitable tolling is appropriate, the inquiry focuses on "what event, in fairness and logic, should have alerted the average lay person to act to protect his rights."²⁹ The Court noted that Petitioner itself had cited several federal actions that, "in fairness and logic, should have alerted it to act years ago."³⁰ Last, the Court addressed the discrete actions that Petitioner challenged that were not time-barred: DOE's decision to release a draft consent-based siting policy document and the solicitation of public comments on that document.³¹ However, the Court concluded that policy document has "no legal consequence" and therefore Petitioner lacked any basis to challenge it under the Nuclear Waste Policy Act and that the policy document and the solicitation of public comments on it did not constitute a final decision or action subject to challenge under the Nuclear Waste Policy Act.³² The Court, therefore, dismissed all of Petitioner's claims, concluding that they did not meet the statutory requirements of timeliness or finality.

***City of Boston Delegation v. FERC*, 897 F.3d 241 (DC Cir. 2018)**

The Court of Appeals for the District of Columbia upheld the US Federal Energy Regulatory Commission's (FERC's) authorisation of a project to upgrade Algonquin Gas Transmission, LLC's natural gas pipeline.³³ The Court held that FERC adequately considered cumulative impacts of other projects in its analysis, did not act arbitrarily and capriciously by declining to consider three projects in a single environmental impact statement (EIS), and appropriately relied on another Federal agency's analysis in addressing safety concerns about project activities near a nuclear energy facility.³⁴

In February 2014, Algonquin applied for a certificate of public convenience and necessity, commonly referred to as a Section 7 certificate,³⁵ from FERC to replace approximately 29 miles of existing pipeline with larger diameter pipe, construct a little over 8 miles of new pipeline, build 3 new meter stations, and make other

26. Petition, *supra* note 11, pp. 19-20, citing 42 USC Sections 10172(a)(1)-(2).

27. *Texas v. United States*, 891 F.3d 553, 561.

28. *Ibid.*, pp. 561-564.

29. *Ibid.*, p. 562.

30. *Ibid.*

31. *Ibid.*, p. 565.

32. *Ibid.*

33. *City of Boston Delegation v. FERC*, 897 F.3d 241 (DC Cir. 2018).

34. See *ibid.*

35. 15 USC Section 717f(c).

upgrades, collectively called the “AIM Project”.³⁶ In March 2015, FERC issued the certificate, subject to certain conditions.³⁷

Several environmental and community groups requested a rehearing before FERC based on alleged NEPA violations and concerns about the project’s proximity to the Indian Point Energy Center (a nuclear facility in Westchester County, New York) and the safety risks of pipeline construction adjacent to an active quarry.³⁸ In January 2016, FERC denied the request for rehearing and dismissed the requests for a stay.³⁹ The City of Boston Delegation, the Town of Dedham, Massachusetts, and Riverkeeper, Inc., with a coalition of environmental groups, community organisations, and individuals then sought judicial review of FERC’s decision to issue the Section 7 certificate for the AIM Project to Algonquin.⁴⁰

Petitioners raised two main NEPA arguments. First, Petitioners contended that FERC improperly segmented its environmental review by failing to evaluate three Algonquin projects (the AIM Project, the Atlantic Bridge project and the Access Northeast project) in a single EIS.⁴¹ Relatedly, Petitioners asserted that FERC did not give adequate consideration to the cumulative environmental impacts of those three projects in the EIS for the AIM Project.⁴² The court held that FERC’s separate EIS for the AIM Project was permissible because the projects were not under simultaneous review, were unrelated, did not depend on one another for justification, and were financially and functionally independent.⁴³ The court also held that FERC appropriately considered the cumulative environmental effects of the Atlantic Bridge and Access Northeast projects based on the foreseeability of the projects and information available at the time the AIM Project was under review.⁴⁴

Petitioners also challenged FERC’s determination that the AIM Project did not pose an increased threat to the Indian Point Energy Center.⁴⁵ Specifically, Petitioners contended that FERC erred in accepting and relying upon safety findings by the NRC and Entergy (the operator of Indian Point) instead of competing expert analyses.⁴⁶ The court upheld FERC’s finding that the AIM Project did not pose an increased threat to Indian Point because it found no reason to reject FERC’s decision to credit the NRC’s safety conclusions, stating, “[a]gencies can be expected to respect the views of such other agencies as to those problems for which those other agencies are more directly responsible and more competent”.⁴⁷

36. City of Boston Delegation, 897 F.3d 241, 246-47.

37. Order Issuing Certificate and Approving Abandonment, Algonquin Gas Transmission, LLC, 150 FERC para. 61,163 (2015), www.ferc.gov/CalendarFiles/20150303170720-CP14-96-000.pdf.

38. City of Boston Delegation, 897 F.3d 241, 247. See also Order Denying Rehearing, Algonquin Gas Transmission, LLC, 154 FERC para. 61,048 (2016), available at: www.ferc.gov/CalendarFiles/20160128180805-CP14-96-001.pdf.

39. Order Denying Rehearing, 154 FERC para. 61,048.

40. City of Boston Delegation, 897 F.3d 241, 247. See also Joint Final Brief of Petitioners, City of Boston Delegation, 897 F.3d 241. The Court first addressed standing of the parties, finding the City of Boston Delegation did not have standing, while the Town of Dedham, Riverkeeper, Inc., and other coalition members did have standing. City of Boston Delegation, 897 F.3d 241, 248-51.

41. *Ibid.*, p. 251

42. *Ibid.*

43. *Ibid.*, pp. 251-53.

44. *Ibid.*, pp. 253-54.

45. *Ibid.*, p. 254.

46. *Ibid.*, p. 255.

47. *Ibid.*, p. 255 (internal quotations omitted), citing *City of Pittsburgh v. Fed. Power Commission*, 237 F.2d 741, 754 (DC Cir. 1956).

