

May 28, 2002

Mark Langer, Clerk
U.S. Court of Appeals for the
District of Columbia Circuit
333 Constitution Avenue, N.W.
Washington, D.C. 20001-2873

RE: State of Nevada v. Nuclear Regulatory Commission, No. 02-0116

Dear Mr. Langer:

Please file the enclosed motion to dismiss. We have submitted an original and four copies. Also enclosed is an appearance form for the Nuclear Regulatory Commission attorneys representing the agency in this case.

Please date stamp the enclosed copy of this letter to indicate date of receipt and return it to me in the enclosed envelope, postage pre-paid, at your convenience.

Sincerely,

/RA/

John F. Cordes
Solicitor
Office of the General Counsel

Enclosure: As stated

cc: service list

United States Court of Appeals
District of Columbia Circuit
Washington, D.C. 20001-2866

General Information
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ENTRY OF APPEARANCE

Case No. 02-1116

CAPTION State of Nevada, et al.

_____ V. _____

Nuclear Regulatory Commission

PARTY

The Clark will enter my appearance as counsel for.

Appellant(s)

Petitioner(s) _____
Name of Party

Appellee(s)

Respondent(s) U.S. Nuclear Regulatory Commission
Name of Party

Intervenor(s) _____
Name of Party

Amicus Curiae _____
Name of Party

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NOTE: Must be submitted by a member of the Bar of the USCA for the D.C. Circuit

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NEVADA, et al.,)	
)	
Petitioners,)	
)	
v.)	No. 02- 1116
)	
NUCLEAR REGULATORY COMMISSION))	
and THE UNITED STATES OF AMERICA,)	
)	
Respondents.)	
_____))	

FEDERAL RESPONDENTS’ MOTION TO DISMISS FOR LACK OF JURISDICTION

Pursuant to District of Columbia Circuit Rule 27(g), the Nuclear Regulatory Commission (“NRC”) and the United States of America¹ move to dismiss the instant petition for review for lack of jurisdiction. Petitioners challenge an NRC rule, 10 C.F.R. Part 63, establishing licensing criteria for disposal of spent nuclear fuel at a proposed geologic repository at Yucca Mountain, Nevada. But petitioners have come to court too late. They filed suit on April 11, 2002. The NRC, however, had issued Part 63 more than five months earlier, on November 2, 2001. The statutes governing judicial review of NRC rules -- the Atomic Energy Act and the Hobbs Act -- establish a 60-day deadline for seeking review of contested rules. The 60-day judicial review period is jurisdictional.

Petitioners likely will argue that the NRC actually issued Part 63 under the Nuclear Waste Policy Act (“NWPA”), which contains its own special 180-day limitations period for filing suit. But bringing this case within the jurisdictional reach of the NWPA would require ignoring critical language in that Act. Its judicial review provisions come into play only where there is agency action (or inaction) “under this subtitle.”² The NRC did

¹The petition for review names only the NRC as respondent. We have added the United States as a statutory party-respondent pursuant to 28 U.S.C. § 2344, and file this motion on behalf of both the NRC and the United States. See *generally Arnow v. NRC*, 868 F.2d 223, 225 (7th Cir. 1989), *cert. denied*, 493 U.S. 813 (1989). An industry trade group, the Nuclear Energy Institute, has moved to intervene before this Court, but the Court has not yet acted on its motion.

² See NWPA, § 119(a), 42 U.S.C. § 10139(a). The codified version says “under this part” rather than “under this subtitle.”

not issue the Part 63 licensing criteria under any authority it received from the NWPA. The NWPA, in fact, gave the NRC no rulemaking authority to issue these criteria. It set out directives and timetables for licensing a spent fuel disposal facility, but it said expressly that the NRC is to promulgate its licensing criteria “pursuant to authority *under other provisions of law*.”³

Moreover, in issuing Part 63 the NRC did not act pursuant to an NWPA directive, but pursuant to a fresh directive in new legislation, the Energy Policy Act of 1992. That Act, like the NWPA, directed NRC action on particular time frames but granted the NRC no new rulemaking power under the NWPA or otherwise. Hence, in issuing Part 63, the NRC necessarily acted under its existing authority to issue rules, authority found only in the Atomic Energy Act. Such rules are subject to the Hobbs Act’s 60-day judicial review deadline.

In short, as we explain in further detail below, a close reading of the pertinent statutes compels dismissal of petitioners’ challenge to Part 63 as untimely.

BACKGROUND

This lawsuit challenges 10 C.F.R. Part 63, a rule that the NRC issued last November to establish licensing criteria for the proposed Yucca Mountain spent fuel disposal facility in Nevada.⁴ Under section 161 b. of the Atomic Energy Act, “the Commission is authorized to ... establish by rule, regulation, or order, such standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary or desirable ... to protect health or to minimize danger to life or property.”⁵ That is exactly what Part 63 does, establishing health-based standards for

³ See NWPA, § 121(b)(1)(A), 42 U.S.C. § 10141(b)(1)(A) (emphasis added).

⁴ See 66 Fed. Reg. 55732 (Nov. 2, 2001).

⁵ See 42 U.S.C. § 2201(b). The Atomic Energy Act also empowers the NRC to issue rules to promote the common defense and security and to require certain types of records and reports. See, e.g., Atomic Energy Act, §§ 65, 161 b., 161 i., 161 o., 42 U.S.C. §§ 2095, 2201(b), (i), (o).

constructing, operating, and closing the Yucca Mountain facility. Part 63, in all its parts, seeks to avoid “unreasonable risk to the health and safety of the public.”⁶

Part 63 came about as part of a Congressionally-established process for handling the longstanding question how to deal with high-level radioactive waste, including spent nuclear fuel generated by the nation’s commercial nuclear power plants. In the NWPA, enacted in 1982, Congress decided that the Department of Energy would be responsible for collecting funds from the private nuclear industry and for ultimately constructing and operating a repository for high-level radioactive waste.⁷ Congress also decided that the NRC would review and license the facility.⁸

Among other things, the NWPA directed the Environmental Protection Agency (“EPA”) to use its authority “under other provisions of law” to promulgate “generally applicable standards for protection of the general environment from offsite releases from radioactive material in repositories.”⁹ EPA did so.¹⁰ The same law directed the NRC, also using its authority “under other provisions of law,” to issue a rule setting out the “technical requirements and criteria that it will apply, under the Atomic Energy Act ..., in approving or disapproving” construction, operation and closure of such repositories.¹¹ The NRC criteria were not to be “inconsistent” with the EPA standards.¹² The NRC issued such criteria, codified at 10 C.F.R. Part 60, in 1986.

By 1987, Congress had focused on the Yucca Mountain site as a possible location for a national repository. It amended the NWPA to direct the Secretary of Energy to study only that site.¹³ Several years

⁶ See, e.g., 10 C.F.R. §§ 63.31(construction), 63.41 (operation), 63.51 (closure).

⁷ See generally 42 U.S.C. §§ 10121 *et seq.*, 10221 *et seq.*

⁸ See generally 42 U.S.C. § 10134.

⁹ See 42 U.S.C. § 10141(a).

¹⁰ See 40 C.F.R. Part 191.

¹¹ See 42 U.S.C. § 10141(b)(1)(A).

¹² See 42 U.S.C. § 10141(b)(1)(C).

¹³ See 42 U.S.C. § 10133.

later, in the Energy Policy Act of 1992, Congress directed the EPA to issue Yucca Mountain-specific standards, and directed the NRC to issue revised licensing criteria “consistent” with EPA’s new standards.¹⁴ Both agencies issued their Yucca Mountain rules during 2001. EPA’s new rule, 40 C.F.R. Part 197, is the subject of separate lawsuits.¹⁵ The NRC’s new rule, Part 63, is the subject of the present case.

ARGUMENT

Where, as with Part 63, a final NRC rule deals with the “activities of licensees,” section 189 of the Atomic Energy Act makes the rule judicially reviewable under the so-called Hobbs Act (also known as the Administrative Orders Review Act).¹⁶ The Hobbs Act, in turn, provides that the courts of appeals have “exclusive jurisdiction” over such cases and that petitions for review must be filed within 60 days after issuance of the final agency rule.¹⁷ Here, petitioners filed suit on April 11, 2002, fully 160 days after *Federal Register* publication of Part 63 on November 2, 2001.¹⁸ If the Hobbs Act applies, therefore, petitioners’ suit is indisputably late. This is a fatal jurisdictional defect.¹⁹

¹⁴ Pub. Law 102-486, 106 Stat. 2776, § 801(a) and (b) (codified at 42 U.S.C. § 10141 note).

¹⁵ *Nuclear Energy Institute v. United States*, Nos. 01-1258, 01-1268, 01-1295, 01-1425 & 01-1226 (consolidated) (D.C. Cir.). Also pending before this Court are other Yucca Mountain-related lawsuits challenging various government actions. See *Nevada v. Department of Energy*, Nos. 01-1516, 02-1036 & 02-1077 (consolidated) (D.C. Cir.).

¹⁶ See 42 U.S.C. § 2239 (a) and (b). Section 2239(b) says that the Hobbs Act governs “[a]ny final order entered in any proceeding of the kind specified in subsection (a).” Subsection (a) provides, among other things, that the NRC must provide interested persons a hearing “in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees.” The rulemaking “hearing” consists of notice and an opportunity to comment. See *Siegel v. AEC*, 400 F.2d 778, 784-86 (D.C. Cir. 1968).

¹⁷ See 28 U.S.C. §§ 2342, 2344; see generally *Natural Resources Defense Council, Inc. v. NRC*, 666 F.2d 595, 601 & nn. 41-42 (D.C. Cir. 1981). *Accord Kelley v. Selin*, 42 F.3d 1501, 1515 n.3 (6th Cir.), *cert. denied*, 515 U.S. 1159 (1995).

¹⁸ See 66 Fed. Reg. 55732 (Nov. 2, 2001).

¹⁹ See *Natural Resources Defense Council, Inc. v. NRC*, 666 F.2d at 602. *Accord United Transportation Union-Illinois Legislative Board v. STB*, 132 F.3d 71, 75 (D.C. Cir. 1998); *Energy Probe v. NRC*, 872 F.2d 436, 437 (D.C. Cir. 1989).

The petition for review, however, invokes the NWPA, not the Hobbs Act, as the basis for jurisdiction in this Court and also points to supposed violations of the NWPA. Petitioners' intent, undoubtedly, is to avoid the Hobbs Act's 60-day deadline for seeking judicial review and to come instead within the NWPA's 180-day deadline.²⁰ But a close reading of the NWPA and related legislation shows the NWPA's 180-day limit inapplicable here. To see why, we must examine three separate statutory provisions.²¹

1. The NWPA's jurisdictional provision, section 119(a), covers final agency action "under this subtitle;" that is, under the NWPA's Subtitle A ("Repositories for Disposal of High Level Radioactive Waste and Spent Nuclear Fuel"). The "under this subtitle" limitation ties judicial review to the source of authority for the challenged agency action.²² As the Ninth Circuit held last year, section 119 applies only where the agency takes action "under" the NWPA's authority, not where NWPA questions are merely "implicated" by agency action taken under other statutory authority.²³ The "NWPA -- like any other authority -- can be implicated by a decision that is not 'under' it for purposes of subject matter jurisdiction."²⁴ The Hobbs Act, the "exclusive" basis for judicial review of NRC rules, provides an adequate means to attack rules on NWPA (or other) grounds. Special review statutes like the Hobbs Act allow challenges based on any claim of legal infirmity, even claims based on statutes (like the NWPA) with separate remedial schemes.²⁵

²⁰ See 42 U.S.C. § 10139(c).

²¹ We have attached to this motion full-text versions of the critical statutory provisions.

²² See *Natural Resources Defense Council, Inc. v. Abraham*, 244 F.3d 742, 744 (9th Cir. 2001).

²³ See *id.* at 746.

²⁴ *Id.* In *General Elec. Uranium Management Corp. v. DOE*, 764 F.2d 896, 900-04 (D.C. Cir. 1985), this Court construed section 119's "under this subtitle" language to allow judicial review of agency action under another NWPA subtitle. Relying on multiple factors, the Court found any other understanding of Congress's intent "inconceivable." See *id.* at 901. But this Court did not suggest that section 119 applied to agency actions taken under the authority of an entirely different statute.

²⁵ See *City of Rochester v. Bond*, 603 F.2d 927, 936-37 (D.C. Cir. 1979); see also *GTE South, Inc. v. Morrison*, 199 F.3d 733, 742-43 (4th Cir. 1999); *Northwest Resource Information Center, Inc. v. National Marine Fisheries Service*, 25 F.3d 872, 874-75 (9th Cir. 1994); *Michigan v. United States*, 994 F.2d 1197, 1202-04 (6th Cir. 1993) (NRC case).

The NWPA's own jurisdictional provision, section 119, displaces the Hobbs Act when the NRC takes a "final decision or action" under authority the NWPA has given the NRC. The NWPA does in fact give the NRC a variety of powers. Among other things, it authorizes the NRC to adopt the Secretary of Energy's environmental impact statement "to the extent practicable"²⁶ and to extend the deadline for approving or disapproving construction of a repository.²⁷ By enacting section 119, Congress presumably intended to allow judicial review within 180 days after final and *NWPA-authorized* NRC actions. Such actions fall "under" the NWPA within the meaning of section 119's jurisdictional grant.

2. But the Hobbs Act, not section 119, covers judicial review of the NRC's Part 63. By the NWPA's own terms, Part 63 cannot reasonably be deemed an agency action taken "under" the NWPA. It is true that, in section 121(b), the NWPA directed timely issuance of an NRC rule setting out "technical requirements and criteria" for licensing a repository.²⁸ But the same provision also stated expressly that in issuing a new rule the NRC was to exercise existing "authority under other provisions of law."²⁹ The NRC's only existing (pertinent) rulemaking authority was (and is) the Atomic Energy Act.³⁰ The NWPA, in fact, specified that the new NRC rule should establish licensing criteria that the NRC would apply "under the Atomic Energy Act."³¹ The NRC unquestionably had, and always has had, authority under the Atomic Energy Act to promulgate safety rules governing disposal of spent nuclear fuel in a repository.³² Part 63 is such a rule.

A rule issued under the Atomic Energy Act comes, of course, with all the usual trimmings, including judicial review under the "exclusive" Hobbs Act remedy (and its 60-day deadline). Congress must be

²⁶ See 42 U.S.C. § 10134(f)(4).

²⁷ See 42 U.S.C. § 10134(d).

²⁸ See 42 U.S.C. § 10141(b).

²⁹ See *id.*

³⁰ See 42 U.S.C. § 2201; note 5, *supra*.

³¹ See 42 U.S.C. § 10141(b).

³² See 42 U.S.C. § 2201(b).

presumed to have acted with “full understanding of existing law”³³ -- that is, with knowledge of the Hobbs Act review scheme -- when it directed the NRC to use its “other” rulemaking authority (*i.e.*, its Atomic Energy Act authority) to issue its “licensing criteria” rule. Hence, applying the Hobbs Act scheme to Part 63 violates no Congressional expectation.

In 1987, in *Natural Resources Defense Council, Inc. v. EPA*, the First Circuit exercised Hobbs Act jurisdiction to review an EPA rule, issued as part of the NWPA process, establishing “generally applicable standards” for high-level waste repositories.³⁴ Stressing the NWPA’s mandate that EPA use its existing rulemaking “authority under other provisions of law,” the Court found that the EPA rule rested on its Atomic Energy Act authority.³⁵ Based on that finding, the Court concluded that it had Hobbs Act jurisdiction.³⁶ The First Circuit’s analysis in *Natural Resources Defense Council* should govern judicial review of the NRC’s Yucca Mountain rule as well. Like the EPA in *Natural Resources Defense Council*, the NRC is operating under a statutory directive to promulgate rules under its pre-existing Atomic Energy Act authority.

3. Insofar as the NRC might be said to have issued Part 63 “under” any statute other than the Atomic Energy Act, that statute would be the Energy Policy Act of 1992, not the NWPA. It was the Energy Policy Act that directed NRC issuance of new licensing “requirements and criteria” consistent with EPA’s Yucca Mountain “standards.”³⁷ Nowhere does the text of the Energy Policy Act suggest an intent to give the NRC new statutory *authority* to issue rules, under the NWPA or otherwise.³⁸ Instead, the Energy Policy Act seems best understood as a statutory directive to use the NRC’s existing rulemaking authority under the Atomic Energy

³³ *American Federation of Gov’t Employees, Local 3295 v. FLRA*, 46 F.3d 73, 78 (D.C. Cir. 1995). See also *Edelman v. Lynchburg College*, 122 S.Ct. 1145, 1152 (2002).

³⁴ 824 F.2d 1258, 1267 n.7 (1st Cir. 1987).

³⁵ See *id.* at 1263.

³⁶ See *id.* at 1267 n.7.

³⁷ See Pub. L. 102-486, § 801(b), 42 U.S.C. § 10141 note..

³⁸ The NRC said as much in issuing Part 63: “The [Energy Policy Act] does not diminish NRC’s authority under the Atomic Energy Act to conduct rulemaking or to select the manner in which it will revise rulemaking requirements.” 66 Fed. Reg. at 55736

Act. But even were the Energy Policy Act conceptualized as independent rule-enabling legislation, review of NRC rules issued under it would fall within the ordinary Hobbs Act process (with its 60-day deadline). The Energy Policy Act, unlike the NWPA, contains no special judicial review provision. Section 189 of the Atomic Energy Act brings within the Hobbs Act “any” NRC rule dealing with “the activities of licensees,” not just rules issued under the NRC’s Atomic Energy Act authority.³⁹

Viewed from every perspective, then, petitioners’ suit lies under the Hobbs Act. To lift the case out of the Hobbs Act and into the NWPA’s separate jurisdictional scheme would require a generous approach to statutory construction, one declaring Part 63 an enactment “under” the NWPA rather than the Atomic Energy Act or the Energy Policy Act.⁴⁰ This would have the practical disadvantage of taking out of play the time-tested and detailed Hobbs Act system for reviewing NRC rules.⁴¹ More fundamentally, construing the NWPA loosely would run afoul of basic canons of statutory interpretation. As the Supreme Court has declared, “[j]udicial review provisions ... are jurisdictional in nature and must be construed with strict fidelity to their terms.”⁴² “This is all the more true of statutory provisions specifying the timing of review, for those time limits are ... mandatory and jurisdictional.”⁴³ Such provisions must be read “with precision.”⁴⁴ Doing so here, we submit, should lead this Court to dismiss petitioners’ lawsuit as untimely under the Hobbs Act.

CONCLUSION

³⁹ For NRC licensing actions, section 189 a. of the Atomic Energy Act, 42 U.S.C. § 2239(a), speaks in terms of proceedings “under this Act.” But section 189 a. contains no “under this Act” restriction for rulemakings. It refers generally “to any proceedings for the issuance or modification of rules and regulations dealing with the activities of licensees.”

⁴⁰ In the “authority” preface to Part 63, the NRC lists the NWPA, among a host of other statutory provisions, mostly from the Atomic Energy Act. See 66 Fed. Reg. at 55793. But among the provisions listed only the Atomic Energy Act actually authorizes issuance of rules. See note 5, *supra*. The other cited provisions relate to the substantive content of Part 63.

⁴¹ See 28 U.S.C. §§ 2341-51.

⁴² *Stone v. INS*, 514 U.S. 386, 405 (1995).

⁴³ *Id.* (internal quotations and citations omitted).

⁴⁴ *Id.*, quoting *Cheng Fan Kwok v. INS*, 392 U.S. 206, 212 (1968). See also *Slinger Drainage, Inc. v. EPA*, 237 F.3d 681, 682-83 (D.C. Cir. 2001).

For the foregoing reasons, this Court should dismiss the petition for review for lack of jurisdiction.

Respectfully submitted,

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May 28, 2002

Statutory Texts

1. Section 119 of the Nuclear Waste Policy Act, 42 U.S.C. § 10139, provides:

2. Section 121 of the Nuclear Waste Policy Act, 42 U.S.C. § 10141, provides:

3. Section 801 of the Energy Policy Act of 1992, 42 U.S.C. § 10141 note, provides:

(a) ENVIRONMENTAL PROTECTION AGENCY STANDARDS. --

[NOT REPRINTED]

CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2002, copies of the foregoing motion to dismiss were served by mail, postage prepaid, upon the following counsel:

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