

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

STATE OF NEVADA, CLARK)	
COUNTY, NEVADA, and CITY OF)	
LAS VEGAS, NEVADA)	
)	
Petitioners,)	
)	
v.)	Case No. 02-1116
)	
UNITED STATES NUCLEAR)	
REGULATORY COMMISSION,)	
)	
Respondent.)	

PETITIONERS' RESPONSE TO MOTION TO DISMISS

Section 119 of the Nuclear Waste Policy Act of 1982, as amended (“NWP A”), provides that the United States courts of appeals shall have original and exclusive jurisdiction over any civil action “for review of any final decision or action of the Secretary, the President, or the Commission under this part.” 42 U.S.C. § 10139(a)(1)(A). The word “Commission” in section 119 “means the Nuclear Regulatory Commission” (“NRC”), 42 U.S.C. § 10101(7), and the phrase “under this part” refers to Part A of the NWP A, which is entitled “Repositories for Disposal of High-Level Radioactive Waste and Spent Nuclear Fuel.” A civil action seeking review under section 119 may be brought within 180 days “of the decision or action.” 42 U.S.C. § 10139(c). Thus, NRC actions taken under Part A of the NWP A may be challenged by the filing of a petition for review in a United States court of appeals within 180 days of the NRC action.

Under the NWP A, and in particular under Part A of the NWP A, the two principal functions assigned by Congress to NRC are (1) the licensing of a repository, and (2) the establishment of rules and criteria for such licensing. See 42 U.S.C. §§ 10107(b)(3), 10107(c), 10134(d), & 10141(b). Citing explicitly to the authority set forth in the NWP A for performing its function

of establishing rules and criteria for its licensing, the NRC published a final rule on November 2, 2001 which is entitled similarly to Part A of the NWPA — “Disposal of High-Level Radioactive Wastes In A Geological Repository At Yucca Mountain, Nevada” – and which sets forth the regulatory guidelines it will apply in licensing the disposal of nuclear waste at Yucca Mountain, Nevada. This final rule is referred to as “Part 63.”

Petitioners State of Nevada, Clark County, Nevada, and City of Las Vegas, Nevada (“Petitioners”), petitioned this Court for review of Part 63 by filing a petition on April 11, 2002, well in advance of the 180-day deadline set by section 119. Accordingly, Petitioners cannot see how there could be any dispute that their petition was filed in a timely manner, and that this Court has jurisdiction. Indeed, since Yucca Mountain was selected as the site for the nation’s sole nuclear waste repository only because of specific directives set forth *in the NWPA*, since Part 63 is intended solely to govern existing proceedings for the construction and operation of the *Yucca Mountain* repository, and since Part 63 *explicitly invokes provisions in Part A of the NWPA* as the Commission’s authority for issuing those rules, one would have thought that no one could legitimately question the applicability of the NWPA’s judicial review provision to this case.

Nevertheless, in its Motion to Dismiss (“Motion”), the NRC¹ has tried to genuinely dispute this seemingly indisputable proposition. The NRC seizes upon a phrase within the NWPA that, it contends, suggests that the NWPA does not itself provide the NRC with the technical statutory authority to write regulations, meaning that Part 63 was issued “under” a statute other than the NWPA, and must therefore not qualify as a “final decision or action” taken by the NRC

¹ The NRC notes that although only it was named as a respondent on the petition for review, the United States has been added as a party-respondent pursuant to the Hobbs Act. Motion at 1 n.1. However, because this petition was brought under the judicial review provision of the NWPA, not the Hobbs Act, Petitioners did not name the United States as a respondent, and will therefore refer to the NRC as the respondent for purposes of this response.

“under” the NWPA. Specifically, the NRC’s Byzantine argument runs as follows: (1) although the NWPA required the NRC to issue rules governing the licensing of any repository selected under the NWPA, it did not technically provide the NRC with *authority* to issue such rules; (2) instead, even though it explicitly invoked the NWPA as authority when it issued the Part 63 rules, the NRC in reality had to rely upon “other authority” for issuing those rules — namely, the Atomic Energy Act (“AEA”); (3) therefore, NRC’s rulemaking activity was taken solely “under” the AEA and not “under” the NWPA; (4) even though the Department of Energy (“DOE”) is not yet a licensee of Yucca Mountain nor even a license applicant, but is instead only a “prospective applicant,” NRC’s action in issuing Part 63 was rulemaking “dealing with the activities of licensees” under the AEA; (5) therefore, only the judicial review provisions of Section 189 of the AEA, 42 U.S.C. § 2239, apply; and (6) because section 2239 specifies that the Hobbs Act governs review of NRC orders, the Hobbs Act’s 60-day limitations period applies.

To say that the NRC’s argument constitutes a strained and hyper-technical reading of the NWPA understates the violence that argument does to plain common sense and ordinary statutory construction. Part A of the NWPA required the NRC to determine whether to issue a license for any repository selected pursuant to the NWPA and to write rules regulating the licensing of any such repository site; Yucca Mountain has been selected under the NWPA; and, after expressly invoking the provisions from Part A of the NWPA that requires it to issue a licensing regulation, the NRC has now issued a rule specifically regulating the licensing of a repository at Yucca Mountain. In any world that has not been totally confused by litigation tactics that are overly resourceful and unduly technical, this rule was plainly issued “under” Part A of the NWPA, and may be challenged by invoking the NWPA’s judicial review provisions.

BACKGROUND

The NWPA was originally enacted in 1982, and contained as one of its principal purposes establishing “a schedule for the siting, construction, and operation of repositories that will provide a reasonable assurance that the public and the environment will be adequately protected from the hazards posed by high-level radioactive waste and such spent nuclear fuel as may be disposed of in a repository.” 42 U.S.C. § 10131(b)(1). As part of the fulfillment of this express purpose, Section 121 of the NWPA also *required* the NRC to issue regulations that would set forth the standards it would apply in licensing applications for constructing such repositories, receiving and possessing nuclear waste at such repositories, and closing and decommissioning such repositories. 42 U.S.C. § 10141. Accordingly, in 1986, the NRC issued a set of regulations dealing with the licensing of NWPA repository sites. 10 C.F.R. Part 60.

In 1987, the NWPA was amended to require the Secretary of Energy to focus exclusively on studying Yucca Mountain as a possible repository site for the nation’s nuclear waste, and to determine whether to recommend such site to the President for final selection as a repository. 42 U.S.C. § 10133. In 1992, a statutory note was then added to section 10141 of the NWPA to require the NRC to modify its previous rules under NWPA section 121 governing the licensing requirements for the disposal of nuclear fuel at NWPA repository sites. 42 U.S.C. § 10141 note (Nuclear Waste Storage and Disposal at Yucca Mountain Site, § 801(b)). Specifically, this statutory note to the NWPA, which was enacted as part of the Energy Policy Act of 1992, required the NRC to modify its licensing rules so that they will be consistent with new standards issued by the Environmental Protection Agency (“EPA”) that deal *solely* with the use of Yucca Mountain as the *sole* NWPA repository site. *Id.* Accordingly, on November 2, 2001, the NRC promulgated Part 63, which is specifically intended to govern the licensing of the disposal of nuclear

fuel at a repository site to be located at Yucca Mountain. 10 C.F.R. Part 63.² In the very first sentence of Part 63, the NRC makes unambiguously clear that it was issuing the rule in accordance with its authority under the NWPAs, together with the proviso added by the statutory note to the NWPAs that was enacted in the Energy Policy Act:

This part prescribes rules governing the licensing of the U.S. Department of Energy to receive and possess source, special nuclear, and byproduct material at a geological repository operations area sited, constructed, or operated at Yucca Mountain, Nevada, *in accordance with the Nuclear Waste Policy Act of 1982, as amended, and the Energy Policy Act of 1992.*

66 Fed. Reg. 55,732, 55,793 (Nov. 2, 2001) (quoting 10 C.F.R. § 63.1) (emphasis added). In addition, the NRC listed sections 114 and 121 of the NWPAs, 42 U.S.C. §§ 10134, 10141, as well as other statutes, as the “authority” for Part 63. 66 Fed. Reg. at 55,793.

ARGUMENT

The NRC concedes that the NWPAs’s judicial review provisions, including the 180-day period governing the filing of a petition for review, apply to NRC actions and decisions taken “under” the NWPAs. Motion at 6-7. It also concedes that NRC decisions subject to the NWPAs’s judicial review provisions may be challenged within 180 days, even if such decisions may also be covered by the 60-day filing provision governing actions under the Hobbs Act. Motion at 6. (“The NWPAs’s own jurisdictional [review] provision, section 119, displaces the Hobbs Act when the NRC takes a ‘final decision or action’ under authority the NWPAs has given the NRC.”). While the NRC further concedes that Part 63 “establish[es] licensing criterion for disposal of spent nuclear fuel at a proposed geological repository at Yucca Mountain,” Motion at 1,

² As explained by the NRC, although it could have “modifi[ed]” its previous NWPAs regulations, the NRC chose, as a matter of convenience, to instead “propose[] a new, separate part of its regulations, 10 CFR part 63, that would apply only to the proposed repository at Yucca Mountain. The Commission also proposed to leave its existing, generic regulations at Part 60 in place, changed only to state that they do not apply, nor may they be the subject of litigation, in any NRC licensing proceeding for a repository at Yucca Mountain.” 10 C.F.R. part 2; 66 Fed. Reg. at 55,732.

and while it must also concede that the NWPA directs the NRC to issue rules setting forth the technical requirements and criteria that it will apply in approving or disapproving the licensing of a repository at Yucca Mountain, Motion at 3-4, it nonetheless argues that Part 63 was not issued “under” the NWPA because the NWPA did not provide the NRC with technical statutory authority to issue regulations. The NRC’s argument is of course contradicted on its face by the plain fact (reluctantly acknowledged by the NRC in a footnote that it buries on the penultimate page of its Motion, Motion at 9 n.40) that the NRC itself *listed the NWPA* as the authority under which Part 63 was published. It is also contradicted by the plain text of the NWPA, the judicial opinions that have interpreted it, and the legislative intent Congress had in enacting it.

I. Section 119 Of The NWPA Applies To This Case

The NRC’s argument cannot be squared with the plain reading of the NWPA’s judicial review provision. In pertinent part, this statute reads as follows:

Except for review in the Supreme Court of the United States, the United States courts of appeals shall have original and exclusive jurisdiction over any civil action . . . for review of *any* final decision or action of the Secretary, the President, or the Commission *under this part*.

42 U.S.C. § 10139(a)(1) (emphasis added).³

The “part” referred to in section 10139 is “Part A” – located in Title 42, Chapter 108, Subchapter I of Title 42 of the United States Code. That part also contains (1) 42 U.S.C. § 10134, which requires DOE to submit to the NRC, and requires the NRC to consider, an application for a construction authorization for a repository at Yucca Mountain; (2) 42 U.S.C. § 10141(b), which requires the NRC to issue rules governing the requirements that it will apply in

³ For reasons that are not entirely clear, the NRC prefers to reference the uncodified version of the NWPA, which uses the language “under this subtitle.” Motion at 2 n.2. The codified version of the NWPA, however, clearly provides for judicial review of any final action or decision taken “under this part.” 42 U.S.C. § 10139(a)(1)(A) (emphasis added).

licensing the receipt and possession of nuclear fuel at any repository that might be selected under the NWPA; and (3) the statutory note to 42 U.S.C. § 10141(b) – section 801(b) of the Energy Policy Act – which requires the NRC to update its rules on licensing repositories so as to set forth the specific requirements that it will apply in licensing a repository at Yucca Mountain.

Thus, it is clear that Part 63 was promulgated “under” a statute that is within the same “part” of Title 42 as is the judicial review provision, section 10139. Indeed, the Part 63 regulations begin with an itemization of the statutory authorities “under” which Part 63 has been promulgated. This itemization explicitly includes 42 U.S.C. §§ 10134 and 10141. 66 Fed. Reg. at 55,793. In other words, the NRC itself has represented to the public that it has issued Part 63 pursuant to the directives contained in the NWPA, and has, at a literal level, published the Part 63 regulations *under* its explicit reference to sections 114 and 121 of the NWPA. Likewise, Part A is entitled “Repositories for Disposal of High-Level Radioactive Waste and Spent Nuclear Fuel;” Part 63 is entitled “Disposal of High-Level Radioactive Wastes In A Geological Repository At Yucca Mountain, Nevada” – thus, it is as plain as day from their title, as from their substance, that the intent of the regulations was to directly fulfill the purposes of Part A of the NWPA. Finally, the NRC began Part 63 by expressly advertng to the express mandate set forth in the NWPA and the codified note from the Energy Policy Act: in its very first sentence, the NRC states that Part 63 is promulgated “*in accordance with the Nuclear Waste Policy Act of 1982, as amended, and the Energy Policy Act of 1992.*” *Id.* (emphasis added).

If this is not sufficient to demonstrate beyond cavil that Part 63 was promulgated “under” Part A of NWPA, then it is hard to fathom what could be. This Court should take the NRC at its word – that is, at its word as given on the first page of Part 63 and *before* it prepared its motion to dismiss – and should accept that Part 63 was promulgated under the authority, and in order to

satisfy the mandate, set forth in 42 U.S.C. § 10141(b), as modified by the statutory note codified therein.⁴ As such, Part 63 was plainly a final action by the NRC “under” Part A of Subchapter I, Chapter 108 of Title 42, and the NWPA’s judicial review provision therefore applies.

Indeed, if section 119 of the NWPA does not apply to the NRC’s final regulations on how it will license the NWPA’s sole nuclear waste repository, it is hard to see what final actions of the NRC *would* be subject to this explicit provision authorizing judicial review of NRC decisions or actions. Anticipating this point, the NRC argues that if its argument is accepted, section 119 would still apply to certain minor, ministerial functions of the NRC – adopting DOE’s environmental impact statement, and providing extensions of time for its final approval decision. Motion at 6. But it would be a very bizarre result, to say the least, if these “final actions” by the NRC were reviewable under the NWPA, but its final actions fulfilling its two core functions under the NWPA – licensing the selected nuclear waste repository and issuing regulations governing such licensing decisions – were held to fall outside of the NWPA’s clear judicial review provision. There is no support for such a result in either law or logic.

II. The NWPA Granted The NRC Authority To Promulgate Part 63

Unable to dispute the fact that sections 114 and 121 of the NWPA were explicitly in-

⁴ Petitioners were clearly entitled to rely upon the NRC’s explicit invocation of the NWPA as authority for Part 63. In this regard, this case is analogous to *American Civil Liberties Union v. FCC*, 486 F.2d 411 (D.C. Cir. 1973), in which this Court rejected an agency’s argument that a petition for review was untimely under the Hobbs Act because it was filed more than 60 days after the agency’s denial of a petition for rehearing. This Court stressed the fact that the agency chose to include proceedings pertaining to the petitioner’s request for rehearing in the same docket as other rehearing requests, and that the petition for judicial review was filed within 60 days of the denial of the remaining rehearing requests in that docket. *Id.* at 413. This Court held that the petitioner was “justified in relying” upon the agency’s plan to treat all the administrative petitions as part of a single proceeding, notwithstanding the agency’s *post hoc* argument to the Court that the proceedings were in fact “separate and distinct.” *Id.* See also *North American Telecommunications Ass’n v. FCC*, 751 F.2d 207, 209 (7th Cir. 1984) (in rejecting agency motion to dismiss petition for review filed before agency action became final, in case where no subsequent petition was filed within 60 days of final agency action, court noted that its action in accepting transfer of petition from another court “may have lulled [petitioner] into thinking that it had not filed its notice of appeal prematurely.”).

voked by the NRC as authority when it issued Part 63, the NRC attempts to avoid the plain language of the NWPA by seizing upon a hyper-technical interpretation of a phrase contained in section 121(b) — *i.e.*, the phrase stating that the NRC shall promulgate its licensing requirements “pursuant to authority under other provisions of law.” 42 U.S.C. § 10141(b). Based on this phrase, the NRC takes the view that the NWPA did not itself *authorize* the NRC to issue its Part 63 regulations. Motion at 7. The NRC then argues that the judicial review provision set forth in section 119 of the NWPA applies only to “*NWPA-authorized* NRC actions,” and therefore should not apply to Part 63 because while section 121(b) might be “implicated” by that regulation, it did not technically “authorize” it. Motion at 6-7 (emphasis in original).

While it is not entirely clear what the reference to “other provisions of law” means, this phrase simply cannot bear the weight the NRC seeks to place upon it. It appears to Petitioners that this phrase simply incorporates the ordinary rulemaking practices and procedures that the NRC must follow in promulgating a rule. *See, e.g.*, 42 U.S.C. § 2231 (provision of the AEA incorporating, among other things, rulemaking procedures established by Administrative Procedures Act). As such, it has nothing at all to do with the specific subject matter at issue in either section 121(b) of the NWPA or in the Part 63 regulation, and is obviously of no import to this case. But even if the phrase means what the NRC hopes it means – that the NRC must rely upon technical “rulemaking authority” from a statute other than the NWPA even when it is clearly implementing an NWPA directive – it still can have no bearing on whether the Part 63 regulation was issued “under” the NWPA. As explained in Section III, below, there is no support for interpreting the word “under” in this context to mean “having its sole technical authority in,” especially where doing so would contradict the plain meaning of the statute.

In any event, the NRC’s argument is wrong even on its own terms. First, the NWPA

does not merely “authorize” Part 63 – it *requires* it. Section 121(b) says the NRC “*shall*, by rule, promulgate technical requirements.” 42 U.S.C. § 10141(b) (emphasis added). The NRC does not and cannot contest that Part 63 sets forth requirements in order to fulfill the mandate set forth in section 10141(b) – indeed, it concedes that section 10141(b) “*directed* timely issuance of an NRC rule setting out the ‘technical requirements and criteria’ for licensing a repository.” Motion at 7 (emphasis added). The NRC therefore cannot dispute that Part 63 is as a substantive matter *required* by the NWPA. Thus, even assuming that the NRC is right and the judicial review provision set forth in section 119 covers only “NWPA-authorized” actions, it surely must be the case that “NWPA-authorized” actions include all “NWPA-*mandated*” actions, and there should therefore be total agreement that section 119 applies to Part 63.

Moreover, the NRC’s argument is especially perverse because *absent* the NWPA, the NRC would not have had legal authority to regulate DOE’s disposal of nuclear waste. The NRC argues that “[t]he NWPA . . . gave the NRC no rulemaking authority to issue these [Part 63] criteria,” Motion at 2, and that therefore Part 63 must be treated as “a rule issued under” the AEA. Motion at 7. But the AEA by itself does not give the NRC *any* authority to regulate DOE as an operator of a nuclear waste disposal facility. To begin with, when the AEA was enacted, there was no “NRC” or “DOE”; instead, there was only the Atomic Energy Commission (“AEC”), which contained both the nuclear regulatory and the nuclear developmental functions that are now split between the NRC and DOE, respectively. And as of the enactment of the AEA in 1954, Congress was careful to specify that the AEC was not itself subject to any licensing requirements — the AEA’s definition of a “person” subject to licensing regulation in Section 11(s) excludes the AEC itself. 42 U.S.C. § 2014(s). This was to prevent the intrusion of civilian regulatory constraints into the AEC’s vast nuclear weapons production complex, then the centerpiece

of America's Cold War effort. And since AEC activities were generally undertaken by contractors, Congress also specified, in Section 110 of the AEA, that licenses were not to be required by contractors performing work "with and for the account of the Commission." 42 U.S.C. § 2140. This provision has been interpreted to mean that any facility operated under contract for the DOE, as successor to the AEC's function of developing and promoting nuclear power, is also presumptively exempt from NRC regulatory authority. *See generally Waste Control Specialists v. Department of Energy*, 141 F.3d 564, 567 n.16 (5th Cir. 1998). Thus, the original scheme established by the AEA provided *no rulemaking authority* for any rule that, like Part 63, seeks to regulate DOE, a legal successor of the AEC.

The absence of any rulemaking authority allowing NRC to regulate DOE's disposal of nuclear waste can also be demonstrated by examining the history behind the creation of the NRC and DOE. In the Energy Reorganization Act ("ERA") of 1974, Congress broke the AEC up into two distinct agencies – the NRC and the Energy Research and Development Administration ("ERDA"), which three years later became the DOE. In doing so, it recognized that the NRC's licensing authority would *not* ordinarily extend to the nuclear activities of ERDA/DOE. *See generally* S. Rep. No. 93-980, at 30 ("the (NRC) will have no licensing jurisdiction over such ERDA nuclear activities"). *See Natural Res. Def. Council ("NRDC") v. NRC*, 606 F.2d 1261, 1266 (D.C. Cir. 1979). For that reason, Congress specifically carved out of this general exemption from the NRC's regulatory jurisdiction certain itemized functions ERDA/DOE might undertake. These exceptions are spelled out in Section 202 of the ERA, titled "Licensing and related regulatory functions respecting selected Administration facilities." 42 U.S.C. § 5842.⁵ The

⁵ Itemized, for example, are facilities such as ERDA's Liquid Metal Fast Breeder Reactor, certain demonstration reactors, and "[f]acilities used primarily for the receipt and storage of high-level radioactive wastes resulting from activities licensed under [the AEA]." Section 202(3), 42 U.S.C. § 5842(3). (Emphasis added.) Also enumerated are "Retrievable Surface Storage Facilities and other facilities au-

ERA confirms that the enumerated exceptions apply “notwithstanding the exclusions provided for in section 110a or any other provision of the [AEA].” 42 U.S.C. § 5842. Similarly, this Court has found that while section 202 of the ERA “gives NRC licensing and related regulatory authority over certain ERDA [DOE] reactors and waste storage facilities,” it does so “*notwithstanding the general exemption of ERDA [DOE] programs from NRC licensing authority.*” *NRDC*, 606 F.2d at 1266 (emphasis added).⁶

Prior to the NWPA, DOE’s well-established, general exemption from NRC licensing and regulatory authority extended to all nuclear waste *disposal* activities. The section 202 carve-out gave the NRC limited licensing and regulatory authorities over “[f]acilities used primarily for the *receipt and storage* of high-level radioactive wastes resulting from activities licensed under [the AEA].” 42 U.S.C. § 5842(3) (emphasis added). This provision does not give NRC authority to license and regulate a DOE nuclear waste *disposal* facility. *See Natural Res. Def. Council*, 5 N.R.C. 550 (March 31, 1977) (“Since ERDA [waste] facilities generally are exempt from the licensing requirements of the Atomic Energy Act, 42 U.S.C. § 2140, licensing ... is required only if they come within the scope of Section 202(4) of the Energy Reorganization Act”).⁷ *Compare*, 42 U.S.C. § 10101(9) (definition of “disposal”) with *id.* § 10101(25) (definition of storage); *see*

thorized for the express purpose of subsequent long-term storage of high-level radioactive waste generated by the Administration.” Section 202(4), 42 U.S.C. § 5842(4).

⁶ In that case, ironically, NRC took the opposite position of its position here, arguing that the AEA specifically exempts ERDA (DOE) waste facilities and activities from NRC licensing. *See Natural Res. Def. Council v. NRC*, 451 F. Supp. 1245, 1251 n.4 (D.D.C. 1978).

⁷ It is for this reason that NRC has had no authority, ever, over numerous, huge and highly controversial DOE radioactive waste disposal sites at federal weapons complex sites like Fernald, Ohio, the Savannah River Site in South Carolina, the Hanford facility in eastern Washington, the Pantex facility in Texas, Los Alamos National Laboratory in New Mexico, the Nevada Test Site, the Idaho National Engineering Laboratory, and others. If the position now suggested by NRC were correct – that NRC possessed the legal authority to license and regulate DOE radioactive waste disposal activities prior to or outside of the NWPA – it would mean these immense DOE disposal facilities have been operated illegally for decades.

also 42 U.S.C. § 7133(a)(8)(c) (treating storage and disposal as separate activities).

Thus, it was not until passage of the NWPA that NRC acquired the authority to license and regulate DOE nuclear waste *disposal* activities.⁸ The NWPA quite clearly was designed to accomplish the following goals: (1) to provide for the location and construction of permanent nuclear waste *disposal* repositories; (2) to provide that DOE would be the sole operator of those repositories; and (3) to provide that NRC would regulate the licensing of those repositories. In light of this self-evident statutory purpose, it is clear that Congress intended to give the NRC authority to license and regulate DOE's *disposal* of nuclear waste in a way that had never previously been authorized.⁹ Thus, section 114 of the NWPA, which the NRC specifically invoked in issuing Part 63, explicitly provides that the Secretary of the DOE must "submit to the Commission an application for a construction authorization for a repository." 42 U.S.C. § 10134(b). And section 121, which the NRC also specifically invoked in issuing Part 63, provides that the NRC must publish rules setting forth how it will regulate the licensing of such repositories — *i.e.*, how it will regulate and license *DOE*. 42 U.S.C. § 10142(b).¹⁰ Accordingly, it is the NWPA

⁸ Consistent with this statutory construction, NRC's regulations repeatedly define a "person" regulated to exclude DOE. *See, for example*, 10 C.F.R. §§ 70.4, 30.4, 40.4, 50.2, 72.3 and, of special significance, 10 C.F.R. § 2.4, applicable to NRC's rules of practice and general rulemaking procedures. *See also* 10 C.F.R. § 2.800 (participation by "persons" in rulemaking). These and other definitional provisions exempt DOE from licensing unless licensing is specifically required by the ERA or, in the case of Part 72 (dealing with spent fuel storage), by the NWPA.

⁹ In its *Federal Register* notice accompanying its final rule, the NRC recognized as much. *See, e.g.*, 66 Fed. Reg. at 55,776 ("The NWPA and the [Energy Policy Act] establish the framework for licensing a potential geologic repository at Yucca Mountain. This legislation gives the NRC the responsibility for making a licensing decision on such a potential repository."); *id.* at 55,793 (10 C.F.R. § 63.1).

¹⁰ The NWPA's plain intention to provide the NRC for the first time with regulatory and licensing authority over DOE's disposal of nuclear waste is also evidenced in section 8 of the NWPA. That provision states that if the President concludes that all military nuclear waste should be disposed of at a separate location from all civilian nuclear waste, then DOE may dispose of such waste, but must do so subject to NRC licensing and regulatory approval. 42 U.S.C. § 10107(b)(3). This provision, which explicitly makes section 202 of the ERA apply to DOE disposal activities at such a separate waste site, would have been wholly unnecessary if section 202 had previously authorized NRC regulation of DOE disposal activities.

that specifically provides the NRC with authority to issue rules that, like Part 63, specifically regulate the manner in which DOE will be licensed for waste disposal activities.¹¹

III. Section 119 Cannot Be Limited To Those Actions That Are Technically Authorized Solely By Provisions In Part A of the NWPA

In any event, there is also no authority for the NRC's exceptionally narrow construction of the NWPA's judicial review provision. The plain text of section 119 authorizes judicial review of actions taken "under" the NWPA, yet the NRC seeks to replace the word "under" with the phrase "having its sole technical authority in." Thus, the NRC argues that section 119 does not apply if the NWPA clearly contemplates or requires certain action by the NRC, but somehow fails to provide the sole technical, statutory authority for taking that action. The NRC wants this Court to ignore the fact that Part 63 was promulgated to fulfill a directive set forth in the NWPA, and sets forth guidelines that would be wholly irrelevant and meaningless were it not for the NWPA's express designation of Yucca Mountain as the presumptive nuclear waste repository. Instead, the NRC wants the Court to focus on where it is in the U.S. Code that the NRC is given the general right to issue regulations in the first place – or, it might be said, to even *exist* in the first place – and urges the Court to characterize Part 63 as having been issued "under" *that* statute (the AEA), which has nothing to do with Yucca Mountain or with the selection of a repository, rather than under the NWPA, whose mandate Part 63 obviously was created to fulfill.

The NRC's argument is untenable on its face. Congress used plain language to give this

¹¹ Further undermining the NRC's current contention that its Part 63 rules were issued not "under" the NWPA but rather solely "under" the authority of the AEA — and, in particular, section 161(b) of the AEA, 42 U.S.C. § 2201(b), *see* Motion at 7 & n.32 — is the fact that Part 63 itself specifies that, at least for purposes of the AEA's criminal penalty provisions, more than 60 of Part 63's 79 sections were "not issued under sections 161b, 161i, or 161o" of the AEA. 66 Fed. Reg. at 55,812 (quoting 10 C.F.R. § 63.172(b)) (emphasis added). Thus, the NRC has itself made clear that more than 75% of Part 63's provisions — including virtually all of its provisions governing license applications and all of its provisions establishing technical criteria for Yucca Mountain — were *not* issued "under" the AEA provision that it now claims was the sole (or at least primary) basis for the regulation at issue in this action.

Court jurisdiction — and to give petitioners 180 days to file their suit — whenever the challenge being brought addressed an action taken “under” the NWPA, and there is simply no plausible way to maintain that regulations that directly implement the NWPA were intended to be carved out of this regime. Thus, while it is clear in the first instance that Part 63 was both *required* and *authorized* by the NWPA, this Court should reject the NRC’s strained argument that the word “under” in section 10139 should be read to mean “having its sole technical authority in.”¹²

Moreover, in addition to being untenable on its face, the NRC’s argument is contradicted by the case law interpreting section 10139. First, the only case the NRC cites to support its notion that “under” should be read to mean “having its sole technical authority in” is *Natural Resources Defense Council v. Abraham*, 244 F.3d 742 (9th Cir. 2001). But far from supporting the NRC’s argument, this decision actually demonstrates just how wrongheaded that argument truly is. *Abraham* addressed a DOE Order that was issued pursuant to authority outside the NWPA. *Id.* at 744. But in rejecting the petitioners’ argument that the DOE’s authority to issue the Order came at least in part from the NWPA, the Court did not rely solely upon whether the DOE had *technical authority* to issue the Order from a source other than the NWPA (which it clearly did), but instead took the trouble to inquire into the *purposes* of the NWPA, specifically those purposes set forth in “Part A” of the NWPA. *Id.* Rather than simply relying upon the fact that the DOE Order was technically authorized by a statute other than the NWPA, the Court analyzed whether the order spoke to any of the NWPA *purposes*, ultimately finding that it “is not a decision about the siting of a repository, establishing federal responsibility for disposal of civilian radioactive waste, defining the relationship between the federal government and state govern-

¹² To be sure, whatever construction is given to the word “under” in section 119, there can be no doubt that Part 63 was promulgated “under” section 121(b) of the NWPA. Indeed, on its face, in section 121(c), the NWPA refers to the regulations that will establish NRC licensing criteria for NWPA repositories as requirements and criteria promulgated “under” section 121(b)(1). 42 U.S.C. § 10141(c).

ments with respect to disposal of such waste and spent fuel, or establishing a Nuclear Waste Fund under Part A of Subchapter I of NWPA.” *Id.* at 745. In addition, the court found that since the DOE Order dealt with facilities that “predate the NWPA,” and that “are not repositories,” it was not “a decision under NWPA that is subject to judicial review within this court’s original jurisdiction.” *Id.* at 743.

Thus, the *Abraham* court concluded that the DOE Order was not “contemplated by NWPA,” *id.* at 747 (emphasis added), and that “DOE’s conduct is not required by virtue of any section of NWPA linked to Part A.” *Id.* (emphasis added). Obviously, if the *Abraham* decision agreed that the word “under” in section 10139 should be read to mean “having its sole technical authority in,” it would have been very differently reasoned, and would not have bothered investigating into the “purposes” of the NWPA and the DOE Order being challenged in that case. The Ninth Circuit’s actual reasoning therefore does not support the NRC’s strained argument in this case, but instead directly undercuts it.

Equally fatal to the NRC’s position in this case is the fact that the only other cases to address the question of how to interpret the judicial review provision in section 119 strongly support giving it a broad construction, rather than the narrow and technically crippled interpretation urged by the NRC. Both the Sixth Circuit and the D.C. Circuit have held that the NWPA’s judicial review provisions set forth in section 119 may apply even to final actions or decisions that were indisputably taken pursuant to provisions located *outside* of Part A of the NWPA. *See generally Tennessee v. Herrington*, 806 F.2d 642 (6th Cir. 1986); *General Elec. Uranium Mgmt. Corp. v. United States*, 764 F.2d 896 (D.C. Cir. 1985); *see also Wisconsin Elec. Power Co. v. Hodel*, 626 F. Supp. 424 (D.D.C. 1984), *aff’d*, 778 F.2d 1 (D.C. Cir. 1985). In those cases, petitioners challenged actions taken by DOE that were, as a formal and technical matter, *not author-*

ized by any provision in “Part A” of NWPA. Nevertheless, both courts concluded that the actions that were being challenged were so closely related to the core purposes of the NWPA that Congress must have intended for them to be covered by the NWPA’s judicial review provision, notwithstanding the technical problem that section 119, as codified at 42 U.S.C. § 10139, was limited on its face to actions taken “under this part.”

Thus, in order to construe section 119 broadly, both courts chose to reject technical arguments that were based on the plain text of section 119 and that were enormously more compelling than the strained argument being advanced by the NRC in this case.¹³ This Court also noted that section 119 may suffer from a “lack of clarity,” *General Elec.*, 764 F.2d at 901, but nonetheless held that it would be “inconceivable” and “incongruous” for it to govern judicial review for actions taken to fulfill most of the core functions of the NWPA, while not also extending to cover actions or decisions that obviously also implement those core purposes. *Id.* at 901-02. Specifically, using language that removes any doubt that the authorization and licensing of a nuclear waste repository was one of the core purposes of the NWPA, this Court stated that “[w]e find it inconceivable that Congress intended to have review of *all actions concerning waste disposal* in the court of appeals — *including* the choice, characterization, approval of, and *authorization for construction of candidate sites* — except for questions concerning the composition of the Nuclear Waste Fund.” *Id.* at 901-02. Accordingly, this Court held that the imposition of a one-time fee under a statute *outside* of Part A of the NWPA could “incorporate by reference the functional responsibilities of the Secretary under Part A of Subchapter I,” because the

¹³ Since (as NRC itself acknowledges, Motion at 9 n.40), Part 63 directly implements the directive in section 121(b), it is obviously far less attenuated from Part A of NWPA than was the fee that was imposed in *General Electric* pursuant to a provision located outside of Part A, or the development of Monitored Retrievable Storage facilities that was challenged in *Tennessee v. Herrington*, an action which was also taken under a provision located outside of Part A.

fee was related to the Nuclear Waste Fund, which itself was established pursuant to provisions inside of Part A of NWPA. *Id.* at 902.

In its Motion, the NRC does not mention the Sixth Circuit's decision in *Tennessee v. Herrington*, and seeks to distinguish *General Electric* in an abrupt footnote that simply points out the difference between applying section 119 to a different "part" of the NWPA and applying it to "an entirely different statute." Motion at 6 n.24. This distinction carries no force whatsoever. First, if the NRC's main argument is correct, then section 119 applies *only* to actions that "have their sole technical authority in" a provision located in Part A of the NWPA; under that interpretation, *General Electric*, *Tennessee v. Herrington*, and *Wisconsin Electric Power* were all decided incorrectly, since none of the actions challenged in those cases were technically authorized solely by provisions in Part A of the NWPA.¹⁴ Second, even if Part 63 was technically issued pursuant to authority set forth in the AEA, that does not mean that it no longer fulfills a core purpose of NWPA as set forth in sections 114 and 121. Indeed, since Part 63 indisputably is intended to satisfy the purpose iterated in those sections, Part A of the NWPA should be "incorporate[d] by reference," just as it was in *General Electric*.

Finally, the NRC also cites to a First Circuit case, *Natural Resource Defense Council v. EPA*, 824 F.2d 1258 (1st Cir. 1987), that it claims should govern judicial review of Part 63. Motion at 8. The NRC's description of this decision is grossly misleading. First, the case involved a final decision made by the EPA, and the parties in the case did not raise, nor did the court even mention, the issue of how to interpret section 119 of the NWPA. The reason this issue did not come up is very simple: section 119 does not list the EPA as an agency whose decisions or ac-

¹⁴ It is ironic that the NRC – in collaboration with the United States – is essentially arguing that those three decisions were decided incorrectly since it was *the Government's* argument in those cases for a *non-technical, broad* construction of section 119 that prevailed.

tions were subject to judicial review. It lists only the Secretary of Energy, the President, and the NRC. 42 U.S.C. § 10139(a)(1). Thus, it was impossible as matter of law for the issue of how to interpret section 119 even to be raised in *NRDC v. EPA*. Moreover, the parties in *NRDC v. EPA* did not raise any other issue that could conceivably have related to judicial review under the NWPA or to the interpretation of section 121 or to anything else that has any relevance to this case; the court simply dropped a footnote to explain that it had jurisdiction under the Hobbs Act, an entirely unremarkable conclusion given that no other jurisdictional provision could even arguably have applied. In short, *NRDC v. EPA* has no relevance here.¹⁵

The case law therefore provides zero authority for the NRC's unnatural reading of section 119, and affirmatively demonstrates that the NWPA's judicial review provision should be applied broadly and fairly to all NRC actions that can fairly be characterized as implementing NWPA's directives.

CONCLUSION

For the forgoing reasons, the NRC's motion should be denied.¹⁶

¹⁵ The fact that section 119 does not list the EPA as an agency whose decisions are subject to judicial review also explains why Nevada's pending petition challenging the EPA's Yucca Mountain rule invokes the AEA and the Hobbs Act as a basis for jurisdiction. In that case, it is irrelevant that the EPA rule was *also* issued under the NWPA because Section 119 simply does not, on its face, apply to EPA final actions. By contrast, in this case it is irrelevant whether the NRC rule may *also* have been issued under the AEA because the parties agree that "[t]he 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." Motion at 6 (emphasis added). Thus, there is no merit to the argument advanced by the Nuclear Energy Institute, Inc. ("NEI") that because Nevada invoked the AEA when it challenged the EPA rule, so too should it have invoked the AEA here. Response of Movant for Leave to Intervene NEI to "Federal Respondents' Motion to Dismiss for Lack of Jurisdiction" at 2. Indeed, this argument is also wrong in its premises, since the EPA stands in a very different posture from the NRC in another respect as well. Long before the creation of the NRC and the enactment of the NWPA, the AEC's radiation standard-setting functions under the AEA were transferred to the EPA. *NRDC*, 824 F.2d at 1263; *Quivera Mining Co. v. EPA*, 728 F.2d 477, 478-79 (10th Cir. 1984). Thus, unlike the NRC, which derived no licensing authority over DOE's disposal of high-level waste until enactment of the NWPA, EPA had authority to set radiation standards from the moment of its creation.

¹⁶ Absent denying the NRC's motion, at a minimum this Court should, as it has in other pending challenges to rules issued by the EPA and DOE, refer resolution of the motion to the merits panel to

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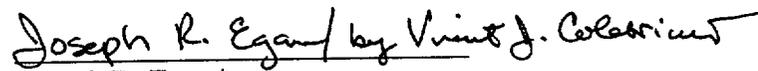
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whom this case will eventually be assigned. See Order at 1, *Nevada v. DOE*, No. 01-1516 (D.C. Cir. March 12, 2002); Order at 1, *NEI v. EPA*, No. 01-1258 (D.C. Cir. March 12, 2002).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served this
13th day of June, 2002 by facsimile and by first class mail, postage prepaid on:

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