
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 04-1145 and 04-1359 (Consolidated)

CITIZENS AWARENESS NETWORK, et al.,
Petitioners,

v.

U.S. NUCLEAR REGULATORY COMMISSION
and the UNITED STATES OF AMERICA,

Respondents,

ON PETITION TO REVIEW AN ORDER OF THE
U.S. NUCLEAR REGULATORY COMMISSION

BRIEF FOR THE FEDERAL RESPONDENTS

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July 14, 2004

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JURISDICTIONAL STATEMENT

This case involves the Nuclear Regulatory Commission's *Final Rule: Changes to Adjudicatory Process*, 69 FR 2183 (2004). Various parties filed timely petitions for review, and motions to intervene, both in this Court and in the District of Columbia Circuit. Pursuant to 28 U.S.C. 2112 the cases ended up in this Court, where they were consolidated. Under the Hobbs Act, this Court has jurisdiction to review timely-filed challenges to NRC final rules. *See* 28 U.S.C. 2342.

ISSUES PRESENTED

1. Whether the NRC reasonably construed its own enabling legislation -- which establishes a right to an agency "hearing" but does not specify the type of hearing -- to give the agency discretion to establish hearing procedures that allow a presiding officer to choose, subject to specified criteria, procedures appropriate to the case and issues presented.

2. Whether, assuming *arguendo* that the NRC's hearings must comply with the Administrative Procedure Act's (APA's) requirements for "on-the-record" hearings, the NRC's new hearing procedures that provide for judicial questioning of witnesses supplemented by party cross-examination if "necessary" for "development of an adequate record," and mandatory disclosure in lieu of traditional discovery, meet the APA's requirements.

3. Whether the NRC acted reasonably when it reformed its hearing procedure to avoid delay and expense.

4. Whether the NRC's new hearing procedures satisfy constitutional due process and equal protection requirements.

STATEMENT OF THE CASE

A. Nature of the Case

The NRC rule under challenge here -- codified at 10 C.F.R. Part 2 -- is the most recent manifestation of a fifty-year project, carried out by both the Commission and Congress, of tailoring the NRC's process for administrative hearings to the different kinds of questions presented in NRC adjudications. The Commission's predecessor agency, the Atomic Energy Commission (AEC), at one time thought section 189a of the Atomic Energy Act (AEA), 42 U.S.C. 2239(a), required trial-type "on-the-record" hearings as provided in the APA (5 U.S.C. 554, 556, 557). Indeed, the AEC's original rules not only met APA "on-the-record" requirements but also contained features that one might find in federal court civil litigation -- for example, full discovery (interrogatories, depositions, etc.) and nearly unfettered cross-examination of witnesses.

Gradually, both the Commission and the Congress perceived problems in this highly formalized approach -- it led to protracted, costly proceedings -- and

moved toward reform. Congress enacted a series of laws encouraging greater informality in NRC hearings. And, following a series of judicial decisions in the 1970s, the NRC revisited AEA section 189a, which requires simply “hearings,” not “on-the-record” hearings, and decided that the agency had sufficient flexibility to establish less formal processes. Beginning in 1982 the NRC took a series of steps introducing more informality in a few specified areas.

The new Part 2 applies a more informal hearing process across a wide range of matters. While retaining full-scale administrative “trials” for some cases, the new Part 2 generally replaces traditional discovery tools with mandatory disclosure obligations, limits cross-examination of witnesses, and gives administrative judges, rather than parties, chief responsibility for developing an adequate record for decision. In the preamble to the new Part 2, the NRC explained that the APA’s “on-the-record” requirements do not apply to NRC hearings. But the agency also explained that the new rule actually meets those requirements. 69 FR 2192.

In this Court, petitioners (and supporting intervenors and *amici curiae*) chiefly argue that the NRC has misconstrued section 189a, which (they say) does in fact require APA “on-the-record” hearings. Petitioners, however, mount no explicit challenge to the NRC’s position that its new rule actually meets APA

“on-the-record” requirements. Petitioners do offer desultory arguments that the NRC’s reform effort is unreasonable and unconstitutional. We outline below a quite different view of the NRC’s new rule.

B. The Development of NRC Hearing Procedures Since 1954

The role of hearings in NRC regulation. The NRC was created by the Energy Reorganization Act (ERA) of 1974, Pub. L. 93-438 (88 Stat. 1233), to be the successor to the AEC’s regulatory arm, and to regulate civilian uses of nuclear power and radioactive material, specifically to protect public health and safety and the common defense and security. *See* Atomic Energy Act of 1954 (AEA), § 161b, 42 U.S.C. 2201(b). The NRC sets standards and reviews applications for licenses. The core of the agency is a technical staff that reviews license applications and enforces licensees’ compliance with the standards. The staff is authorized by statute to issue licenses. 42 U.S.C. 5843(b), 5844(b). By law, therefore, licensing is first and foremost a proceeding involving an applicant and the agency staff.

Section 189a and the APA. Section 189a of the AEA entitles interested parties to a “hearing” in ongoing proceedings “for the granting, suspending, revoking, or amending” of licenses, for the “transfer” of control, and “for the issuance or modification of rules and regulations.” 42 U.S.C. 2239(a). The

NRC's Atomic Safety and Licensing Board Panel (ASLBP) conducts adjudicatory hearings, and the Commission itself sits as an appellate body to review ASLBP decisions.

Under section 554 of the APA, hearings "required by statute to be determined on the record after opportunity for an agency hearing" are governed by sections 554, 556, and 557 of the APA. *See* 5 U.S.C. 554(a). Those provisions, in turn, establish a process for "on-the-record" hearings, including witness testimony, cross-examination and independent presiding officers. Section 189a of the AEA, however, does not state that NRC hearings are to be "on the record." It "nowhere describes the content of a hearing or prescribes the manner in which this 'hearing' is to be run." *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 53 (D.C. Cir 1990).

The AEC's early position. Despite the absence of specific language in the AEA, AEC representatives initially took the position that section 189a required on-the-record hearings in licensing proceedings. *AEC Regulatory Problems: Hearings before the Subcommittee on Legislation, Joint Committee on Atomic Energy*, 87th Cong., 2d Sess. (1962) 60 (Letter of AEC Commissioner Loren K. Olsen). The AEC in fact conducted hearings even more formal than the APA required. AEC hearings typically permitted oral and written evidence and

routine cross-examination, as well as full discovery. The rules governing these proceedings were set forth in 10 C.F.R. Part 2, Subpart G (1962).

Rulemaking 'hearings'. The AEC also took the position that section 189a did *not* require on-the-record hearings in *rulemaking*, even though section 189a's "hearing" clause applies to rulemaking as well as licensing. The AEC's position on the required degree of formality in rulemaking was affirmed in *Siegel v. AEC*, 400 F.2d 778, 785-86 (D.C. Cir. 1968).

Mandatory hearing requirement eliminated. In 1962, Congress eliminated a requirement it had added in 1957 for mandatory hearings on applications for reactor operating licenses. Pub. L. 87-615 (76 Stat. 409), sec. 2. This law prompted a debate on whether section 189a required formal APA trial-type hearings. The AEC itself argued for formality; administrative law experts, including Professor Kenneth Davis, argued against. *See Radiation Safety and Regulation: Hearings before Joint Comm. on Atomic Energy*, 87th Cong., 1st Sess., 376, 386 (1981).

Technically trained judges. In the same 1962 legislation, Congress added to the AEA a new Section 191, which authorized the use of three-member Licensing Boards in which two of the members would "have such technical or other qualifications as the Commission deems appropriate to the issues to be

decided.” Pub. L. 87-615 (76 Stat. 409), sec. 1. This helped tailor hearings to the technical and scientific issues that arose in AEC hearings.

Exports. In 1978, Congress enacted the Nuclear Non-Proliferation Act (NNPA), which required, among other things, that the NRC establish procedures for “such public hearings [on nuclear export licenses] as the Commission deems appropriate.” NNPA section 304(b), 42 U.S.C. 2155a(b). The statute added: “[N]otwithstanding section 189a. of the 1954 Act, [the Commission’s procedures] shall not require the Commission to grant any person an on-the-record hearing in such a proceeding.” 42 U.S.C. 2155a(c). The Commission implemented this legislation in 10 C.F.R. Part 110.

Expansion of spent fuel storage. In 1982, in section 134 of the Nuclear Waste Policy Act, 42 U.S.C. 10154, Congress specified a set of “hybrid” procedures for hearings on applications to expand spent fuel storage capacity at reactor sites. These procedures authorized limited discovery, required parties to submit summaries of facts and arguments on which they proposed to rely at the hearing, limited issues that could be considered in such hearings, and limited judicial review of any “failure by the Commission to use a particular procedure.” The Commission promulgated 10 C.F.R. Part 2, Subpart K, to implement this legislation.

Hearings in materials licensing. During the 1970s the Supreme Court held that where Congress provides for “a hearing” in a rulemaking and does not specify that the hearing is to be “on-the-record,” a less formal hearing is sufficient, unless a definite congressional intention to the contrary is expressed in the statute’s legislative history. *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972).

Following this decision, the Commission again looked at the text and legislative history of the AEA and concluded that section 189a did not require “on-the-record” hearings. *See Kerr-McGee Corp.*, 15 NRC 232 (1982), JA25.

In *Kerr-McGee*, the Commission had conducted an informal hearing, using written submissions only, on an amendment to a “materials” license.¹ In explaining its approach, the Commission observed that the AEA did not specifically require on-the-record hearings, and it called the Act’s legislative history “unilluminating” as to what kind of hearing must be held under section 189a. *Id.* at 247, JA26.

In *City of West Chicago v. NRC*, 701 F.2d 632 (7th Cir. 1983), the Seventh Circuit upheld the Commission’s decision not to require formal hearings

¹A “materials” license permits the possession and use of regulated radioactive materials.

in “materials” cases. The court left open the question of nuclear power reactor licensing. *Id.* at 643. A few years later, the NRC issued 10 C.F.R. Part 2 Subpart L, which provided for informal “paper” hearings on all materials license applications and amendments. 54 FR 8276 (1989). This earlier version of Subpart L -- the one presently before this Court is different -- provided an opportunity for an oral hearing only in rare instances. It allowed no cross-examination and no discovery. *See* 10 C.F.R. 2.1235, 2.1231 (1989).

Design certification. In 1989, the NRC issued rules that allowed for the consideration of a specific reactor design in a rulemaking, rather than an adjudication. *See* 10 C.F.R. Part 52, 54 FR 15386 (1989). The NRC was aiming to foster standardization of nuclear power plant designs, as well as the early resolution of key safety issues. The new Part 52 provided, in pertinent part, that standard designs could be approved by rulemaking, before construction, with an opportunity for an informal hearing conducted by an NRC Licensing Board. This hearing was to be a “paper” hearing, unless the Commission gave the Licensing Board authority to conduct an oral hearing. 10 C.F.R. 52.51 (1990).

Part 52 was challenged in court, in part on the ground that it accomplished by rulemaking much that had been done theretofore only in licensing hearings. The new Part 52 was affirmed by the D.C. Circuit sitting *en banc*, in *Nuclear*

Information and Resource Service v. NRC, 969 F.2d 1169 (D.C. Cir. 1992). In *NIRS* the NRC argued that section 189a's hearing requirement for nuclear power plant licensing did not require APA-type "on-the-record" hearings, but the court reserved judgment on this argument. *Id.* at 1180.

Hearings after construction of a standard design. In 1992, Congress amended the AEA to codify some of the chief features of Part 52. Pub. L. 102-486 (106 Stat. 2776) (1992). The amendment provided, among other things, that "[t]he Commission, in its discretion, shall determine appropriate hearing procedures, whether informal or formal adjudicatory," for any hearing on whether a plant constructed using a standard design meets the criteria set forth in the license that permits the construction. *Id.*, codified at 42 U.S.C. 2239(a)(1)(B)(iv).

Uranium enrichment facility licensing. Earlier, in 1990, Congress added to the AEA a new section 193, 42 U.S.C. 2243, providing that, for the licensing of a uranium enrichment facility, the NRC "shall conduct a single adjudicatory hearing." The new section 193 expressly required that this single hearing be "on the record." This is the AEA's only explicit requirement for "on-the-record" hearings.

Equal Access to Justice rules. In 1994 the NRC issued rules implementing the Equal Access to Justice Act (EAJA), 5 U.S.C. 504. *See* 10 C.F.R. 12.101 *et seq.* EAJA authorizes the recovery of attorneys' fees by certain "prevailing" parties in "adversary adjudications," -- defined generally as APA-type "on-the-record" formal adjudications. *See* 10 C.F.R. 12.101. The NRC decided against authorizing payment of attorneys' fees in agency adjudications under section 189a. The NRC pointed out that it previously had "gone on record that it interprets section 189a ... as not requiring formal hearings." 59 FR 23119, 23120 (1994).

Reactor license transfer. Most recently, in 1998, the NRC promulgated Subpart M to Part 2 -- hearing rules covering transfers of licenses, including those for power reactors. Subpart M provided some, but not all, the features of "on-the-record" adjudications. For example, it did not provide for cross-examination. *See* 10 C.F.R. 2.1323(e). The Commission again cited its "position ... that section 189 does not require formal [APA] hearings." *See* 63 FR 66721, 66722 (1998).

C. The Revised Part 2

The NRC's new Part 2² grew out of an effort in late 1998 by the agency's Office of the General Counsel (OGC) to re-examine the NRC's adjudicatory practices and to review the APA and the varied adjudicatory practices of other agencies and the federal courts, with a view to developing options for improving the NRC's hearing processes. JA1. OGC's effort was prompted by the Commission's long-standing and continuing priority of improving the efficiency and effectiveness of all its processes, not just hearings. Congress, too, had expressed an interest in hearing reform.³

OGC concluded that, except for hearings associated with the licensing of uranium enrichment facilities, the AEA did not mandate the use of "on-the-record" hearings within the meaning of the APA, and that the Commission enjoyed substantial latitude in devising hearing processes that would accommodate the rights of participants. JA1-10. In response to OGC's conclusions, the Commission directed OGC to develop a proposed rule. JA117.

²The Federal Register notice containing the new Part 2 appears in the Addenda of the petitioners' briefs.

³*See, e.g.*, H.R. Rep. No. 105-581, 105th Cong., 2d Sess., 135 (1998). In addition, the Commission had issued a Policy Statement urging its licensing boards to use available tools to act expeditiously. *See* 63 FR 41872 (1998).

In 1999, before drafting a proposal, OGC conducted public meetings with representatives of the industry, citizen groups, another Federal agency, academia, and the ASLBP. The discussions encompassed a full range of issues: standing, admission of contentions, discovery, cross-examination, summary disposition, hearing schedules and time limits, the role of the presiding officer, and the number of different hearing “tracks” that might be appropriate. JA121-378.

A proposed rule was issued on April 16, 2001. JA613. The notice of rulemaking asked a series of questions designed to elicit full public discussion of the issues, including, for example, the usefulness of cross-examination. JA622-24. The Commission received 1431 comments. Of these, only 22 were substantive, 15 of which opposed the revisions. Included in the 22 were all the comments submitted by the parties to this litigation. 69 FR 2190. After lengthy deliberations and responding to all significant comments, the Commission issued a revised final rule on January 14, 2004.

The preamble to the final rule explained the Commission’s commitment to improve the hearing process by making it more efficient:

Commission experience suggested that in most instances, the use of the full panoply of formal, trial-like adjudicatory procedures in subpart G is not essential to the development of an adequate hearing record; yet all

too frequently their use resulted in protracted, costly proceedings. The Commission adopted more informal procedures with the goals of reducing the burden of litigation costs, and enhancing the role of the presiding officer as a technical fact finder by giving him or her the primary responsibility for controlling the development of the hearing record beyond the initial submissions of the parties. Given the Commission's experience, and with the potential in the next few years for new proceedings to consider applications for new facilities, to renew reactor operating licenses, to reflect restructuring in the electric utility industry, and to license waste storage facilities, the Commission concluded it needs to reassess its hearing processes to identify improvements that will result in a better use of all participants' limited resources.

69 FR 2182. The new rule retained formal, trial-type hearings (10 C.F.R. Part 2 Subpart G) for some types of proceedings, but provided a less formal process (10 C.F.R. Part 2, Subpart L) for most proceedings.

The preamble to the new rule reiterated at some length the Commission's interpretation of section 189a of the AEA as not requiring APA-type "on-the-record" hearings. *See* 69 FR 2183-2186. The preamble also pointed out, however, that the new Part 2 "meets," or in the case of discovery, goes "well beyond," APA requirements. *Id.* at 2189, 2192. Turning to cross-examination, the preamble explained that "neither due process principles nor the APA require" it, and that in any case the new rule allows it, consistent with the APA, "to the extent necessary for a full and true disclosure of the facts." *Id.* at 2196, *citing* 5 U.S.C. 556(d).

The new Part 2 is more judge-centered than its predecessor in two important respects. First the presiding officer decides what level of formality -- or hearing "track" -- is appropriate. *See* 10 C.F.R. 2.310. Second, the presiding officer, more than the advocates, is ultimately responsible for the record, in a way more nearly corresponding to civil law proceedings than the adversarial proceedings of the common law. *See, e.g.,* 69 FR 2196.

The central part of the revised Part 2 is the new Subpart C, 10 C.F.R. 2.300 *et seq.* It contains the criteria governing the presiding officer's determination of the appropriate level of formality, or "hearing track," as well as procedural rules that apply generally to all tracks. Section 2.336 contains lengthy and detailed requirements for discovery. They mirror the requirements for mandatory disclosure in Federal Rules of Civil Procedure (FRCP) 26(a)(1)-(4). Subpart C also provides for possible use of more traditional discovery where mandatory disclosure fails. 10 C.F.R. 2.336(e).

The final rule retains the highly formal Subpart G -- with rights to full discovery and cross-examination, for example -- for use in, among other proceedings, reactor licensing cases where the presiding officer finds that "resolution of the contention or contested matter necessitates resolution of issues of material fact relating to the occurrence of a past activity, where the credibility

of an eyewitness may reasonably be expected to be at issue, and/or issues of motive or intent of the party or eyewitness material to the resolution of the contested matter.” 10 C.F.R. 2.310(d). Subpart G also applies to enforcement matters, unless all parties agree to a lesser degree of formality. 10 C.F.R. 2.310(b). Finally, Subpart G will be used in the licensing of uranium enrichment facilities and the national high-level waste disposal facility proposed for Yucca Mountain, Nevada. 10 C.F.R. 2.310(f).

In most other kinds of proceedings, a revised Subpart L, 10 C.F.R. 2.1200 *et seq.*, is the default track. 10 C.F.R. 2.310(a). It is more formal than the 1989 version of Subpart L. Subpart L now provides for an oral hearing unless all the parties agree otherwise. 10 C.F.R. 2.1206. Subpart L now also provides that the presiding officer may question witnesses using that officer’s own questions or questions proposed by the parties, 10 C.F.R. 2.1207(a)(3), and for cross-examination where “the presiding officer determines that cross-examination by the parties is necessary to ensure the development of an adequate record for decision.” 10 C.F.R. 2.1204(b).

SUMMARY OF ARGUMENT

The NRC's new Part 2, which gives presiding officers the flexibility to select hearing procedures appropriate to the circumstances, subject to specified criteria, reasonably interprets section 189 of the AEA. As the Commission has said consistently for more than 20 years, the key first sentence of section 189a provides for NRC "hearings," but does not require "on-the-record" hearings, which would bring into play the requirements for formal adjudications under the APA. *See* 42 U.S.C. 2239(a)(1); 5 U.S.C. 554(a). Section 189a applies the same "hearing" requirement to all kinds of proceedings -- reactor proceedings as well as proceedings such as rulemaking that have long been less formal than APA "on-the-record" hearings -- but does not require that different kinds of hearings employ different levels of formality.

Neither does the legislative history of section 189a show that Congress intended reactor hearings to be "on the record." The Commission has several times examined this history and found it not helpful, and a reviewing court has agreed. *See City of West Chicago v. NRC*, 701 F.2d at 642. Indeed, if the history supports any position, it tends to support the Commission's.

The courts have consistently affirmed the agency's moves toward less formality in several kinds of proceedings, including rulemaking, materials

licensing, and certification of standard reactor designs. Petitioners argue that this Court should follow a 26-year-old decision, *Seacoast Anti-Pollution League v. Costle*, 572 F. 2d 872 (1st Cir. 1978), *cert. denied*, 439 U.S. 824 (1978), and should "presume" that section 189a intends "on-the-record" hearings in the absence of strong indications that Congress intended otherwise. However, the core of *Seacoast* is a simple concern that the record of administrative actions be adequate for judicial review. The new Part 2 provides a more than adequate record. Moreover, since the Supreme Court rulings in *U.S. v. Allegheny-Ludlum*, 406 U.S. 742 (1972), and *Chevron v. NRDC*, 467 U.S. 837 (1984), the courts of appeals have leaned toward the opposite presumption, one in favor of informality, and toward deferring to agencies' judgments about what level of formality is appropriate in agency hearings.

In any case, the core of the new Part 2, Subpart L, meets, and in some respects exceeds, the APA's "on-the-record" requirements. Petitioners make no explicit attempt to show otherwise. Viewed broadly, the new Subpart L gives parties ample opportunity to present oral and written evidence before an impartial judge who must give a reasoned decision based on the public record.

In particular, the new Subpart L permits such cross-examination as is "necessary to ensure development of an adequate record for decision." 10

C.F.R. 2.1204(b). This is equivalent to the APA's provision for such cross-examination "as may be required for a full and true disclosure of the facts."

5 U.S.C. 556(d). Moreover, though the APA does not require traditional discovery, Subpart L mandates disclosure of relevant documents, and permits the usual discovery devices when parties fail to disclose. *See* 10 C.F.R. 2.336.

The NRC's latest revisions to its hearing rules are entirely reasonable, the fruit of long experience with resolving technical issues in hearings, and the most recent result of the agency's continuing efforts to make its processes more efficient and less expensive for all concerned. The agency's purposes and reasons are fully explained in the preamble to the final rule, and in an earlier policy statement that one court has ruled "fully explained the need for expedited case processing." *NWC v. NRC*, 208 F.3d 256, 263 (D.C. Cir. 2000).

These changes have been made incrementally, in consultation with interested parties, and with a full appreciation of the fact that public participation in agency decisions is a vital ingredient in the regulatory process. The changes reflect the Commission's long held view that section 189a gives the agency the flexibility to adapt its hearing procedures to the different kinds of questions encountered in different sorts of proceedings. They moreover reflect a shift in administrative law in general away from trials, especially for resolving technical

issues. They also reflect the efforts of federal district courts to reduce the costs of discovery by mandating disclosure of relevant documents. *See* FRCP 26(a)(1)-(4).

Contrary to CAN's view, there is no constitutional dimension to this case. The APA level of formality provided by Subpart L in no way deprives any interested party of due process. Moreover this Court has held, "safety and environmental concerns do not constitute liberty or property subject to due process protections." *CAN v. NRC*, 59 F.3d 284, 294 (1995). Neither does the new Part 2 discriminate against any group of participants. Its opportunities and burdens apply to both opponents and proponents of a licensing action.

ARGUMENT

Standard of Review

The fundamental issue before this Court is whether the revised Part 2 is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See* 5 U.S.C. 706(2)(A). "The scope of this review is narrow; a court should not substitute its judgment for that of the agency, and agency decisions will be upheld so long as they do not collide directly with substantive statutory commands and so long as procedural corners are squarely turned."

CAN v. NRC, 59 F.3d 284, 290 (1st Cir. 1995) (internal quotation marks and citations omitted).

To the extent this case involves review of NRC statutory interpretations of its organic statute, deference is due to "permissible" agency interpretations under the well-known two-step *Chevron* test. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984); *see also United States v. Mead Corp.*, 533 U.S. 218 (2001); *Elien v. Ashcroft*, 364 F.3d 392, 396-97 (1st Cir. 2004). That test looks first to Congress's clear commands, and gives effect to those. It then gives wide interpretive room to agencies charged with filling in statutory gaps, or construing ambiguities, in broad enabling legislation -- particularly where, as here, Congress has granted an agency broad rulemaking power. *See United States v. Mead Corp.*, 533 U.S. at 226-27; *see also* section 161 of the AEA, 42 U.S.C. 2201. By statute, the NRC enjoys a "unique degree [of] broad responsibility, free of close prescription in its charter as to how it shall proceed." *See Union of Concerned Scientists v. NRC*, 920 F.2d at 54 (internal quotation marks omitted). A "challenge to the NRC's procedural rules faces a steep uphill climb." *Id.* at 53. *See also Goncalves v. INS*, 6 F.3d 830, 832 (1st Cir. 1993).

Because petitioners are challenging Part 2 on its face, rather than as applied in a specific situation, they have a "heavy burden" to show that no set of

circumstances exists under which the rule would be valid. *See Rust v. Sullivan*, 500 U.S. 173, 183 (1991); *Union of Concerned Scientists*, 920 F.2d at 56.

I. The NRC Reasonably Construes Section 189a of the AEA Not to Require “On-the-Record” Hearings in NRC Licensing.

A. Section 189a on its face does not require “on-the-record” APA hearings.

Petitioners⁴ make the interpretation of section 189a the centerpiece of their argument in favor of “on-the-record” hearings. But section 189a provides only for a “hearing.” It “nowhere describes the content of the hearing or prescribes the manner in which this ‘hearing’ is to be run.” *Union of Concerned Scientists*, 920 F.2d at 53. Moreover, it provides for hearings in all types of proceedings -- rulemakings and materials licenses included -- without distinguishing among them. In a series of cases, and in a number of contexts, courts have found that section 189a’s “hearing” requirement does not require “on-the-record” APA hearings.⁵ The only issue so far undecided is reactor hearings, but it is not easy

⁴We use the term “petitioners” to refer to all party-challengers to the NRC’s revised Part 2, petitioners and intervenors alike. They have filed multiple briefs. We refer to specific ones where appropriate.

⁵Courts have found that hearings on NRC materials licenses and spent fuel casks need not be “on the record.” *See Kelley v. Selin*, 42 F.3d 1501, 1510-12, 1513 (6th Cir. 1995); *City of West Chicago v. NRC*, 701 F.2d 632 (7th Cir. 1983). Neither do NRC rulemaking “hearings.” *See Siegel v. AEC*, 400 F.2d 778 (D.C. Cir. 1968). Petitioners do not appear to challenge these results.

to see why section 189a's identical "hearing" sentence should have a different meaning there.

Section 189a's unelaborated "hearing" provision gives the agency wide discretion to select the adjudicatory procedures it deems appropriate, and our Statement of the Case shows that the agency has used this discretion frequently. Petitioners are therefore driven to go beyond the plain language of section 189a and to seek support in other sources -- legislative history, case law, and statutory provisions other than 189a. None supports their view.

B. The legislative history provides no support for petitioners' view.

Petitioners agree that the legislative history of the 1954 enactment of the crucial first sentence of section 189a is slim. *See* Public Citizen Brief 20, NWC Brief 6. Nevertheless, they try to find something useful in it, by, for example, reading *one* Senator's comments in the Congressional Record as demonstration that *Congress* intended section 189a to require "on-the-record" hearings. *See, e.g.,* CAN Brief 24-27. *See Garcia v. United States*, 469 U.S. 70, 76 (1984) (eschewing reliance on items of legislative history other than Committee Reports).

The Commission canvassed this material, along with later legislative material, in 1982 in *Kerr-McGee*, 15 NRC at 247-56. The Commission did not find it helpful, and neither did the Seventh Circuit when it reviewed the NRC's decision. See *West Chicago v. NRC*, 701 F.2d at 642. In *Kerr-McGee*, the Commission noted that, during congressional debates on the AEA, Senator Anderson had said, "I think a hearing should be required and a formal record should be made regarding all aspects." 100 *Cong. Rec.* 10,000 (July 14, 1954). He argued that, while the bill then under consideration, S. 3690, made the APA applicable to the AEC, as the current section 181 of the AEA does today, 42 U.S.C. 2231, the APA did not, by itself, require formal hearings. *Id.* CAN cites this as proof that Congress in 1954 intended that section 189a hearings be formal. Brief 25-26.

Actually, Senator Anderson's comment goes the other way. The proposed section 181 the Senator was criticizing provided that, "upon application, the Commission shall grant a hearing to any party materially interested in any agency action." S. 3690, 83d Cong., 2d Sess., sec. 181 (1954). In other words, the then proposed section 181 said roughly what the first sentence of section 189a said in 1954 and still says. Section 189a provides no more particulars about the

kind of hearing than did the section 181 criticized by Senator Anderson. See *Kerr-McGee*, 15 NRC at 247 n.14.

CAN misses this fact entirely. CAN notes that the enacted section 189a contains virtually the same language that the proposed section 181 contained about hearings, but CAN does not see that Senator Anderson had been *criticizing* section 181 for failing to require “on-the-record” hearings, and thus by extension, section 189a also. CAN Brief 25-26. Thus, the statements by Senator Anderson would tend to show that 189a does *not* require on-the-record hearings.

The legislative histories of later amendments to the AEA yield nothing conclusive. See *West Chicago*, 701 F.2d at 642. Generally speaking, appeal to post-enactment legislative history -- one Congress’s opinion of what an earlier Congress intended -- has its perils. It may be true that “[s]ubsequent *legislation* declaring the intent of an earlier statute is entitled to great weight in statutory construction,” *Loving v. U.S.*, 517 U.S. 748, 770 (1996) (emphasis added), but in *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 751 (1979), the Court brushed aside a conference committee report that, in dealing with amendments to a statute, offered its view of the proper interpretation of the original statute.⁶

⁶Petitioners cite *Power Reactor Development Corp. v. International Union*, 367 U.S. 396 (1961) (*PRDC*), arguing that *PRDC* was willing to give “particular weight” to what the Joint Committee on Atomic Energy thought the AEA meant,

Public Citizen notes that in 1962 two of the Joint Committee's "consultants recommended legislation stating that 'the requirement of a hearing in section 189a ... shall not be deemed to require a determination on the record after opportunity for agency hearing, within the meaning of section [554] of the [APA].'" Brief 24-25, *quoting Kerr McGee Corp.*, 15 N.R.C. at 250. "Despite this recommendation," Public Citizen says, "Congress did not enact such legislation." Brief 25.

But this is too superficial an account. Consultants to the Committee had indeed recommended adding a provision that would specifically provide that informal procedures would satisfy section 189a. However, the Committee declined to do so because it found such a provision *unnecessary*. The Committee's report explained its reasoning:

To the extent that the legislative history of the 1957 amendments may not be clear, it is expressly stated here that the committee encourages the Commission to use informal procedures to the maximum extent permitted by the Administrative Procedure Act.

and that *PRDC* saw "'de facto acquiescence in and ratification of the Commission's licensing procedure by Congress.'" NWC Brief 29, *citing PRDC*, 367 U.S. at 408; Public Citizen Brief 24, *quoting PRDC*, 367 U.S. at 409. But *PRDC* was speaking not of *hearing* procedure but rather the AEC's practice of permitting construction of a reactor to begin before its design was complete and approved by the agency. *Id.* at 398.

In this connection, the committee refers to the recent report by the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee ...:

By now, it has become apparent that the adversary type of proceeding, resembling as it does the processes of the courts, does not lend itself to the proper, efficient, or speedy determination of issues with which the administrative agencies frequently must deal Questions relating to ... licensing of atomic reactors ... might better be solved in some type of proceeding other than an administrative "lawsuit" among numerous parties....

Having pointed out the desirability of informal procedures, *and the legal latitude afforded the Commission to follow such procedures*, the committee does not believe it necessary to incorporate specific language in the legislation requiring informal procedures.

H.R. Report. No. 87-1966, 87th Cong., 2d Sess., 6 (1962) (emphasis added).

See also S. Rep. No. 102-72, 102d Cong., 1st Sess., 296 (1991) ("NRC has long used formal adjudicatory procedures ... even though the Atomic Energy Act does not expressly require them").

Thus, contrary to petitioners' arguments, the legislative history does not speak uniformly to one side of the issue. If anything, it supports the NRC's understanding of section 189a.

C. Relevant case law supports the NRC's reading of section 189a.

The courts have offered at least three possible ways to approach silent or ambiguous statutory hearing provisions with no helpful legislative history. We

consider two of the approaches here, and the other in section I.E of our argument. One essentially assigns something like a “burden of proof.” The other, of which this Court’s decision in *Seacoast Anti-Pollution League v. Costle* is representative, considers institutional needs, in particular the needs of judicial review. Under either approach, the NRC’s revised Part 2 should be affirmed.

The first approach is represented by the Supreme Court case that prompted the NRC to reconsider whether its and the AEC’s hearing practices were required by section 189a. In *U.S. v. Allegheny-Ludlum Steel*, 406 U.S. at 757, a case involving railway freight rates established in rulemaking by the Interstate Commerce Commission, the Court ruled that “only where the agency statute, in addition to providing a hearing, prescribes explicitly that it be “on the record,”” need sections 556 and 557 of the APA be applied. *Id.*, quoting *Siegel v. AEC*, 400 F.2d at 785.

The Court confined its holding to the exercise of “legislative rulemaking power rather than adjudicatory hearings.” *Id.* Since *Allegheny-Ludlum*, the circuits have disagreed about whether the same presumption -- that a hearing required by statute is assumed not to be “on the record” unless the statute includes the words “on the record” or their equivalent -- should be extended to agency adjudication.

The Seventh Circuit, in *West Chicago*, looking to legislative history and other statutes for signs of Congressional intent about section 189a, concluded that at least NRC “materials” licensing adjudications could be informal. The court noted that, “even in adjudication, the ‘on the record’ requirement is significant at least as an indication of congressional intent.” 701 F.2d at 644. “Despite the fact that licensing is adjudication under the APA, there is no evidence that Congress intended to require formal hearings for all Section 189(a) activities.” *Id.* at 645. The *West Chicago* court did not decide whether section 189a required “formal” hearings for reactor licensing. “Even *if* the legislative history indicates that formal procedures are required by statute in reactor licensing cases ..., we do not accept the ... argument that this by necessity indicates that all hearings ... must be formal as well.” *Id.* at 643 (emphasis added).

Public Citizen appears to read the “even if” as “even *though*.” Brief 29. This misreading may be prompted by Public Citizen’s insistence that *West Chicago* has no implications for reactor licensing. *Id.* But the court simply had no reason to reach the question of reactor hearings, and left it open. However, the Seventh Circuit’s logic, like the disputed first sentence of section 189a itself, did not distinguish between materials licensing and reactor licensing, and the Seventh Circuit never indicated that its holding could not be expanded to reactor

licensing. The court noted that the NRC had not said whether it was providing “formal” reactor hearings as a matter of discretion or statutory mandate. *West Chicago*, 701 F.2d at 642.

In a later NRC case, *Kelley v. Selin*, the Sixth Circuit declined to require a “formal adjudicatory hearing” for licensing a spent fuel storage facility. 42 F.3d at 1513. The court stressed that section 189a “provides for a ‘hearing,’ but does not provide for any particular format for this hearing.” *Id.*

In yet another case, involving the EPA, the D.C. Circuit upheld a procedure under which EPA had declined to provide an opportunity for oral presentation of evidence and cross-examination in certain adjudications.

Chemical Waste Management v. EPA, 873 F.2d 1477 (D.C. Cir. 1989). The court said that while the words “on-the record” were not absolutely essential in order to find that formal adjudicatory hearings were required, there must be, in the absence of those words or similar language, evidence of “exceptional circumstances” demonstrating that Congress intended to require the use of formal adjudicatory procedures. *Id.*⁷

⁷Although the *Chemical Waste* court suggested, in *dicta*, that section 189a of the AEA might be a case where “exceptional circumstances” dictated formal, on-the-record hearing requirements, that suggestion has its roots in a factually incorrect *dictum* in an earlier case that had said that, in 1961, “the AEC specifically requested Congress to relieve it of its burden of ‘on-the-record’

Petitioners, however, focus solely on this Court's decision in *Seacoast Anti-Pollution League v. Costle*, a case arising under the Federal Water Pollution Control Act (FWPCA) and involving an EPA permit granted to a nuclear utility to discharge heated water into the Hampton-Seabrook Estuary. In *Seacoast*, this Court found that, in EPA adjudication under the FWPCA, it was "willing to presume that unless a statute otherwise specifies, an adjudicatory hearing subject to judicial review must be on the record." 572 F.2d at 877. Public Citizen and some critics of *Seacoast* take this "presumption" to be an essential holding in the case. See, e.g., Public Citizen Brief 17; *Chemical Waste Management*, 873 F.2d at 1482 (noting that *Seacoast* was decided before *Chevron*); K. Davis and R. Pierce, *Administrative Law Treatise*, 3d ed. (1994), section 8.2, at 382.

However, there are other ways to read *Seacoast*. For example, the Seventh Circuit, in *West Chicago*, read *Seacoast* as "rel[ying] at least in part on the presence of the 'on the record' requirement in Section 509 [of the Federal Water Pollution Control Act,] [33 U.S.C. 1369]," 701 F.2d at 644, whereas

adjudications under section 189(a)" and Congress did not do so. See *Union of Concerned Scientists v. NRC*, 735 F.2d 1437, at 1444 n.12, cert. denied, 469 U.S. 1132 (1985). As we have argued above in section I.B, the opposite is more nearly correct: The AEC argued in favor of formal procedures and the Joint Committee on Atomic Energy advised that informal procedures were permissible. See H.R. Rep. No. 87-1966, at 6, quoted in *Kerr McGee*, 15 NRC at 251.

“there is no indication even in the judicial review Section of the AEA [189b, 42 U.S.C. 2239(b)], ... that Congress intended to require formal hearings under the AEA.” *Id.*

More fundamentally, we read the *Seacoast* “presumption” as resting on a concern for judicial review, as clearly set forth in the Court’s opinion:

If determinations such as the one at issue here are not made on the record, then the fate of the Hampton-Seabrook Estuary could be decided on the basis of evidence that a court would never see or, what is worse, that a court could not be sure existed.

572 F.2d at 877. *Seacoast*, in short, was primarily concerned that agency procedure should provide a record adequate for judicial review. In fact, *Seacoast* can be understood (and limited) in light of the peculiar facts presented in that case. In *Seacoast*, the EPA granted the permit in part on the basis of evidence *not* in the record. *Id.* at 881.

But it does not require a *Seacoast*-style “on-the-record” presumption to ensure an adequate record for judicial review. As *Seacoast* itself appeared to recognize, 557 F.2d at 876 n.6, the fact of judicial review means that “the agency must be careful to provide some basis for appellate court review,” not necessarily a basis reached in an “on-the-record” hearing. For decades, courts have reviewed agency rulemaking records that would not necessarily meet the

“on the record” test.⁸ Certainly, less formal adjudication can offer the same adequate basis for review.

Whatever the level of formality in a section 189a hearing, the NRC agrees that it must provide a record adequate for judicial review. It has always done so, as, for example, in the rulemaking (*Siegel v. AEC*) and materials licensing (*City of West Chicago v. NRC*) cases, where hearings are not “on the record.” The NRC’s revised Part 2 clearly requires an adequate hearing record for judicial review. *See* 10 C.F.R. 2.319, 2.337, 2.344, 2.1210(c). This meets *Seacoast’s* fundamental concern.

As far as we know, this Court has never again applied a *Seacoast*-style presumption in order to ensure adequate judicial review.⁹ Indeed, this Court is understood by one scholar to have abandoned the presumption in a recent case, one in which, moreover, the Court granted the Federal Aviation Administration *Chevron* deference. *See* J. Pierce, Jr., *Administrative Law Treatise*, 4th ed.

⁸The APA’s provisions on judicial review apply to all final agency actions (with some exceptions), whether on the record or not. Thus, the mere fact of judicial review does not entail “on-the-record” proceedings.

⁹*Dantran v. U.S. Dept. of Labor*, 246 F.3d 36 (1st Cir. 2001), *see, e.g.*, Public Citizen Brief 30-31, is not to the contrary. That case involved a debarment. The NRC’s revised Part 2 provides formal, trial-type hearings in enforcement cases.

(2002), section 8.2, at 538-39, *citing Penobscot Air Services v. FAA*, 164 F.3d 713 (1st Cir. 1999). *See also Central Maine Power v. FERC*, 252 F.3d 34, 46 (1st Cir. 2001) (term “hearing” “notoriously malleable”). *Seacoast* seems incompatible with the Supreme Court’s holding in *U.S. v. Florida East Coast Ry.*, 410 U.S. 224, 234 (1973), that a general statutory “hearing” requirement is not “equivalent” to a requirement for an “on-the-record” hearing.

D. Other statutes do not require that hearings in reactor licensing be on the record.

Finding little support in the plain language or history of section 189a itself, petitioners try to find the “on-the-record” requirement in other statutes. The attempt fails.

APA Section 558(c). NWC asserts, “Section 558(c) requires that all administrative licensing proceedings governed by the APA provide the on-the-record procedures set forth in 5 U.S.C. §§ 556 and 557.” NWC Brief 20-21. However, in the case that petitioners make the centerpiece of their attack on Part 2, *Seacoast*, this Court rejected that very argument, and held that section 558(c) does *not* require “full adjudicatory hearings.” 572 F.2d at 878 n.11 (citations omitted). *Accord West Chicago*, 701 F.2d at 644. Section 558(c) requires “on-the-record” hearings only if they are already required by another law.

AEA Section 181. Petitioners also assert that section 181 of the AEA independently requires that hearings in NRC reactor licensing proceedings be on the record. CAN Brief 35; NWC Brief 21. Section 181 provides, in pertinent part, “The provisions of the Administrative Procedure Act ... shall apply to all agency action taken under this Act.” 42 U.S.C. 2231.

Petitioners miss the logic of section 181, which says that the APA applies to all NRC actions but says nothing about the “on-the-record” issue. The Seventh Circuit in *West Chicago* recognized that section 181 sheds no light on the “on-the-record” issue: “While Section 181 ... made the provisions of the APA applicable to all agency actions, it did not specify the ‘on the record’ requirement necessary to trigger Section 554 of the APA.” 701 F.2d at 642.

AEA Section 189b. Petitioners also assert that a provision in section 189b that makes final NRC actions judicially reviewable necessarily implies that hearings under section 189a must be on-the-record. *See* CAN Brief 37. *See also* *Amici* Brief 12 n.6. As we discussed above, however, “on-the-record” hearings are not indispensable to creating an adequate record for judicial review of NRC decisions. *See West Chicago*, 701 F.2d at 644; *see also Seacoast*, 572 F.2d at 876 n.6 (judicial review section of Federal Water Pollution Control Act, section

509(b), 33 U.S.C. 1369(b), does not, standing alone, trigger the “on-the-record” requirement).

AEA Section 189a(1)(B)(iv). The *amici* argue that “Congress knows how to authorize the NRC to depart from formal APA adjudicatory requirements when it wishes” because in section 189a(1)(B)(iv) Congress explicitly gave the Commission authority to use “informal” procedures in any hearing held between construction and operation of a certified standard design. In other words, *amici* say, where Congress does not explicitly provide for less formal hearings -- such as in section 189a -- Congress intends that the hearings be more formal. Brief 20.

However, the very same form of argument may be applied to reach the opposite conclusion. Section 193(b)(1) of the AEA, 42 U.S.C. 2243(b)(1), explicitly says, “the Commission shall conduct a single adjudicatory hearing *on the record* with regard to the licensing of and construction and operation of a uranium enrichment facility under sections 53 and 63.” (Emphasis added). Based on this explicit reference to an “on-the-record” hearing, arguably, where Congress does not explicitly provide for *more* formal hearings, Congress intends that the hearings be *less* formal. In short, this form of argument cuts both ways and so is not useful in interpreting section 189a.

AEA Section 191a. Similarly unpersuasive are arguments that rely on an overly narrow interpretation of the word “notwithstanding” in AEA Section 191a. That provision says, in pertinent part,

“*Notwithstanding* the provisions of sections 556(b) and 557(b) of Title 5, the Commission is authorized to establish ... licensing boards, each comprised of three members, ... two of whom shall have such technical or other qualifications as the commission deems appropriate.”

(Emphasis added.) Public Citizen argues that “Congress would not have needed to begin Section 191a with the language ‘notwithstanding the provisions of section 556(b) and 557(b)’ unless APA hearing procedures were required under section 189a.” Brief 22.

The NRC has long taken the position that Congress likely included the “notwithstanding” clause “to eliminate ambiguity” and “to counter and eliminate potential legal objections to the use of informal hearing procedures.” See 15 NRC at 250 n.25 (1982); 69 FR 2184 (final rule). As the Commission’s *Kerr-McGee* decision noted, section 191a’s “notwithstanding” clause could have been a response to ambiguity created by the NRC’s use of formal procedures in practice, and an attempt to preempt the argument that, having chosen to use “on-

the-record” procedures, the agency was required to use them *in toto*. See 15 NRC at 250 n.25.¹⁰

Public Citizen asserts that “[t]he NRC’s argument ignores the principle that a court should avoid interpreting an act in a manner that would render one of its provisions meaningless.” Brief 22 (citations omitted). But that is not the NRC’s position. Petitioners ignore the principle that “the ‘mere’ elimination of evident ambiguity is ample -- indeed, admirable -- justification for the inclusion of a statutory phrase.” *Walters v. Metropolitan Educational Enterprises*, 519 U.S. 202, 209-10 (1997).

Thus, the other statutes cited by petitioners neither themselves require on-the-record hearings nor tell us how to read section 189a.¹¹

¹⁰The same is true about the use of “notwithstanding” in 42 U.S.C. 2155a: “Notwithstanding section 2239(a) of this title [section 189a of the AEA],” the Commission shall not “grant any person an on-the-record hearing in [a nuclear export] proceeding.”

¹¹NWC cites legislative history that says that the Federal Communications Act (FCA) was one of the models for the AEA, and notes that the Supreme Court has held that hearings under the FCA are to be “on the record” even though the FCA does not use those words. NWC Brief 25-26, *citing* Joint Committee: *A Study of AEC Procedures and Organization in the Licensing of Reactor Facilities* (April 1957), at 20 (NWC Brief Addendum), and *U.S. v. Storer Broadcasting*, 351 U.S. 192, 202-03 (1956).

The analogy the Joint Committee report made, however, was not between the *hearing* provisions of the two acts. Rather, both acts provided for first authorizing construction and then licensing operation. *Study* at 20. There is little

E. Under *Chevron* this Court should defer to the NRC's reasonable interpretation of section 189a.

Any doubts about section 189a's meaning should be resolved in the NRC's favor. The Supreme Court's *Chevron* case establishes a two-part inquiry: "First ... is the question whether Congress has directly spoken to the precise question at issue.... [I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron v. NRDC*, 467 U.S. at 843.¹²

Under *Chevron* step one, Section 189a is silent about the level of formality the:

analogy between section 189a and the hearing provision at issue in *Storer*. The latter applied just to cases in which the Federal Communications Commission (FCC) had denied a license application. In such cases, the FCA called for "a full hearing in which the applicant and all other parties in interest shall be permitted to participate but in which both the burden of proceeding with the introduction of evidence upon any issue specified by the Commission, as well as the burden of proof upon all such issues, shall be upon the applicant." 47 U.S.C. 309(b). The NRC's final rule provides even more formality in such cases. 10 C.F.R. Part 2 Subpart G. But the Joint Committee itself notes that the FCA requires more formality in cases of license denials than the AEA, in which "no distinction is made between procedures in granting and denying applications." *Study* at 21, *citing* 47 U.S.C. § 309(b) (FCA).

¹²Thus, where *Seacoast* dealt with silence or ambiguity by means of a presumption, *Chevron*, which was decided after *Seacoast*, accords deference to reasonable agency interpretations. This is another reason to believe that the remaining core of *Seacoast* is this Court's concern for the adequacy of the record. *See Penobscot Air*, 164 F.3d 713 (1st Cir. 1990) (not employing *Seacoast* presumption but giving FAA *Chevron* deference), discussed above in section I.C of the Argument.

required hearings should have. *See West Chicago*, 701 F.2d at 642. Therefore, the question before this Court (*Chevron* step two) is whether the NRC's reading of section 189a is permissible. For the reasons we have already given, it plainly is. The NRC has for years construed section 189a to permit the agency to adapt its hearing procedures to the kind of question being considered in a particular hearing.

Petitioners argue that the NRC should not be given *Chevron* deference. They argue that "the ordinary tools of statutory construction show that Congress intended that Section 189a require on-the-record hearings" (Public Citizen Brief 30), that "a statute that relates to matters outside the agency's area of expertise [is] entitled to no special deference" (*id.* at 30, citing *Dantran*, 246 F.3d at 48), and that "any deference that might have been due ... was lost when the Commission reversed its position" (Public Citizen Brief 31, citing *U.S. v. Mead*, 533 U.S. 218, 228 (2001)).

These arguments come to nothing. First, as we have just shown in section I.B, the ordinary tools of statutory construction do not in any way show that "Congress has directly spoken to the precise question at issue." In fact, three Circuits have found no such direct speaking. *See Kelley v. Selin*, 42 F.3d at

1511, 1513; *Union of Concerned Scientists v. NRC*, 920 F.2d at 53; *West Chicago*, 701 F.2d at 642.

Second, how to the conduct hearings under section 189a is very much a matter within the agency's expertise: Section 189a is part of the NRC's organic statute, and the agency has been conducting hearings on technical matters within the agency's expertise for decades. Due to the technical nature of such hearings, the NRC is specially positioned to understand what is necessary for effective hearings. Deference is "especially applicable when NRC is structuring its own rules of procedure and methods of inquiry." *Kelley v. Selin*, 42 F.3d at 1511, citing *Vermont Yankee v. NRDC*, 435 U.S. 519, 543 (1978). Accord *Union of Concerned Scientists v. NRC*, 920 F.2d at 54 (*increased* deference due NRC procedural rules because of unique degree to which broad responsibility is reposed in the Commission, free of close prescription in its charter) (emphasis in the original).

Chemical Waste provides a useful parallel to the present case. There, the D.C. Circuit gave *Chevron* deference to EPA's interpretation of a hearing provision in an environmental statute administered only by the EPA. See 873 F.2d at 1478-79, 1480-81. Likewise, the NRC administers the AEA's hearing provisions, and should receive deference to its interpretations. This Court's

Dantran decision, where deference was denied, is not to the contrary, for the statutes involved there were administered by several agencies. *See, e.g.*, the Service Contract Act of 1965, 41 U.S.C. 351, *et seq.* (applies to every contract entered into by the U.S. for an amount in excess of \$2500).

Third, as discussed above, the NRC has not suddenly "reversed" its position on what section 189a requires. Indeed, the Commission has been consistent in its interpretation of section 189a for over 20 years. Moreover, reversals of agency positions do not, by themselves, rule out *Chevron* deference. The *Chevron* case itself affirmed the EPA's reversal of a policy, indeed a double reversal in a short time. *See* 467 U.S. at 853-59.

Again, *Chemical Waste* provides a useful parallel. There petitioners had argued that EPA had abandoned a position that the hearing provision at issue had required formal hearings. The D.C. Circuit ruled that, "Even if EPA had taken that position, ... it would remain free to change its interpretation in order to permit the use of informal procedures ..., provided that its new interpretation is otherwise legally permissible and is adequately explained." 873 F.2d at 1480-81. We have shown that the NRC's long-standing reading of section 189a is legally permissible, and we later show that the NRC's revision of Part 2 is adequately explained.

II. The Challenged Portion of the Revised Part 2 Meets the Administrative Procedure Act's Requirements for On-the-Record Hearings.

Even if section 189a of the AEA mandates “on-the-record” APA hearings in reactor licensing, this Court should uphold the new rule because the new Subpart L meets APA “on-the-record” requirements.

Petitioners devote nearly their entire briefs to arguing that NRC hearings must comply with the APA's requirements for “on-the-record” hearings, but they offer no explicit argument on the logically next question whether the revised Part 2 meets those requirements. Indeed, Public Citizen's and CAN's briefs never cite or quote a provision of the new Part 2. The Commission stated at least three times in the preamble to the final rule that its new Part 2 satisfied APA “on the record” standards. *See* 69 FR 2189, 2192, 2196.

“[I]ssues adverted to on appeal in a perfunctory manner,” or by “passing references,” are “deemed ... abandoned.” *Ryan v. Royal Ins. Co. of Amer.*, 916 F.2d 731, 734 (1st Cir. 1990). *See also Blake v. Pellegrino*, 329 F.3d 43, 50 (1st Cir. 2003). Abandoned issues may not be revived in reply briefs. *See*

Ryan, 916 F.2d at 734. Here, petitioners do not offer the kind of “developed argumentation” necessary to raise an issue on appeal. *See id.*¹³

The revised Part 2, in particular the new Subpart L,¹⁴ satisfies the level of formality required in APA “on-the-record hearings.” We single out the two questions about which the petitioners are the most concerned: cross-examination and discovery. We also address other requirements of APA “on-the-record” hearings and show that the new Subpart L meets them.

A. Subpart L permits parties to present evidence and to conduct cross-examination when necessary.

Under the APA, “[a] party is entitled to present his case or defense by oral or documentary evidence [and] to submit rebuttal evidence.” 5 U.S.C. 556(d). The NRC’s new Subpart L provides for the submission of written testimony, responses, and rebuttal testimony, along with supporting affidavits. *See* 10 C.F.R. 2.1207, 2.1208. It also requires an oral hearing unless the parties

¹³Petitioners’ silence on a fundamental question is fatal. *Berna v. Chater*, 101 F.3d 631, 633 (10th Cir. 1996) (if on appeal claimant challenges only one of two alternative rationales supporting a disposition, and unchallenged rationale is a sufficient basis for the disposition, claimant’s success is foreclosed).

¹⁴Petitioners’ briefs focus on the new Subpart L, the centerpiece of the revised Part 2. *See, e.g.*, Public Citizen Brief 12-13. The new Subpart L is expected to cover most NRC licensing hearings. *See* 69 FR 2213. Nothing in petitioners’ arguments challenges other subparts of the revised Part 2.

unanimously agree to a written hearing. *See* 10 C.F.R. 2.1206. Each party is entitled to present witnesses at the oral hearing and can submit proposed questions for the presiding officer to ask witnesses at the hearing. 10 C.F.R. 2.1207. The APA also gives parties the right to submit proposed findings and conclusions of law. 5 U.S.C. 557(c). So does the revised Subpart L. *See* 10 C.F.R. 2.1209.

Petitioners claim that the revised rule unlawfully “abolishes” cross-examination, or at least cross-examination of experts. Public Citizen Brief 3, 13. But the APA does not guarantee unlimited cross-examination. Instead, APA “on-the-record” hearings require only such cross examination “as may be required for a full and true disclosure of the facts.” 5 U.S.C. 556(d). This Court has held that this APA language affords no right to cross-examination, and that “[t]he party seeking to cross-examine bears the burden of showing that cross-examination is in fact necessary.” *Seacoast*, 572 F.2d at 880 n.16, *citing American Public Gas v. FPC*, 498 F.2d 718, 723 (D.C. Cir. 1974), and the Attorney General's Manual on the Administrative Procedure Act at 78 (1947). *See also Calvin v. Chater*, 73 F.3d 87, 91 (6th Cir. 1996), *citing Solis v. Schweiker*, 719 F.2d 301 (9th Cir. 1983).

The NRC's Subpart L, though using somewhat different language, provides as much access to cross-examination as the APA. Subpart L allows cross-examination where "necessary to ensure the development of an adequate record for decision." 10 C.F.R. 2.1204(b)(3). As the preamble to the final rule makes clear, the NRC intended that language to be the equivalent of the APA's. 69 FR 2188, 2191, 2195-96. The difference in language can be read simply as the NRC's elaboration on what in fact the APA standard means in actual adjudication.

Public Citizen claims that Part 2 "eliminates" any cross-examination of experts. Brief 3. This is untrue. Public Citizen cites a statement in the preamble to the final rule that the Commission believes cross-examination "does not appear to be either necessary or useful in circumstances where, for example, the dispute falls on the interpretation of or inferences arising from otherwise undisputed facts." Public Citizen's Brief 36-37, *citing* 69 FR 2196. But the Commission goes on to say that the presiding officer is best able to assess the record as the hearing progresses, and to determine whether cross-examination is needed to develop an adequate record. *Id.*

Having first claimed that the new Subpart L "abolishes" or "eliminates" cross-examination, incongruously petitioners then object to the Part 2

requirement that expressly directs parties to submit cross-examination plans. See, *e.g.*, NWC Brief 16 n.4. But Part 2 requires no more than what a good advocate would prepare: the issues, the objective of the cross-examination, and a proposed line of questions. See 10 C.F.R. 2.104(b). Cross-examination plans are one means by which NRC judges can “exercise reasonable control over the mode ... of interrogating witnesses ... so as to make the interrogation ... effective for the ascertainment of the truth, ... avoid needless consumption of time, and ... protect witnesses.” Federal Rule of Evidence (FRE) 611(a). Several provisions of the APA give presiding officers authority to require reasonable case management measures such as cross-examination plans. See 5 U.S.C. 556(c)(3), (5), (6), and (11).

In its comments on the proposed rule, NWC had asserted, “There should be *no* limits, whatsoever, on cross-examination.” JA787. This is simply unrealistic, and hardly reflective of judicial practice (*see* FRE 611(a), quoted above). It assumes, as do many of petitioners’ objections to plans, limits, schedules, etc., that the parties and tribunals have unlimited time and resources.¹⁵

¹⁵The *amici* also argue that subpart L’s provisions on cross-examination are inconsistent with section 2741 of the AEA, 42 U.S.C. 2021(l). Brief 22. That section says that, in certain Commission adjudicatory proceedings -- those which the Commission conducts in a State which exercises authority relinquished to the State by the NRC under section 274 -- the Commission must give the State a

B. Subpart L requires mandatory disclosure of relevant documents.

Petitioners' claims, most notably NWC's extravagant claim that Part 2 "abolishes" discovery, NWC Brief 16, reveal, once again, an inattention to the APA and to the NRC rule itself. It is well-established that the APA does not require any discovery. *Kelly and Prisk v. EPA*, 203 F.3d 519, 523 (7th Cir. 2000); *NLRB v. Valley Mold Co.*, 530 F.2d 693, 695 (6th Cir. 1975), *cert. denied*, 429 U.S. 824, (1976); *Frilette v. Kimberlin*, 508 F.2d 205, 208 (3d Cir. 1974), *cert. denied*, 421 U.S. 980 (1975). But the new Part 2 actually provides significant discovery. First and foremost, Subpart L, and Subpart G also, mandate disclosure of an immense amount of material, precisely the sort of material subject in the past to rounds of document requests and interrogatories -- "documents relevant to the issues in the proceeding." 10 C.F.R. 2.336.¹⁶

"reasonable opportunity to interrogate witnesses." We have shown that Part 2 does in fact provide "reasonable opportunity to interrogate witnesses." This issue is being raised for the first time on appeal, and by the *amici*, who, moreover, did not participate in the rulemaking. The Court should therefore not even consider the issue. *See U.S. v. Tucker Truck*, 344 U.S. 33, 36-37 (1952); *Brigham v. Sun Life of Canada*, 317 F.3d 72, 82 (1st Cir. 2003); *American Federation of Government Employees, Local 3936, AFL-CIO, v. FLRA*, 239 F.3d 66, 69 n.1 (1st Cir. 2001).

¹⁶Thus, even though the new Subpart L is labeled "informal," it actually provides more formality than the APA's "on-the-record" provisions require. The "informal" misnomer reflects AEC and NRC terminology only, in which

Mandatory disclosure is the now decade-old practice in federal district courts, adopted to reduce the resources consumed in discovery. *See generally* Advisory Committee Notes on the 1993 amendments to FRCP 26. The Commission has simply tailored mandatory disclosure to the particular kinds of information that are likely to matter in NRC license proceedings. 69 FR 2194. In the final rule, the Commission explained that mandatory disclosure “has the potential to significantly reduce the delays and resources expended by all parties in discovery.” *Id.*¹⁷

Furthermore, Part 2 leaves room for traditional discovery. Subpart G clearly says that discovery is to be had by the usual devices. 10 C.F.R. 2.704, 2.705. Subpart L says that discovery is not available except as Subpart C provides, 2.1203(d), but C provides the usual discovery devices as one possible sanction for failure to comply with mandatory disclosure. In fact, such discovery is the only sanction available when continuing adjudication of an issue, because

Subpart G has always been called “formal” and Subpart L “informal.”

¹⁷The *amici* claim that mandatory disclosure would not cover enforcement documents. Brief 22. However, in a proceeding on enforcement, or in any other proceeding where enforcement documents might be relevant, enforcement documents would be disclosed, unless the documents were privileged or otherwise withholdable. Moreover, Subpart G procedures apply in enforcement proceedings, and Subpart G provides the usual range of discovery devices. 10 C.F.R. 2.705.

the other sanctions are denial of the application, or dismissal of either the relevant contentions or the whole adjudication. 10 C.F.R. 2.336(e).

C. Subpart L meets all other APA Requirements.

Sub-part L also meets all other APA “on-the-record” requirements. For example, it requires a qualified and unbiased presiding officer, as the APA provides. Section 2.313(a) of Part 2 provides that an ASLB, appointed pursuant to Section 191 of the AEA, or an ALJ will preside over Subpart L hearings. The NRC’s regulations provide the presiding officer in NRC hearings with essentially the same powers the APA provides. *See* 10 C.F.R. 2.319, 2.329(a), 2.338; *cp.* 5 U.S.C. 556(c). Both the APA and Part 2 prohibit *ex parte* contacts (*see* 5 U.S.C. 557(d)(1) and 10 C.F.R. 2.347), require separation of the agency’s prosecutorial and decision-making functions (*see* 5 U.S.C. 554(d) and 10 C.F.R. 2.347 and 2.348),¹⁸ and provide for disqualification of a presiding officer for bias or other cause (*see* 5 U.S.C. 556(b) and 10 C.F.R. 2.313(b)). Also, as the APA requires, an NRC adjudicatory decision is on the record and explained. *See* 5 U.S.C. 556 and 557(c), and 10 C.F.R. 2.344(b) and 2.1210(c).

¹⁸Part 2 imposes separation of functions even in initial licensing and thus again exceeds the APA’s requirements.

In short, as the NRC found in its rulemaking, the new Subpart L meets or exceeds all APA "on-the-record" requirements.

III. The NRC Has Provided a Full Rationale For Revising Part 2.

Petitioners make several arguments that the agency has acted arbitrarily and capriciously -- that the NRC has reversed a long-standing position (*e.g.*, Public Citizen Brief 31), given no rationale for that reversal (Public Citizen Brief 32), inconsistently applied the new position (Public Citizen Brief 35), reneged on an "historic bargain" (Public Citizen Brief 34, NWC Brief 35), and ignored the value of public participation through hearings, especially through the device of cross-examination (Public Citizen Brief 36).

These arguments all mischaracterize either the new rule, the history of the NRC's consideration of hearing procedures, or the reasons why the NRC has adopted the revisions at issue here.

Expense and delay. The NRC has given a reasonable explanation for its revision of Part 2 -- that is, a desire to reduce the expense and delay of more formal hearings. *See* 69 FR 2182 ("Commission experience suggested that in most instances, the use of the full panoply of formal, trial-like adjudicatory procedures in subpart G is not essential to the development of an adequate hearing record; yet all too frequently their use resulted in protracted, costly

proceedings.”) Almost from the beginning of the NRC's existence, neutral third parties expressed concern about the lengthy licensing process at the NRC, both the lengthy staff reviews and the long hearings. See S. Breyer, “*Vermont Yankee* and the Courts’ Role in the Nuclear Energy Controversy,” 91 *Harvard L. Rev.* 1833, 1838-40 (1978) (“it seems safe to conclude that licensing delays have in fact played a significant role in these decisions [not to order nuclear plants].”). Highly formal procedures consume substantial resources and can cause avoidable expense and delay. Indeed, Congress, in the Civil Justice Reform Act of 1990, Pub. L. 101-650 (104 Stat. 5090), Dec. 1, 1990, required the federal district courts to find ways to reduce that expense and delay. See 28 U.S.C. 471.

Looking for ways to simplify its procedures, the NRC has not ignored the value of public participation. Rather, as the preamble to Part 2 states (quoting from an historic Commission decision), “Public participation, the Commission said, ‘is a vital ingredient.’” 69 FR 2182. The NRC has asserted the universally acknowledged fact that trials can be too long and expensive. Public participation can and should be accommodated in NRC proceedings, but that can be done without an overly-formalized hearing process. “The NRC has expressed a clear and reasonable goal of expediting nuclear power plant proceedings, both to accommodate the large number of cases to be heard and to ensure fair processes

for applicants and would-be intervenors alike.” *National Whistleblower Center v. NRC*, 208 F.3d 256, 263 (D.C. Cir. 2000); *see also id.* at 264 (1998 NRC Statement of Policy [part of the basis of the new Part 2] “fully explained the need for expedited case processing”).¹⁹

Shift in NRC position. Contrary to petitioners’ view, there has been no radical change, no “total reversal” (Public Citizen Brief 14), no abandonment of 50 years of practice and understanding. The NRC’s recent revisions to Part 2 are only the most recent revisions in a long history of revisions that goes back to 1962, when Congress removed from section 189a the requirement for a mandatory hearing on an application for an operating license.

Considering just the changes the NRC has instituted, the changes reflect legal views the agency has maintained since 1982 and include less formal hearings on materials licenses, reactor design certifications, and reactor license transfers. The substantive revisions in the rule at issue here affect mainly discovery and cross-examination, traditional discovery being replaced largely by mandatory disclosure, and cross-examination being limited to those issues on

¹⁹In view of the NRC’s long experience with hearings under section 189a, and the widely recognized cost of traditional discovery and other highly formal procedures, it is not necessary for the NRC to conduct a special study, as urged by the Petitioners. *See, e.g.*, Public Citizen Brief 33.

which the presiding officer determines that an adequate record cannot be developed without cross-examination. But the NRC rule continues to require greater formality for any cases where the presiding officer determines that it is necessary to resolve “issues of material fact relating to the occurrence of a past activity, where the credibility of an eyewitness may reasonably be expected to be at issue, and/or issues of motive or intent.” *See* 10 C.F.R. 2.700.²⁰

Throughout this long history, the NRC has moved deliberately and in full consultation with interested parties. The agency’s latest reconsideration of its adjudicatory procedures began over 5 years ago, with the issuance of a Statement of Policy on the Conduct of Adjudicatory Proceedings, 63 FR 41872 (Aug. 5, 1998), and OGC’s review of hearing procedures. JA1. The rulemaking that followed went beyond the usual notice and comment process (*see* 69 FR 2186) and made available to the public a large number of internal memoranda that discussed all sides of the issues.

The NRC’s changes to its hearing process are well within the mainstream of administrative law and are based on changes in the understanding of the law

²⁰To the extent the NRC has changed position, it may do so as long as it explains the change. *See, e.g., Chevron*, 467 U.S. at 863-64.

that date back almost 30 years.²¹ The presumption against a high degree of formality in rulemaking, first enunciated by the Supreme Court in *Allegheny-Ludlum* in 1972, is now extended in many Circuits to adjudications. See R. Pierce, *Administrative Law Treatise*, 4th ed. (2002), section 8.2, at 538-39 (“a veritable flood of similar opinions”). Prompted by the Supreme Court's reasoning, the NRC has maintained since at least its 1982 decision in *Kerr-McGee*, 15 NRC 232, that section 189a does not require on-the-record hearings, let alone hearings with the formality required by Subpart G.²²

Cross-examination. Petitioners claim that the NRC has unreasonably restricted cross-examination. See, e.g., Public Citizen Brief 36-39. But the

²¹See R. Levy and S. Shapiro, “Administrative Procedure and the Decline of the Trial,” 51 *U. Kan. L. Rev.* 473 (May 2003); G. Edles, “An APA-Default Presumption for Administrative Hearings: Some Thoughts on ‘Ossifying’ the Adjudication Process,” 55 *Admin. L. Rev.* 787 (Fall 2003). Informal adjudication has been the “lifeblood” of the administrative process. R. Levy and S. Shapiro, “... the Decline of the Trial,” 51 *U. Kan. L. Rev.* at 496.

²²As petitioners have pointed out, see, e.g., NWC Brief 28, in 1989 the NRC's then General Counsel stated a contrary view in a memorandum advising the NRC staff (not the Commission) during rulemaking on reactor license renewal. The memorandum was not a formal interpretation of the kind collected in 10 C.F.R. Part 8, and his advice ultimately was not adopted by the agency, for when the proposed rules were issued, the Commission retained Subpart G hearings “as is customary.” 55 FR 29043, 29052 (1990). Moreover, the same NRC General Counsel three years later signed the NRC brief in *NIRS v. NRC*, 969 F.2d 1169 (D.C. Cir. 1992), where the agency argued that section 189a gave the NRC flexibility to depart from APA “on-the-record” requirements.

NRC concluded that cross-examination has at best only limited uses in resolving expert scientific and technical issues. The Attorney General's Manual on the APA appears to recognize that cross-examination in technical contexts is not always useful. Discussing rulemaking, the Manual says that, "where the subject matter and evidence are broadly economic or statistical and the parties or witnesses numerous, the direct or rebuttal evidence may be of such a nature that cross-examination adds nothing substantial to the record and unnecessarily prolongs the hearings." Manual at 78, quoting H.R. Rep. 79-1980, 79th Cong., 2d Sess. (1945), at 37.

Similarly, "in rate making and licensing proceedings, which frequently involve extensive technical or statistical data, the agency may require that the mass of such material be submitted in orderly exhibit form. Typically, in these cases, the veracity and demeanor of witnesses are not important." *Id.*²³ See also K. Davis and R. Pierce, *Administrative Law Treatise*, 3d ed. (1994), section 8.2, at 383 (technical facts at issue in *Seacoast* should not have been the subject of cross-examination); *Chemical Waste*, 873 F.2d at 1482, quoting EPA,

²³More generally, three scholars of administrative law have said, "in many sophisticated and well-regarded legal systems other than that with which Americans are directly familiar, judicial proceedings are often unmarked by even an approximation of cross-examination." W. Gellhorn, C. Byse, and P. Strauss, *Administrative Law: Comments and Cases*, 7th ed. (1979), at 679.

53 FR. 11257 (EPA saw “little need to establish witness veracity or credibility through observation of a witness’s demeanor on cross-examination”).

Public Citizen cites the Supreme Court’s opinion in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 596 (1993), for the proposition that cross-examination is a safeguard against questionable scientific evidence. However, the Court certainly did not rule on the comparative value of cross-examination of experts versus the NRC’s scientist-judges’ examination of experts. The Court merely responded to the claim that the Court’s rejection of “general acceptance” as the standard for admission of scientific testimony might open the courtroom door to much junk science. Moreover, as we have noted, Subpart L provides for cross-examination where necessary.

By retaining subpart G for certain proceedings (not just enforcement), and requiring mandatory disclosure, the NRC’s revised Part 2 goes beyond what the law requires. Petitioners, however, see an inconsistency here, particularly in the agency’s retaining of Subpart G formality for the upcoming proceeding on the proposed high-level waste repository at Yucca Mountain, Nevada. *See, e.g.*, Public Citizen Brief 35. But, as the Commission indicated, there can be no doubt that the Yucca Mountain proceeding is likely to be the most complex and politically charged proceeding in the NRC’s history, and it is the only licensing

proceeding for which a Subpart G hearing has been promised for many years.

See 69 FR 2204.

“Historic bargain.” We conclude our defense of the reasonableness of the new Part 2 with consideration of petitioners’ oddest argument -- that the agency is reneging on an “historic bargain,” in which, in 1957, the liability of the industry was limited in return for trial-type hearings. *See, e.g.,* Public Citizen Brief 34. Such history simply does not accord with the facts.

To begin with, the hearing requirement in section 189a was made law in 1954, a full three years before the liability of the industry was limited by the Price-Anderson Act. *See* Pub. L. 85-256 (72 Stat. 576) (1957), sec. 4. The only hearing provision enacted that same year was the provision for *mandatory* hearings in reactor license proceedings. *See id.*, sec. 7. But even here, if there was any “bargain” between backers of a limit on liability and backers of mandatory reactor license hearings, the bargain was done away with a mere 5 years later, when Congress removed the provision for mandatory hearings on operating licenses. *See* Pub. L. 87-615 (76 Stat. 409) (1962), sec. 2. Nothing in the legislative record supports petitioners’ “bargain” argument.

IV. The Revised Part 2 Is Constitutional.

Only CAN argues that Part 2 is unconstitutional, under both the First and the Fifth Amendments. CAN made a similar argument in 1995, in *CAN v. NRC*, 59 F.3d 284 (1st Cir. 1995), resting on claims of “takings” and a lack of due process. This Court rejected both claims, as being “overbroad, vague, and unaccompanied by factual support or analysis.” *Id.* at 294. This Court also cited *West Chicago* for the proposition that “generalized health, safety and environmental concerns do not constitute liberty or property subject to due process protections.” *Id.*, citing *West Chicago*, 701 F.2d at 645.

The same reasons call for rejecting CAN’s present constitutional claims. CAN tries to revitalize the due process claim and adds a novel claim that opponents of nuclear power plants form a “discrete and insular minority who are, without rights to full, fair, ‘on the record’ hearings, almost voiceless.” CAN Brief 22. CAN then suggests that the Part 2 revisions violate nuclear opponents’ First Amendment “right to participate in their government.” *See, e.g.*, CAN Brief 14. These arguments appear to be based largely on misreadings of the revised Part 2, and on an inapposite D.C. Circuit case.

The D.C. Circuit case, *D.C. Federation of Civic Associations v. Volpe*, 434 F.2d 436 (1970), is entirely off the point. In *D.C. Federation*, the Court

required the Department of Transportation to conduct hearings before beginning construction of a proposed bridge across the Potomac River. The court found that the Department had discriminated against citizens of the District of Columbia because the Department had deprived them of “the right to participate in the determination of highway projects,” while it granted citizens of all the States the same right. *See* 434 F.2d at 439-44.

CAN tries to analogize *D.C. Federation* to our case, but the analogy fails. To begin with, the Department appears not to have provided an opportunity for a hearing at all, but Part 2 clearly does. Also, of the three judges on the panel that decided the case, only one saw a constitutional dimension to it. *See* 434 F.2d at 448, 461. In addition, it is not clear from the case that the required hearing in fact had to be on the record.

In any event, Part 2 simply does not discriminate against opponents of nuclear power, who in any case do not constitute the kind of “discrete and insular minority” that concerned the court in *D.C. Federation*. *See also San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973) (large, diverse, amorphous class with political power and without a history of purposeful unequal treatment is not a “discrete and insular minority”) No right afforded a

license applicant or licensee by Part 2 is not also provided intervenors, no limit on participation by an intervenor not also imposed on an applicant or licensee.

In pursuing its claim of discrimination, CAN claims that the public may not participate in enforcement proceedings. CAN Brief 18, *citing* to unidentified portions of the agency's section-by-section analysis of the final rule and *citing also Bellotti v. NRC*, 725 F.2d 1380 (D.C. Cir. 1983). The claim that the public may not participate in enforcement hearings misreads *Bellotti* and is unrelated to the revisions of Part 2. In *Bellotti*, the Court ruled that third parties could not automatically participate in an NRC enforcement proceeding to seek stricter enforcement action than the Commission itself was seeking, but they could participate if the Commission was proposing to *remove* a restriction upon the licensee. *Id.* at 1383. Also, in NRC practice, third parties can seek to intervene to *support* an NRC enforcement order. *See, e.g., Sequoyah Fuels Corp. and General Atomics*, 40 NRC 64, 69-70 (1994).

Moreover, the formality Part 2 provides in enforcement proceedings is entirely consistent with applicable law. Administrative law from the beginning has recognized the special character of proceedings in which license denial, suspension, or revocation are at stake. *See, e.g., Attorney General's Manual on*

the APA at 41; *see also* the survey of the adjudicatory practices of agencies other than the NRC, JA10.²⁴

Moreover, insofar as CAN makes a procedural due process claim, it makes no attempt to support the claim by reference to the three criteria the Supreme Court has set forth for use in evaluating such claims. CAN does not address the "three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *See Matthews v. Eldridge*, 424 U.S. 319, 335 (1976). Had CAN addressed these factors, it could not have

²⁴CAN also argues that the NRC's reliance on its computerized record system, the Agencywide Documents Access and Management System (ADAMS), to which the public has access through the NRC's Web site, unconstitutionally discriminates against people who live in poor communities near nuclear facilities, because they used to have access to NRC Public Document Rooms (LPDRs), but these are now closed. CAN Brief 28-29. The agency's decision to close the LPDRs and rely on ADAMS for public access was made 5 years ago, in a rulemaking in which CAN did not participate. *See* 64 FR 48942 (Sept. 9, 1999). ADAMS provides a larger public with a wider range of documents, more quickly, and at less expense. *Id.* at 48942-43. Moreover, in 1999, of the 86 facilities that then housed the LPDRs, all but six provided access to the Internet. *Id.* at 48942.

shown that Subpart L, together with the use of the more formal Subpart G procedures in some cases, did not provide adequate procedural safeguards.

In sum, there is no constitutional dimension to this case.

CONCLUSION

For the foregoing reasons, the petitions for review should be denied.

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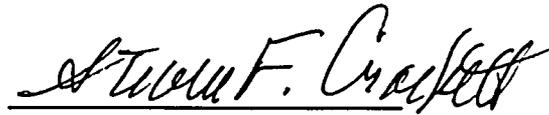
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CERTIFICATE OF COMPLIANCE REQUIRED BY FRAP 32(a)(7)(C)

I hereby certify that the Brief for Federal Respondents complies with the type-volume limitation in FRAP 32(a)(7)(B). The number of words in the Brief, excluding Table of Contents, Table of Authorities, Statutory Addendum, and Certificates of Counsel, is 14,000, as counted by the Corel WordPerfect 8 program.

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July 14, 1004

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ADMINISTRATIVE PROCEDURE ACT

Sec. 554 [5 U.S.C. 554]. Adjudications.

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved-

- (1) a matter subject to a subsequent trial of the law and the facts de novo in a court;
- (2) the selection or tenure of an employee, except an administrative law judge appointed under section 3105 of this title;
- (3) proceedings in which decisions rest solely on inspections, tests, or elections;
- (4) the conduct of military or foreign affairs functions;
- (5) cases in which an agency is acting as an agent for a court; or
- (6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of-

- (1) the time, place, and nature of the hearing;
- (2) the legal authority and jurisdiction under which the hearing is to be held; and
- (3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for-

- (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and
- (2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency.

Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

Sec. 556 [5 U.S.C. 556]. Hearings; Presiding Employees; Powers and Duties; Burden of Proof; Evidence; Record as Basis of Decision.

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency;

or

(3) one or more administrative law judges appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or

participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

- (1) administer oaths and affirmations;
- (2) issue subpoenas authorized by law;
- (3) rule on offers of proof and receive relevant evidence;
- (4) take depositions or have depositions taken when the ends of justice would be served;
- (5) regulate the course of the hearing;
- (6) hold conferences for the settlement or simplification of the issues by consent of the parties; or by the use of alternative means of dispute resolution as provided in subchapter IV of this chapter;
- (7) inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods;
- (8) require the attendance at any conference held pursuant to paragraph
(6) of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy.
- (9) dispose of procedural requests or similar matters;
- (10) make or recommend decisions in accordance with section 557 of this title; and
- (11) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponents of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is

entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceedings, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

Sec. 557 [5 U.S.C. 557]. Initial Decisions; Conclusiveness; Review by Agency; Submissions by Parties; Contents of Decisions; Record.

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses-

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions-

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exception of proposed findings or conclusions. The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of-

(A) findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

(d)

(1) In an agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law-

(A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to

be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

(i) all such written communications;

(ii) memoranda stating the substance of all such oral communications; and

(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

(D) upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceedings should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

....

Sec. 558 [5 U.S.C. 558]. Imposition of Sanctions; Determination of Applications For Licenses; Suspension, Revocation, and Expiration of Licenses.

....

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is

lawful only if, before the institution of agency proceedings therefor, the licensee has been given—

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

ATOMIC ENERGY ACT

Sec. 181 [42 U.S.C. 2231]. General.

The provisions of the Administrative Procedure Act (Public Law 404, Seventy-ninth Congress, approved June 11, 1946) shall apply to all agency action taken under this Act, and the terms “agency” and “agency action” shall have the meaning specified in the Administrative Procedure Act

Sec. 189 [42 U.S.C. 2239]. Hearings and Judicial Review.

a.

(1)

(A) In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award, or royalties under sections 153, 157, 186c., or 188, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application under section 103 or 104b. for a construction permit for a facility, and on any application under section 104c. for a construction permit for a testing facility. In cases where such a

construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

(B)

(i) Not less than 180 days before the date schedules for initial loading of fuel into a plant by a licensee that has been issued a combined construction permit and operating license under section 185b., the Commission shall publish in the Federal Register notice of intended operation. That notice shall provide that any person whose interest may be affected by operation of the plant, may within 60 days request the Commission to hold a hearing on whether the facility as constructed complies, or on completion will comply, with the acceptance criteria of the license.

(ii) A request for hearing under clause (i) shall show, prima facie, that one or more of the acceptance criteria in the combined license have not been, or will not be met, and the specific operational consequences of nonconformance that would be contrary to providing reasonable assurance of adequate protection of the public health and safety.

(iii) After receiving a request for a hearing under clause (i), the Commission expeditiously shall either deny or grant the request. If the request is granted, the Commission shall determine, after considering petitioners' prima facie showing and any answers thereto, whether during a period of interim operation, there will be reasonable assurance of adequate protection of the public health and safety. If the Commission determines that there is such reasonable assurance, it shall

allow operation during an interim period under the combined license.

(iv) The Commission, in its discretion, shall determine appropriate hearing procedures, whether informal or formal adjudicatory, for any hearing under clause (i), and shall state its reasons therefor.

(v) The Commission shall, to the maximum possible extent, render a decision on issues raised by the hearing request within 180 days of the publication of the notice provided by clause (i) or the anticipated date for initial loading of fuel into the reactor, whichever is later. Commencement of operation under a combined license is not subject to subparagraph (A).

....

b. The following Commission actions shall be subject to judicial review in the manner prescribed in chapter 158 of title 28, United States Code, and chapter 7 of title 5, United States Code:

(1) Any final order entered in any proceeding of the kind specified in subsection (a).

(2) Any final order allowing or prohibiting a facility to begin operating under a combined construction and operating license.

(3) Any final order establishing by regulation standards to govern the Department of Energy's gaseous diffusion uranium enrichment plants, including any such facilities leased to a corporation established under the USEC Privatization Act.

(4) Any final determination under section 1701(c) relating to whether the gaseous diffusion plants, including any such facilities leased to a corporation established under the USEC Privatization Act, are in compliance with the Commission's standards governing the gaseous diffusion plants and all applicable laws.

Sec. 191 [42 U.S.C. 2241]. Atomic Safety and Licensing Board.

a. Notwithstanding the provisions of sections 7(a) and 8(a) of the Administrative Procedure Act, the Commission is authorized to establish one or more atomic safety and licensing boards, each comprised of three members, one of whom shall be qualified in the conduct of administrative proceedings and two of whom shall have such technical or other qualifications as the Commission

deems appropriate to the issues to be decided, to conduct such hearings as the Commission may direct and make such intermediate or final decisions as the Commission may authorize with respect to the granting, suspending, revoking or amending of any license or authorization under the provisions of this Act, any other provision of law, or any regulation of the Commission issued thereunder.

The Commission may delegate to a board such other regulatory functions as the Commission deems appropriate. The Commission may appoint a panel of qualified persons from which board members may be selected.

....

Sec. 193 [42 U.S.C. 2243]. Licensing of Uranium Enrichment Facilities.

....

(b) Adjudicatory Hearing.-

(1) In General.-The Commission shall conduct a single adjudicatory hearing on the record with regard to the licensing of the construction and operation of a uranium enrichment facility under sections 53 and 63.

(2) Timing.-Such hearing shall be completed and a decision issued before the issuance of a license for such construction and operation.

(3) Single Proceeding.-No further Commission licensing action shall be required to authorize operation.

....

NUCLEAR WASTE POLICY ACT

Sec. 134 [42 U.S.C. 10154]. Licensing of Facility Expansions and Transshipments.

....

(b) Adjudicatory Hearing-

(1) At the conclusion of any oral argument under subsection (a), the Commission shall designate any disputed questions of fact, together with any remaining questions of law, for resolution in an adjudicatory hearing only if it determines that-

(A) there is a genuine and substantial dispute of fact which can only be resolved with sufficient accuracy by the introduction of evidence in an adjudicatory hearing; and

(B) the decision of the Commission is likely to depend in whole or in part on the resolution of such dispute.

(2) In making a determination under this subsection, the Commission—

(A) shall designate in writing the specific facts that are in genuine and substantial dispute, the reason why the decision of the agency is likely to depend on the resolution of such facts, and the reason why an adjudicatory hearing is likely to resolve the dispute; and

(B) shall not consider—

(i) any issue relating to the design, construction, or operation of any civilian nuclear power reactor already licensed to operate at such site, or any civilian nuclear power reactor for which a construction permit has been granted at such site, unless the Commission determines that any such issue substantially affects the design, construction, or operation of the facility or activity for which such license application, authorization, or amendment is being considered; or

(ii) any siting or design issue fully considered and decided by the Commission in connection with the issuance of a construction permit or operating license for a civilian nuclear power reactor at such site, unless

(I) such issue results from any revision of siting or design criteria by the Commission following such decision; and

(II) the Commission determines that such issue substantially affects the design, construction, or operation of the facility or activity for which such license application, authorization, or amendment is being considered.

....

(c) Judicial Review.—No court shall hold unlawful or set aside a decision of the Commission in any proceeding described in subsection (a) because of a failure by the Commission to use a particular procedure pursuant to this section unless—

(1) an objection to the procedure used was presented to the Commission in a timely fashion or there are extraordinary circumstances that excuse the failure to present a timely objection; and

(2) the court finds that such failure has precluded a fair consideration and informed resolution of a significant issue of the proceeding taken as a whole.

NUCLEAR NON-PROLIFERATION ACT

Sec. 304 [42 U.S.C. 2155a]. Export Licensing Procedures.

....
(b) ... [T]he Commission shall, after consultations with the Secretary of State, promulgate regulations establishing procedures (1) for the granting, suspending, revoking, or amending of any nuclear export license or exemption pursuant to its statutory authority; (2) for public participation in nuclear export licensing proceedings when the Commission finds that such participation will be in the public interest and will assist the Commission in making the statutory determinations required by the 1954 Act, including such public hearings and access to information as the Commission deems appropriate

(c) The procedures to be established pursuant to subsection (b) shall constitute the exclusive basis for hearings in nuclear export licensing proceedings before the Commission and, notwithstanding section 189a. of the 1954 Act, shall not require the Commission to grant any person an on-the-record hearing in such a proceeding.

....

CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2004, a copy of the "Brief for the Federal Respondents," was served by mail, postage prepaid, upon the following counsel:

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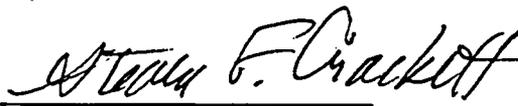
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