UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

OFFICE OF THE
GENERAL COUNSEL

December 9, 2004

Office of the Clerk
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street, P.O. Box 193939
San Francisco, CA 94110-3939

RE: Nuclear Information and Resource Service, et al. v. Nuclear Regulatory Commission, No. 04-71432

Dear Sir/Madam:

Enclosed you will find an original and four copies of the Federal Respondents' Opposition to Petitioners' Motion to Transfer Proceedings to District Court in the above-referenced case. Please date stamp the enclosed copy of this letter to indicate date of receipt, and return the copy to me in the enclosed envelope, postage pre-paid, at your convenience.

Respectfully submitted,

Grace H. Kim
Senior Attorney
Office of the General Counsel

Enclosures: As stated

cc: service list

CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2004, a copy of the foregoing Federal Respondents' Opposition to Petitioners' Motion to Transfer Proceedings to District Court was served by mail, postage prepaid, upon the following counsel:

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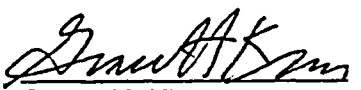

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NUCLEAR INFORMATION AND RESOURCE SERVICE, et al. Petitioners, v. NUCLEAR REGULATORY COMMISSION and THE UNITED STATES OF AMERICA, Respondents.	)	No. 04-71432

FEDERAL RESPONDENTS' OPPOSITION TO
PETITIONERS' MOTION TO TRANSFER PROCEEDINGS TO DISTRICT COURT

In this proceeding, Petitioners have filed in this Court a petition for review challenging a final rule issued by the Nuclear Regulatory Commission ("NRC"). The challenged NRC rule pertains to the packaging and transportation of radioactive material consistent with international standards.[1] Petitioners have now filed a motion requesting that this proceeding be transferred to district court and consolidated with a complaint proceeding initiated by Petitioners on a related transportation rule issued by the Department of Transportation ("DOT").[2] For the reasons stated below, the NRC and the United States oppose Petitioners' motion to transfer this proceeding.

[1]Compatibility with IAEA Transportation Safety Standards (TS-R-1) and Other Transportation Safety Amendments, 69 Fed. Reg. 3698 (Jan. 26, 2004).

[2]NIRS, et al. v. DOT-RSPA, No. 04-4740 (N.D. Cal. filed Nov. 9, 2004).

ARGUMENT

1. Pursuant to the Administrative Orders Review Act (the "Hobbs Act"), the court of appeals "has exclusive jurisdiction to enjoin, set aside, suspend...or to determine the validity of...all final orders of the [NRC] made reviewable by section 2239 of title 42." 28 U.S.C. § 2342(4). Section 2239 of Title 42, in turn, makes reviewable under the Hobbs Act any order of the NRC entered in any proceeding for, inter alia, "the issuance or modification of rules and regulations dealing with the activities of licensees."[3]

There is no question that the Hobbs Act gives the courts of appeals exclusive jurisdiction to consider challenges to NRC "rules and regulations," a power the courts of appeals have exercised on many occasions.[4] In their motion to transfer, Petitioners acknowledge (at 2) that this Court has original jurisdiction under the Hobbs Act to review the NRC's transportation rule. But Petitioners maintain (at 2) that a provision of the Hobbs Act, 28 U.S.C. § 2347(b)(3), requires that this Court transfer this proceeding to the district court "for a hearing and determination as if the proceedings were originally initiated in the District Court...." Petitioners claim that transfer to district court is required under section 2347(b)(3) whenever "a genuine issue of material fact is

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[3]See General Atomics v. NRC, 75 F.3d 531, 538 (9th Cir. 1996).

[4]See, e.g., Reytblatt v. NRC, 105 F.3d 715 (D.C. Cir. 1997); Kelley v. Selin, 42 F.2d 1501 (6th Cir. 1995), cert. denied, 515 U.S. 1159 (1995); Nuclear Info. Res. Serv. v. NRC, 969 F.2d 1169 (D.C. Cir. 1992) (en banc).

presented" in the court of appeals proceeding. They say that transfer is appropriate here because "issues of material fact" are purportedly raised by the NRC's environmental analysis of the transportation rule under the National Environmental Policy Act ("NEPA").

Petitioners entirely ignore threshold prerequisites to invoking section 2347(b)(3). On its face, this provision authorizes a transfer of a proceeding to district court only "when a hearing is not required by law" and "[w]hen the agency has not held a hearing before taking the action of which review is sought." By its own terms, this provision simply does not apply to judicial review of NRC rules because by law the NRC must provide a "hearing" when issuing rules and because the NRC does so in all rulemaking proceedings, including this one.

The Atomic Energy Act ("AEA"), the NRC's organic statute, explicitly requires that a "hearing" be held by the agency "[i]n any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees...." Section 189a.(1)(A), 42 U.S.C. § 2239a.(1)(A). Prior to issuing its final transportation rule, the NRC did in fact hold a hearing in accordance with the notice and comment rulemaking provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553.[5] It is firmly established that APA "notice-and-

[5]Indeed, the NRC's transportation rule, including the supporting Environmental Assessment issued pursuant to NEPA (see 69 Fed. Reg. at (continued...)

comment" procedures meet the "hearing" requirement for the issuance of NRC rules under Section 189a.(1)(A) of the AEA. See Siegel v. AEC, 400 F.2d 778, 785-86 (D.C. Cir. 1968). See also Vermont Yankee Nuclear Power v. NRDC, 435 U.S. 519, 547-48 (1978); United States v. Florida East Coast Railway Co., 410 U.S. 224, 241-42 (1973). Petitioners' effort to obtain a transfer to district court in a case where the NRC must provide a hearing, and has done so, fails as a matter of law.

Petitioners cite two cases where transfers to District Court were ordered under 28 U.S.C. § 2347(b)(3) – Gallo-Alvarez v. Ashcroft, 266 F.3d 1123 (9th Cir. 2001), and Lake Carriers' Association v. United States, 414 F.2d 567 (6th Cir. 1969). Neither of these cases is helpful to Petitioners. In fact, they only confirm our view of when § 2347(b)(3) may be invoked. In both cases, in direct contrast to the NRC rule at issue, transfers to district court pursuant to section 2347(b)(3) were ordered when a hearing was not required by law and the agencies had not held a hearing. Moreover, the transfers to district court do not appear to have been controversial in either case. In both cases, the

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[5](...continued)
3702-03), was developed based upon an extensive administrative record and was the subject of intense public participation both before and after publication of the proposed rule. The public participation process included an interactive Web site, three facilitated public meetings, a "roundtable" workshop at NRC Headquarters, and two "townhall" meetings prior to publication of the proposed rule, and two additional public meetings subsequent to the proposed rule's publication. See id. at 3698.

court simply reiterated the basic requirements for transfers under section 2347(b)(3) without further analysis. See Gallo-Alvarez, 266 F.3d at 1129; Lake Carriers' Association, 414 F.2d at 567-68.

2. It is dispositive of Petitioners' motion that 28 U.S.C. § 2347(b)(3) does not authorize courts of appeals to make a transfer to district court in a case such as this where the agency is required by law to provide a hearing and has done so. But Petitioners' request for transfer under section 2347(b)(3) would fail even if "a genuine issue of material fact" were the only prerequisite to a transfer under that provision. This is because Petitioners' claims raise no "genuine issues of material fact" for judicial resolution.

To be sure, Petitioners have argued that there are factual matters that the NRC should have considered when evaluating the environmental impacts of its rule under NEPA, and that this Court should look beyond the administrative record to assess the adequacy of the NRC's NEPA compliance.[6] However, even if there are extra-record materials that this Court could and should consider in evaluating the adequacy of the NRC's NEPA compliance (something the NRC does not concede), this does not mean that there are or will be "genuine issues of material fact" for this Court (or a district court upon transfer) to determine. While this Court will allow consideration of extra-record materials in certain circumstances in NEPA (and APA) cases, including when "necessary to

[6]See discussion in 3., pp. 6-8, infra.

determine 'whether the agency has considered all relevant factors and has explained its decision,'" see Northcoast Environmental Center v. Glickman, 136 F.3d 660, 665 (9th Cir. 1998) (quoting Southwest Center for Biological Diversity v. U.S. Forest Service, 100 F.3d 1443, 1450 (9th Cir. 1996)), this does not mean that this Court (or district courts) may resolve factual disputes that are raised by the extra-record materials. To the contrary, where an agency's factual determinations are challenged in a NEPA case (through extra-record materials or otherwise) the courts are required to defer to the technical expertise of the agency. See Sausalito v. O'Neill, 306 F.3d 1186, 1206 (9th Cir. 2004) (and cases cited therein). If this Court determines that the agency has not considered the relevant factors or made the necessary findings, the appropriate remedy is remand to the agency.[7] In exercising such review -- including the consideration of any extra-record materials where appropriate -- the Court does not engage in traditional fact finding. Accordingly, the court of appeals is in as good a position to undertake such review as the district court. Accord County of Suffolk v. Secretary of the Interior, 562 F.2d 1368, 1375 (2d Cir. 1977).

3. Arguing (at 2-3) that "[r]eview here is not possible on the record developed by the [NRC] [and] requires extra-record evidence to determine the adequacy of NRC's analyses in support of its [NEPA assessment]," Petitioners

[7]See discussion in 4., pp. 8-10, infra.

also cite National Audubon Society v. U.S. Forest Service, 46 F.3d 1439 (9th Cir. 1993), and County of Suffolk, supra, as support for their request for transfer under section 2347(b)(3). However, neither of these cases concerns transfers from the court of appeals to district court, let alone transfers under the Hobbs Act's section 2347(b)(3). Rather, these cases address an unrelated issue -- i.e., what circumstances justify a reviewing court to expand review beyond the existing administrative record.

The line of case authority that Petitioners rely on carves out narrow exceptions, applicable "only under extraordinary circumstances," Voyageurs Natonal Park Association v. Norton, 381 F.3d 759, 766 (8th Cir. 2004), to the general rule that judicial review of an agency decision must be based on the administrative record created by an agency. See Camp v. Pitts, 411 U.S. 138, 142 (1973), discussed infra. One such exception -- the exception cited by Petitioners (at 2-3) -- involves cases under NEPA where it is necessary for a reviewing court to look outside the administrative record in order "to see what the agency may have ignored" in its NEPA statement. County of Suffolk, 562 F.2d at 1384. But the exceptions noted in these cases do not bear on transfers of cases from the court of appeals to district court under section 2347(b)(3) of the Hobbs Act. As indicated above, these cases neither address nor set forth any governing standards for such transfers.

Moreover, even if this Court were ultimately to decide that it is necessary

to look outside the administrative record in this proceeding,[8] this would not, in and of itself, justify a transfer of this proceeding to district court. While NEPA challenges frequently originate in district court, as in the cases cited by Petitioners, nothing in those cases limits application of the administrative record exception to cases reviewed in district court. This Court and other courts of appeals have used their Hobbs Act authority to review many NEPA-based claims.[9] We are aware of none ever transferred to a district court. It is within the purview of *this* Court, as the reviewing court under the Hobbs Act, to make any needed inquiries outside the existing administrative record -- for example, through affidavits or through a remand to the agency. See 28 U.S.C. § 2347(c).

4. Petitioners maintain (at 3) that "extra-record evidence" gathering in district court is necessary because the NRC's NEPA assessment of its transportation rule was inadequate. However, the Supreme Court has firmly established that in reviewing cases under the review standard applicable to

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[8]We note that this proceeding is still in its initial stage, with no schedule as yet for briefing and oral argument. Petitioners' suggestion notwithstanding, it is far too early in the proceeding for this Court now to determine whether it needs to go beyond the agency record in order to review the NRC's rule.

[9]See, e.g., Public Citizen v. DOT, 316 F.3d 1002, 1013 (9th Cir. 2003), rev'd on other grounds, 124 S.Ct. 2204 (2004); Sierra Club v. NRC, 862 F.2d 222 (9th Cir. 1988); see also Michigan v. United States, 994 F.2d 1197, 1202-03 (6th Cir. 1994); Shoreham-Wading River Central School District v. NRC, 931 F.2d 102, 106 (D.C. Cir. 1991).

APA § 553 rulemakings -- i.e., the "arbitrary and capricious" standard under 5 U.S.C. § 706(2)(A) -- "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." Camp, 411 U.S. at 142. Here, "as in most administrative cases...'the factfinding capacity of the district court is...unnecessary to judicial review of agency decisonmaking,' because the administrative proceedings have already generated the record necessary for appellate review." Midwest Independent Transmission System Operator, Inc. V. FERC, slip op. at 10 (D.C. Cir. No. 03-1238) (Nov. 12, 2004) (quoting Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985)).[10] If this Court were ultimately[11] to find that the rulemaking record before the NRC "does not support the agency action" or that the NRC did "not consider[] all relevant factors," Florida Power & Light Co., 470 U.S. at 744, "the proper course [would be] to remand to the agency for additional investigation or explanation." Id. Indeed, the Hobbs Act expressly allows parties seeking to "adduce additional

[10]As previously noted (see n. 5, supra), the NRC developed an extensive record on the transportation rule; it gave members of the public multiple opportunities to provide views on its NEPA evaluation (and other aspects of the rule) through a series of public meetings and a 90-day comment period on the proposed rule. See 67 Fed. Reg. 21390 and 21441 (April 30, 2002). Thus, Petitioners and other members of the public had ample opportunity to place in the administrative record any concerns they may have had regarding the NRC's NEPA assessment.

[11]As we indicated in n. 8, supra, we believe that any such decision should be made only after briefing and oral argument.

evidence" to seek a remand to the agency. See 28 U.S.C. § 2347(c).

5. Petitioners' final argument is that transfer to district court to enable consolidation with the DOT case "will avoid inefficiency and inconsistency." Motion at 5. They maintain that the "analytical factors applied by the Court in [Florida Power & Light Co.] to avoid duplication of judicial review under the Hobbs Act favor transfer here...." But the policy factors noted in Florida Power & Light Co., such as avoidance of duplicative and bifurcated review, were factors found by the Court to weigh *against* review in the district court and *in favor of* review in the court of appeals under the Hobbs Act. Id., 470 U.S. at 740-43. Moreover, in the end it is the terms of Congress's jurisdictional provisions that count. "The limited nature of federal courts' jurisdiction 'means that the efficiency and convenience of a consolidated action will sometimes have to be forgone in favor of separate actions.'" Galt G/S v. Hapag-Lloyd AG, 60 F.3d 1370, 1375 (9th Cir. 1995), quoting Finley v. United States, 490 U.S. 545, 555 (1989).

In any event, the government intends to file a motion to dismiss Petitioners' district court lawsuit against DOT for lack of jurisdiction. The district court lacks jurisdiction because 49 U.S.C. § 20114(c) confers direct review jurisdiction on the courts of appeals for challenges to DOT's regulation. Thus, even if this Court had authority to transfer this case to the district court -- which for the reasons we have given it does not -- such a transfer would not be efficient or in the interest of judicial economy.

CONCLUSION

For the foregoing reasons, this Court should deny Petitioners' Motion to Transfer Proceedings to District Court.

Respectfully submitted,

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