UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

STATE OF NEW JERSEY **Appellants,** **v.** **UNITED STATES NUCLEAR REGULATORY COMMISSION And UNITED STATES OF AMERICA** **Appellees.**	**Nos. 06-5140, 07-1559 and 07-1756 (Consolidated)**

REPLY OF GLOUCESTER COUNTY BOARD OF CHOSEN FREEHOLDERS TO OPPOSITION TO MOTION FOR LEAVE TO SUPPLEMENT THE RECORD

The Gloucester County Board of Chosen Freeholders (the "Board"), hereby replies to the opposition filed by the Federal Respondents and Shieldalloy Metallurgical Corporation ("SMC") to the Board's request to supplement the record.

The Federal Respondents and SMC are correct in their assertion that, as a general rule, extra-record materials should not be considered during judicial review of final agency action. However, what the Federal Respondents and

SMC failed to acknowledge is that this general rule has a number of exceptions. Those exceptions give a reviewing court the authority to consider materials outside of the record where doing so will aid the court in its duty to undertake a substantial inquiry into whether or not the agency in question considered all relevant factors. As is set forth below, the Board's request to supplement the record in this case falls squarely within one or more of those exceptions to the general rule against extra-record materials. In short, the Board's proposed record supplement is designed to assist this Court in its understanding of a highly technical regulation (NUREG-1757) that, as applied in this case, will have significant negative economic implications to the community and the region for years to come. Absent this additional record material, this Court's attempt at a proper review will unfortunately be frustrated.

In the case of Asarco v. U.S.E.P.A., 616 F.2d 1153 (9th Cir. 1980), the Ninth Circuit held that a reviewing court can indeed go outside the administrative record if necessary to ascertain whether the agency considered all relevant factors or fully explicated its course of conduct or grounds of decision. The Ninth Circuit observed that a court should never feel that it is "straightjacketed" to the original record, especially where the agency action is highly technical in nature and supplementary materials would aid the court's understanding. Referring to such cases as Bunker Hill Co. v. EPA, 572 F.2d

1286 (9th Cir. 1977), and Association of Pacific Fisheries v. Environmental Protection Agency, 615 F.2d 794 (9th Cir. 1980), the court stated that:

> A number of rules governing the scope of judicial review of agency action emerge from these cases. Predominant is the rule that agency action must be examined by scrutinizing the administrative record at the time the agency made its decision. The Supreme Court recognized in Overton Park, however, that even where the agency has employed adequate fact-finding procedures, the courts may find it necessary to go outside the agency record to evaluate agency action properly. The Court contemplated that any additional material should be explanatory in nature, such as requiring the involved administrative officials to demonstrate the basis for their action. A satisfactory explanation of agency action is essential for adequate judicial review, because the focus of judicial review is not on the wisdom of the agency's decision, but on whether the process employed by the agency to reach its decision took into consideration all relevant factors.

616 F.2d 1159. The Ninth Circuit Court then went on to state that "[t]he court cannot adequately discharge its duty to engage in a 'substantial inquiry' if it is required to take the agency's word that it considered all relevant matters. 616 F.2d at 1160.

Similarly, in the case of Environmental Defense Fund v. Costle, 657 F.2d 275 (D.C. Cir. 1981), the court noted that exceptions to the rule against extra-record materials are based on the policy of ensuring that effective judicial review is not frustrated. "When the record is inadequate, a court may 'obtain from the agency, either through affidavits or testimony, such additional

explanations of the reasons for the agency decision as may prove necessary.'" 657 F.2d at 285. See also, Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). Likewise, in the case of Gomez v. Wilson, 477 F.2d 411 (D.C. Cir. 1973), the United States Court of Appeals for the District of Columbia allowed the record on appeal to be supplemented to compensate for a change in the law during the appeal. At issue in Gomez was whether or not the Court of Appeals should hear about modifications to police policies governing on-the-street stopping and questioning of citizens. The appellant advised the court that there were specific instances, while the appeal was on-going, of new police stops that bore directly on the issues being argued before the court. There, the District of Columbia Circuit Court of Appeals allowed additional fact finding under the appellate jurisdiction empowering the Court to require such further proceedings "...as may be just under the circumstances." 477 F.2d at 416-417. More importantly, this appellate jurisdiction was characterized by the Court as a "broad authorization." Id.

Despite the Federal Respondents' and SMC's contention that extra-record materials are absolutely barred, courts have obviously shown a willingness to allow the introduction and consideration of information and opinions that are not part of the record before the agency at the time it renders its decision. Perhaps most directly on point, in terms of the nature of the record

supplement being requested by the Board here, is the case of Association of Pacific Fisheries v. Environmental Protection Agency, 615 F.2d 794 (9th Cir. 1980). There, the Ninth Circuit held that three expert reports impugning the validity of a U.S. Environmental Protection Agency ("EPA") rule were admissible, even though they post-dated the rule that was being challenged. The court held that the three expert reports went to the heart of the EPA's analysis and thus provided useful information and guidance in helping the court decide whether EPA's action was arbitrary, capricious and unreasonable.

As applied here, and as set forth in the Board's original brief, the NRC did not consider all relevant factors that would give rise to a reliable cost-benefit analysis for the SMC Decommissioning Plan. In particular, the NRC failed to consider the potential long-term economic impact on the host community stemming from such things as (1) flight from the community and its consequential financial impact on the region, (2) diminution in property values due to the "stigma" associated with the presence of a radioactive waste landfill, and (3) the inability to attract new businesses to the community. This lack of consideration of such relevant factors, which is a fatal flaw of NUREG-1757, is precisely what Costle, Asarco, Bunker Hill, and Assn. of Pacific Fisheries were designed to prevent.

In this case, the Board is seeking to supplement the record with only a

limited number of pages of expert testimony and public comment to demonstrate a substantial weakness in the NUREG-1757 process. In that sense, the type and amount of extra-record information being offered by the Board is far less than what was deemed permissible in the reported cases. More importantly, the supplementary information is being offered as a means of explaining a fault with the reasoning of NUREG-1757, which is a highly technical regulation involving an extremely complex analysis and review. The Board's limited supplemental record thus meets the threshold standard of Asarco that "[i]t will often be impossible, especially when highly technical matters are involved, for the court to determine whether the agency took into consideration all relevant factors unless it looks outside the record to determine what matters the agency should have considered but did not." 616 F.2d at 1160 (emphasis added). Absent the Board's proposed limited supplement to the record, this Court will find itself in the difficult position of taking the NRC's word that it considered all relevant factors, thus limiting the Court's ability to undertake a "substantial inquiry." This "straightjacket" is precisely the trap that Asarco suggested courts avoid by keeping an open mind to the submission and consideration of materials outside the record so that courts can better understand all aspects of the agency decision-making process.

Also, the record supplement proposed by the Board goes only to the

process, or lack thereof, involved in NUREG-1757 and in NRC's attempt to implement that regulatory program. Restated, the Board is not attempting to influence or affect the outcome of the NRC's decision with its proposed record supplement so much as it is pointing out procedural inadequacies. This point is evidenced by the fact that the Board's proposed addition to the record does not give a specific alternative dollar assessment in connection with the cost-benefit analysis required under NUREG-1757. Rather, the additional record materials merely point out that, because of a lack of sufficient consideration of certain well-documented economic factors, NUREG-1757 most likely results in a faulty conclusion regarding the risks and rewards of SMC's Decommissioning Plan. And, while the Board in its brief suggested that the alternatives analysis required by NUREG-1757 would likely turn out differently if the economic factors proposed by the Board had been properly accounted for, the Board did not go so far as to attach an actual revised dollar outcome for the cost-benefit analysis required under NUREG-1757. This approach to the record supplement demonstrates conclusively that the Board is merely attempting to assist the Court with an understanding of the faulty and prejudicial process embodied in NUREG-1757. From that standpoint, the Board's proposed record supplement complies with the standard set forth in Asarco that "...the focus of judicial review is not on the wisdom of the agency's decision, but on whether the

process employed by the agency to reach its decision took into consideration all relevant factors."

This request to supplement the record is all the more compelling in light of recent news reports regarding the NRC's failure to provide adequate safeguards with respect to it licensing procedures. In particular, congressional investigators set up a bogus company with only a post office box. Within a month, that bogus company had purchased enough radioactive material to construct a "dirty bomb." In the wake of such documented lack of attention and dismal safeguards at the NRC, this Court should show an even greater willingness to allow the submission of any documents that address the NRC's decision-making capacities. And, that's precisely what the Board's request to supplement the record is intended to do. It simply demonstrates that the NRC, because of a faulty licensing rule, will allow the creation of numerous radioactive waste landfills across the country, all of which could potentially add to the national security concerns raised in recent news reports.

In conclusion, the Board believes it is "just under the circumstances," as articulated in Gomez, that the record be supplemented to allow for the consideration of how NUREG-1757 fails altogether to account for the fact that the host community and the region will suffer financially for years to come as a result of NRC's decision in this case.

The Board thus respectfully requests that this Court grant the Board's Motion for Leave to Supplement the Record

Respectfully submitted,

PARKER McCAY P.A.
Attorneys for Intervenor, The Gloucester County Board of Chosen Freeholders

Dated: 7/25/07

By: _____
JOSEPH J. McGOVERN

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PROOF OF SERVICE

I, Joseph H. McGovern, of full age, hereby certify that:

1. I am an attorney with the Law Firm of Parker McCay P.A., and am the attorney assigned with the handling of this matter on behalf of Intervenor, The Gloucester County Board of Chosen Freeholders.

2. On July 25, 2007, I caused to have forwarded copies The Gloucester County Board of Chosen Freeholders Reply to Opposition to Motion for Leave to Supplement Record and accompanying Proof of Mailing, on behalf of the Intervenor, The Gloucester County Board of Chosen Freeholders, in the within action as follows:

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I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, then I am subject to punishment.

JOSEPH J. McGOVERN

Dated: 7/25/07

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