Nos. 07-1482; 07-1483

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,
v.
UNITED STATES; U.S. NUCLEAR REGULATORY COMMISSION
Respondents,

ENTERGY NUCLEAR OPERATIONS, INC.; ENTERGY NUCLEAR VERMONT LLC; ENTERGY NUCLEAR GENERATION COMPANY,
Intervenors.

ON PETITIONS FOR REVIEW OF ORDERS OF THE
U.S. NUCLEAR REGULATORY COMMISSION

REPLY BRIEF FOR PETITIONER COMMONWEALTH OF MASSACHUSETTS

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INTRODUCTION

In its responsive brief, the U.S. Nuclear Regulatory Commission (NRC) admits that the Commission issued a final order eliminating the Commonwealth from the individual relicensing proceedings for the Pilgrim and Vermont Yankee nuclear power plants. Brief for the Federal Respondents (Oct. 22, 2007) (NRC Brief) at 1. ("An agency denial of an intervention petition terminates the petitioner's rights in a proceeding and is 'final' agency action."). Yet the NRC then asserts that the Commonwealth's claims raised in those same proceedings -- that the NRC has violated the National Environmental Policy Act (NEPA) -- are not final and reviewable by this Court. NRC Brief. at 29.

The NRC is not free to select only those issues it prefers to litigate that arise from its final order. The NRC's failure to comply with NEPA's requirements is final and reviewable now because the present appeal is the Commonwealth's only chance to obtain judicial review to ensure that the NRC corrects these errors before relicensing Pilgrim and Vermont Yankee for another twenty years. Therefore the NRC's order on these issues meets the judicial test of finality and is reviewable now because (a) it determines "rights or obligations" or triggers "legal consequences" and (b) it is not "tentative or interlocutory." *Bennett v. Spear,* 520 U.S. 154, 177-78 (1997).

Because the NRC issued a final order to eliminate the Commonwealth from the individual licensing proceedings, the Commonwealth's claims that the NRC has failed to follow federal procedures mandated by NEPA also are ripe for judicial review. *Nkihtaqmikon v. Bureau of Indian Affairs,* No. 06-2733, ---F.3d--- 2007 WL 2685200 (1st Cir. Sept. 14, 2007), (Supp. Add. 1).

Finally, the NRC's invitation to participate as an interested state on other issues neither raised nor contested by the Commonwealth in this case does not render the NRC's NEPA violations unripe, is contrary to the NRC's own regulations and would be a meaningless exercise.

I. THE NRC'S OBLIGATION TO COMPLY WITH THE NATIONAL ENVIRONMENTAL POLICY ACT IS NOT DISCRETIONARY

As the NRC correctly observes, the agency has the discretion to choose between a generic rulemaking process, and an individual adjudication, to resolve the Commonwealth's claim that NEPA requires the NRC to consider new and significant information regarding the environmental impacts of spent fuel storage at the Pilgrim and Vermont Yankee nuclear power plants. NRC Brief at 26; Commonwealth Initial Brief at pp. 32-33. However, the NRC then commits legal error by asserting that the agency has the discretion to disregard NEPA's fundamental and non-discretionary requirements to complete the generic rulemaking in a timely way, *i.e.,* before deciding whether to relicense the Pilgrim

and Vermont Yankee plants for an additional twenty years. The NRC also refuses to ensure it will conform to NEPA's mandate to apply ("plug in[]") the results of the rulemaking to those individual proceedings prior to relicensing. *Baltimore Gas and Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983); *see also* Commonwealth Initial Brief at 33 (citing *Baltimore Gas* that the generic decision-making must be "plugged into" the individual proceeding) and 16-18, 32-33.

Instead of complying with these nondiscretionary procedural obligations under NEPA, the NRC asserts that it will withhold its license renewal decisions pending completion of the rulemaking proceeding only if, at the time it decides whether to renew the licenses, a "balancing of the equities" favors a stay of the license renewal decisions. NRC Brief at 38, *citing Acevedo-Garcia v. Vera-Monroig,* 296 F.3d 13, 16-17 (1st Cir. 2002).[1] But the Commission does not have the discretion to balance away its legal obligation to comply with NEPA prior to relicensing. The NRC has no choice but to make a timely decision regarding the Commonwealth's rulemaking petition and apply the results in the individual

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[1] As the Court observed in *Acevedo-Garcia,* the issuance of a stay essentially depends upon "whether the harm caused [movant] without the [stay], in light of the [movant's] likelihood of eventual success on the merits, outweighs the harm the [stay] will cause [the non-moving party]." 296 F.3d at 16-17, *quoting United Steelworkers of America v. Textron, Inc.*, 836 F.2d 6, 7 (1st Cir. 1987).

licensing proceedings. That is because, under settled law, NEPA requires an agency to take a hard look at the information before – not after – the major federal action. Commonwealth Initial Brief at 25-26.

Similarly, the NRC errs by impermissibly placing the burden on the Commonwealth to meet the legal requirements for a stay of agency action before the NRC is willing to comply with NEPA's mandate and consider the Commonwealth's new and significant information prior to relicensing. *See* NRC Brief at 31 ("[T]he Commonwealth may still request a stay of the license renewal proceedings at the appropriate time."). To the contrary, the burden of demonstrating compliance with NEPA is on the NRC, not public intervenors. *Calvert Cliffs Coordinating Committee v. AEC,* 449 F.2d 1109, 1118-19 (D.C. Cir. 1971).

By failing to ensure that it will comply with NEPA's fundamental requirements in a timely manner, and by turning NEPA's non-discretionary duties into a matter of agency discretion, the NRC violated NEPA.

II. THE NRC'S FAILURE TO ENSURE THAT IT WILL COMPLY WITH NEPA PRIOR TO RELICENSING THE PILGRIM AND VERMONT YANKEE PLANTS FOR AN ADDITIONAL TWENTY YEARS CONSTITUTES FINAL AND REVIEWABLE AGENCY ACTION UNDER THE HOBBS ACT.

A. The NRC's Refusal To Ensure That It Will Comply With NEPA Is Final And Reviewable Now Because This Legal Error Was Made In Conjunction With An Order Dismissing The Commonwealth From The Pilgrim And Vermont Yankee License Renewal Proceedings.

According to the NRC, because the agency has issued no final order in response to either the Commonwealth's rulemaking petition or Entergy's license renewal applications, this Court lacks jurisdiction to hear the Commonwealth's claim that the NRC violated NEPA by refusing to ensure that it would resolve the Commonwealth's rulemaking petition and apply the result in the individual license renewal decisions. NRC Brief at 4, 22-23.

The NRC argues that its decision in CLI-07-03 was final "only on the question of whether the NRC ought to have allowed the Commonwealth to intervene and obtain an adjudicatory hearing" on the Pilgrim and Vermont Yankee license renewal proceedings. NRC Brief at 1, 30, citing *Thermal Ecology Must be Preserved v. AEC,* 433 F.2d 524, 525 (D.C. Cir. 1970); *Environmental Law and Policy Center v. NRC,* 470 F.3d 676, 681 (7th Cir. 2006).

That is not the law. By dismissing the Commonwealth from the Pilgrim and Vermont Yankee license renewal cases without addressing its NEPA claims, the

NRC has conclusively established the Commonwealth's rights and imposed legal consequences on the Commonwealth, because the Commission's decision eliminates the Commonwealth's right to challenge the agency's compliance with NEPA in renewing the operating licenses for those nuclear plants. *Environmental Law and Policy Center,* 470 F.3d at 681 (holding that a grant of summary disposition which resulted in dismissal of the petitioner from an NRC licensing proceeding constituted final action, despite the fact that the NRC had not yet issued the permit). While the NRC may not have concluded the Pilgrim and Vermont Yankee license renewal proceedings, those proceedings have ended as far as the Commonwealth is concerned, because NRC regulations offer the Commonwealth no further opportunity to challenge the adequacy of the NRC's NEPA analysis to support those license renewal decisions. *Id.; cf. Natural Resources Defense Council v. NRC,* 680 F.2d 810, 816 (D.C. Cir. 1982) (finding that the availability of a subsequent opportunity to obtain review of a final order in an NRC licensing proceeding dictated against review of an initial order regarding the conduct of the hearing).

The sixty-day jurisdictional limit of the Hobbs Act (28 U.S.C. § 3242(4) – measured from the date of the Commonwealth's dismissal from Pilgrim and Vermont Yankee license renewal proceedings (January 22, 2007) – would preclude the Commonwealth from challenging in the future the NRC's failure to comply

with NEPA by timely issuing the rulemaking or applying it to the license renewal decisions. Therefore, the Commonwealth's NEPA claims are now reviewable by this Court because the NRC's order (a) determines "rights or obligations" or triggers "legal consequences" and (b) is not "tentative or interlocutory." *Bennett v. Spear,* 520 U.S. at 177.[2]

B. The Opportunity To Challenge The NRC's Denial Of The Commonwealth's Rulemaking Petition Does Not Include The Right To Challenge The NRC's Application Of The Rulemaking Decision In The Individual License Renewal Cases.

The NRC and Entergy argue that the NRC's refusal to comply with NEPA is not final because the Commonwealth will have an opportunity to challenge any decision by the NRC denying its rulemaking petition. NRC Brief at 37; Brief of Intervenors Entergy Nuclear Operations, Inc., Entergy Nuclear Vermont Yankee LLC, And Entergy Nuclear Generation Company (Entergy Brief) at 43. They do not contend, however, that such a challenge could also include the question of whether the NRC's denial of the rulemaking petition rendered the NRC's license renewal decisions for Pilgrim and Vermont Yankee unlawful under NEPA. Nor is it clear that such a challenge would be permitted. As the U.S. Court of Appeals for

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[2] While contesting the ripeness of the Commonwealth's claims, the NRC apparently does not contest the Commonwealth's right under the Atomic Energy Act (AEA 4239(a)(1)(A)) to a hearing on whether the agency violated NEPA. *See* Commonwealth Initial Brief at 38, *see also* NRC Brief at 34-36.

the D.C. Circuit held in *Natural Resources Defense Council v. NRC,* 547 F.2d 633, 653 n.57 (D.C. Cir. 1976), *rev'd on other grounds, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978),. promulgation of a generic NEPA rulemaking containing conclusions about the significance of environmental impacts is not, of itself, a "major federal action" giving rise to the obligation to prepare an environmental impact statement.

In this case, the appealable "major federal action" is the relicensing of the Pilgrim and Vermont Yankee nuclear plants. The NRC initiated a hearing to consider that major federal action in 2006 and reached its final decision in CLI-07-03 with respect to the issues raised by the Commonwealth. Now that the sixty-day time limit for challenging CLI-07-03 has expired, the Commonwealth has no further opportunity to challenge the NRC's license renewal decision for Pilgrim and Vermont Yankee. The Commonwealth thus has one opportunity for judicial relief to ensure NEPA compliance at the plants of concern and that is now.[3]

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[3] Entergy claims that the Commonwealth did not exhaust its administrative remedies because it did not seek a waiver of the NRC's regulations. Entergy Brief at 44. Even the Commission recognized that a generic rulemaking petition – not a waiver petition intended to address a site specific difference at an individual plant -- is the "appropriate way" to challenge a generic finding by the NRC. *See* NRC Brief at 16-17, citing J.A. 3-4. Inconsistently, Entergy suggests that it also agrees with this position. Entergy Brief at 32-33.

Entergy's remaining arguments largely address issues raised by the NRC, not in dispute between the parties, or not before the Court on appeal. *See* e.g. Entergy Brief at 27 (NRC has authority to resolve issues through generic

C. This Appeal is Ripe for Judicial Review. [4]

In the alternative, the NRC argues that even if its refusal to commit to NEPA compliance in CLI-07-03 could be considered final, the court should not review it because it is not ripe. NRC Brief at 34, citing *Abbott Laboratories v. Gardner,* 387 U.S. 136, 148-49 (1967). To the contrary, this case is ripe for judicial review because 1) the Commonwealth has suffered injury from the NRC rulings that rejected it from the individual licensing proceedings since as noted it will have no further opportunity to challenge the NRC's failure to timely address and apply the NEPA issues to the individual licensing proceedings and 2) the NRC already has committed legal error by erroneously construing its obligation to comply with NEPA to be a matter of agency discretion. *Nkihtaqmikon v. Bureau of Indian Affairs,* 2007 WL 2685200 at *9, (Supp. Add. 18), quoting *Ohio Forestry, Inc. v. Sierra Club,* 523 U.S. 726, 737 (1998) (holding that "a person with standing who is injured by a failure to comply with (statutory) procedure may complain of that failure at the time the failure takes place, for the claim can never get riper.")

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rulemaking); Entergy Brief at 32 (Commonwealth must seek rulemaking to challenge the Generic EIS).

[4] This Court previously denied a request by the Commonwealth to hold this appeal in abeyance pending a decision by the NRC on the rulemaking petition. Commonwealth of Massachusetts Motion to Hold Petitions for Review in Abeyance (April 24, 2007). The briefs subsequently submitted by the parties in this case confirm that the NRC's legally erroneous construction of NEPA is ripe for judicial review.

In *Nkihtaqmikon,* this Court rejected an argument, similar to the NRC's argument in this case, that a concededly final decision by the Bureau of Indian Affairs (BIA) to issue a lease was "not ripe because 'the existence of the dispute itself hangs on future contingencies that may or may not occur.'" 2007 WL 2685200 at *9, (Supp. Add. 18), quoting *Texas v. United States*, 523 U.S. 296, 300 (1998). *See also* NRC Brief at 35-36 (arguing that NRC's refusal to comply with NEPA is not ripe for review because it is "possible that the NRC will deny or delay the license renewal applications"). The Court found the case was ripe because the Petitioners' "alleged injury is the BIA's failure to follow federal law before approving the lease." *Id.* Similarly, in this case the Commonwealth suffered injury when the NRC failed to follow NEPA mandatory procedures for considering environmental impacts before rejecting the Commonwealth's claims and ejecting the Commonwealth from the Pilgrim and Vermont Yankee license renewal proceedings.[5] The NRC's failure to comply with NEPA is ripe for reversal and remand to the agency "for further consideration in light of" the rulemaking

[5] In contrast to *Nkihtaqmikon* and the instant case, in *City of Fall River v. Federal Energy Regulatory Commission,* Nos. 06-1203, 06-2146, 06-1204, 06-2147, 06-1220, --- F.3d ---, 2007 WL 3121568 (1st Cir. Oct. 26, 2007), this Court found that a permitting decision by the Federal Energy Regulatory Commission was not ripe because it was "expressly conditioned" on approval by two other federal agencies. *Id.* at *4, (Supp. Add. 25). Here, however, there is nothing conditional about the NRC's decision to terminate the Commonwealth's participation in the Pilgrim and Vermont Yankee license renewal proceedings, thereby conclusively rejecting the Commonwealth's NEPA claims.

proceeding. Commonwealth Initial Brief at 32 quoting *State of Minnesota v. NRC,* 602 F.2d 412, 418 (D.C. Cir. 1979).

III. THE COMMONWEALTH DOES NOT HAVE AN OPPORTUNITY TO PARTICIPATE AS AN INTERESTED STATE NOR DOES THIS HAVE ANY EFFECT ON THE FINALITY OF THE NRC'S DECISION IN CLI-07-03.

The NRC contends that no "legal consequences" have arisen from the Commission's refusal to comply with NEPA, because the Commonwealth has the right to seek continued participation in the Pilgrim and Vermont Yankee license renewal proceedings as an "interested state" under 10 C.F.R. § 2.315(c), even if it does not have an admitted contention. NRC Brief at 29, 31; (*see* Supp. Add. 29). The NRC suggests that the Commonwealth could use its interested state status to postpone its dismissal from the case and thereby delay the time for filing an appeal until the NRC makes its license renewal decisions. *Id.*

The NRC raises this argument for the first time on appeal: until the filing of its brief on appeal to this Court, the NRC has taken the position that the Commonwealth could seek interested state status only if it abandoned its contentions and waived its right to judicial review. The Commission explicitly affirmed that position in this case.[6] The Court should reject the NRC's *post hoc*

[6] As the NRC stated:

rationalization for its decision, because it was never made in support of the decision below. *Dubois v. U. S. Dept. of Agriculture*, 102 F.3d 1273, 1289 (1st Cir. 1996).

In any event, the NRC's newly stated position is inconsistent with NRC case law which precludes the Commonwealth from raising its NEPA concerns about spent fuel pool risks as an interested state. Under well-established NRC precedents, an interested state must either litigate its own contentions or limit its participation to the contentions submitted by other parties that are admitted to the proceeding. *Gulf State Utilities Co.* (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760, 768 (1977). The representative of an interested state must "take the proceeding as he finds it" and may not challenge previous rulings. *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-600, 12 NRC 3, 8 (1980).

> A state may participate *either* as an interested governmental entity *or* as a party with its own contentions, but not both. *Louisiana Energy Services, L.P.* (National Enrichment facility), CLI-04-35, 60 NRC 619, 626-27 (2004). Therefore the Mass AG could not have sought 'participation' status under section 2.315 while the appeal on the admissibility of her contention was still pending. But, as at least one contention has been admitted for hearing in each of the *Vermont Yankee* and *Pilgrim* proceedings, the Mass AG could seek participation status even now."

See Commonwealth Initial Brief at 18 n.11, citing JA 9 n. 16 (emphasis Commission). *See also* Supp. Add. 29.

The Commonwealth seeks to litigate only one claim in the Pilgrim and Vermont Yankee license renewal proceedings, and that is the inadequacy of Entergy's and the NRC's environmental analyses to address the environmental risks of spent fuel storage. The NRC has dismissed that claim from both license renewal proceedings. Thus the Commonwealth would be barred from pursuing its claim as an interested state.

Finally, while the NRC now asserts that the Commonwealth incorrectly interpreted its position, the agency's new position would lead to an irrational construction of the regulation. According to the NRC, the Commonwealth should "participate" in proceedings on issues it has not raised and in which it has expressed no interest. *See* Commonwealth Initial Brief at 2 and 37 citing the Administrative Procedure Act, 5 U.SC. § 702.[7]

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[7] Both the NRC and Entergy suggest that by not seeking interested state status, the Commonwealth has failed to exhaust its administrative remedies. NRC Brief at 32, Entergy Brief at 44. However, as noted above, the Commonwealth did exhaust its administrative remedies consistent with Section 2.315. *See* J.A. 9 and Supp. Add. 29. In any event, exhaustion of administrative remedies is not required where the issue presented is a pure question of law. *Christopher W. v. Portsmouth School Committee*, 877 F.2d 1089, 1098 (1st Cir. 1989).

CONCLUSION

For the foregoing reasons, this Court should reverse and remand CLI-07-03 with directions that the Commission withhold any final decision in the individual license renewal proceedings for Pilgrim and Vermont Yankee unless and until the Commission considers and rules upon the Commonwealth's new and significant information in accordance with NEPA and the AEA and any further rulings by the Court, and the Commission applies those considerations and rulings to the individual Pilgrim and Vermont Yankee relicensing proceedings.

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November 8, 2007

Attorney's Certificate of Compliance with Rule 32(a)

This reply brief complies with the type-volume requirements of Fed. R. App. P. 32(a)(7)(B)(ii) because it contains 3,178 words as determined by the word-count function on the word processor, and excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The count does not include the title page, corporate disclosure statement, table of contents, table of authorities, statement with respect to oral argument, addendum of statutes, rules, and regulations. The word count does include all footnotes, headings, and sub-headings within the brief.

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The typeface used is Times New Roman, a proportionally spaced typeface using serifs, and the Brief is set in 14-point type. The word processing program used was Microsoft Word.

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Dated: November 8, 2007

Certificate of Service

I hereby certify that on November 8, 2007, copies of the Reply Brief for Petitioner Commonwealth of Massachusetts were served by first class mail upon the following:

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SUPPLEMENTAL ADDENDUM

SUPPLEMENTAL ADDENDUM

UNPUBLISHED JUDICIAL OPINIONS

PERTINENT REGULATIONS

--- F.3d ----, 2007 WL 2685200 (C.A.1 (Me.))

Briefs and Other Related Documents

Only the Westlaw citation is currently available.

United States Court of Appeals,
First Circuit.
NULANKEYUTMONEN NKIHTAQMIKON, David Moses Bridges, Vera J. Francis, Hilda Lewis, Deanna Francis, Reginald Joseph Stanley, Mary Bassett, Plaintiffs, Appellants,
v.
Robert K. IMPSON, Acting Regional Director, Eastern Region, **Bureau of Indian Affairs**; Gale Norton, Secretary of the Interior, United States Department of the Interior, Defendants, Appellees.
No. 06-2733.
Heard June 8, 2007.
Decided Sept. 14, 2007.

Background: Group of Indian tribe members and individual tribe members brought action for declaratory and injunctive relief, alleging that approval by Bureau of Indian Affairs (BIA) of lease of tribal land on which developer sought to construct liquefied natural gas (LNG) terminal violated Indian Long-Term Leasing Act, National Environmental Policy Act (NEPA), National Historic Preservation Act (NHPA), Administrative Procedure Act (APA), and Endangered Species Act (ESA) and breached federal government's fiduciary duty to Indian citizens. The United States District Court for the District of Maine, John A. Woodcock, Jr., J., 462 F.Supp.2d 86, dismissed for lack of jurisdiction. Plaintiffs appealed.

Holdings: The Court of Appeals, Torruella, Circuit Judge, held that:
(1) BIA's change in position on appeal did not warrant remand;
(2) plaintiffs had Article III standing to pursue their procedural claims under NEPA, NHPA, and ESA;
(3) plaintiffs' interests arguably fell within zone of interests protected by Indian Long-Term Leasing Act, as required for prudential standing;
(4) plaintiffs failed to state claim in alleging breach of federal government's fiduciary duty to Indian citizens;
(5) plaintiffs' claims were ripe for review; and
(6) administrative exhaustion was not jurisdictional requirement.

Affirmed in part; reversed and remanded in part.

[1] KeyCite Notes

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases

Court of Appeals reviews de novo district court's decision to dismiss for lack of jurisdiction on standing and ripeness grounds.

[2] KeyCite Notes

⇦170B Federal Courts
⇦170BI Jurisdiction and Powers in General
⇦170BI(A) In General
⇦170Bk29 Objections to Jurisdiction, Determination and Waiver
⇦170Bk34 k. Presumptions and Burden of Proof. Most Cited Cases

⇦170B Federal Courts KeyCite Notes
⇦170BVIII Courts of Appeals
⇦170BVIII(K) Scope, Standards, and Extent
⇦170BVIII(K)3 Presumptions
⇦170Bk797 k. Dismissal. Most Cited Cases

Although plaintiff has burden of clearly alleging definite facts to demonstrate that jurisdiction is proper, on review of decision to dismiss case for lack of jurisdiction on standing and ripeness grounds, Court of Appeals construes such facts and reasonable inferences drawn therefrom in favor of plaintiff.

[3] KeyCite Notes

⇦209 Indians
⇦209VI Actions
⇦209k252 k. Appeal or Other Review. Most Cited Cases

Change in position on appeal by Bureau of Indian Affairs (BIA) regarding finality of its approval of lease of tribal land did not warrant remand of action by group of Indian tribe members and individual tribe members alleging that lease approval violated federal laws, which district court had dismissed for lack of jurisdiction on standing and ripeness grounds, given that Court of Appeals reviewed issues of standing and ripeness de novo and had necessary information on appeal to decide those issues.

[4] KeyCite Notes

⇦170A Federal Civil Procedure
⇦170AII Parties
⇦170AII(A) In General
⇦170Ak103.1 Standing
⇦170Ak103.2 k. In General; Injury or Interest. Most Cited Cases

⇦170A Federal Civil Procedure KeyCite Notes
⇦170AII Parties

⇐170AII(A) In General
⇐170Ak103.1 Standing
⇐170Ak103.4 k. Rights of Third Parties or Public. Most Cited Cases

Standing doctrine embraces several judicially-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.

[5] KeyCite Notes

⇐170A Federal Civil Procedure
⇐170AII Parties
⇐170AII(A) In General
⇐170Ak103.1 Standing
⇐170Ak103.2 k. In General; Injury or Interest. Most Cited Cases

⇐170A Federal Civil Procedure KeyCite Notes
⇐170AII Parties
⇐170AII(A) In General
⇐170Ak103.1 Standing
⇐170Ak103.3 k. Causation; Redressability. Most Cited Cases

To satisfy the irreducible constitutional minimum of standing, plaintiffs must show (1) that they have suffered an injury-in-fact, (2) that the injury is fairly traceable to defendant's allegedly unlawful actions, and (3) that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[6] KeyCite Notes

⇐170A Federal Civil Procedure
⇐170AII Parties
⇐170AII(A) In General
⇐170Ak103.1 Standing
⇐170Ak103.2 k. In General; Injury or Interest. Most Cited Cases

In the standing context, an "injury-in-fact" is an invasion of a legally protected interest which is (1) concrete and particularized and (2) actual or imminent, not conjectural or hypothetical.

[7] KeyCite Notes

⇐170A Federal Civil Procedure
⇐170AII Parties

⇐170AII(A) In General
⇐170Ak103.1 Standing
⇐170Ak103.2 k. In General; Injury or Interest. Most Cited Cases

⇐170A Federal Civil Procedure KeyCite Notes
⇐170AII Parties
⇐170AII(A) In General
⇐170Ak103.1 Standing
⇐170Ak103.3 k. Causation; Redressability. Most Cited Cases

In cases of alleged procedural harm, plaintiffs receive special treatment in the Article III standing context, in that a person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[8] KeyCite Notes

⇐149E Environmental Law
⇐149EXIII Judicial Review or Intervention
⇐149Ek649 Persons Entitled to Sue or Seek Review; Standing
⇐149Ek656 k. Other Particular Parties. Most Cited Cases

Allegations of Indian tribe members that they were harmed by failure of Bureau of Indian Affairs (BIA) to follow procedures required by NEPA, National Historic Preservation Act (NHPA), and Endangered Species Act (ESA) before approving lease of tribal land upon which developer sought to construct liquefied natural gas (LNG) terminal brought members' claims within procedural standing analysis, and therefore members, to establish injury-in-fact, only had to show that NEPA, NHPA, and ESA were designed to protect some threatened concrete interest personal to them. U.S.C.A. Const. Art. 3, § 2, cl. 1; National Historic Preservation Act, § 1 et seq., 16 U.S.C.A. § 470 et seq.; Endangered Species Act of 1973, § 2 et seq., 16 U.S.C.A. § 1531 et seq.; National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

[9] KeyCite Notes

⇐149E Environmental Law
⇐149EXIII Judicial Review or Intervention
⇐149Ek649 Persons Entitled to Sue or Seek Review; Standing
⇐149Ek656 k. Other Particular Parties. Most Cited Cases

Under procedural standing analysis, Indian tribe members alleged sufficient injury-in-fact for standing to pursue their procedural claims against Bureau of Indian Affairs (BIA) under NEPA, National Historic Preservation Act (NHPA), and Endangered Species Act (ESA) based upon BIA's approval of lease of tribal land upon which developer planned to build liquefied natural gas (LNG) terminal, given that members lived near affected land and used it and surrounding waters for variety of ceremonial and community purposes, and that approved lease was change in land use that allegedly endangered environment, historic preservation of tribal land, and protected animal species in area, harms against which statutes relied upon by members were designed to protect. U.S.C.A. Const. Art. 3, § 2, cl. 1; National Historic Preservation Act, § 1 et seq., 16 U.S.C.A. § 470 et seq.;

Endangered Species Act of 1973, § 2 et seq., 16 U.S.C.A. § 1531 et seq.; National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

[10] KeyCite Notes

⇦149E Environmental Law
⇦149EXIII Judicial Review or Intervention
⇦149Ek649 Persons Entitled to Sue or Seek Review; Standing
⇦149Ek656 k. Other Particular Parties. Most Cited Cases

Although potential harm to tribal land resulting from proposed construction thereon of liquefied natural gas (LNG) terminal was not certain, procedural injury suffered by Indian tribe members due to alleged failure of Bureau of Indian Affairs (BIA) to comply with requirements of NEPA, National Historic Preservation Act (NHPA), and Endangered Species Act (ESA) before approving lease of affected land had already occurred, and therefore members satisfied causation element of Article III standing in their action challenging lease approval. U.S.C.A. Const. Art. 3, § 2, cl. 1; National Historic Preservation Act, § 1 et seq., 16 U.S.C.A. § 470 et seq.; Endangered Species Act of 1973, § 2 et seq., 16 U.S.C.A. § 1531 et seq.; National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

[11] KeyCite Notes

⇦149E Environmental Law
⇦149EXIII Judicial Review or Intervention
⇦149Ek649 Persons Entitled to Sue or Seek Review; Standing
⇦149Ek656 k. Other Particular Parties. Most Cited Cases

Indian tribe members satisfied redressability requirement for Article III standing in their action challenging approval by Bureau of Indian Affairs (BIA) of lease of tribal land upon which developer planned to build liquefied natural gas (LNG) terminal, inasmuch as there was at least a possibility that BIA would be convinced to withhold its approval of lease after conducting review allegedly required pursuant to NEPA, National Historic Preservation Act (NHPA), and Endangered Species Act (ESA). U.S.C.A. Const. Art. 3, § 2, cl. 1; National Historic Preservation Act, § 1 et seq., 16 U.S.C.A. § 470 et seq.; Endangered Species Act of 1973, § 2 et seq., 16 U.S.C.A. § 1531 et seq.; National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

[12] KeyCite Notes

⇦170A Federal Civil Procedure
⇦170AII Parties
⇦170AII(A) In General
⇦170Ak103.1 Standing
⇦170Ak103.3 k. Causation; Redressability. Most Cited Cases

All that is required to meet the redressability requirement of Article III standing in cases of procedural injury is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[13] KeyCite Notes

⇦149E Environmental Law
⇦149EXIII Judicial Review or Intervention
⇦149Ek649 Persons Entitled to Sue or Seek Review; Standing
⇦149Ek652 k. Organizations, Associations, and Other Groups. Most Cited Cases

⇦149E Environmental Law KeyCite Notes
⇦149EXIII Judicial Review or Intervention
⇦149Ek649 Persons Entitled to Sue or Seek Review; Standing
⇦149Ek656 k. Other Particular Parties. Most Cited Cases

Group of Indian tribe members and individual tribe members had prudential standing to pursue their claims that Bureau of Indian Affairs (BIA) violated NEPA, National Historic Preservation Act (NHPA), and Endangered Species Act (ESA) when it approved lease of tribal land upon which developer planned to build liquefied natural gas (LNG) terminal, given that alleged violations and injuries were of the sort that such statutes were designed to protect, and that plaintiffs were asserting their own interests, rather than those of third parties. National Historic Preservation Act, § 1 et seq., 16 U.S.C.A. § 470 et seq.; Endangered Species Act of 1973, § 2 et seq., 16 U.S.C.A. § 1531 et seq.; National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

[14] KeyCite Notes

⇦149E Environmental Law
⇦149EXIII Judicial Review or Intervention
⇦149Ek649 Persons Entitled to Sue or Seek Review; Standing
⇦149Ek652 k. Organizations, Associations, and Other Groups. Most Cited Cases

Group of Indian tribe members had organizational standing to challenge approval by Bureau of Indian Affairs (BIA) of lease of tribal land upon which developer planned to build liquefied natural gas (LNG) terminal pursuant to NEPA, National Historic Preservation Act (NHPA), and Endangered Species Act (ESA), inasmuch as interests asserted and evaluated were those of group's individual members, interests in affected land were germane to objectives for which group was formed, and neither claims nor requested relief required personal participation of affected individuals. National Historic Preservation Act, § 1 et seq., 16 U.S.C.A. § 470 et seq.; Endangered Species Act of 1973, § 2 et seq., 16 U.S.C.A. § 1531 et seq.; National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

[15] KeyCite Notes

⇦149E Environmental Law
⇦149EXIII Judicial Review or Intervention

⇐149Ek649 Persons Entitled to Sue or Seek Review; Standing
⇐149Ek652 k. Organizations, Associations, and Other Groups. Most Cited Cases

⇐149E Environmental Law KeyCite Notes
⇐149EXIII Judicial Review or Intervention
⇐149Ek649 Persons Entitled to Sue or Seek Review; Standing
⇐149Ek656 k. Other Particular Parties. Most Cited Cases

Interests of group of Indian tribe members and individual tribe members arguably fell within zone of interests protected by Indian Long-Term Leasing Act, as required for group and individual members to have prudential standing to challenge approval by Bureau of Indian Affairs (BIA) of lease of tribal land upon which developer planned to build liquefied natural gas (LNG) terminal, given that members had concrete and particularized interest in lands and environment surrounding affected property, which they used for variety of ceremonial and community purposes, and that their interests were consistent with Act, which was intended to protect Native American interests and ensure that parties to lease adequately considered its impacts. Indian Long-Term Leasing Act, § 1(a), 25 U.S.C.A. § 415(a); 25 C.F.R. §§ 2.2, 162.113.

[16] KeyCite Notes

⇐15A Administrative Law and Procedure
⇐15AV Judicial Review of Administrative Decisions
⇐15AV(A) In General
⇐15Ak665 Right of Review
⇐15Ak666 k. Interest in General. Most Cited Cases

Zone-of-interest test for prudential standing is a guide for deciding whether, in view of Congress's evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision.

[17] KeyCite Notes

⇐15A Administrative Law and Procedure
⇐15AV Judicial Review of Administrative Decisions
⇐15AV(A) In General
⇐15Ak665 Right of Review
⇐15Ak666 k. Interest in General. Most Cited Cases

⇐170A Federal Civil Procedure KeyCite Notes
⇐170AII Parties
⇐170AII(A) In General
⇐170Ak103.1 Standing
⇐170Ak103.2 k. In General; Injury or Interest. Most Cited Cases

When plaintiff is not the subject of regulatory action, prudential standing requirements may be satisfied under zone-of-interests test so long as plaintiff's interests are not so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.

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[18] KeyCite Notes

⇦209 Indians
⇦209IV Real Property
⇦209k176 Leases
⇦209k179 k. Supervision by Federal Officers. Most Cited Cases

To the extent that they sought to assert separate cause of action from their claim under Indian Long-Term Leasing Act, group of Indian tribe members and individual tribe members failed to state claim when they alleged that Bureau of Indian Affairs (BIA) breached federal government's fiduciary duty to Indian citizens by approving lease of tribal land upon which developer planned to build liquefied natural gas (LNG) terminal, given that members were not land owners and BIA did not manage their interests in a fiduciary capacity, and that members could not claim a specific trust relationship created by government's general obligation to consider their interests before approving a lease under Act. Indian Long-Term Leasing Act, § 1, 25 U.S.C.A. § 415.

[19] KeyCite Notes

⇦209 Indians
⇦209I In General
⇦209k102 Status of Indian Nations or Tribes
⇦209k105 k. Trust Relationship; Fiduciary Duty of United States. Most Cited Cases

General trust relationship between the United States and the Indian people is insufficient to establish specific fiduciary duties; substantive statutes and regulations must expressly create a fiduciary relationship that gives rise to defined obligations.

[20] KeyCite Notes

⇦170A Federal Civil Procedure
⇦170AII Parties
⇦170AII(A) In General
⇦170Ak103.1 Standing
⇦170Ak103.2 k. In General; Injury or Interest. Most Cited Cases

⇦170B Federal Courts KeyCite Notes

⚖170BI Jurisdiction and Powers in General
⚖170BI(A) In General
⚖170Bk12 Case or Controversy Requirement
⚖170Bk12.1 k. In General. Most Cited Cases

Whereas "standing" asks "who" may bring a claim, "ripeness" concerns "when" a claim may be brought.

Whereas "standing" asks "who" may bring a claim, "ripeness" concerns "when" a claim may be brought.

[21] KeyCite Notes

⚖170B Federal Courts
⚖170BI Jurisdiction and Powers in General
⚖170BI(A) In General
⚖170Bk12 Case or Controversy Requirement
⚖170Bk12.1 k. In General. Most Cited Cases

To determine whether a particular claim is ripe, courts generally evaluate the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

[22] KeyCite Notes

⚖170B Federal Courts
⚖170BI Jurisdiction and Powers in General
⚖170BI(A) In General
⚖170Bk12 Case or Controversy Requirement
⚖170Bk13 k. Particular Cases or Questions, Justiciable Controversy. Most Cited Cases

Claims in which group of Indian tribe members and individual tribe members alleged that Bureau of Indian Affairs (BIA) failed to comply with various federal laws before approving lease of tribal land upon which developer planned to build liquefied natural gas (LNG) terminal were ripe for review.

[23] KeyCite Notes

⚖170B Federal Courts
⚖170BI Jurisdiction and Powers in General
⚖170BI(A) In General
⚖170Bk12 Case or Controversy Requirement
⚖170Bk13 k. Particular Cases or Questions, Justiciable Controversy. Most Cited Cases

A person with standing, who is injured by a failure to comply with statutory procedure, may complain of that failure at the time the failure takes place, for the claim can never get riper.

[24] KeyCite Notes

⌐=149E Environmental Law
⌐=149EXIII Judicial Review or Intervention
⌐=149Ek665 k. Exhaustion of Administrative Remedies. Most Cited Cases

Although mandatory, subject to certain exceptions, administrative exhaustion was not jurisdictional requirement in action in which group of Indian tribe members and individual tribe members alleged that Bureau of Indian Affairs (BIA) failed to comply with federal law, including Indian Long-Term Leasing Act, NEPA, National Historic Preservation Act (NHPA), and Endangered Species Act (ESA), before approving lease of tribal land upon which developer planned to build liquefied natural gas (LNG) terminal, given that finality requirement of Administrative Procedure Act (APA) was not jurisdictional, and that Indian Long-Term Leasing Act contained no language suggesting that Congress intended exhaustion to be prerequisite to federal court review of BIA lease approvals. 5 U.S.C.A. § 551 et seq.; National Historic Preservation Act, § 1 et seq., 16 U.S.C.A. § 470 et seq.; Endangered Species Act of 1973, § 2 et seq., 16 U.S.C.A. § 1531 et seq.; Indian Long-Term Leasing Act, § 1, 25 U.S.C.A. § 415; National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

[25] KeyCite Notes

⌐=15A Administrative Law and Procedure
⌐=15AIII Judicial Remedies Prior to or Pending Administrative Proceedings
⌐=15Ak229 k. Exhaustion of Administrative Remedies. Most Cited Cases

Exhaustion of administrative remedies is a jurisdictional requirement only when Congress clearly ranks it as such.

Patrick A. Parenteau, with whom Justin E. Kolber and David K. Mears, of the Environmental and Natural Resources Law Clinic, Vermont Law School, were on brief, for appellants.

M. Alice Thurston, Attorney, Environment and Natural Resources Division, U.S. Department of Justice, with whom Matthew J. McKeown, Acting Assistant Attorney General, Caroline M. Blanco, Sara E. Culley, Rebecca J. Riley, Elizabeth Ann Peterson, John Harrington Assistant Regional Solicitor, Department of the Interior, and Stephen L. Simpson, Assistant Solicitor for Trust Responsibility, Department of the Interior, were on brief, for appellees.

Before TORRUELLA and LIPEZ, Circuit Judges, and FUSTÉ,[FN*] District Judge.

TORRUELLA, Circuit Judge.

***1** This appeal arises from the Bureau of Indian Affairs ("BIA") approval of a lease of Passamaquoddy tribal land to a developer who wishes to construct a Liquified Natural Gas ("LNG") terminal in part on that land. Nulankeyutmonen Nkihtaqmikon [FN1] ("NN"), a group of tribe members who oppose construction of the LNG terminal, and several individual tribe members (collectively, "Plaintiffs") challenge the district court's dismissal of their case for lack of jurisdiction. After careful review, and based in large part on the

BIA's change of position on appeal regarding the finality of its lease approval, we conclude that Plaintiffs have standing and that their claims are ripe for review, and therefore that the district court has jurisdiction to adjudicate Plaintiffs' claims. We thus reverse the dismissal of this suit by the district court and remand the case for further action consistent with this opinion.

I. *Background*

A. Quoddy Bay Lease

The complicated nature of this case requires a slightly extended introduction. Part of the complexity stems from the fact that neither of the litigants are parties to the lease agreement that precipitated this dispute. The lease at issue is between the Pleasant Point Passamaquoddy Reservation [FN2] and Quoddy Bay, LLC ("Quoddy Bay"), a developer seeking to construct an LNG terminal on tribal lands. In May 2005, these parties formalized a ground lease agreement ("Quoddy Bay Lease"), which would allow Quoddy Bay to develop a LNG terminal on a 3/4-acre portion of tribally owned land known as Split Rock, pending federal approval of the project. The fifty-year lease is a complex and multistage contract, contemplating four distinct phases: Permitting, Construction, Operations, and Removal and Remediation. The latter periods call for heavily invasive construction and operation of the LNG terminal. The permitting period, however, allows only less-invasive testing and surveying, necessary for obtaining Federal Energy Regulatory Commission ("FERC") approval. [FN3] During this initial period, Quoddy Bay is limited to

> a non-exclusive right and license to enter upon and restrict access to the Premises, at any time and from time to time, to inspect, to examine, to survey, and to conduct, soil tests, borings, installation of water monitoring wells, and other engineering, geotechnical, archaeological, and architectural tests and studies on the Premises, and otherwise to do that which, in Tenant's reasonable discretion, is necessary to conduct due diligence, to secure Permits and to determine the suitability of the Premises for the LNG Project.[FN4]

The Tribal Council approved the lease on May 19, 2005, and pursuant to the Indian Long-Term Leasing Act of 1955 ("Leasing Act"), 25 U.S.C. § 415, sent the lease to the BIA for review. On June 1, 2005, the BIA approved the lease. [FN5] At the same time, the BIA issued a Categorical Exclusion Checklist, indicating that

> lease approval is solely for the site investigation required for the [FERC] permitting process in the development of an [Environmental Impact Statement ("EIS")] .... [C]omplete environmental analysis and EIS development [will] be conducted through the FERC permitting process. Continuing the lease beyond the investigation period is contingent upon FERC permit approval, acceptability of the EIS analysis and insignificant impact on the leased property. The BIA will be a Cooperating Agency for the EIS development through FERC.

***2** The BIA determined that the site investigation fell within the definition of a Categorical Exclusion, such that an EIS was not required prior to approval of the lease.[FN6]

B. Plaintiffs

In opposition to the LNG project, a group of private citizens banded together to form NN. NN members live on Passamaquoddy Tribal lands in Maine, though none possess individual ownership rights in Split Rock. They oppose the construction of the Quoddy Bay

LNG terminal out of concern that "it will fundamentally and permanently transform the Split Rock site from a natural beach area with historical, cultural, religious, and recreational significance, to an industrial zone that will not be accessible to the members of the group."

Plaintiffs-NN and individual tribe members-live within a mile of Split Rock and/or use the leased land for traditional tribal ceremonies, community events, and recreation. According to Plaintiffs, Split Rock is the Tribe's "only remaining community space."

C. Procedural History

On November 2, 2005, Plaintiffs initiated this suit claiming that the BIA's approval of the Quoddy Bay Lease violated the Leasing Act, 25 U.S.C. § 415; the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321 *et seq.* ; the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470 *et seq.* ; the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706; and the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.* Specifically, Plaintiffs complain that the BIA failed to appraise the land, to prepare an environmental assessment, to provide an opportunity for public comment, or to consider the historical, religious, and cultural significance of the leased land. Plaintiffs later added a claim that, by violating the above statutes, the BIA had breached the federal government's fiduciary duty to Indian citizens (the "Trust Obligation" claim).[FN7]

The BIA moved to dismiss for lack of jurisdiction, contending that Plaintiffs lacked standing and that their claims were not yet ripe. On November 16, 2006, the district court dismissed all of Plaintiffs' claims, concluding that the NEPA, NHPA, and Trust Obligation claims were not ripe and that Plaintiffs lacked standing to bring the NEPA, NHPA, ESA, and Leasing Act claims.[FN8] *Nulankeyutmonen Nkihtaqmikon v. Impson*, 462 F.Supp.2d 86 (D.Me.2006). Plaintiffs now appeal the dismissal.

II. *Standard of Review*

[1] [2] We review *de novo* the district court's decision to dismiss for lack of jurisdiction on standing and ripeness grounds. *Mangual v. Rotger-Sabat*, 317 F.3d 45, 56 (1st Cir.2003). The plaintiff has the burden of clearly alleging definite facts to demonstrate that jurisdiction is proper. *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1281 (1st Cir.1996). We then construe such facts and the reasonable inferences drawn therefrom in favor of the plaintiff. *See N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 12 (1st Cir.1996).

III. *Finality of Lease Approval*

*3 [3] Plaintiffs ask us to forego review of the standing and ripeness issues and instead remand the case to the district court based on the BIA's "reversal of position" regarding the finality of its lease approval. Plaintiffs claim that the BIA argued before the district court that lease approval was limited to site investigation and was revocable upon further review by the BIA, and that the district court relied heavily on these representations. On appeal, the BIA concedes that its lease approval is final. It argues instead-but to the same effect-that "implementation of the lease is contingent upon multiple factors, including FERC authorization," and that therefore Plaintiffs' alleged

injuries resulting from construction of the LNG terminal are too attenuated to satisfy standing and ripeness requirements.

Because we review the standing and ripeness issues *de novo,* and because we have all the information we need to decide these issues, we see no reason to remand. We approach the standing and ripeness issues assuming-as everyone agrees-that the BIA has completed its lease approval process and will not have another opportunity to review the lease. For purposes of our review, we also assume, as alleged by Plaintiffs, that the BIA has failed to meet its federal obligations with respect to the lease approval. Whether or not this is true is a question on the merits of Plaintiffs' case, which we need not address at this stage of the proceedings.[FN9]

IV. *Standing*

[4] The doctrine of standing addresses whether a particular plaintiff has "such a personal stake in the outcome of [a] controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." *Baker v. Carr,* 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). The core of the doctrine arises from the constitutional requirement that federal courts act only on "Cases" or "Controversies." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *see also* U.S. Const. art. III, § 2. In addition, "[s]tanding doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Allen v. Wright,* 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). We begin with the challenged constitutional elements of standing before moving on to the additional prudential concerns.

A. NEPA, NHPA, and ESA Claims

[5] [6] To satisfy the "irreducible constitutional minimum of standing," Plaintiffs must show (1) that they have suffered an injury in fact, (2) that the injury is fairly traceable to the BIA's allegedly unlawful actions, and (3) that "it [is] likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan,* 504 U.S. at 560-61, 112 S.Ct. 2130 (internal quotation marks omitted). An "injury in fact" is "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 560, 112 S.Ct. 2130 (internal citations, footnote, and internal quotation marks omitted).

*4 [7] [8] In cases of alleged procedural harm, however, plaintiffs receive "special treatment." *Dubois,* 102 F.3d at 1281 n. 10 (internal quotation marks omitted). "The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Lujan,* 504 U.S. at 572 n. 7, 112 S.Ct. 2130. For example,

one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact

statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.

Id.

[9] The case before us is very similar to the above example described by the Supreme Court in *Lujan.* Plaintiffs allege that they have been harmed by the BIA's failure to follow the procedures required by NEPA, NHPA, and ESA before approving the Quoddy Bay lease,[FN10] bringing their claims within the procedural standing analysis. With immediacy concerns relaxed, to establish an injury in fact, Plaintiffs need only show that NEPA, NHPA, and ESA were "designed to protect some threatened concrete interest" personal to Plaintiffs. *Id.* at 572-73 nn. 7-8, 112 S.Ct. 2130; *see also Ashley Creek Phosphate Co. v. Norton,* 420 F.3d 934, 938 & n. 2 (9th Cir.2005) (focusing on the question of whether the procedures at issue "protect the plaintiff's concrete interest"). Here, Plaintiffs' concrete and particularized interest is clear: They not only live very near Split Rock, but they also use the land and surrounding waters for a variety of ceremonial and community purposes. *See, e.g., Lujan,* 504 U.S. at 572 n. 7, 112 S.Ct. 2130 ("[O]ne living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement...."); *Dubois,* 102 F.3d at 1282-83 (finding sufficient interest where litigant regularly visited and "engaged in recreational activities" in the subject area); *see also Ashley Creek Phosphate Co.,* 420 F.3d at 938 ("[P]laintiffs who use the area threatened by a proposed action or who own land near the site of a proposed action have little difficulty establishing a concrete interest."). The now-approved lease constitutes a "change in land use," which allegedly endangers the environment, the historic preservation of tribal land, and protected animal species in the area. The statutes in question were specifically designed to protect against these very dangers by requiring federal agencies, like the BIA, to consider these dangers before taking action. *See Massachusetts v. Watt,* 716 F.2d 946, 952 (1st Cir.1983) (discussing the purposes of NEPA). Plaintiffs have therefore alleged a sufficient injury in fact to establish standing to pursue their procedural claims under NEPA, NHPA, and ESA.

***5** [10] The BIA focuses its arguments on the causation requirement of standing. The agency characterizes Plaintiffs' alleged injury as the harm to Split Rock, and consequently, Plaintiffs' interests in the land, resulting from the impacts of the construction of the LNG terminal. It goes on to argue that any such harms are not fairly traceable to the BIA's lease approval because the LNG terminal cannot be constructed until Quoddy Bay receives FERC approval, which is unpredictable.[FN11] *Sea Shore Corp. v. Sullivan,* 158 F.3d 51, 56 (1st Cir.1998) ("[T]he injury is not imminent because it depends upon several tenuous contingencies."). This argument misapprehends the injury claimed by Plaintiffs. While it is true that the potential harm to Split Rock, and therefore to Plaintiffs, as a result of the construction of the LNG terminal is not certain, the procedural injury alleged by Plaintiffs has already occurred. *See Watt,* 716 F.2d at 952 ("[W]hen a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered."). The procedures at issue seek to minimize the risk of future harm by "influenc[ing] the decisionmaking process; [their] aim is to make government officials notice environmental [and other] considerations and take them into account." *Id.* The lease contemplates construction and operation of a LNG terminal, and it is the risks posed by the implementation of the lease which the BIA is required to consider under NEPA, NHPA, and ESA. As discussed above, Plaintiffs have clearly established a demonstrable risk to their interests in Split Rock as a result of the BIA's alleged failure to adequately

assess the dangers associated with the lease as required by federal law. *Cf.* Sierra Club v. Marsh, 872 F.2d 497, 500 (1st Cir.1989) ("[T]he [irreparable] harm consists of the added risk to the environment that takes place when governmental decisionmakers make up their minds without having before them an analysis (with prior public comment) of the likely effects of their decision upon the environment.").

[11] [12] Finally, Plaintiffs meet the redressability requirement of Article III standing. All that is required in cases of procedural injury is "some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Massachusetts v. EPA*, --- U.S. ----, 127 S.Ct. 1438, 1453, 167 L.Ed.2d 248 (2007). Here, although Plaintiffs cannot establish with any certainty that the requested procedures will change the BIA's collective mind, there is at least a chance that proper consideration would convince the BIA to withhold approval of the lease.

[13] [14] Although the BIA does not challenge Plaintiffs' prudential standing to pursue the NEPA, NHPA, and ESA claims on appeal, it is clear from our discussion above that "the violations and injuries alleged in the complaint are the sort that [these statutes] were specifically designed to protect," and that Plaintiffs are asserting their own interests, rather than those of third parties.[FN12] *Dubois*, 102 F.3d at 1283 (internal quotation marks omitted). We accordingly find that Plaintiffs have established standing to pursue their procedural claims under these statutes.

B. Leasing Act Claim

*6 [15] [16] The prudential standing concern at issue here is whether Plaintiffs' Leasing Act claim "fall[s] within the zone of interests protected by the law invoked." [FN13] *Allen*, 468 U.S. at 751, 104 S.Ct. 3315. "The 'zone of interest' test is a guide for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987).

We disagree with the district court's conclusion that Plaintiffs do not fall within the zone of interests protected by the Leasing Act. It is true, as the district court emphasized, that the Leasing Act requires federal approval when " 'restricted Indian lands, whether tribally or individually owned, [are] leased by the *Indian owners.*' " *Nulankeyutmonen Nkihtaqmikon*, 462 F.Supp.2d at 110 (quoting 25 U.S.C. § 415(a)). The district court also agreed that "Plaintiffs are almost certainly correct that the Leasing Act was intended to protect 'Indian tribes *and their members.*' " *Id.* (quoting *San Xavier Dev. Auth. v. Charles*, 237 F.3d 1149, 1153 (9th Cir.2001)). But we do not read the former passage referring to "Indian owners" to suggest that the duty owed by the BIA under the Leasing Act is limited to the land owners regulated by the Act. *But see* Bullcreek v. U.S. Dep't of Interior, 426 F.Supp.2d 1221, 1230 (D.Utah 2006) (denying standing to tribal members with no property interest in the leased land because the act refers to "Indian Landowners"). Rather, it clearly appears to us to be a limitation on the *leases* subject to the Leasing Act.

The federal government's duty under the Leasing Act, through the BIA, is to ensure that the parties to a lease of Indian land have given adequate consideration to the impacts of the lease on, *inter alia,* neighboring lands and the environment. 25 U.S.C. § 415(a). The

land owners presumably have a vested interest in a lease's approval, so it stands to reason that they would rarely challenge the BIA's failure to comply with federal law in approving the lease. Congress surely intended, therefore, for other tribal members whose interests would be adversely affected by the lease's impacts to complain of the agency's action. *See* Clarke, 479 U.S. at 399, 107 S.Ct. 750. This conclusion is bolstered by the BIA's own regulations, which allow "any person whose interests could be adversely affected by a decision in an appeal" to request review of an agency action. 25 C.F.R. § 2.2; *see also id.* § 162.113 (allowing appeal of BIA lease approvals pursuant to 25 C.F.R. pt. 2).

[17] Furthermore, "[t]he ['zone of interests'] test is not meant to be especially demanding." Clarke, 479 U.S. at 399-400, 107 S.Ct. 750 ("[I]n particular, there need be no indication of congressional purpose to benefit the would-be plaintiff."); *see also* Dennis v. Higgins, 498 U.S. 439, 461, 111 S.Ct. 865, 112 L.Ed.2d 969 (1991) ("The plaintiff need only demonstrate a plausible relationship between his interest and the policies to be advanced by the relevant provision." (internal quotation marks omitted)). When a plaintiff is not the subject of the regulatory action, as here, prudential standing requirements may be satisfied so long as "the plaintiff's interests are [not] so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.* Here, Plaintiffs have demonstrated, as discussed above, their concrete and particularized interest in the lands and environment surrounding Split Rock.[FN14] These interests are explicitly addressed in the Leasing Act as ones that the BIA must consider before granting approval of the lease. They are therefore not peripheral interests. Plaintiffs' interests are also consistent with the statute, which was "intended to protect ... Native American interests," Rosebud Sioux Tribe v. McDivitt, 286 F.3d 1031, 1036-37 (8th Cir.2002) (referring to 25 U.S.C. § 416, an analog to § 415), and to ensure that the parties to the lease have adequately considered its impacts. Thus, we find that Plaintiffs meet the prudential standing requirement that their interests arguably fall within the zone of interests protected by the Leasing Act.[FN15] *See* Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970) ("The question of standing ... concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.").

V. *Trust Obligation Claim*

***7** The district court also dismissed Plaintiffs' claim of breach of fiduciary duty to the extent that it was a separate cause of action from the Leasing Act claim.[FN16] Nulankeyutmonen Nkihtaqmikon, 462 F.Supp.2d at 111 ("[A] generalized claim of violation of a fiduciary duty, which is not tethered to any statute or regulation, cannot stand."). On appeal, Plaintiffs argue that "the district court erred because the Indian Leasing Act is a codification of the trust duty," citing Brown v. United States for the proposition that " '[t]he scope and extent of the fiduciary relationship ... is established by the regulation[s]' that control this type of leasing ... [and] 'define the contours of the United States' fiduciary responsibilities.' " 86 F.3d 1554, 1563 (Fed.Cir.1996) (emphasis omitted) (quoting Pawnee v. United States, 830 F.2d 187, 192 (Fed.Cir.1987), and United States v. Mitchell (Mitchell II), 463 U.S. 206, 224, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983)).

Although the district court and the parties addressed this issue in their discussions on standing, we construe the court's dismissal as one for failure to state a claim, and accordingly review *de novo*. *See* Palmer v. Champion Mortgage, 465 F.3d 24, 27 (1st

Cir.2006).

[18] [19] We agree with the district court that Plaintiffs' Trust Obligation claim cannot stand alone. Despite Plaintiffs' vague assertions to the contrary, we can find no law in support of an enforceable fiduciary duty owed by the federal government to Plaintiffs qua individuals who are not landowners. As Plaintiffs acknowledge, the "general trust relationship between the United States and the Indian people" is insufficient to establish specific fiduciary duties. *United States v. Navajo Nation*, 537 U.S. 488, 506, 123 S.Ct. 1079, 155 L.Ed.2d 60 (2003). Substantive statutes and regulations must expressly create a fiduciary relationship that gives rise to defined obligations. *See id.; United States v. White Mountain Apache Tribe*, 537 U.S. 465, 474, 123 S.Ct. 1126, 155 L.Ed.2d 40 (2003). *Brown* found a fiduciary relationship between the government and Indian land owners who could lease their lands only subject to the Secretary's approval under the Long-Term Leasing Act precisely because the Secretary was acting in part to protect the land owners' financial interests, a traditional fiduciary capacity. *Id.* at 1562-63. In other cases finding enforceable fiduciary duties, too, the government had extensive management control over Indian-owned resources, and the duties arising from the government's fiduciary responsibilities were owed to the owners of the resources being managed. *Compare Mitchell II*, 463 U.S. at 224, 103 S.Ct. 2961 (finding fiduciary relationship between government and Indian allottees where Secretary had "full responsibility to manage Indian resources and land for the benefit of the Indians"); *Pawnee*, 830 F.2d at 190 ("[T]he United States has a general fiduciary obligation toward the Indians [who own the oil and gas leases in question] with respect to the management of those oil and gas leases."), *with United States v. Mitchell (Mitchell I)*, 445 U.S. 535, 542, 100 S.Ct. 1349, 63 L.Ed.2d 607 (1980) (finding no fiduciary duty to Indian allottees where "[t]he Act [in question] does not unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands").

***8** Here, Plaintiffs are not land owners and the BIA does not manage their interests in a fiduciary capacity. While Plaintiffs have standing to complain of the BIA's failure to comply with federal law because they fall within the zone of interests protected by the Leasing Act, they cannot claim a specific trust relationship created by the Secretary's general obligation to consider their interests before approving a lease. *See Brown*, 86 F.3d at 1562 ("[T]he statutory criteria that constrain the Secretary's exercise of his or her approval power are ... in the nature of zoning, safety, or environmental concerns, which are the traditional general welfare concerns of government when acting in a non-fiduciary capacity." (internal quotation marks omitted)).

Although Plaintiffs have no fiduciary duty claim, their Leasing Act claim generally encompasses the same allegations, and the dismissal of the "separate" Trust Obligation claim in no way impairs their claimed right to the relief requested. The district court should therefore treat their references to the "Trust Obligation" as commensurate with the Leasing Act, which, as Plaintiffs explain, derives from the general trust obligation assumed by the federal government toward the Indian people. *See Morton v. Mancari*, 417 U.S. 535, 552, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974) ("Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, [are] derived from historical relationships and explicitly designed to help only Indians."); *see also Seminole Nation v. United States*, 316 U.S. 286, 296-97, 62 S.Ct. 1049, 86 L.Ed. 1480 (1942) ("Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, [the government] has charged itself with moral obligations of the highest responsibility and trust." (footnote omitted)). To the extent that the Trust Obligation claim is one and the same as the Leasing Act claim, Plaintiffs have established standing for the same reasons.

VI. *Ripeness*

[20] [21] [22] Whereas standing asks "who" may bring a claim, ripeness concerns "when" a claim may be brought. R.I. Ass'n of Realtors, Inc. v. Whitehouse, 199 F.3d 26, 33 (1st Cir.1999). With respect to administrative decisions, the ripeness doctrine seeks "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." Abbott Labs. v. Gardner, 387 U.S. 136, 148-49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). To determine whether a particular claim is ripe, we generally evaluate "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Doe v. Bush, 323 F.3d 133, 138 (1st Cir.2003) (quoting Abbott Labs., 387 U.S. at 149, 87 S.Ct. 1507).

*9 [23] Plaintiffs' remaining claims-aside from the Trust Obligation claim-allege that the BIA failed to comply with various federal laws before approving the Quoddy Bay lease. These claims of procedural injury are clearly ripe under Ohio Forestry Ass'n, Inc. v. Sierra Club: "[A] person with standing who is injured by a failure to comply with [statutory] procedure may complain of that failure at the time the failure takes place, for the claim can never get riper." 523 U.S. 726, 737, 118 S.Ct. 1665, 140 L.Ed.2d 921 (1998). The BIA now concedes that its approval was final, and therefore now is the appropriate time to complain that the agency failed to do its duty.[FN17]

The BIA argues, however, that Plaintiffs' claims are not ripe because "the existence of the dispute itself hangs on future contingencies that may or may not occur." Texas v. United States, 523 U.S. 296, 300, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998). As we stated above with respect to standing, however, this argument misses the mark. Contrary to the BIA's characterization, Plaintiffs' alleged injury is the BIA's failure to follow federal law before approving the lease. The dispute before us is not over the hypothetical construction and operation of an LNG terminal, but the allegedly improper approval of the lease that is the prerequisite to the terminal. While the construction of the terminal is hypothetical and uncertain at this juncture, the approval of the lease is complete. The BIA has made its decision.

The BIA also argues that the alleged procedural failures have not yet occurred, even though its approval is final, because FERC will consider the impacts of the lease during the permitting process. Moreover, the BIA will serve as a cooperating agency and contribute to review of the LNG project. These points are well-taken, but they do not go to ripeness. Whether the BIA can fulfill its statutory obligations by participating in the FERC process is a question on the merits of Plaintiffs' claims.

VII. *Exhaustion*

[24] In the alternative, the BIA argues that the district court lacks subject matter jurisdiction because Plaintiffs failed to exhaust their administrative remedies. BIA regulations require an appeal to the Interior Board of Indian Appeals before lease approval is "final," and therefore subject to judicial review under the APA. 25 C.F.R. §§ 2.4(e), 2.6.

[25] Plaintiffs correctly argue in response that exhaustion is not a jurisdictional bar in this case. Exhaustion of administrative remedies is a jurisdictional requirement only when Congress clearly ranks it as such. *Cf.* Arbaugh v. Y & H Corp., 546 U.S. 500, 126 S.Ct. 1235, 1237, 163 L.Ed.2d 1097 (2006) ("[W]hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character."). We have previously held that the APA's finality requirement is not jurisdictional in nature. R.I. Dep't of Envtl. Mgmt. v. United States, 304 F.3d 31, 40 (1st Cir.2002) ("[T]he issue of whether the APA provides for judicial review of the nonfinal ruling is not one that, precisely speaking, implicates the subject-matter jurisdiction of the court."). Furthermore, the BIA has pointed to no "sweeping and direct" language in the Leasing Act itself-nor do we find any-that suggests that Congress intended exhaustion to be a prerequisite to federal court jurisdiction to review BIA lease approvals. Casanova v. Dubois, 289 F.3d 142, 146 (1st Cir.2002) ("[T]he PLRA's exhaustion requirement ... does not contain the type of sweeping and direct language that would indicate a jurisdictional bar rather than a mere codification of administrative exhaustion requirements." (internal quotation marks omitted) (quoting Ali v. Dist. of Columbia, 278 F.3d 1, 5-6 (D.C.Cir.2002))).

***10** Although exhaustion is not a jurisdictional issue, it is mandatory, *see* id. at 147; R.I. Dep't of Envtl. Mgmt., 304 F.3d at 40 ("Even though the asserted lack of finality does not directly challenge the subject-matter jurisdiction of the district court, the question of whether the state otherwise has a valid cause of action is an important one that we address as a threshold issue."), subject to certain exceptions, White Mountain Apache Tribe v. Hodel, 840 F.2d 675, 677 (9th Cir.1988) ("There are exceptional circumstances where exhaustion may not be required."); *see also* Frederique-Alexandre v. Dep't of Natural and Envtl. Res., 478 F.3d 433, 440 (1st Cir.2007) ("[T]he exhaustion requirement is not a jurisdictional prerequisite, but rather is subject to waiver, estoppel, and equitable tolling ...." (citing Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982))). On remand, the district court should consider whether Plaintiffs merit an exception to the exhaustion requirement. *See* Casanova v. Dubois, 289 F.3d 142, 147 (1st Cir.2002) ("[W]e remand this case to the district court for development of the record with regard to the issue of exhaustion of administrative remedies.").

VIII. *Conclusion*

For the reasons stated above, we reverse the district court's dismissal of Plaintiffs' NEPA, NHPA, ESA, and Leasing Act claims. We also reverse dismissal of the APA claim, given that Plaintiffs' other claims are revived. *See* Nulankeyutmonen Nkihtaqmikon v. Impson, 462 F.Supp.2d at 112 (dismissing APA claim because other claims were dismissed). We affirm the district court's dismissal of the "Trust Obligation" claim to the extent that Plaintiffs intended a cause of action separate from the Leasing Act claim. Each party shall bear its own costs.

Affirmed in part, reversed and remanded in part.

FN* Of the District of Puerto Rico, sitting by designation.
FN1. "Nulankeyutmonen Nkihtaqmikon" translates into English from the Passamaquoddy language as "We Protect the Homeland." It is pronounced "Nu-lahnk-kay-yoot-mah-nin Nee-kaht-mee-kahn."

FN2. The Passamaquoddy Tribe, a federally recognized Indian tribe, maintains two separate reservations, Pleasant Point and Indian Township, both in Maine. While each

Reservation has its own elected tribal government, a Joint Tribal Council manages lands held in common. The Joint Tribal Council has authorized each community to lease tribal land within its own reservation.

FN3. For LNG import facilities located onshore and near shore in state waters, FERC has "to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal." 15 U.S.C. § 717b(e)(1). FERC reviews proposed LNG facilities with the cooperation of numerous federal, state, and local agencies, and with the input of other interested parties. 71 Fed.Reg. 14,200-201 (March, 21, 2006) (explaining the process FERC will undertake to review the Quoddy Bay LNG project).

FN4. At oral argument, Plaintiffs suggested that even during the site investigation period, Quoddy Bay was granted a right to exclude. Our analysis, however, does not depend on this allegation.

FN5. The lease approval itself is a brief, one-sentence form attached at the end of the lease. It was signed by the Director of the Eastern Region of the BIA, Franklin Keel, and stated simply, "Approved: Secretary of the Interior."

FN6. The National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* , requires federal agencies to assess environmental impact before taking any "action[ ] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). A detailed EIS is not required, however, for "categor[ies] of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations." 40 C.F.R. 1508.4. The BIA has adopted procedures governing which of its activities constitute such "Categorical Exclusions," and in this case, using the Checklist, determined that the Quoddy Bay Lease fell within its exclusion for "data gathering activities." *See* National Environmental Policy Act; Revised Implementing Procedures, 53 Fed.Reg. 10,439, 10,442 (Mar. 31, 1988).

FN7. The procedural history of this case is explained in more detail in the district court's opinion. *See* *Nulankeyutmonen Nkihtaqmikon v. Impson*, 462 F.Supp.2d 86, 89-90 (D.Me.2006).

FN8. The APA claim was dismissed because, without the other statutory claims, NN had no private right of action. *Nulankeyutmonen Nkihtaqmikon*, 462 F.Supp.2d at 112.

FN9. In particular, the argument that the BIA will participate in the FERC permitting process-and therefore that the BIA will have other chances to prevent the construction of the LNG terminal-properly goes to the merits of the case, *i.e.*, whether the BIA has fulfilled its duties.

FN10. For example, Count One of Plaintiffs' Second Amended Complaint alleges, *inter alia,* that "[t]he BIA breached its duty under NEPA by issuing a Categorical Exclusion for the lease approval because the effects of the ground lease constitute extraordinary circumstances that preclude it from categorical exemption under Appendix 2 of the BIA's Departmental Manual." Count Three alleges that "[t]he BIA breached its duty under section 470a(d)(6) of the NHPA by failing to consult with the tribe before approving the ground lease on a site of religious and cultural significance to the Passamaquoddy Tribe and which is eligible for listing on the Registry of Historic Places." Plaintiffs' ESA complaint alleges, *inter alia,* that the BIA failed to consult with the National Marine Fisheries Service as to the impacts of the lease on certain whales.

FN11. While the BIA frames this argument as one involving causation, it is actually a question of imminence under the injury-in-fact analysis. As stated above, and shown by the *Lujan* example, immediacy is not of particular concern here.

FN12. NN's organizational standing is clear: the interests asserted and evaluated are those of the individual members, *see Dubois*, 102 F.3d at 1281 ("A membership organization ... may assert the claims of its members, provided that one or more of its members would satisfy the individual requirements for standing."); the interests in Split Rock are "germane to the objectives for which [NN] was formed," *id.* at 1281 n. 11; and there is no reason the claim or requested relief "requires the personal participation of affected individuals," *id.*

FN13. Neither party raises constitutional standing concerns on appeal, and we see no obstacle to constitutional standing for the same reasons discussed above with respect to standing under NEPA, NHPA, and ESA.

FN14. The BIA suggests that we not consider Plaintiffs' argument that the zone of interests protected by the Leasing Act encompasses Plaintiffs' environmental concerns, because they make this argument for the first time on appeal. Plaintiffs, however, point to specific language in their complaint and in the transcript that shows they raised the issue before the district court. Additionally, though not dispositive, the BIA is hardly in an equitable position to make such a claim considering its shift in position on crucial issues from the stance it took before the district court as comparted to that before us.

FN15. Contrary to the BIA's assertions, we cannot-and will not-affirm the dismissal at this stage of the proceedings on the ground that the BIA complied with the Leasing Act. Further, it is irrelevant to our analysis whether "[t]he true gravamen of [Plaintiffs'] complaint apparently lies with the Tribal Resolution authorizing the lease." Plaintiffs' have chosen their battleground and their opponent, and our review for standing is limited to the allegations of injury asserted in this suit.

FN16. The district court was unclear as to whether Plaintiffs intended to assert a Trust Obligation claim apart from the Leasing Act claim. *Nulankeyutmonen Nkihtaqmikon*, 462 F.Supp.2d at 110. Plaintiffs' explanation is no more enlightening on appeal, but we assume for purposes of our review that this was their intention.

FN17. The district court ruled that Plaintiffs' claims were not ripe "because the lease approval process is not yet complete." *Nulankeyutmonen Nkihtaqmikon*, 462 F.Supp.2d at 97. It further stated, however, "Had the BIA given a final, irrevocable stamp of approval on the ground lease ..., NN would have a ripe claim...." *Id.* at 98.

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United States Court of Appeals,
First Circuit.
CITY OF FALL RIVER, MASSACHUSETTS; The Attorney General of the Commonwealth of Massachusetts; The Attorney General for the State of Rhode Island; and Massachusetts Energy Facilities Siting Board, Petitioners,
v.
FEDERAL ENERGY REGULATORY COMMISSION, Respondent.
Conservation Law Foundation, Petitioner,
v.
Federal Energy Regulatory Commission, Respondent.
Michael L. Miozza, Petitioner,
v.
Federal Energy Regulatory Commission, Respondent.
Nos. 06-1203, 06-2146, 06-1204, 06-2147, 06-1220.
Heard June 8, 2007.
Decided Oct. 26, 2007.

On Petitions for Review of an Order of the Federal Energy Regulatory Commission.
Robert S. Taylor, with whom Edward Berlin, Lester S. Hyman, B, H & T Associates, Thomas F. McGuire, Jr., Corporation Counsel, Thomas F. Reilly, Massachusetts Attorney General, Chief, Carol Iancu, Assistant Attorney General, were on brief, for the City of Fall River, the Attorney General of the Commonwealth of Massachusetts, and Massachusetts Energy Facilities Siting Board.

Paul Roberti, Assistant Attorney General, Chief, Regulatory Unit, with whom Patrick C. Lynch, Attorney General of the State of Rhode Island, and Terence Tierney, Special Assistant Attorney General, were on brief, for the Attorney General for the State of Rhode Island.

Susan M. Reid, with whom Jerry Elmer were on brief, for Conservation Law Foundation.

Beth G. Pacella, Senior Attorney, with whom John S. Moot, General Counsel, and Robert H. Solomon, Solicitor, were on brief, for Federal Energy Regulatory Commission.

Bruce F. Kiely, with whom G. Mark Cook, Adam J. White, Jessica A. Fore, Emil J. Barth, and Baker Botts L.L.P. were on brief, for intervenors Weaver's Cove Energy, LLC and Mill River Pipeline, LLC.

Michael L. Miozza, on brief, pro se.

Before TORRUELLA and LIPEZ, Circuit Judges, and FUSTÉ,[FN*] District Judge.

TORRUELLA, Circuit Judge.
***1** The City of Fall River, Massachusetts, the Attorneys General of the States of Massachusetts and Rhode Island, the Conservation Law Foundation ("CLF"), and Michael

Miozza (together, "Appellants") seek reversal of the July 2005 Order of the Federal Energy Regulatory Commission ("FERC") granting conditional approval to Weaver's Cove Energy ("WCE") to site, construct, and operate a proposed liquified natural gas ("LNG") terminal and associated pipeline in Fall River, Massachusetts, as well as the reversal of subsequent orders denying the reopening of the record and rehearing. The facility, which would include a marine berth (requiring dredging of the harbor and waterways, including the Taunton River), an LNG storage tank, regasification facilities, and an LNG truck distribution facility, would receive LNG from ocean-going ships for off-load to trucks or for regasification and delivery by pipeline to New England's network of natural gas pipelines.

The conditional permit is subject to a number of stipulations, including approval of the vessel transportation plan by the United States Coast Guard ("USCG") and consistency with the Wild and Scenic Rivers Act, as determined by the Department of the Interior ("DOI"). Because the USCG and the DOI have not completed their respective evaluations of these aspects of the project, we find that it would be premature to address the merits of the appeal. Appellants maintain the right to petition FERC, and subsequently seek appeal to this Court, if and when these and other relevant agencies have made their final recommendations.

I. *Background*

In 2004, FERC, USCG, and the United States Department of Transportation ("DOT") entered into an Interagency Agreement to coordinate review of proposed LNG facilities. Under the agreement, FERC is the lead agency in authorizing LNG facilities and in preparing a proposed facility's Environmental Impact Statement ("EIS"),[FN1] which is required by the National Environment Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321 *et seq.* Generally, authorization is granted (as it was in this case) on the condition that certain stipulations, environmental and otherwise, are met.

Here, the development of the EIS began on May 2, 2003, with a preliminary meeting between WCE, FERC staff, and key federal and state officials to discuss WCE's proposal and the accompanying environmental review process. At that time, FERC invited all federal, state, or local agencies with jurisdiction or special expertise to cooperate in preparing the EIS, and also invited all interested parties to submit written comments and to attend a public scoping meeting to be conducted jointly by FERC and Massachusetts state officials on July 29, 2003. On December 19, 2003, WCE formally applied to FERC under the Natural Gas Act of 1938 ("NGA"), 15 U.S.C. §§ 717 *et seq.* , requesting authority to site, construct, and operate the proposed LNG facility.

During the review process, FERC received voluminous comments from the public, as well as objections from government agencies. As part of this process, FERC's Commissioner and Chairman also hosted a meeting in January 2005, at which Fall River's Mayor, Senators Edward Kennedy and John Kerry, Congressman James McGovern, Massachusetts Representative David Sullivan, and then-Governor Mitt Romney's representative presented their views on the proposal.

***2** Based on those comments and the research conducted during the review process, FERC prepared and issued a Final EIS on May 20, 2005, and conditionally authorized the project on July 11, 2005.[FN2] The conditional authorization was based on an analysis of the need for the project,[FN3] project alternatives,[FN4] and safety and security considerations.[FN5]

The conditions imposed on the project's authorization include two significant hurdles: (1) approval of WCE's transportation plan by the USCG,[FN6] and (2) the DOI's finding that the project is consistent with the Wild and Scenic Rivers Act.[FN7] Neither the USCG nor the DOI have completed their respective final evaluations.

Since the conditional approval, there have also been two changes in project conditions that could very well affect WCE's final project approval. First, at the time of conditional approval, the Brightman Street Bridge, which crosses the river leading from the ocean to the planned LNG facility site, was scheduled for demolition. However, in late 2005, Congress passed legislation forbidding the demolition of the bridge, frustrating WCE's original plan to use 150-foot wide vessels to bring LNG to the facility. A new, larger Brightman Street Bridge is still scheduled to be built next to the old protected bridge. In an amended proposal, WCE informed the USCG that it would use smaller ships that could pass through the ninety-eight foot wide opening of the Bridge, thereby increasing the frequency of shipments from the planned fifty to seventy deliveries up to 120 deliveries per year. Even with the smaller ships, however, transit through the new and old Brightman Street Bridges would be "an extraordinary navigational maneuver" leaving "no margin for error," according to the Coast Guard's preliminary findings.

Second, seven months after FERC approval, DOI announced new restrictions that would limit the dredging of the necessary waterways to a few months of the year, likely delaying the completion of the project from 2010 to 2015.

On April 17, 2006, CLF petitioned FERC to reopen the record to consider the impact of those two developments on the project. FERC denied the motion, finding that there had not been a change in circumstances on which its conditional approval was based, and therefore review was not warranted. FERC explained that it is the USCG's duty to review the changed shipment plan in its yet-to-be-released Letter of Recommendation, and that there is no change relative to FERC's conditional approval unless the USCG's review of this matter results in changes to the project that require a change to the plan authorized by FERC.[FN8] FERC did not address the potential impact of the changes in dredging regulations on the project's start date.

Following FERC's order denying the motion to reopen the record, CLF requested a rehearing based on the changes to WCE's navigation plan and potential delays caused by the new dredging constraints. FERC denied CLF's subsequent rehearing request on July 19, 2006. The explanation accompanying the denial of rehearing was largely the same as the denial to the motion to reopen. FERC added that, in regard to the dredging regulations, there was "no new or significantly changed project" warranting a rehearing and that the 2010 target date for the commencement of service was not a prerequisite for FERC's authorization to the project.

***3** The Appellants now seek review of (1) the merits of FERC's conditional project approval and (2) FERC's denial of Appellant's motion to reopen the record.

II. *Discussion*

A. *FERC's Conditional Approval*

At this time, we decline to review the merits of FERC's conditional project approval because it is not yet ripe for review. "Ripeness is a justiciability doctrine" that is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 807-08, 123 S.Ct. 2026, 155 L.Ed.2d 1017 (2003) (quoting *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n. 18, 113 S.Ct. 2485, 125 L.Ed.2d 38 (1993)). Even in cases "raising only prudential concerns, the question of ripeness may be considered on a court's own motion." *Id.* at 808. We now consider the question.

The ripeness doctrine is designed to prevent courts from "entangling themselves in abstract disagreements over administrative policies" and from improperly interfering in the administrative decision-making process. *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977). In determining whether a case is ripe for review, we must examine "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149.

Under the first prong of this ripeness inquiry, fitness for judicial review, we consider "whether the matter involves uncertain events which may not happen at all, and whether the issues involved are based on legal questions or factual ones." *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1237 (10th Cir.2004); *see also McInnis-Misenor v. Me. Med. Ctr.*, 319 F.3d 63, 70 (1st Cir.2003) ("In the fitness inquiry, ... prudential concerns focus[ ] on the policy of judicial restraint from unnecessary decisions."). "If the court's interest tends toward postponement, we must then weigh this consideration against the immediate impact of the actions on the challengers, and whether that impact is so harmful that present consideration is warranted." *Midwestern Gas Transmission Co. v. Fed. Energy Reg. Comm'n*, 589 F.2d 603, 618 (D.C.Cir.1978).

In making the fitness determination, the prospect of entangling ourselves in a challenge to a decision whose effects may never be "felt in a concrete way by the challenging parties," *Abbott Labs.*, 387 U.S. at 148-49, is an especially troublesome one. We have explained that "premature review not only can involve judges in deciding issues in a context not sufficiently concrete to allow for focus and intelligent analysis, but it also can involve them in deciding issues unnecessarily, wasting time and effort." *W.R. Grace & Co. v. EPA*, 959 F.2d 360, 366 (1st Cir.1992) (internal quotation marks and citation omitted). As such, a "claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.' " *Texas v. United States*, 523 U.S. 296, 300, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985)).

***4** A pragmatic view of the facts in this case reveals that it is not ripe for review. Plainly stated, WCE's proposed LNG project may well never go forward because FERC's approval of the project is expressly conditioned on approval by the USCG and the DOI. Neither agency has yet given its final recommendation, and each has expressed serious reservations about the project. The USCG has remarked that "it appears that the waterway may not be suitable for the type and frequency of LNG marine traffic contained in [the WCE] smaller tanker proposal," and that "the entire proposed transit route ... presents a unique challenge to water-borne security." Likewise, the DOI has warned that if Taunton River is designated as a National Wild and Scenic River (a designation that has strong local support), it is unlikely that "[the DOI] will ... be able to provide the statutorily required affirmative statement of no adverse impact," due to the "unavoidable adverse site impacts." Because "[c]ourts have no business adjudicating the legality of non-events," *Nat'l Wildlife Fed'n v. Goldschmidt*, 677 F.2d 259, 263 (2d Cir.1982), we decline to decide whether FERC's actions thus far were proper.

The balance of hardship to the parties in this case does not persuade us otherwise. Appellants retain every opportunity to challenge FERC's decision in the event the USCG and DOI approve the project. Such a challenge would not be barred by the statute of limitations. "A time limitation on petitions for review ... can run only against challenges ripe for review." *Baltimore Gas & Elec. Co. v. Interstate Commerce Comm'n*, 672 F.2d 146, 149 (D.C.Cir.1982); *see also Whittle v. Local 641, Int'l Bhd. of Teamsters*, 56 F.3d 487, 489 (3d Cir.1995) (holding that a cause of action accrues "when it is sufficiently ripe that one can maintain suit on it"). While the statute of limitations may pose a bar to claimants who delay filing their complaints based "on their own assessment of when an

issue is ripe for review," *see, e.g.*, Eagle-Pitcher Indus. Inc. v. EPA, 759 F.2d 905 (D.C.Cir.1985) (articulating the limited "circumstances under which the court will engage in 'retrospective ripeness analysis' after the statutory review period has expired"), the appellants here will not suffer that consequence. Because we hold that Appellants' challenge to FERC's approval of the WCE project will not be ripe for review until the USCG and the DOI have given their respective approvals for the project, the statute of limitations period will not begin to run against Appellants until WCE obtains those approvals. *Cf.* Baltimore Gas & Elec. Co. v. Interstate Commerce Comm'n, 672 F.2d at 149-50 (dismissing the petition on ripeness grounds, but reassuring the petitioner that the statute of limitations would not begin to run until its claims ripened).

Concerns about hardship to the parties are further lessened by the fact that FERC's decision will have no immediate impact on Appellants. Because WCE may not proceed with the NLG project until it obtains approval from the USCG and the DOI, no one will experience the effects of FERC's decision unless and until the agencies authorize the project. *See* New Hanover Twp. v. United States Army Corps of Eng'rs, 992 F.2d 470, 473 (3d Cir.1993) (concluding that the challenge to defendant's issuance of a general permit to landfill corporation was not ripe for review because corporation needed further approval from state agency before proceeding with landfill project).

***5** Given that decisive questions remain open, we think it wiser to allow the agencies to continue their decision-making process at least until final authorization is granted by all three agencies. *See* Midwestern Gas Transmission Co., 589 F.2d at 620 ("Exhaustion of this administrative process will refine and focus the factual basis upon which both the public interest determination and the overall authorization rest, and will avoid a multiplicity of suits challenging conditional, tentative [agency] decisions."). Until then, our review would be advisory, and likely irrelevant to the ultimate approvability of the project. *See* Nat'l Wildlife Fed'n, 677 F.2d at 263 (declining to review adequacy of Final EISs prepared for proposed highway sections that might never be built, noting that "[r]eview now might well adjudicate matters which are ultimately immaterial and would by no means put the matter to rest, since actions brought after a decision to build [the highway] has been made can challenge the present [Final EISs] as obsolete."); *see also* Environmental Defense Fund, Inc. v. Johnson, 629 F.2d 239, 241 (2d Cir.1980) (holding that adjudication of the legality of an agency's recommendation would be premature where project undergoing further study could ultimately be abandoned or substantially altered).

B. *FERC's Denial of Appellant's Motion to Reopen the Record*

When FERC denies a petition to reopen a case record, we review its decision for abuse of discretion. *E.* Carolinas Broad. Co. v. FCC, 762 F.2d 95, 103 (D.C.Cir.1985) ("[We] normally reverse an agency's decision not to reopen the record only for abuse of discretion."). We generally uphold a federal agency's decision not to reopen a record or hearing based on changed circumstances or newly available information unless it "clearly appear[s] that the new evidence would compel or persuade ... a contrary result." *Id.* (quoting *Friends of the River v. FERC,* 720 F.2d 95, 98 n. 6 (D.C.Cir.1983)).

We find that FERC did not abuse its discretion in denying to reopen the record due to the changes in the applicable dredging regulations and the status of the old Brightman Street Bridge. While the changes in dredging regulations are likely to delay project completion, FERC has denied that the anticipated project completion date of 2010 was a controlling factor in its conditional project approval. Thus, it is not clear that the change in the dredging regulations would compel FERC to adopt a "contrary result." *Id.* Likewise, we cannot conclude that the change in the status of the old Brightman Street Bridge would necessarily compel FERC to revoke the conditional project approval. Congress's

prohibition of the demolition of the bridge will surely impact WCE's transit plan, but until the USCG determines the acceptable contours of that plan, FERC is not in a position to make an informed evaluation.

III. *Conclusion*

In sum, we will not review the merits of FERC's conditional project approval because we find it is not ripe for review at this time. We also find no abuse of discretion in FERC's decision to deny a reopening of the record. However, our decision does not preclude Appellants from again petitioning FERC to reopen the record-or subsequently seeking redress with this Court-when the future of WCE's proposed LNG project is more certain.

6 Affirmed.

FN* Of the District of Puerto Rico, sitting by designation.
FN1. An EIS addresses not only environmental issues, but also safety, security and design issues, as well as maritime safety and security operations.

FN2. Shortly after conditional approval, on January 23, 2006, FERC denied a petition by CLF to rehear the case.

FN3. LNG facilities have existed in New England for over thirty years. The demand for the project is fueled by New England's increasing consumption of natural gas. When consumption peaks in the winter months, daily demand can exceed supply by over 1 billion cubic feet of gas. *Weaver's Cove Energy, LLC,* 112 F.E.R.C. 61,070, 61,528 (2005).

FN4. The alternatives considered included: no action or postponed action; onshore or offshore system and terminal site alternatives; terminal layout alternatives; and dredge disposal alternatives. The alternatives each failed for at least one of the following reasons: it did not meet the purpose of the proposed project; it could not be developed by 2010, when the project was expected to be operational; it involved greater environmental impacts; or the property was not available for development. *Weaver's Cove,* 112 F.E.R.C. at 61,544.

FN5. This includes federal and state safety standards, including the USCG's security plans for LNG vessels. *Weaver's Cove,* 112 F.E.R .C. at 61,540.

FN6. "Pursuant to [USCG] regulations, an owner or operator that intends to construct an LNG facility must submit a Letter of Intent to the Coast Guard describing ... the vessels ... and the frequency of the visits." *Weaver's Cove Energy, LLC,* 115 F.E.R.C. 61,058, 61,179 (2006) (citing 33 C.F.R. § 127.007 (2005)). The USCG makes a determination on the suitability of the waterway for LNG vessels in a Letter of Recommendation. *Id.* "Factors considered by the [USCG] ... include, as pertinent: density and characteristics of marine traffic in the waterway; locks, bridges and other man-made obstructions in the waterway; and water depth and tides." *Id.* (citing 33 C.F.R. § 127.009 (2005)).

FN7. According to FERC's conditional permit, approval was granted conditional to the DOI's evaluation that "the project would not have a substantial adverse effect on the Taunton River's potential designation as a Wild and Scenic River ("WSR") and that the project would be consistent with the Wild and Scenic River Act if the Taunton River were designated a WSR." *Weaver's Cove,* 112 F.E.R.C. at 61,550.

FN8. Although the USCG has not provided FERC with a Letter of Recommendation regarding the transit of the LNG vessels, the USCG's preliminary letter stated, as

previously noted, that the maneuvers required to get through the Brightman Street Bridges were extremely difficult and that the waterway configuration "appears unsuitable" for WCE's vessel transit proposal. It also noted that the "entire proposed transit route ... represents a unique challenge to water-borne security."

C.A.1,2007.
City of **Fall River**, MA v. F.E.R.C.
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Briefs and Other Related Documents (Back to top)

- 06-2147 (Docket) (Aug. 1, 2006)
- 06-2146 (Docket) (Aug. 1, 2006)
- 06-1220 (Docket) (Jan. 30, 2006)
- 06-1204 (Docket) (Jan. 26, 2006)

END OF DOCUMENT

10 C.F.R. § 2.315

Code of Federal Regulations Currentness
Title 10. Energy
Chapter I. Nuclear Regulatory Commission (Refs & Annos)
Part 2. Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders (Refs & Annos)
Subpart C. Rules of General Applicability: Hearing Requests, Petitions to Intervene, Availability of Documents, Selection of Specific Hearing Procedures, Presiding Officer Powers, and General Hearing Management for NRC Adjudicatory Hearings (Refs & Annos)
➡§ 2.315 Participation by a person not a party.

(a) A person who is not a party (including persons who are affiliated with or represented by a party) may, in the discretion of the presiding officer, be permitted to make a limited appearance by making an oral or written statement of his or her position on the issues at any session of the hearing or any prehearing conference within the limits and on the conditions fixed by the presiding officer. However, that person may not otherwise participate in the proceeding. Such statements of position shall not be considered evidence in the proceeding.

(b) The Secretary will give notice of a hearing to any person who requests it before the issuance of the notice of hearing, and will furnish a copy of the notice of hearing to any person who requests it thereafter. If a communication bears more than one signature, the Commission will give the notice to the person first signing unless the communication clearly indicates otherwise.

(c) The presiding officer will afford an interested State, local governmental body (county, municipality or other subdivision), and affected, Federally-recognized Indian Tribe, which has not been admitted as a party under § 2.309, a reasonable opportunity to participate in a hearing. Each State, local governmental body, and affected Federally-recognized Indian Tribe shall, in its request to participate in a hearing, each designate a single representative for the hearing. The representative shall be permitted to introduce evidence, interrogate witnesses where cross-examination by the parties is permitted, advise the Commission without requiring the representative to take a position with respect to the issue, file proposed findings in those proceedings where findings are permitted, and petition for review by the Commission under § 2.341 with respect to the admitted contentions. The representative shall identify those contentions on which it will participate in advance of any hearing held.

(d) If a matter is taken up by the Commission under § 2.341 or sua sponte, a person who is not a party may, in the discretion of the Commission, be permitted to file a brief "amicus curiae." Such a person shall submit the amicus brief together with a motion for leave to do so which identifies the interest of the person and states the reasons why a brief is desirable. Unless the Commission provides otherwise, the brief must be filed within the time allowed to the party whose position the brief will support. A motion of a person who is not a party to participate in oral argument before the Commission will be granted at the discretion of the Commission.

10 C. F. R. § 2.315, 10 CFR § 2.315

Current through March 22, 2007; 72 FR 13590