

UNITED STATES COURT OF APPEAL FOR THE THIRD CIRCUIT
DOCKET NOS. 06-5140, 07-1559 and 07-1756

STATE OF NEW JERSEY,)
)
 Petitioner,)
)
 v.)
)
 UNITED STATES NUCLEAR REGULATORY)
 COMMISSION and the)
 UNITED STATES OF AMERICA,)
)
 Respondents.)

**MOTION OF THE STATE OF NEW JERSEY
FOR A PANEL REHEARING ON SECTION III OF
THE COURT'S MAY 21, 2008 DECISION**

This Motion for a Rehearing is being filed pursuant to F.R.A.P. 40 regarding certain statements made on the merits of the State's National Environmental Policy Act ("NEPA") claim in Section III of the Court's May 21, 2008 decision. In view of the Court's holding that it lacks jurisdiction, the State submits that the Court should modify its opinion to eliminate certain statements which address the merits of the State's argument.

The State of New Jersey respectfully requests that the Court rescind the following sentence from its decision: "Only Shieldalloy has applied for a POL/LTC, and NEPA does not require a comprehensive impact statement covering merely contemplated projects." Slip Op. at 8. This sentence conflicts with the Court's jurisdictional authority and with case law interpreting NEPA.

The Supreme Court has held that "a federal court generally may not rule on the merits of a case without first determining that it has jurisdiction" because "[w]ithout jurisdiction the court cannot proceed at all in any cause." Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 127 S. Ct. 1184, 1191 (2007). Because the Court held in the case at bar that it lacks jurisdiction, it should not have proceeded to rule on the merits of the State's NEPA claim.

Furthermore, the Court's ruling on the NEPA claim conflicts with settled case law. The State acknowledges that NEPA does not require a programmatic Environmental Impact Statement ("EIS") for impacts that are indefinite and speculative in nature. However, the context of the Court's ruling may imply that the Court is holding that an EIS concerning the Nuclear Regulatory Commission's ("NRC") instituted change in its decommissioning program is not required. Such a holding conflicts with settled law that an agency is required to conduct a programmatic EIS where it proposes to alter a major federal program that significantly affects the quality of the human environment. Kleppe v. Sierra Club, 427 U.S. 390, 395-414 (1976); Public Citizen v. NRC, 940 F.2d 679, 685 (D.C. Cir. 1991).

In Kleppe, the Department of the Interior proposed to change its coal-leasing program on federally owned land. Supra, 427 U.S. at 398, 400. The Supreme Court stated that a programmatic EIS

that considers the national environmental impacts was required since "the new leasing program is a coherent plan of national scope, and its adoption surely has significant environmental consequences." Id. at 400.

In Public Citizen, the NRC issued a policy statement that exempted from its regulation radiation exposures below regulatory concern ("BRC"). Supra, 940 F.2d at 680. The Court held that this case was not ripe for review since the NRC stated that future action would be required before applying the policy statement. Id. at 684. Specifically, a person must first apply to the NRC for an exemption, and the risks associated with the request for an exemption would be thoroughly analyzed. Id. Nevertheless, the Court stated:

The petitioners' fears that the Commission will avoid a programmatic EIS by examining the environmental impact of isolated exemptions only is premature. Moreover, the very existence of the policy statement will (ironically) give petitioners an argument that the BRC exemptions are so "related" as to require a programmatic EIS once the Commission actually confronts a specific request for exemption.

Id. at 685 (citing Kleppe, supra, 427 U.S. at 410).

The Council on Environmental Quality has developed regulations for determining whether an agency action qualifies as a "major Federal action" requiring a programmatic EIS. Under the guidelines, "formal documents establishing an agency's policies

which will result in or substantially alter agency programs" constitute a "major Federal action" requiring a programmatic EIS. 40 C.F.R. § 1508.18(b)(1) (1986). These regulations are entitled to "substantial deference." Andrus v. Sierra Club, 442 U.S. 347, 358 (1979).

The Supreme Court in Kleppe made a clear distinction between two categories of federal actions requiring a programmatic EIS. The first category concerns a change to an agency program that has an environmental impact, as discussed above. Kleppe, supra, 427 U.S. at 400. The second category concerns several federal actions that are pending concurrently before a federal agency that will have a cumulative environmental impact. Id. at 410. The Kleppe Court held that while a programmatic EIS considering the national environmental impacts was required since the Department of the Interior proposed to change its national coal-leasing program, id. at 400, a programmatic EIS considering the Northern Great Plain region was not required since there were no proposals for such region-wide action, id. at 414-15.

This Court cited Society Hill Towners Owners' Ass'n v. Rendell, which holds that only "actual proposals" that have "cumulative or synergistic environmental impact" require a programmatic EIS. 210 F.2d 168, 180 (3d Cir. 2000) (quoting Kleppe, supra, 427 U.S. at 410). However, the Court's decision failed to recognize the category of federal actions requiring a programmatic

EIS applicable to this case, a change to an agency program.

In the case at bar, because NUREG-1757 and the LTC license substantially alter the NRC's national program regarding restricted release decommissioning, a programmatic EIS is required. Prior to this change, the restricted release option was intended to apply primarily to short-lived nuclides. 62 Fed. Reg. 39058, 39083 (Response F.7.3) (July 21, 1997); see also id. at 39061 n.2 ("[F]or most of the facilities covered by this rule, the TEDE is controlled by relatively short-lived nuclides of half-lives of 30 years or less for which the effect of radioactive decay will, over time, reduce the risk significantly"); see also id. at 39070 ("Radioactive decay for relatively short-lived nuclides . . . that are the principal dose contributing contaminants at the large majority of NRC licensed facilities, will actually reduce the dose level over a period of time for most sites that will provide an additional margin of safety equivalent to fractionation of the limit.") Now, the NRC has provided the LTC license, which specifically applies to the onsite disposal of long-lived nuclides upon decommissioning. (A228-A229). Indeed, the NRC could not point to a single past example where the NRC itself issued a license placing the responsibility on a private entity to own and maintain a radioactive waste site containing long-lived nuclides. (NRC merits brief at 50; State reply brief at 24).

The NRC's expressed purpose of changing its

decommissioning program, to make the onsite disposal of long-lived radioactive waste easier and more available, will surely result in a significant impact on the human environment that will subject the program to the requirements of NEPA. The NRC stated that the LTC license was being provided to the regulated community to "make the restricted release and alternate criteria provisions of the LTR [License Termination Rule] more available for NRC licensee use by identifying institutional control options and removing existing regulatory impediments" (A491; see also A485). The LTC license was also being provided for sites containing long-lived nuclides where a licensee was having "difficulty decommissioning" for "financial" reasons, among other reasons. (A487).

The NRC has already instituted this change to its national decommissioning program by issuing NUREG-1757 and making the LTC license available to the regulated community; the NRC is past the point of only contemplating such change. Just as a change in national policy concerning coal mining on federal lands and a change in the NRC's policy to exempt certain radiation exposures on a wide-scale basis would require a programmatic EIS, providing NUREG-1757 and the LTC license constitute a major change to the NRC's national program concerning the decommissioning of licensed facilities which also requires a programmatic EIS. See Kleppe, supra, 427 U.S. at 400; Public Citizen, supra, 940 F.2d at 685.

Furthermore, when the NRC changed its decommissioning

program in 1997 to add the restricted release option, it conducted the required programmatic EIS that was national in scope. 62 Fed. Reg. at 39069 (Section B.3.2). However, the EIS assumed that onsite-disposals would be limited to short-lived nuclides. Id. ("The Final GEIS illustrates when it may be inappropriate . . . to completely remediate a site to an unrestricted level Specific examples include reactors or other materials facilities where the dose is controlled by relatively short-lived nuclides . . . that will decay to unrestricted dose levels in a finite time period of institutional control (e.g., about 10-60 years)."); see also the quotations from the Federal Register cited above. Because the NRC has stated that the purpose of the LTC license is to make onsite-disposals of long-lived nuclides more available, (A485, A491), it should be required to revise its 1997 programmatic EIS or conduct a new programmatic EIS. In light of these reasons to conduct a programmatic EIS, the State simply requests that the Court rescind the above quoted sentence from its decision.

The State of New Jersey also requests this Court to rescind the following statement:

One categorical exclusion from the NEPA requirement covers "[i]ssuance or amendment of guides for the implementation of regulations in this chapter, and issuance or amendment of other informational and procedural documents that do not impose any legal requirements." 10 C.F.R. § 51.22(c)(16). Because NUREG-1757 is not a binding document but a guide without legal obligations, it is covered by this exclusion.

Slip Op. at 8.

As discussed above, the Court should not reach the merits of the State's claim if it does not have jurisdiction. See Sinochem Int'l Co., supra, 127 S. Ct. at 1191. Furthermore, an agency regulation cannot conflict with a statute. Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842-43 (1984). Thus, if it is found in the future that NEPA requires the NRC to conduct a programmatic EIS of the NUREG-1757 and the LTC license, the requirements of NEPA must prevail over 10 C.F.R. § 51.22(c)(16). See Chevron, supra, 467 U.S. at 842-43. Furthermore, the regulation itself provides an exception to the categorical exclusion under "special circumstances, as determined by the Commission." 10 C.F.R. § 51.22(b). The State is thus requesting that the above referenced language on Page 8 of the decision be rescinded.

The State is not seeking a rehearing of the Court's decision that it lacks jurisdiction. Rather, the State is only asking the Court to rehear the matter for the purpose of modifying its opinion to rescind certain statements discussed above regarding the merits of the State's NEPA claim.

Respectfully submitted,

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Dated: June 20, 2008

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