

**UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT**

CENTER FOR A SUSTAINABLE COAST,)	
<i>et al.</i> ,)	
)	
Petitioners,)	No. 09-1262
)	
v.)	
)	
NUCLEAR REGULATORY COMMISSION)	
and UNITED STATES OF AMERICA,)	
)	
Respondents.)	
)	

**PETITIONERS' OPPOSITION TO RESPONDENTS' AND
INTERVENORS' MOTION TO DISMISS PETITION FOR REVIEW**

Petitioners, the Center for a Sustainable Coast, *et al.* (collectively, “Environmental Groups”), seek judicial review of Early Site Permit 004 (the “ESP”) and the accompanying Limited Work Authorization (the “LWA”) (unless context demands otherwise, referred to collectively as “ESP-004”), a final order of Respondent Nuclear Regulatory Commission (the “Commission” or “NRC”).

Intervenors, Southern Nuclear Operating Company, *et al.* (collectively, “Southern”), and the Commission contend that this Court lacks jurisdiction over the Petition for Review because Environmental Groups filed a mandatory administrative appeal of an interlocutory decision of the Atomic Safety and

Licensing Board (the “ASLB”), which was pending before the Commission when Environmental Groups filed their Petition for Review in this Court. Despite suggestions to the contrary, this is not a case of a litigant choosing to “challenge the same agency action in two forums at once.” (NRC Mot. to Dismiss at 1; *See also* Southern Mot. to Dismiss at 6–7). Environmental groups filed only one appeal of ESP-004—the Petition for Review filed in this Court.

Issuance of ESP-004 was the culmination of a protracted administrative proceeding in which Environmental Groups participated to the maximum extent required by NRC regulations to exhaust administrative remedies. These regulations erect significant procedural hurdles as prerequisites to seeking judicial review, including a requirement to file an administrative appeal of certain interlocutory decisions of the ASLB. When the ASLB issued its so-called “First Partial Initial Decision” (the “Partial Decision”) on the contested issues, Environmental Groups filed the required administrative appeal with the Commission. More than two months later, the NRC issued ESP-004 notwithstanding the pending administrative appeal, and Environmental Groups subsequently filed the Petition for Review in this Court within the 60 day time limit provided by the Hobbs Act.

On January 7, 2010, the Commission rejected the administrative appeal of the Partial Decision, thereby removing any jurisdictional impediment to judicial

review of ESP-004. Unfortunately, this action does not resolve the issue presented in the motions to dismiss. The question remains whether the Petition for Review was timely, or whether Environmental Groups must now re-file the Petition for Review in order to perfect jurisdiction in this Court. Because the issue concerns the jurisdiction of this Court, Environmental Groups cannot afford to be wrong.

The Commission's failure to rule on the mandatory administrative appeal of the Partial Decision before issuing ESP-004 did not render ESP-004 non-final for the purpose of judicial review. The Administrative Procedure Act ("APA") provides that mandatory administrative remedies preclude judicial review *only when the agency action is "inoperative" while the administrative appeal is pending*. 5 U.S.C. § 704 (2009). In contrast, NRC regulations specify that the ASLB's Partial Decision is immediately effective regardless of whether an administrative appeal is pending. *See* 10 C.F.R. 2.1210(d) (2009). Likewise, the Commission allows an ESP to be issued when there is a pending administrative appeal of an interlocutory ASLB decision. 10 C.F.R. § 2.340(i) (2009). In addition, ESP-004 is "effective immediately" for a term of 20 years, with no further opportunity for administrative appeal. Notice of Issuance of ESP for the Vogtle Electric Generating Plant Site, 74 Fed. Reg. 44,879, 44,880 (Aug. 31, 2009). Under these circumstances, the interlocutory administrative appeal of the

ASLB's Partial Decision does not deprive this Court of jurisdiction over the Petition for Review of ESP-004.

In addition, the APA provides that interlocutory or preliminary decisions of an agency made during the course of an administrative proceeding are not immediately reviewable, but rather must wait until the agency takes final action. In this case, Environmental Groups seek judicial review of several procedural and evidentiary decisions of the ASLB, as well as the interlocutory Partial Decision. Preliminary agency decisions, such as those of the ASLB in this case, are normally reviewed after the agency takes final action. Here, the Commission issued its final order, ESP-004, before resolving the mandatory administrative appeal of the Partial Decision; however, under APA § 704, issuance of ESP-004 remains the final order of the Commission for the purpose of judicial review.

BACKGROUND

On August 14, 2006, Southern filed an ESP application for early site approval of two additional nuclear reactors at the existing Vogtle Electric Generating Plant ("Plant Vogtle") near Waynesboro, Georgia. On December 11, 2006, Environmental Groups petitioned to intervene in the ESP proceeding and requested a hearing. *See* Petition for Intervention (Dec. 11, 2006); Certified Index of Record, No. 1. By order dated March 12, 2007, the ASLB permitted Environmental Groups to intervene and admitted environmental contention 1.2

(“EC 1.2”)¹ for hearing. *Southern Nuclear Operating Co.*, 65 N.R.C. 237, 237 (2007). The Board, in a later order, limited the scope of EC 1.2. *Southern Nuclear Operating Co.*, 67 N.R.C. 54 (2008).

Then, on August 18, 2008, the NRC staff issued the Final Environmental Impact Statement for an ESP at Plant Vogtle (the “FEIS”). Based on new information contained within the FEIS, Environmental Groups submitted an additional environmental contention (“EC 6.0”), which the Board admitted for hearing. *See* Joint Intervenors’ Mot. to Admit New Contention (Sept. 22, 2008); *Southern Nuclear Operating Co.*, ASLBP No. 07-850-01-ESP-BD01 (Oct. 24, 2008) (ruling on motion to admit new contention).

In preparation for the hearings on EC 1.2 and EC 6.0, Environmental Groups, Southern, and the NRC staff each filed initial position statements, direct testimony, response statements, and rebuttal testimony. Through a series of orders, certain portions of Environmental Groups’ testimony and exhibits regarding EC 1.2 were struck. *Southern Nuclear Operating Co.*, ASLBP No. 07-850-01-ESP-BD01 (Jan. 26, 2009) (memorandum and order ruling on in limine motions); *Southern Nuclear Operation Co.*, ASLBP No. 07-850-01-ESP-BD01 (Feb. 23, 2009) (memorandum and order ruling on in limine motions).

¹ A narrow version of environmental contention 1.3 was also admitted. However, that contention is not the subject of the Petition for Review and accordingly will not be discussed herein.

Then, on March 16-19, 2009, the Board held evidentiary hearings in Augusta, Georgia. The following month, Environmental Groups, Southern, and the NRC staff submitted proposed findings of fact and conclusions of law concerning the contentions. Each party then similarly filed reply findings of fact and conclusions of law.

On June 22, 2009, the Board issued the Partial Decision, resolving all contentions in favor of Southern and the NRC staff. *Southern Nuclear Operating Co.*, LBP-09-07, ASLBP No. 07-850-01-ESP-BD01 (June 22, 2009). Pursuant to NRC rules, Environmental Groups appealed this decision to the Commission on July 15, 2009. 10 C.F.R. §§ 2.1212, 2.341 (2009); Commission Order (June 29, 2009) (extending filing deadline to July 15, 2009); Joint Intervenors' Pet. for Review of the First Partial Initial Decision (Contested Proceeding) (July 15, 2009).

Then, on August 17, 2009, the Board issued its Second and Final Partial Initial Decision, resolving all uncontested issues in favor of Southern and recommending that the Commission issue ESP-004 to Southern. *Southern Nuclear Operating Co.*, LBP-09-19, ASLBP No. 07-850-01-ESP-BD01 (Aug. 17, 2009). Nine days later, with Environmental Groups' administrative appeal of the First Partial Initial Decision still pending, the Commission issued ESP-004. *See* 74 Fed. Reg. 44,879.

After issuing ESP-004, which was immediately effective pursuant to its own terms, the Commission then issued an order indefinitely extending the time within which the Commission could rule on Environmental Groups' administrative appeal. *Southern Nuclear Operation Co*, LBP-09-19, ASLBP No. 07-850-01-ESP-BD01 (Sept. 3, 2009). On October 22, 2009—with Southern conducting activities pursuant to its LWA and the Commission failing to set a deadline to decide Environmental Groups' administrative appeal—Environmental Groups filed this Petition for Review.

ARGUMENT

Although the Hobbs Act “specifies the form of proceeding for judicial review” of NRC orders, the APA “codifies the nature and attributes of judicial review.” *ICC v. Bhd. of Locomotive Engr's*, 482 U.S. 270, 282 (1987). Section §704 of the APA speaks directly to the issues presented in the motions to dismiss:

A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is *subject to review on the review of the final agency action*. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule *and provides that the action meanwhile is inoperative*, for an appeal to superior agency authority.

5 U.S.C. § 704 (2009) (emphasis added). In this case, NRC regulations mandated filing of an administrative appeal of the ASLB's Partial Decision, but did not

render that ruling “inoperative” while the administrative appeal was pending before the Commission. *See* 10 C.F.R. §§ 2.1212, 2.341(e), 2.340(f) (2009). Also, when the NRC issued ESP-004, Environmental Groups sought judicial review of several “preliminary, procedural, or intermediate” rulings of the ASLB, including the Partial Decision subject to the required administrative appeal. 5 U.S.C. § 704 (2009). Thus, both of the above-quoted sentences of APA § 704 are implicated here.

1. The mandatory administrative appeal does not impact the finality of ESP-004 for the purpose of judicial review because the underlying decision remained in effect while the administrative appeal was pending before the Commission.

Environmental Groups’ administrative appeal of the Partial Decision was mandated by NRC regulations as a condition for seeking judicial review. *See* 10 C.F.R. § 2.1212 (2009). The Commission and Southern contend that the Commission can decline to rule on this mandatory administrative appeal and thereby defeat this Court’s appellate jurisdiction under the Hobbs Act to review the agency’s final order granting ESP-004. (NRC’s Mot. to Dismiss at 3; Southern’s Mot. To Dismiss at 1.) Such a contention is contrary to both law and logic.

When a party *chooses* to pursue an administrative appeal of a final order, the pendency of reconsideration renders the underlying decision not yet final for the purpose of judicial review under the Hobbs Act. *See Stone v. INS*, 514 U.S. 386, 392 (1995) (holding that the “timely filing of a motion to reconsider renders the

underlying order nonfinal for purposes of judicial review”). A different calculus applies when the administrative remedy is *mandated* by agency rule as a precondition to seeking judicial review. Under the APA, the Commission’s issuance of ESP-004 “is final for the purposes of this section whether or not there has been . . . an appeal to superior agency authority[.]” “unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative. . . .” 5 U.S.C. § 704 (2009). Because NRC fails to provide by rule that an ESP is “inoperative” during the pendency of a mandatory administrative appeal, the Commission’s issuance of an ESP remains a final action while the appeal is pending.

The motions to dismiss espouse a position contrary to the plainest dictates of the APA. In *Darby v. Cisneros*, the Supreme Court explained the APA’s administrative exhaustion provision:

Agencies may avoid the finality of an initial decision, first, by adopting a rule that an agency appeal be taken before judicial review is available, and, second, by providing that the initial decision would be “inoperative” pending appeal. Otherwise, the initial decision becomes final and the aggrieved party is entitled to judicial review.

509 U.S. 137, 152 (1993); *see also Marine Mammal Conservation v. Dep’t of Agric.*, 134 F.3d 409, 411 (D.C. Cir. 1998). In support of its decision, the Court in *Darby* referred to the APA’s legislative history: “There is a fundamental inconsistency in requiring a person to continue ‘exhausting’ administrative

processes after administrative action has become, and while it remains, effective.” 509 U.S. at 148 (quoting S. Rep. No. 752, 79th Cong., 1st Sess., 27 (1945); Administrative Procedure Act: Legislative History 1944–1946, S. Doc. No. 248, 79th Cong., 2d Sess., 213 (1946)); *see also Glisson v. United States Forest Service*, 55 F.3d 1325, 1327 (7th Cir. 1995) (“We are astonished that the Department of Justice . . . should have overlooked *Darby*.”).

The Commission’s regulations governing issuance of an ESP or LWA unequivocally mandate that “a party to an NRC proceeding must file a petition for Commission review before seeking judicial review of an agency action.” 10 C.F.R. § 2.1212 (2009). Moreover, this mandatory administrative appeal of initial decisions must be “in accordance with the procedures set out in § 2.341.” 10 C.F.R. § 2.1212 (2009). In addition to specifying the timing and contents of an administrative appeal, § 2.341 repeats the admonition of § 2.1212, that “a party to an NRC proceeding must file a petition for Commission review before seeking judicial review of an agency action.” 10 C.F.R. § 2.341(b)(1) (2009).

In stark contrast with the requirements of the APA, however, the NRC regulations state that, “[p]ending review and final decision by the Commission,” an initial decision “*is immediately effective upon issuance.*” 10 C.F.R. § 2.1210(d) (2009) (emphasis added); *id.* § 2.341(e) (2009) (“Neither the filing nor the granting of a petition under this section stays the effect of the decision or action of the

presiding officer.”); *id.* § 2.340(f) (2009) (an initial decision of the ASLB “directing the issuance” of an ESP or LWA is “immediately effective upon issuance”).

As Southern notes in its brief, 10 C.F.R. § 2.1210(a) provides that the ASLB’s Partial Decision “constitutes the final decision of the Commission on the contested matter forty (40) days after the date of issuance, unless . . . any party files a petition for Commission review in accordance with § 2.1212.” (Southern Mot. to Dismiss at 7.) Southern fails to note, however, that subsection (d) of the same regulation explicitly provides that the ASLB’s Partial Decision “is immediately effective upon issuance.” 10 C.F.R. § 2.1210(d) (2009). While the filing of the administrative appeal in this case prevented the Partial Decision from becoming the “final action of the Commission,” it did not stay the proceedings or prevent NRC from ultimately issuing a final order in the proceeding. 10 C.F.R. § 2.1210(d) (2009). Accordingly, the APA allows for judicial review of ESP-004 notwithstanding the pendency of the administrative appeal. *See* 5 U.S.C. § 704 (2009).

Moreover, the Commission’s regulations *mandated* that ESP-004 be issued “[n]otwithstanding the pendency of” the administrative appeal of the Partial Decision. 10 C.F.R. § 2.340(i) (“[W]ithin 10 days from the date of issuance of the initial decision” of the ASLB, the NRC “shall issue” an ESP or LWA

“[n]otwithstanding the pendency of . . . a petition for review under § 2.341.”).

And, like the Partial Decision, ESP-004 was “effective immediately” upon issuance. 74 Fed. Reg. at 44,880. In sum, the mere filing of the mandatory administrative appeal in this case did not deprive this Court of jurisdiction over the Petition for Review of ESP-004 because the agency action is not “inoperative” while the administrative appeal is pending.

Courts have uniformly ruled that jurisdiction is present to review agency when agency regulation require an administrative appeal but do not also stay the decision pending administrative appeal. For example, in *Oregon Natural Desert Ass’n v. Green*, the petitioner was not required to proceed with pending mandatory administrative appeal prior to seeking judicial review because the agency had discretion to grant or deny an administrative stay. 953 F. Supp. 1133, 1141-42 (D. Or. 1997). Similarly, in *Idaho Watersheds Project v. Hahn*, the Ninth Circuit excused a mandatory administrative appeal when the agency’s regulations did “not provide that the action is meanwhile inoperative as required by the APA.” 307 F.3d 815, 827 (9th Cir. 2002) (internal quotation omitted); *see also Chevron v. Watt*, 564 F. Supp. 1256, 1258-59 (E.D. La. 1983) (order assessing a penalty is a final agency action within the meaning of the APA because it remains operative during an administrative appeal); *Wilderness Workshop v. BLM*, 2008 WL

1897997, at *2 (D. Colo. 2008) (mandatory administrative appeal excused when agency regulation does not automatically stay agency decision).

The cases relied upon by Southern and the NRC to support their Motions to Dismiss are readily distinguishable in at least one of two critical attributes. First, many of the cited cases involved pending administrative appeals that were *optional*, rather than, as in this case, *mandatory*. See, e.g., *Acura of Bellevue v. Reich*, 90 F.3d 1403, 1407 (9th Cir. 1996) (“exercise of an optional appeal” to an ALJ “renders the . . . decision nonfinal for purposes of judicial review”); *Outland v. CAB*, 284 F.2d 224, 227-228 (D.C. Cir. 1960) (“Section § 1009(c) *does not command* a motion for rehearing in order to reach finality by exhaustion of administrative remedies; it leaves that to each *litigant’s choice*.”) (emphasis added); *Clifton Power Corp. v. FERC*, 294 F.3d 108, 110-11 (D.C. Cir. 2002) (“Clifton had to *choose* between rehearing before the agency or immediate court review.”) (emphasis added) (internal quotation omitted)). Second, the Motions to Dismiss also rely upon *Aluminum Co. of America v. ICC*, 761 F.2d 746, 748 (D.C. Cir. 1985), a case in which the underlying agency action was automatically *stayed* during the pendency of administrative appeal, rather than, as here, made immediately effective. Because the facts of the cases cited by the Motions to Dismiss differ from those of this case in such critical respects, they fail to dictate that this Court lacks jurisdiction.

2. The ASLB's preliminary decisions, including the Partial Decision, became subject to judicial review when the Commission issued ESP-004.

The motions to dismiss gloss over the fact that the administrative appeal and the petition for review address two distinct decisions by two different entities. The administrative appeal seeks review of the ASLB's Partial Decision, which was not a final order of the Commission. The subsequently-filed Petition for Review seeks review of ESP-004, which is a final order of the Commission. The only final order of the Commission was ESP-004, and Environmental Groups filed only one appeal of that order: the Petition for Review filed in this Court. Pursuant to the APA, the ASLB's preliminary decisions, including the Partial Decision, became subject to judicial review when the Commission issued ESP-004.

In Commission licensing proceedings, "it is the order granting or denying the license that is ordinarily the final order." *City of Benton v. NRC*, 136 F.3d 824, 825 (D.C. Cir. 1998). Agency decisions which are "preliminary, procedural, or intermediate" are "subject to review on the review of the final agency action." 5 U.S.C. § 704 (2009); see also *Thermal Ecology Must Be Preserved v. Atomic Energy Comm'n*, 433 F.2d 524, 526 (D.C. Cir. 1970) ("An agency's procedural or evidentiary rulings in the course of a proceeding do not constitute a final order justifying judicial review."); *Ecology Action v. Atomic Energy Comm'n*, 492 F.2d 998, 1001 (2d Cir. 1974) ("An order excluding evidence would normally be the archetype of a non-final order."); *Natural Res. Def. Council v. NRC*, 680 F.2d 810,

816 (D.C. Cir. 1982) (order setting hearing procedures not final); *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 803 F.2d 258, 261 (6th Cir. 1986) (“[R]eview of the final licensing decision is the appropriate proceeding in which to consider all objections.”).

Here, Environmental Groups sought review of several preliminary decisions of the ASLB, but properly refrained from filing the Petition for Review in this Court until *after* the Commission issued ESP-004. In addition to the Partial Decision, Environmental Groups seek review of several preliminary decisions of the ASLB, narrowing the scope of the proceeding and limiting the evidence admitted in the hearing. (Pet. for Review). Regardless of the pending interlocutory appeal of the Partial Decision, the ASLB’s preliminary evidentiary rulings were subject to judicial review when the Commission issued its final order, ESP-004. *See* 5 U.S.C. § 704 (2009).

When a preliminary or interlocutory agency decision is “immediately effective,” it is subject to judicial review despite the lack of finality. *Massachusetts v. NRC*, 924 F.2d 311, 316, 321-22 (D.C. Cir. 1991). In *Massachusetts v. NRC*, this Court allowed judicial review over the NRC’s decision to allow low power testing of a nuclear power plant, even though it was “not a final adjudication on the merits and is without prejudice to any pending administrative appeal or subsequent adjudication.” *Id.* at 322. In contrast, here, the NRC held an

evidentiary hearing, completed the administrative proceedings, and issued a permit with a 20-year term that was “effective immediately.” 74 Fed. Reg. 44,879, 44,880.

ESP-004 constitutes a “final order” of the Commission for the purpose of judicial review under the Hobbs Act, 28 U.S.C. §§ 2341-2351 (2009). To be “final,” agency action must “mark the consummation of the agency’s decisionmaking process,” and must either determine “rights or obligations” or occasion “legal consequences.” *Bennett v. Spear*, 520 U.S. 154, 176-78 (1997) (citing *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948); *Port of Boston Marin Terminal Ass’n v. Rederiaktiebolaget Translatic*, 400 U.S. 62 (1970)); *See also Am. Trucking Ass’n v. ICC*, 755 F.2d 1292, 1296 (7th Cir. 1985) (“final order” under the Hobbs Act equivalent to “final action” under the APA); *Domestic Sec., Inc. v. SEC*, 333 F.3d 239, 246-47 (D.C. Cir. 2003) (applying *Bennett* test for finality in a Hobbs Act case).

By its own terms, ESP-004 marked consummation of the licensing proceeding: It is immediately effective, for a term of 20 years, without any further opportunity for administrative appeal. Although an ESP itself does not authorize construction of a nuclear facility, ESP holders can reference the ESP in a subsequent application for a construction permit or combined operating license. *See* 10 C.F.R. §§ 52.26(d), 52.73(a) (2009). An ESP determines the suitability of a

site for future construction of a nuclear facility, and resolves environmental issues in any future NRC proceeding for a combined license or a construction permit. Moreover, ESP-004 includes a LWA, which authorized specific construction activities at the Plant Vogtle site. Thus, ESP-004 was a final order upon issuance, and this Court has jurisdiction over the Petition for Review filed in this Court.

CONCLUSION

For the reasons set forth above, Environmental Groups respectfully request that this Court deny the Motions to Dismiss.

Dated: January 11, 2010

Respectfully submitted,

/s/ Lawrence D. Sanders
Lawrence D. Sanders
Turner Environmental Clinic
Emory University School of Law
1301 Clifton Road
Atlanta, GA 30322
Telephone: (404) 712-8008
Fax: (404) 727-7851
E-mail: lsanders@law.emory.edu

Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that, on January 11, 2010, a copy of foregoing PETITIONERS' OPPOSITION TO RESPONDENTS' AND INTERVENORS' MOTION TO DISMISS PETITION FOR REVIEW was filed electronically. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Lawrence D. Sanders
Lawrence D. Sanders