

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CENTER FOR A SUSTAINABLE
COAST, *et al.*,

Petitioners,

v.

UNITED STATES NUCLEAR
REGULATORY COMMISSION, and
the UNITED STATES OF AMERICA

Respondents.

No. 09-1262

**RESPONDENTS' REPLY TO PETITIONERS' OPPOSITION TO
MOTION TO DISMISS PETITION FOR REVIEW**

Our Motion to Dismiss established that this case was prematurely filed – there was as yet no “final” agency resolution of petitioners’ claims – and must be dismissed for a lack of jurisdiction.

At the time petitioners sought review in this Court they were also before the Nuclear Regulatory Commission (on administrative appeal) raising the same issues.¹ As a matter of basic doctrine, the

¹ The Commission recently decided the administrative appeal, ruling against petitioners. *See Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), CLI-10-05, ___ NRC ___ (Jan. 7, 2010). Since that ruling, petitioners have filed no fresh petition for review challenging the Commission decision.

jurisdictional statute controlling this case, the Hobbs Act (28 U.S.C. § 2341 *et seq.*), does not allow parties to an agency hearing both to seek judicial review of matters decided at that hearing and at the same time appeal the decision within the agency. *See, e.g., INS v. Stone*, 514 U.S. 386, 392 (1995).

Petitioners, in short, cannot litigate the same issue in two forums at once. “[S]uch a regime could lead only to a waste of resources on the part of the agency, or the court, or both, without any countervailing benefit.” *United Transp. Union v. ICC*, 871 F.2d 1114, 1117 (D.C. Cir. 1989), *quoting West Penn Power Co. v. EPA*, 860 F.2d 581, 585 (3d Cir. 1988) (emphasis omitted).

Petitioners attempt to wriggle free from this settled principle. Their Opposition offers a lengthy analysis, but it boils down to two simple contentions: (1) NRC regulations “mandated” their administrative appeal, thus allowing them to simultaneously seek relief in this Court, and (2) their judicial challenge is to agency action separate from the administrative appeal. Neither argument saves their case.

1. Petitioners first claim that they should be allowed to file simultaneous appeals in multiple forums under the Supreme Court's decision in *Darby v. Cisneros*, 509 U.S. 137, 152 (1993). In that case, the Court interpreted 5 U.S.C. § 704 (an Administrative Procedure Act provision) to allow parties to administrative agency hearings to file for judicial review of "otherwise final" agency decisions, without requiring internal appeals, with one exception. Agencies may forestall immediate judicial review if they put in place regulations requiring an appeal to superior agency authority and rendering the initial decision inoperative while the administrative appeal is pending. *Id.*

Petitioners imply that NRC's regulations come within that exception, and forced them to file what they call a "mandatory" administrative appeal to the Commission. But as even petitioners themselves point out, NRC regulations do *not* render initial hearing decisions "inoperative." See Opposition at 11 (citing 10 C.F.R. § 2.1210(d)). Thus, under *Darby*, nothing prevented petitioners from filing a lawsuit in this Court without pursuing an

administrative appeal at the NRC. See Opposition at 12-13 (citing cases in agreement with this principle).

Petitioners mistakenly argue that NRC regulations at 10 C.F.R. §§ 2.341(b)(1) and 2.1212 – calling on NRC litigants to appeal hearing decisions within the agency before going to court – forced them to file an appeal with the Commission before seeking judicial review. But despite pointing to those regulations no fewer than eight times, petitioners never mention a critical phrase appearing in both regulations. It states that petitioners should file an appeal with the Commission “*unless otherwise authorized by law*” to seek judicial review first. *Id.* (emphasis added).

The regulatory language that petitioners ignore leaves plenty of room for a *Darby*-type appeal to this Court. (The NRC could not, in any event, overrule *Darby* by administrative regulation.) Thus, under *Darby* petitioners might have sought judicial review without pursuing an administrative appeal. But as our Motion to Dismiss showed (pp. 6-8), petitioners were not free to seek relief from this Court while at the same time continuing to seek appellate relief from the Commission.

2. Petitioners' other rationale for pursuing the current lawsuit is that the two challenges cover separate issues. Petitioners argue that this lawsuit challenges the NRC Staff Order issuing the Early Site Permit (ESP).² By contrast, they say, their administrative appeal challenged only the agency's Licensing Board decision rejecting their contentions on the ESP's validity and authorizing (in effect) issuance of the ESP. But this is sophistry. The issues before this Court and those before the agency on the administrative appeal are identical. *See* Motion to Dismiss by Intervenors at 5-6 (table of issues).

Under the Hobbs Act, only "parties" to NRC proceedings may challenge NRC actions. 28 U.S.C. § 2344. Petitioners here were a party to the Licensing Board's hearing on the ESP. The NRC Staff order issuing the ESP was merely a ministerial act that followed naturally from the conclusion of that hearing.

² Petitioners also purport to challenge NRC's issuance of a Limited Work Authorization, but as our motion to dismiss shows (pp. 9-10), petitioners defaulted on their chance to challenge that at the NRC and so cannot challenge it in court.

Finally, the Hobbs Act requires the filing of a petition for review with the Court “after” the agency’s “final” order, 28 U.S.C. § 2344. The Commission has now issued its final decision on administrative appeal (note 1, *supra*), but petitioners filed suit in this Court months *before* the Commission resolved that appeal. Thus, this suit is “incurably premature” and must be dismissed. *See Riffin v. Surface Transp. Bd.*, 331 Fed. Appx. 751, 752 (D.C. Cir. 2009) (citing cases). Petitioners must file a fresh petition for judicial review if they still wish to challenge the agency’s actions.

Respectfully submitted,

____/s/_____
CHARLES R. SCOTT
Attorney
U.S. Department of Justice
Environment & Natural
Resources Division
P.O. Box 23795
L’Enfant Plaza Station
Washington, D.C. 20026
Office of the General Counsel
202-514-4786
charles.scott@usdoj.gov

____/s/_____
JOHN F. CORDES
Solicitor

____/s/_____
SEAN D. CROSTON
Attorney
U.S. Nuclear Regulatory
Commission
Office of the General Counsel
Mail Stop O15 D21
Washington, D.C. 20555
301-415-2585
sean.croston@nrc.gov

Dated: January 22, 2010

CERTIFICATE OF SERVICE

I hereby certify that, on January 22, 2010, a copy of foregoing "RESPONDENTS' REPLY TO PETITIONERS' OPPOSITION TO 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, and parties may access the filing through that system.

/s/

SEAN D. CROSTON