



U.S. Department of Justice

*United States Attorney
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*86 Chambers Street
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May 11, 2012

By ECF

The Honorable Catherine O'Hagan Wolfe
Clerk of Court
United States Court of Appeals for the Second Circuit
500 Pearl Street
New York, New York 10007

Re: *Brodsky v. NRC, 11-2016*
Argued May 3, 2012, before Judges Raggi, Sack, and Swain

Dear Ms. Wolfe:

This Rule 28(j) letter provides further authority regarding whether NEPA requires hearings. Defendant-Appellee Br. 57–58.

Assuming CEQ regulations bind independent agencies like NRC, “[a]n agency is not required to hold a public hearing before preparing an environmental assessment,” *River Road Alliance v. Corps of Engineers*, 764 F.2d 445, 451 (7th Cir. 1985), even when “controversy” exists, *Friends of Ompompanoosuc v. FERC*, 968 F.2d 1549, 1557 (2d Cir. 1992). Lack of public involvement is harmless where reconsideration mechanisms exist, *id.* at 1557–58—as here, 10 C.F.R. § 2.206.*

The suggestion that “substantial environmental controversy,” 40 C.F.R. § 1506.6(c), cannot be determined without prior public notice is in tension with holdings that draft EAs generally need not be published. *Pogliani v. Corps of Engineers*, 306 F.3d 1235, 1238–39 (2d Cir. 2002); *Alliance to Protect Nantucket Sound v. Dep’t of Army*, 398 F.3d 105, 115 (1st Cir. 2005); *Fund for Animals v. Rice*, 85 F.3d 535, 548 (11th Cir. 1996); *Bering Strait*, 524 F.3d at 952. *American Bird Conservatory v. FCC* suggested public notice of pending applications may be needed, but there the agency’s own regulations invited the public to request EAs for certain actions, yet no advance notice was provided. 516 F.3d 1027, 1035 (D.C. Cir. 2008). Additionally, that case stated “website” notice suffices, *id.*; here, NRC’s website, <http://adams.nrc.gov/wba/>, posted the

* This addresses the Ninth Circuit’s concern that the public should have sufficient information to weigh in on EAs. *Bering Strait Citizens v. Corps of Engineers*, 524 F.3d 938, 952–53 (9th Cir. 2008).

exemption request (accession no. ML062140057) twenty-six days before the EA, and a reference to it was posted five months earlier (ML070730309) and copied to environmental organizations and public officials (JA 283–88).

CEQ regulations do not require EAs to state why no hearing was held. 40 C.F.R. § 1508.9(b). Review of decisions not to hold hearings is nevertheless possible, where the agency's reasoning "may reasonably be discerned." *Dibble v. Fenimore*, 545 F.3d 208, 219 (2d Cir. 2008). The EA here shows NRC found no risk of environmental effect at all, and therefore no "substantial environmental controversy."

Respectfully,

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