

15-1330-CV

United States Court of Appeals
for the
Second Circuit

RICHARD BRODSKY, New York State Assemblyman from the 92nd Assembly
District, in His Official and Individual Capacities,

Plaintiff-Appellant,

PUBLIC HEALTH AND SUSTAINABLE ENERGY (PHASE),
WESTCHESTER'S CITIZENS AWARENESS NETWORK (WESTCAN),
SIERRA CLUB,

Plaintiffs,

– v. –

UNITED STATES NUCLEAR REGULATORY COMMISSION,

Defendant-Appellee,

ENERGY NUCLEAR OPERATIONS, INC.,

Intervenor.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR INTERVENOR

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Intervenor Entergy Nuclear Operations, Inc. states as follows:

Entergy Nuclear Operations, Inc., a Delaware Corporation, is a direct wholly owned subsidiary of Entergy Nuclear Holding Company #2 and an indirect wholly owned subsidiary of Entergy Corporation. No other publicly held company has 10 percent or more equity interest in Entergy Nuclear Operations, Inc.

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I. STATEMENT OF ISSUES

The appeal presents two issues for the Court's consideration:

1. Whether the United States District Court for the Southern District of New York ("District Court") correctly found that the United States Nuclear Regulatory Commission ("NRC" or "Appellee") complied with the United States Court of Appeals for the Second Circuit ("Court" or "Second Circuit") decision in *Brodsky v. U.S. Nuclear Regulatory Comm'n*, 704 F.3d 113 (2d Cir. 2013) ("Remand Order") by soliciting and considering public comments on its reconsideration of the Indian Point fire protection exemptions.
2. Whether the District Court was correct in determining that a number of other safety-related issues, including National Environmental Policy Act ("NEPA")-related concerns involving terrorism, were outside the scope of the present proceeding and, in any event, precluded from being re-litigated under the law of the case doctrine.

The District Court correctly found that the NRC complied with this Court's Remand Order when the NRC provided an opportunity for public comments on its reconsideration of the Indian Point fire protection exemptions, and when it responded to those comments in its issuance affirming the fire protection exemptions as originally granted. Other issues raised go beyond the "narrow" scope of this Court's remand and seek to impermissibly challenge previously decided legal issues. Therefore, this Court should affirm the Judgment of the District Court.

II. STATEMENT OF THE CASE AND FACTS

A. The Parties

To continue a case that has been ongoing since 2009, on September 15, 2015, Richard Brodsky (“Appellant” or “Brodsky”) filed a brief with the Second Circuit challenging again the NRC’s issuance of two fire protection exemptions for Entergy Nuclear Operations, Inc.’s (“Entergy” or “Intervenor”) Indian Point Nuclear Power Plant (“Indian Point”) in 2007. The Appellee is the NRC, the federal agency responsible for the safety and licensing of nuclear power plants in the United States. This is the second appeal that Appellant has taken to this Court claiming that the exemptions are inappropriate.

B. Background on Fire Protection Exemptions

On March 22, 1975, a fire at the Brown’s Ferry Nuclear Power Plant in Alabama significantly changed the NRC’s approach to fire protection at nuclear power plants, leading the NRC to adopt new and highly prescriptive requirements found in Appendix R to the NRC’s regulations in 10 C.F.R. Part 50. (*See* Fire Protection Program for Operating Nuclear Power Plants, 45 Fed. Reg. 76,602 (Nov. 19, 1980), codified at 10 C.F.R. § 50.48 and 10 C.F.R. pt. 50 App. R.) The NRC’s prescriptive rules presented challenges and difficulties for nuclear units with different designs and ages, which led many nuclear power plant operators,

including Entergy, to seek exemptions from the regulations. *See Connecticut Power & Light Co. v. U.S. Nuclear Regulatory Comm'n*, 673 F.2d 525, 527 (D.C. Cir. 1982).

The exemptions at issue concern a fire barrier material used at Indian Point and many other nuclear power plants called Hemyc, which is intended to enable electrical cables and other equipment in the plant to withstand fire. In 2006, the NRC determined, as a generic matter, that Hemyc could not withstand a fire for the one-hour period required by the regulations. 71 Fed. Reg. 58,436, 58,437 (Oct. 3, 2006). Therefore, in 2006, Entergy applied for exemptions from this requirement for specific applications at Indian Point. *Id.* at 58,436-40. In response, the NRC undertook a thorough investigation of the proposed exemptions, and issued a draft Environmental Assessment (“EA”) and a Finding of No Significant Impact (“FONSI”) under NEPA, 72 Fed. Reg. 55,254 (Sept. 28, 2007), and then granted the exemptions, 72 Fed. Reg. 56,798 (Oct. 4, 2007). After the exemptions were granted by the NRC, Appellant filed an objection and a request for a hearing with the NRC, which the NRC denied.

C. Procedural Background

After the request was denied, Appellant filed a petition for review with this Court. This Court dismissed the petition for review, holding that it lacked jurisdiction to hear a direct challenge regarding NRC proceedings involving exemptions. *Brodsky v. U.S. Nuclear Regulatory Comm’n*, 578 F.3d 175 (2d Cir. 2009) (“Brodsky I”). Appellant then filed a complaint with the District Court, alleging 21 causes of action under the Atomic Energy Act, the Administrative Procedure Act (“APA”), and NEPA. The District Court granted NRC’s motion for summary judgment and dismissed the action. *Brodsky v. U.S. Nuclear Regulatory Comm’n*, 783 F. Supp. 2d 448 (S.D.N.Y. 2011) (“Brodsky II”), *vacated in part*, 704 F.3d 113 (2d Cir. 2013), *aff’d in part*, 507 F. App’x 48 (2d Cir. 2013).

Appellant then filed an appeal with this Court. This Court issued two opinions. In its main opinion, *Brodsky v. U.S. Nuclear Regulatory Comm’n*, 507 F. App’x 48 (2d Cir. 2013), this Court broadly affirmed the District Court’s ruling with respect to all but a single point – *i.e.*, that the NRC had not adequately explained its reason for not allowing public comment on the proposed exemption request. In the Remand Order, this Court remanded the case to the District Court with the instruction: “to remand to the NRC so that the agency may: (1) supplement the administrative record to provide an explanation, with supporting

affidavits or findings of fact, as to why affording public input into the exemption request was inappropriate or impracticable; or (2) take other such action as it may deem appropriate to resolve this issue.” Remand Order, 704 F.3d at 124.

In response to the Remand Order, the NRC complied with this Court’s second directive. Specifically, the agency published notice that it would reconsider the issuance of the exemptions for Indian Point, which included a draft EA and FONSI virtually identical to those issued in 2007, and solicited public comments on that proposed action. 78 Fed. Reg. 20,144, 20,144-45 (Apr. 3, 2013). In so doing, the NRC noted that “[a]s necessary, the underlying action (i.e., approval of the exemptions) may be modified in light of public comments.” *Id.* at 20,145. During the subsequent comment period, which was extended at Appellant’s request, the NRC received 135 public comments. The comments ranged in topic, including legal objections to the exemptions, requests for a hearing, safety objections, objections based on the risk of terrorism, requests to consider alternatives to the proposed exemptions, and requests to add documents to the record. On August 27, 2013, the NRC reissued the 2007 exemptions together with an EA and FONSI. 78 Fed. Reg. 52,987 (Aug. 27, 2013). The NRC included responses to the public comments it received, noting that each had been “carefully

reviewed by the NRC staff.” *Id.* at 52,988. The NRC also issued a separate document responding more fully to each comment. *Id.*

In particular, the agency noted that the commenters' legal objections had been resolved by the District Court and this Court in the various prior *Brodsky* decisions; that safety objections, including possible terror attacks, were beyond the scope of NEPA's strictly environmental considerations and, regardless, had already been examined by the agency; and that the NRC had considered the only feasible alternative (*i.e.*, denying the exemptions) and determined that it had no discernibly different environmental impacts than granting the exemptions. *Id.* at 52,988-89. The agency also stated that NRC staff reviewed all specific documents referenced in the public comments but determined that they lacked “relevance or probative value” sufficient to merit inclusion in the administrative record. *Id.* at 52,989. Thus, after considering all public comments, the NRC concluded that the exemptions would “not have a significant effect on the quality of the human environment,” rendering a full Environmental Impact Statement unnecessary and the prepared EA and FONSI sufficient. *Id.* at 52,990.

On February 14, 2014, Appellant filed a “Brief on Remand” with the District Court claiming that the NRC’s actions were insufficient under NEPA and this

Court's Remand Order. *Brodsky v. U.S. Nuclear Regulatory Comm'n*, No. 09 Civ. 10594, ECF No. 38 (S.D.N.Y. Feb. 14, 2014).

D. The District Court's Decision

The District Court granted summary judgment in favor of the NRC, finding that the NRC had complied with the public participation requirement of NEPA and had adequately considered the question of terrorism in its safety analysis. *Brodsky v. U.S. Nuclear Regulatory Comm'n*, No. 09 Civ. 10594, 2015 WL 1623824 (S.D.N.Y. Feb. 26, 2015) ("Brodsky IV"). The District Court also held that the Appellant's other concerns dealt with legal issues that were outside the scope of the proceeding, and that had already been decided by prior decisions in this case, including the adequacy of the record and the NRC's alleged refusal to consider safety-related concerns. *Brodsky IV*, 2015 WL 1623824 at *6-8.

III. SUMMARY OF ARGUMENT

In 2013, this Court remanded this case in order to give the NRC the opportunity to either "(1) supplement the administrative record to explain why allowing public input into the exemption request was inappropriate or impracticable, or (2) take such other action as it may deem appropriate to resolve this issue." Remand Order, 704 F.3d at 115. This Court expressly stated that it was not pronouncing a rule "as to the degree or form of public participation

required,” but instead granted the remand for the narrow purpose of allowing the NRC to supplement the record as it saw fit to allow for public participation as required by NEPA. *Id.* at 124. The entire, narrow focus of the Remand Order was to allow the NRC to supplement the record to allow for some level of public participation that the NRC deemed appropriate. The NRC’s actions on remand fully complied with the letter and intent of the Remand Order: the NRC issued notice that it would reconsider the exemptions, and solicited public comments. The NRC carefully and thoughtfully reviewed and responded to each of the 135 comments submitted by the public. These actions were an appropriate method for satisfying the public participation requirements of NEPA, and they satisfied the Remand Order’s narrow directive. The District Court thus correctly found that the NRC fully complied with the Remand Order.

The District Court also correctly found that Appellant’s remaining arguments raise legal issues that have already been addressed in this proceeding. Those issues included the alleged inadequacy of the record and the NRC’s alleged refusal to consider certain safety-related concerns raised by the public comments. *See Brodsky IV*, 2015 WL 1623824 at *7-8. Appellant’s arguments before this Court largely ignore this finding by the District Court, and argue that concerns regarding terrorism are a new issue. However, as the District Court noted, both the

District Court and this Court have already found that concerns related to a terrorist attack were insufficient to make the NRC's findings and issuance of the exemptions arbitrary and capricious. *Id.* at *8. Because the NRC appropriately satisfied the Remand Order and NEPA's requirement for public participation, Appellant resorts to using the substance of the public comments to remake the same arguments regarding terrorism that have already been decided in this case. Both the NRC and the District Court found that nothing in the public comments adds additional credibility to the concerns already raised regarding terrorism. The District Court was correct in finding that the Appellant failed to raise any new evidence that would suggest that the prior legal conclusions made by the District Court and this Court were erroneous, and therefore, this Court should summarily affirm the decision of the District Court.

IV. ARGUMENT

A. The District Court Correctly Found that the NRC Fully Complied With This Court's Remand Order

In the present appeal, this Court should be concerned solely with whether the NRC complied with the Court's Remand Order in satisfying NEPA's public participation requirements before issuing the EA/FONSI and reissuing the Indian Point exemptions. As this Court noted in the Remand Order, it did not dictate a

particular form or degree of public participation for an agency to fulfill its public participation obligation and acknowledged that agencies maintain “considerable discretion to decide the extent to which such public involvement is ‘practicable.’” 704 F.3d at 121 (quoting 40 C.F.R. § 1501.4(b)).

The NRC did exactly as this Court directed in the Remand Order by affording the public the opportunity to provide comments on the agency’s reconsideration of the exemptions. The NRC solicited public comments, received 135 public comments, and in reissuing the exemptions, the NRC stated that it had carefully reviewed each comment, and published a separate document responding to each comment. 78 Fed. Reg. 52,987, 52,988 (Aug. 27, 2013). The District Court was correct in concluding that the NRC’s “conscientious consideration of and response to all public comments” satisfied the NEPA public participation requirement. *Brodsky IV*, 2015 WL 1623824 at *6.

As the District Court ruled, the extensive notice and comment opportunity “alerted the agency to the citizenry’s concerns before the challenged decision was reached,” and no additional process was therefore required. *Brodsky IV*, 2015 WL 1623824 at *5 (citing *Brodsky III*, 704 F.3d at 121); *see also id.* at *6 (citing Remand Order, 704 F.3d at 120) (“Given the discretion afforded agencies by the

regulatory text, however, we will not readily second guess an agency decision not to hold a public hearing in a particular case.”). The NRC's actions on remand addressed this Court's concerns regarding public participation, and there appears to be no other dispute regarding the adequacy of that participation under NEPA. Therefore, the District Court was correct in ruling that the NRC is entitled to summary judgment on Appellant's challenge under the public participation provisions of NEPA.

B. The District Court Was Correct In Ruling That Appellant's Remaining Concerns Raise Legal Issues That Have Already Been Addressed By Prior Decisions In This Case and Cannot Be Challenged Again Under the "Law of the Case"

Other than the public participation argument, the Appellant's remaining concerns raise legal issues that have already been addressed by prior decisions in this case and fall outside the narrow scope of this Court's remand. When considering Appellant's other concerns, the Court is guided by the "law of the case" doctrine, which "counsels against revisiting [] prior rulings in subsequent stages of the same case absent cogent and compelling reasons such as an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Brodsky IV*, 2015 WL 1623824 at *5 (citing *United States v. Thorn*, 446 F.3d 378, 383 (2d Cir. 2006))

(internal citations omitted)). As the District Court noted, this doctrine holds extra weight for the District Court based on this Court's remand. *Id.* at *5 (citing *United States v. Carr*, 557 F.3d 93, 104 (2d Cir. 2009) (“[T]he doctrine bars the district court on remand from revisiting issues that were adjudicated on the prior appeal”)).

The District Court and this Court have already ruled on many of the issues raised by the Appellant in *Brodsky I, II*, and the Remand Order. Accordingly, the District Court can only disturb prior decisions to the extent that a party raises new evidence suggesting that previous legal conclusions may have been erroneous. As the District Court notes, “complete reconsideration of all previously decided legal questions based solely on additional commentary added to the original record would otherwise waste judicial resources and render the Second Circuit's broad affirmance and ‘narrow’ remand meaningless.” *Brodsky IV*, 2015 WL 1623824 at *6 (citations omitted).

For example, in the most recent District Court challenge and now the appeal before this Court, the Appellant focuses on the NRC's alleged refusal to consider safety-related concerns raised by public comments. To the extent these arguments focus on a potential terror attack, the District Court and this Court have already found that the Appellant's specific concerns were “speculation” and “insufficient

to demonstrate that the agency's defense-and-security finding was arbitrary and capricious.” *Brodsky IV*, 2015 WL 1623824 at *8 (citations omitted). As the District Court noted in the *Brodsky IV* decision, nothing in the recent public comments adds credibility to Appellant’s concern, and NEPA does not require further consideration of the environmental impacts of terrorism-related fires “because the effect on the environment would be no worse than that of a severe accident at the plant.” *Id.* (citing *Brodsky II*, 783 F. Supp. 2d at 462 n.10).

Nevertheless, as the District Court noted, the NRC addressed commenters' concerns about a potential terrorist attack in its EA and FONSI, noting that it “has analyzed plausible threat scenarios” and concluded “from its independent safety evaluation . . . that the configuration of the fire zones under review provide reasonable assurance that a severe fire is not plausible and the existing fire protection features are adequate.” *Brodsky IV*, 2015 WL 1623824 at *8 (citations omitted). As the District Court further noted, “[t]his reasonable response further undermines any claim that the NRC failed to consider a potential terror attack and demonstrates that its analysis regarding such a scenario was not arbitrary and capricious.” *Id.* With regard to a number of the safety concerns raised in the public comments, which the NRC noted were “beyond the scope” of a NEPA review, the NRC nonetheless still addressed all the safety issues raised in the

public comments and again concluded that the “exemptions will not result in a decreased or otherwise unacceptable reduction in safety margins.” *Id.*

Based on the previous litigation in these cases, as supported by the NRC’s EA and FONSI for the reconsidered exemptions in response to the Remand Order, the District Court was correct in ruling that the Appellant’s other legal challenges were meritless, barred, or both, in this proceeding.

V. CONCLUSION

For the foregoing reasons, the Court should AFFIRM the ruling of the District Court.

Respectfully submitted,

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Date: December 15, 2015

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