UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SIERRA CLUB, *et al.*,	)	
Petitioners,	)	Case No. 21-1229
v.	)	
UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA,	)	
Respondents.	)	

* * * * *

PETITIONERS' MEMORANDUM IN OPPOSITION TO FEDERAL RESPONDENTS' MOTION TO CONSOLIDATE PETITION WITH PREVIOUSLY CONSOLIDATED PETITIONS

Now come the Petitioners, Sierra Club, *et al.* ("Petitioners"), by and through counsel, and set forth their opposition to the Federal Respondents' (collectively, NRC) "Motion to Consolidate Petition with Previously Consolidated Petitioner" (Doc. #1925216) below.

I. INTRODUCTION AND BACKGROUND

On December 3, 2021, the NRC filed a motion to consolidate this case (No. 21-1229) with seven other already-consolidated petitions currently pending before this Court. The lead case of the seven is captioned *Don't Waste Michigan v. NRC*,

Case No. 21-1048, consolidated with Case Nos. 21-1055, 21-1056, 21-1179, 21-1227, 21-1230, and 21-1231. The proceedings before the NRC were conducted under the Atomic Energy Act ("AEA"), 42 U.S.C. §§ 2011 *et seq*.; the Nuclear Waste Policy Act ("NWPA"), 42 U.S.C. §§ 10101 *et seq*.; and the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq*. that ultimately resulted in issuance of a license to Intervenor Interim Storage Partners, L.L.C. ("ISP") to construct and operate a consolidated interim storage facility for spent nuclear fuel and greater-than-Class-"C" radioactive waste.

The NRC's Atomic Safety and Licensing Board ("ASLB"), as the trial tribunal, bifurcated the NEPA process. There were multiple rounds of briefing and oral argument and more than two dozen contentions filed under the AEA intervention rule by the Petitioners, including many contentions alleging violations of NEPA. The ASLB issued, through 2019, several orders which denied or dismissed all of Petitioners' challenges. In the last order of that series, LBP-19-11, 90 NRC 358 (December 13, 2019), the Licensing Board dismissed Contention 17 advanced by Petitioner Sustainable Energy and Economic Development (SEED) Coalition. After ruling to deny SEED's motion for leave to late-file its Contention 17, the Board then ordered, "This proceeding is *terminated*. As this decision terminates this proceeding before the Board, any appeal to the Commission shall

be filed in conformity with 10 C.F.R. § 2.311." 90 NRC at 368. (Emphasis in original).

At that point, the Petitioners were left with no option but to appeal the accumulated adverse rulings to the NRC Commissioners, and they did appeal, and lost. CLI-20-13 (December 4, 2020); CLI-20-15 (December 17, 2020); CLI-20-14, (December 20, 2020).

But the NEPA proceeding continued, despite the termination of proceedings under the AEA. On September 23, 2020, the NRC published the Draft Environmental Impact Statement ("DEIS") for the ISP proposal, and simultaneously opened up a public comment period for it, which ended on November 3, 2020. 20285 Fed. Reg. 59831 (September 23, 2020). The respective Petitioners timely commented on the DEIS. On July 29, 2021, the NRC issued the Final Environmental Impact Statement, and on September 17, 2021, the Commission issued the Record of Decision ("ROD") via notice published at 86 Fed. Reg. 51,926 (Sept. 17, 2021). At the same time, the NRC issued a materials license to ISP, which is the last major hurdle to construction and operation, of a Consolidated Interim Storage Facility in Andrews County, Texas.

The Respondents' Motion to Consolidate is based on the incorrect premise that the NRC can restrict the public to engagement in the NEPA process only

through the ASLB procedure set out in 10 C.F.R. § 2.309. As the Petitioners explain below, that argument contradicts the intentions underlying NEPA and compliance with NEPA in the body of court-made interpretation.

II. ARGUMENT

A. NEPA Is A Distinct And Separate Statute From The AEA And Requires Separate Compliance

1. NEPA Is External To The AEA, Which Is An Organic Agency Statute

The ASLB terminated the AEA proceeding by LBP-19-11, but it could not – and indeed, the NRC did not – terminate the separate, ongoing NEPA proceeding at that point in time (. NEPA and the AEA are two distinct, independent statutes. While the NRC has adopted regulations which encompass NEPA considerations, 10 C.F.R. Part 51, fulfillment of those AEA regulations addressing NEPA does not dispense with all compliance under NEPA.

The NRC distinguished the NEPA track from the AEA track when the Atomic Safety and Licensing Board terminated the AEA proceeding six months before the Draft Environmental Impact Statement, issuance of which is required by NEPA, was published for the receipt of public comments. With the AEA proceeding terminated at that DEIS issuance point (May 2020), and the Petitioners actively prosecuting AEA proceeding appeals to the Commissioners of the agency, it was not possible to raise new contentions in the AEA proceeding concerning

claimed noncompliance with NEPA in the NRC Staff's compilation of the DEIS. NRC regulations at 10 C.F.R. § 2.309(c) authorize the filing of new contentions under very strict requirements, which are almost never found by the NRC or the ASLB. And even if it were available, in the form of Petitioners moving to reopen the AEA proceeding pursuant to 10 C.F.R. § 2.326 (another virtually impossible barrier to cross), the NEPA track remained obligatory upon the agency to complete, and with it, separate public participation and court challenge.

Courts have repeatedly held that separate compliance with the agency's organic statute and NEPA is required unless specifically excluded by statute or where existing law makes compliance impossible. See, *e.g., Public Service Co. of New Hampshire v. NRC*, 582 F.2d 77, 81 (1st Cir. 1978) ("The directive to agencies to minimize all unnecessary adverse environmental impact obtains except when specifically excluded by statute or when existing law makes compliance with NEPA impossible."), *cert. denied*, 439 U.S. 1046, 99 S. Ct. 721, 58 L. Ed. 2d 705 (1978).

The language of NEPA indicates that Congress did not intend that it be precluded by the AEA. Section 102 of NEPA requires agencies to comply "to the fullest extent possible." 42 U.S.C. § 4332. Although NEPA responsibilities are procedural, there is no language in NEPA itself that would permit its procedural

requirements to be limited by the AEA. Moreover, there is no language in the AEA that would indicate AEA precludes NEPA. *Limerick Ecology Action, Inc. v. United States Nuclear Regulatory Com.*, 869 F.2d 719, 729 (3rd Cir. 1989). Accordingly, "unless there are specific statutory provisions which necessarily collide with NEPA, the Commission [is] under a duty to consider and, to the extent within its authority, minimize environmental damage. . . ." *Public Service*, 582 F.2d at 81 (footnote omitted). On the basis of the language of NEPA and AEA, the legislative history of NEPA, and the existing case law, Congress did not intend that the AEA preclude application of NEPA. *Limerick Ecology Action*, 869 F.2d at 730. Moreover, exclusion of consideration of an issue under the AEA does not require exclusion of the same issue from consideration under NEPA. *Id.*

In *Citizens for Safe Power, Inc. v. NRC*, 173 U.S. App. D.C. 317, 524 F.2d 1291, 1299 (D.C. Cir. 1975), the court indicated that where the concerns under the AEA and NEPA are the same, conclusions reached on the basis of evidence received in "environmental" hearings conducted under NEPA may be applied to "health and safety" considerations under the AEA. The court did not indicate, though, that when issues are excluded from consideration under the AEA they must also be excluded under NEPA. The court noted, albeit in *dictum*, that it is "unreasonable to suppose that [environmental] risks are automatically acceptable,

and may be imposed upon the public by virtue of the AEA, merely because operation of a facility will conform to the Commission's basic health and safety standards." *Id.*

In their NEPA-based Petition for Review (Case No. 21-1229), Petitioners are challenging the draft EIS, the final EIS, and ROD. As the aforementioned precedent recognizes, there may be concerns raised under NEPA that go beyond mere compliance with AEA safety regulations. But the AEA cannot be used to constrain consideration of environmental concerns, even those with safety implications. *Limerick Ecology Action*, 869 F.2d at 730.

To hold otherwise would be anomalous. NEPA requires publication of a draft EIS and invitation for comments from the public. Since the NRC seems to argue that only intervenors via AEA can challenge the EIS, does that mean that non-intervenors who comment on the draft EIS cannot legally challenge the EIS? That concept would clearly conflict with NEPA regulations and the Third Circuit in *Limerick Ecology Action*.

2. *City of Benton v. NRC* Is Inapropos

Respondents cite only one case with superficial relevance to their argument, *City of Benton v. NRC*, 136 F.3d 824 (D.C. Cir. 1998). However, that case clearly does not support the Respondents' arguments.

In *City of Benton,* the NRC had made an interlocutory decision that the license amendment for a nuclear plant did not have antitrust implications. The court held that the petitioners there could not seek review of that interlocutory issue because it was not the final order of the commission. But that case is factually and legally distinguishable from the argument the Respondents are making in this case.

First of all, the Petitioners here do not dispute that only a final order can be the basis for judicial review. And that was the only issue in *City of Benton*. But the ROD is the final order of the Commission in satisfying its duty under NEPA. So the Petitioners can certainly seek review of that order. To the extent that *City of Benton* is relevant at all, the Petitioners have satisfied the holding in that case.

Furthermore, as explained above, the *City of Benton* case dealt with a determination that the license at issue in that case complied with antitrust considerations. The basis for the antitrust review arose from a provision in the AEA, the former § 105(c) (42 U.S.C. § 2035(c)) that required the NRC to conduct antitrust reviews of applications for certain licenses. So this requirement was an internal requirement of the AEA. NEPA, on the other hand, is an external requirement imposed on the agency by a separate law, not the agency's organic law. And in that regard, and adding to the irrelevance of the *City of Benton*

decision is the fact that the Energy Policy Act of 2005 eliminated the NRC's antitrust review.

Therefore, the Petitioners are seeking review of a final order of the Commission that, although required in conjunction with the issuance of the license for the ISP Consolidated Interim Storage Facility, is governed by a separate statute that imposes obligations separate and apart from the requirements of the AEA licensing procedure.

B. The AEA Adjudicatory Process Here Was Clearly A Separate Track

1. The AEA Adjudication Terminated Long Before the NEPA Proceeding

Petitioners are not aware of any federal agency, other than the NRC, that attempts to restrict public participation in the NEPA process by forcing a party to intervene in an adjudicatory proceeding long before a draft EIS is even prepared. The intent of NEPA and its implementing regulations is to "involve environmental agencies, applicants, and **the public**, to the extent practicable." (emphasis added). 40 C.F.R. § 1501.4(b). The NRC, on the other hand, has designed its procedural regulations to make it difficult for citizens to participate in its adjudicatory process. In fact, NRC precedent states that the procedural requirements to intervene are "strict by design." *Dominion Nuclear Comm., Inc.,* (Millstone Nuclear Power Station, Units 2 & 3), 54 NRC 349, 358 (2001).

It is also significant that the NRC's own rules set forth procedures for objecting and commenting on environmental impact statements. 10 C.F.R. §§ 51.73, 51.91, 51.117. The NRC itself contemplates that interested parties will participate in the NEPA process without necessarily seeking to intervene in the NRC's license adjudication process.

2. Reopening The AEA Record Was Effectively Impossible

It is virtually impossible to reopen an adjudicatory record once an NRC proceeding is terminated, as happened here six months before the draft EIS was even issued. In order to reopen the record for the Petitioners to raise concerns about the draft EIS, 10 C.F.R. § 2.326 requires that the motion to reopen:

1. Be timely, meaning that it be filed within 30 days after issuance of the draft EIS. In the instant matter, the public comment period for the draft EIS was 45 days.

2. Assert a significant issue. Of course, it would be up to the NRC to determine if the issue was significant. There is no requirement in NEPA or its implementing regulations that allows the agency to determine if the public comment presents a significant issue. That would be letting the fox guard the henhouse.

3. Demonstrate that a materially different result would be likely or would

have been likely had the newly proffered evidence been considered initially. Again, this requirement places a significant barrier to public participation in the hands of the agency that wants to prevent public participation.

The Commission considers "reopening the record for any reason to be 'an extraordinary' action." *Tenn. Valley Auth.* (Watts Bar Nuclear Plant, Unit 2), CLI-15-19, 82 NRC 151, 156 (2015) (quoting Final Rule, Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,538 (May 30, 1986)); cited with approval in *Interim Storage Partners LLC* (WCS Consolidated Interim Storage Facility), LBP-21-02 at 4, __ NRC __ (2021) . The Commission places "an intentionally heavy burden on parties seeking to reopen the record." *Tenn. Valley Auth.* at 155, *WCS* at 4, The Commission's rules mandate that "the standard for admitting a new contention after the record is closed is higher than for an ordinary late-filed contention." *Private Fuel Storage,* LLC (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 (2005); *WCS* at 4.

C. Consolidation of the AEA and NEPA Cases Would Cause Confusion

Consolidation of Petitioners' NEPA case with the licensing cases as the NRC requests would cause confusion in the administrative record. The record in the licensing cases is the record heard and considered by the ASLB which was closed six months before the draft EIS was even issued. The record in the NEPA

case, pursuant to NEPA and its implementing regulations, would include the comments submitted during the scoping process, the comments on the draft EIS, the DEIS and Final EIS. While those items appear in the Administrative Record provided by the NRC, they interestingly are not characterized by the NRC in compiling the record as being adjudicatory. This suggests that the NRC, itself, does not consider the NEPA track to be part of the AEA adjudication.

D. The Court Understood The Distinctions In Its *Sua Sponte* Order

Finally, the fact that the Court, *sua sponte*, did not consolidate the NEPA case when it consolidated the other cases strongly suggests that the Court recognized the distinction between the Petitioners' NEPA case and the licensing cases and consciously determined not to force Petitioners' NEPA case to be considered solely within the NRC's adjudicatory procedure.

E. Petitioners Are 'Parties" Under the Hobbs Act Who Participated by Commenting During the NEPA scoping process and on the Draft EIS.

In their Motion to Consolidate, the NRC argues that the only way Petitioners can be "parties" as contemplated by the Hobbs Act, 28 U.S.C. § 2344 is to intervene and petition for a hearing under the AEA, pursuant to 10 C.F.R. § 2.309.[2]

[2]Motion to Consolidate at 7: "To be clear, Federal Respondents' position is that the Court only has jurisdiction over the first two petitions, which directly (and properly, from a jurisdictional perspective) challenge the Commission's decision denying them admission in the proceeding. See Alaska v. FERC, 980 F.2d 761, 763 (D.C. Cir. 1992) ('Having failed to achieve the status of a party to the litigation, the putative intervenor could not later seek review of the final judgment

But it doesn't fall to the NRC to decide who is a "party" to a Hobbs Act petition for review. That is a decision reserved for the Court.

Under the Hobbs Act only a "party aggrieved" by a final order may petition for review in the Courts of Appeals, but the determination of whether an entity is an aggrieved party is not dependent upon the agency's labeling of an entity as a "party." *Clark & Reid Co. v. United States*, 804 F.2d 3, 6 (1st Cir. 1986) (Court does "not equate the regulatory definition of a 'party' in an [agency] proceeding with the participatory party status required for judicial review under the Hobbs Act."). If an agency's labeling of participants were controlling, as the NRC ventures here, any agency could cut off a person's right to judicial review by simply not calling such person a party. Obviously, this cannot be the case. Rather, under the Hobbs Act, the courts, *not* the agencies, construe the term "party" to encompass "those who directly and actually participated in the administrative proceedings." *Id*. at 5; *ACLU v. FCC*, 774 F.2d 24, 26 (1st Cir. 1985); *Reyblatt v. NRC*, 105 F.3d 715, 720 (D.C.Cir. 1997). Participation can include tendering comments if that avenue is available for participation. *Id.*; *Water Transp. Ass'n v. ICC*, 819 F.2d 1189, 1192-1993 (D.C.Cir. 1987) (An entity becomes a "party aggrieved" under the Hobbs Act by presenting its views to the agency, typically through a comment or other written submission on a proposed rule) (citing

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on the merits.')."

Simmons v. ICC, 230 U.S.App.D.C. 236, 239, 716 F.2d 40, 43 fn. 26 (1983)). Interested persons who participate by comment are § 2344 "parties."

In *Massachusetts v. United States*, 522 F.3d 115 (1st Cir. 2008), the state was concerned about the management of spent fuel rods at two nuclear reactors. The state wanted to participate directly in the relicensing proceedings as a party in a formal adjudicatory proceeding. The state had also filed a separate rulemaking petition. The NRC denied the state's request to intervene and seek a formal hearing. The NRC argued that the state should not be a formal party in the licensing proceedings, but instead should participate as an interested governmental entity. The First Circuit decided that the state could participate as an interested governmental entity.

En route to making that decision, the First Circuit discussed the NEPA procedure with respect to nuclear relicensing proceedings. First, the court said:

> In such a situation, the regulations provide channels through which the agency's staff may receive new and significant information, namely from a license renewal applicant's environmental report or *from public comments on the draft SEIS*, ... (emphasis added).

Id. at 127. If commenting on a draft supplemental EIS is a recognized way to participate in the NEPA process in a nuclear relicensing case, it follows that commenting on the draft EIS would also comprise participation in the NEPA phase of licensing.

The *Massachusetts* court further explicitly discussed who is a party:

> "Party" can both be defined in one context as a term of art, e.g., as one who has demonstrated standing and whose contention has been admitted for hearing in a licensing adjudication, see 10 C.F.R. § 2.309(a), and deployed in its more general sense of one who participates in a proceeding or transaction, ... The NRC has not defined the term "party" uniformly throughout its regulations.

Id. at 129.

That court then addressed the heart of the issue presented here in Respondents' Motion to Consolidate:

> This court applies a functional test to determine whether one is a "party aggrieved" for Hobbs Act purposes. That test asks whether the would-be petitioner "directly and actually participated in the administrative proceedings." . . . Because "we do not equate the regulatory definition of a 'party' in an [agency] proceeding with the participatory party status required for judicial review," . . . it matters not here whether NRC regulations label the Commonwealth as a "party" or an "interested governmental entity."

The *Massachusetts* court unequivocally stated that the agency's interpretation of who is a party does not control the court in determining party status for purposes of 28 U.S.C. § 2344.

III. CONCLUSION

The Atomic Safety and Licensing Board and the Commission terminated the Atomic Energy Act proceeding before several substantive milestones in the NEPA track were completed. Petitioners have a right under the Hobbs Act to press their NEPA claims without being confined to an administrative record that does not

reflect the record that was considerably expanded by NEPA requirements during the scoping process and upon publication of the draft EIS and public comment opportunity. NEPA clearly establishes a separate process upon which the Petitioners can seek judicial review apart from their other petitions.

Dated: December 13, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of December, 2021, I filed the foregoing "Petitioners' Memorandum in Opposition to Federal Respondents' to Consolidate Petition with Previously Consolidated Petitions" in the Court's electronic case filing system, which according to its protocols would automatically be served upon all counsel of record.

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CERTIFICATE OF COMPLIANCE

The foregoing "Petitioners' Memorandum in Opposition to Federal Respondents' to Consolidate Petition with Previously Consolidated Petitions" complies with the typeface requirements of Fed. R. App. P. 32(a)(5); the type-style requirements of Fed. R. App. P. 32(a)(6); the length limitation set forth in F. R. App. P. 27(d)(2)(a); and the applicable rules for the U.S. Court of Appeals for the District of Columbia Circuit. The Memorandum was prepared in 14-point, double spaced Times New Roman font using LibreOffice. The Memorandum contains 3,297 words exclusive of caption and certificates.

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