National Whistleblower Center v. NRC, Nos. 99-1002 & 99-1043
(D.C. Cir., decided April 11, 2000)

NATIONAL WHISTLEBLOWER CENTER,
Petitioner,
v.
NUCLEAR REGULATORY COMMISSION and United States of America, Respondents.
Baltimore Gas and Electric Company, Intervenor.

Nos. 99-1002, 99-1043.

United States Court of Appeals,
District of Columbia Circuit.

Argued March 2, 2000.

Decided April 11, 2000.

Petitioner sought review of order of the Nuclear Regulatory Commission (NRC) denying it intervention in nuclear power plant license renewal proceeding. On reconsideration, the Court of Appeals, Harry T. Edwards, Chief Judge, held that: (1) NRC had authority to change adjudicatory rule, and apply "unavoidable and extreme circumstances" test, in lieu of a "good cause" test, to assess requests for extensions of time in which to file contentions; (2) NRC could adopt new standard without notice-and-comment rulemaking; (3) NRC's adoption of new standard was not arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law; and (4) petitioner was not prejudiced by NRC's application of new standard.

Petition denied.

[1] ELECTRICITY ⚷10
145k10
Nuclear Regulatory Commission (NRC) had authority to change adjudicatory rule, and apply "unavoidable and extreme circumstances" test, in lieu of a "good cause" test, to assess requests for extensions of time in which to file contentions in nuclear power plant license renewal proceeding; NRC's policy statement and subsequent referral order at start of the proceeding gave interested parties adequate notice.

[2] ADMINISTRATIVE LAW AND PROCEDURE ⚷382.1
15Ak382.1
Rules that prescribe timetable for asserting substantive rights are procedural, and unless such rules foreclose effective opportunity to make one's case on the merits, they need not be promulgated pursuant to notice-and-comment rulemaking.

[3] ELECTRICITY ⚷10
145k10
Nuclear Regulatory Commission (NRC) could adopt, without resort to notice-and- comment rulemaking, "unavoidable and extreme circumstances" test, in lieu of a "good cause" test, to assess requests for extensions of time in which to file contentions in nuclear power plant license renewal proceeding; new rule was procedural, since it merely altered standard for enforcement of filing deadlines and did not purport to regulate or limit interested party's substantive rights.

[4] ELECTRICITY ⚷10
145k10
Nuclear Regulatory Commission's (NRC) adoption of "unavoidable and extreme circumstances" test to assess requests for extensions of time in which to file contentions in nuclear power plant license renewal proceeding was not arbitrary, capricious, abuse of discretion, or otherwise not in accordance with the law; change merely refined existing procedural standard and no affected party had detrimentally relied on old "good cause" test. 5 U.S.C.A. § 706(2)(A).

[5] ELECTRICITY ⚷10
145k10
Nuclear Regulatory Commission's (NRC) adoption of "unavoidable and extreme circumstances" test to assess requests for extensions of time in which to file contentions in nuclear power plant license renewal proceeding was adequately supported by policy statement which fully explained need for expedited case processing.

[6] ELECTRICITY ⚷10
145k10
Would-be intervenor was not prejudiced by Nuclear Regulatory Commission's (NRC) application of new "unavoidable and extreme circumstances" test to deny its request for extension of time to file contentions in nuclear power plant license renewal proceeding; would-be intervenor sought and received two extensions of time in which to file contentions, and filings which allegedly supported requested extension did not even satisfy old "good cause" standard.

[7] ELECTRICITY ⚷10
145k10
Claim which was never presented to Nuclear Regulatory Commission (NRC) in license renewal proceeding or in briefs submitted to Court of Appeals on petition for review of NRC order came too late in oral argument.

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On Petitions for Review of an Order of the Nuclear Regulatory Commission.

Peter B. Bloch argued the cause for petitioner. With him on the briefs were Stephen M. Kohn, Michael D. Kohn and David K. Colapinto.

John F. Cordes, Jr., Solicitor, United States Nuclear Regulatory Commission, argued the cause for respondents. With him on the briefs were Lois J. Schiffer, Assistant Attorney General, United States Department of Justice, Mark Haag, Attorney, Karen D. Cyr, General Counsel, United States Nuclear Regulatory Commission, E. Leo Slaggie, Deputy Solicitor, and Marjorie S. Nordlinger, Senior Attorney.

David R. Lewis, argued the cause for intervenor Baltimore Gas and Electric Company. With him on the briefs was James B. Hamlin.

Before: EDWARDS, Chief Judge, WILLIAMS and SENTELLE, Circuit Judges.

Opinion for the Court filed by Chief Judge HARRY T. EDWARDS.

HARRY T. EDWARDS, Chief Judge:

*1 The petition for review in this case presents a claim by the National Whistleblower Center ("Center") seeking to overturn a decision by the Nuclear Regulatory Commission ("NRC" or "Commission") denying intervention by the Center in a nuclear power plant license renewal proceeding. The relicensing at issue involves the Calvert Cliffs nuclear facilities operated by Baltimore Gas & Electric ("BG&E"). This is the second time that this matter has come before this court. On November 12, 1999, the court issued a judgment holding that the NRC erred in rejecting the Center's petition to intervene in the Calvert Cliffs license renewal proceeding. See National Whistleblower Center v. NRC, No. 99-1002, Slip. Op., 1999 WL 1024662 (D.C.Cir. Nov. 12, 1999). Following a sua sponte inquiry by the court, however, this judgment was vacated, see National Whistleblower Center v. NRC, 196 F.3d 1271 (D.C.Cir.1999), and the case was reargued before the court on March 2, 2000. Upon reconsideration, we deny the Center's petition for review.

Any third party seeking to participate in a relicensing proceeding must file a motion to intervene, followed by a timely submission of "contentions." A contention is a specific issue of law or fact that the third party seeks to have adjudicated; it must be substantiated by an explanation of its bases, a statement of supporting facts or expert opinion, appropriate references and citations, and sufficient information to indicate that a genuine dispute exists between the party seeking to intervene and the applicant. The Center's problems in this case arose when it failed to make a timely filing of contentions in support of its petition to intervene in the Calvert Cliffs relicensing proceeding.

The Center complains that the NRC erred in applying an overly rigid standard in assessing their requests for extensions of time. According to the Center, the Commission was required to adhere to a well-established "good cause" test in considering petitions for extensions of time. The NRC replies, in turn, that it gave clear notice in a published policy statement and in a subsequent referral order in the Calvert Cliffs proceeding that the agency intended to adopt a streamlined schedule in license renewal proceedings. The referral order specifically directed that "the Licensing Board should not grant requests for extensions of time absent unavoidable and extreme circumstances." In re Baltimore Gas & Elec. Co., Order Referring Petition for Intervention and Request for Hearing to Atomic Safety and Licensing Board Panel, CLI-98-14,6 (Aug. 19, 1998), reprinted in Joint Appendix ("J.A.") 23, 28.

We hold, first, that the NRC was free to adopt, without resort to notice-and- comment rulemaking, the "unavoidable and extreme circumstances" standard for application in the Calvert Cliffs proceeding, so long as affected parties had proper notice of the standard and it was not arbitrary and capricious, or otherwise in violation of the law. There is no doubt here that the agency's policy statement and subsequent referral order at the start of the Calvert Cliffs proceeding gave the Center and other interested parties adequate notice. Furthermore, the agency's adoption of the "unavoidable and extreme circumstances" standard did not reflect any arbitrary and capricious, or otherwise unlawful action. The revised standard was not an extreme departure from the "good cause" standard and it was adequately explained by the Commission; and the agency was not bound by any law to adhere to the old "good cause" standard.

*2 Furthermore, on the record at hand, the Center can show no cognizable injury. The disputed "unavoidable and extreme circumstances" test was undoubtedly applied once, when the Licensing Board

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denied the Center's request for an extension of time to file contentions. However, that action was reversed by the NRC when it granted the Center's petition for more time. The Center thereafter failed to meet the extended deadline. The Center claims that it filed a subsequent motion for an extension upon missing the extended deadline, but the record belies this claim. And, even assuming, arguendo, that the October 1, 1998 filings to which the Center refers can be viewed as a request for an additional extension of time, it is clear that those filings do not indicate even good cause for the purported request. In other words, the Center was not denied any extension of time that might otherwise have been obtained if the Commission had applied the "good cause" standard. Thus, the Center suffered no prejudice from the agency's application of the disputed "unavoidable and extreme circumstances" test.

The record in this case indicates that the contested motion to intervene was properly denied by the Commission, because the Center failed to submit the required contentions within the prescribed deadline. Accordingly, the petition for review is hereby denied.

I. BACKGROUND

The Calvert Cliffs relicensing process officially commenced on April 8, 1998, when BG&E applied to renew its licenses to operate the nuclear power plant. A few weeks later, the application was made public and the Commission announced that interested third parties would have an opportunity to request a hearing. See Notice of Receipt of Application, 63 Fed.Reg. 20,663 (1998). On May 19, 1998, the Commission accepted BG&E's application for docketing, again noted that the application was publicly available, and again announced that third parties would be afforded an opportunity to request a hearing. See Notice of Acceptance for Docketing of the Application, 63 Fed.Reg. 27,601 (1998). On July 8, 1998, the NRC published a notice outlining the rights of third parties to seek a hearing in the Calvert Cliffs proceeding. See Notice of Opportunity for a Hearing, 63 Fed.Reg. 36,966 (1998). The July 8 Notice indicated that anyone seeking a hearing would be required to file a request and an application to intervene by August 7, 1998. The Notice also indicated that such parties would be required to file "a supplement to the petition to intervene which must include a list of contentions which are sought to be litigated in the matter." Id. at 36,966.

The Calvert Cliffs case is the first of many nuclear power plant license renewal proceedings. In view of the anticipated large number of license renewal applications, and also in response to "recent experience and criticism of agency proceedings," the Commission announced its intention to streamline procedures for adjudicatory actions before the agency. Policy on Conduct of Adjudicatory Proceedings, 63 Fed.Reg. 41,872, 41,873 (1998). The NRC recognized that "the opportunity for hearing should be a meaningful one"; the Commission, however, noted that "applicants for a license are also entitled to a prompt resolution of disputes concerning their applications." Id. Accordingly, in this policy statement, the Commission "identified certain specific approaches for its boards to consider implementing in individual proceedings, if appropriate, to reduce the time for completing licensing and other proceedings." Id. In particular, the Commission stated that requests for extensions of time should only be granted "when warranted by unavoidable and extreme circumstances." Id. at 41,874.

*3 A few days after issuance of the policy statement, the Center filed a petition to intervene in the Calvert Cliffs proceeding. The Commission referred the motion to intervene to an Atomic Safety and Licensing Board ("Board") for further action. See In re Baltimore Gas & Elec. Co., Order Referring Petition for Intervention and Request for Hearing to Atomic Safety and Licensing Board Panel, CLI-98-14 (Aug. 19, 1998), reprinted in J.A. 23. The NRC's Referral order contained a number of directives to the Board, including limitations on the scope of the proceeding and a suggested schedule for completing the proceeding. Drawing from its policy statement, the Commission instructed the Board not to grant "requests for extensions of time absent unavoidable and extreme circumstances." Id. at 6, reprinted in J.A. 28.

On August 20, 1998, the Licensing Board issued an Initial Prehearing Order. See In re Baltimore Gas & Elec. Co., ASLBP No. 98-749-01-LR, Memorandum and Order, Initial Prehearing Order (Aug. 20, 1998), reprinted in J.A. 42. The order contained deadlines for submissions as well as other procedural directives. Specifically, the order directed the Center to file its required contentions by September 11, 1998, and noted that a prehearing conference would be held during the week of October 13. The order also stated that any requests for extensions of time were to be submitted three business days before the due date for the pleading and emphasized that such requests must "demonstrate 'unavoidable and extreme

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circumstances.' " Id. at 10, reprinted in J.A. 51.

The day after the Board issued its Prehearing Order, the Center filed two motions, one directed to the Commission requesting that it vacate the referral order, and another directed to the Board requesting that it extend the time for contentions and delay the prehearing conference until at least December 1, 1998. In the Motion to Vacate, the Center objected to the NRC's directive that extensions of time be granted only in "unavoidable and extreme circumstances." The Center argued that "[i]t is illegal and improper for the [Commission] not to follow the 'good cause' standard" set forth in 10 C.F.R. § 2.711(a). Petition's [sic] Motion to Vacate Order CLI-98-14, 7 (Aug. 21, 1998). In denying the motion to vacate, the NRC stated that the agency had "plenary supervisory authority over its adjudications and adjudicatory boards," which "allows it to interpret and customize its process for individual cases." In re Baltimore Gas & Elec. Co., Memorandum and Order, CLI 98-15, 6-7 (Aug. 26, 1998), reprinted in J.A. 55, 60-61. The Commission also noted that the unavoidable and extreme circumstances standard "simply gives content ... to [the] rule's general 'good cause' standard." Id. at 6-7 n. 5, reprinted in J.A. 60-61 n.5. For these and other reasons, the Commission denied the Center's Motion to Vacate.

The Board, in turn, denied the Center's Motion for Enlargement of Time. The Board held that the Center had failed to demonstrate the requisite "unavoidable and extreme circumstances" required to justify an extension of time. See In re Baltimore Gas & Elec. Co., ASLBP No. 98-749-01-LR, Memorandum and Order, Denying Time Extension Motion and Scheduling Prehearing Conference, 3 (Aug. 27, 1998), reprinted in J.A. 65, 67. Accordingly, the Center's deadline for submitting contentions remained September 11, 1998. The Center, however, filed no contentions on September 11. Instead, it filed a Petition for Review with the Commission appealing the Board's denial of its request for an extension. The Center argued that the Board was wrong to deny it an extension of time, and that the deadline for contentions was itself improper. Under the current schedule, the Center argued, it "should have had ... until September 30, 1998 to make the required filings." Petition for Review, 6-7 (Sept. 11, 1998).

*4 The Commission acquiesced. While it stood by the Board's application of the "unavoidable and extreme circumstances" test, the Commission nonetheless granted the Center until September 30, 1998, to file its contentions. See In re Baltimore Gas & Elec. Co., Memorandum and Order, CLI-98-19 (Sept. 17, 1998), reprinted in J.A. 71. The next day, the Center filed a motion asking the Board to delay the prehearing conference, or, in the alternative, provide for a one- day extension to accommodate a Jewish holiday. See Petitioner's Motion to Vacate Pre-Hearing Conference or in Alternative for an Extension of Time (Sept. 18, 1998). The Board denied the request to delay the prehearing conference, but granted the one-day extension, making the Center's contentions due October 1, 1998. See In re Baltimore Gas & Elec. Co., ASLBP No. 98-749-01-LR, Memorandum and Order, Scheduling Matters and Electronic Hearing Database (Sept. 21, 1998), reprinted in J.A. 74.

The Center missed the extended October 1, 1998 deadline. No contentions were filed on that date. Rather, the Center filed a "Status Report," a "Motion to Vacate and Re-Schedule the Pre-Hearing Conference," and a "Motion Requesting to be Informed of Communication Between the NRC Staff and Applicant." The Center also filed an answer to questions raised about its standing. The Status Report listed the experts hired by the Center and the areas of concern that they would cover. In the Motion to Vacate, the Center noted that the Commission's staff had submitted "Requests for Additional Information" ("RAIs") to BG&E and that BG&E was not required to submit its responses to the RAIs until November 21, 1998. The Center argued that it would be prejudicial and unfair to the Center to require it to submit its contentions before BG&E had submitted its responses to the RAIs. Thus, the Center argued, "the pre-hearing conference should be postponed until no sooner than 115 days after [BG&E] submits its response to the RAI." Petitioner's Motion to Vacate and Re-Schedule the Pre-Hearing Conference, 6 (Oct. 1, 1998). The Motion Requesting to be Informed of Communication Between the NRC Staff and Applicant asked that the Center be included on the agency's service list for written communications and given notification of status conferences regarding the BG&E application.

It was not until October 13, 1998, when the Center finally filed two purported contentions. Subsequently, on October 16, 1998, the Board dismissed the Center's petition to intervene. The Board held that the Center had "failed to establish cause" for an extension, failed to file any contentions before the prescribed deadline, and failed to show that the contentions filed on October 13 met the late-filed

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contention standards. In re Baltimore Gas & Elec. Co., ASLBP No. 98-749-01-LR, Memorandum and Order, Denying Intervention Petition/Hearing Request and Dismissing Proceeding, 19-20 (Oct. 16, 1998), reprinted in J.A. 315, 333-34. The Center then sought review by the NRC.

*5 The Commission upheld the Board's dismissal, rejecting the Center's argument that it was denied extensions of time to which it was entitled under the "good cause" standard. Although the NRC defended the "unavoidable and extreme circumstances" test, it found no need to apply it. Rather, the Commission held that the Center's "complete failure to provide specific information about its concerns precluded any finding that 'good cause,' in a meaningful sense, justified [the Center's] requested extensions of time prior to [October 1st]." In re Baltimore Gas & Elec. Co., Memorandum and Order, CLI- 98-25, 10-11 (Dec. 23, 1998), reprinted in J.A. 336, 345-46. The Commission also upheld the Board's decision to reject contentions filed by the Center on October 13, both because the Center failed to meet the late-filed contention standards, and also because the purported contentions were wholly inadequate. This appeal followed.

II. ANALYSIS

The Center has voiced many objections in protesting the NRC's actions in this case. Almost all of the objections are plainly meritless. One objection, however, warrants our attention. That one objection rests on the Center's claim that the NRC erred in adopting and applying an "unavoidable and extreme circumstances" test, in lieu of a "good cause" test, to assess requests for extensions of time in which to file contentions in the Calvert Cliffs nuclear power plant license renewal proceeding. We reject this claim, because the Commission was fully justified in adopting the disputed test and, also, because the Center suffered no prejudice in the Commission's application of the new standard.

A. NRC's Authority to Change an Adjudicatory Rule

[1] The Center contends that the Commission erred in applying the "unavoidable and extreme circumstances" test to its requests for extensions of time. The correct standard, argues the Center, is the "good cause" test articulated in the Commission's regulations. The Commission argues that the "unavoidable and extreme circumstances" test simply gives content to "good cause." Moreover, the NRC adds, the adoption of the new standard resulted in no breach of law, because the "Commission implemented it with a case-specific adjudicatory order." Supp. Br. for Respondents at 9. The Commission has the better of this argument. We are in complete accord with the Seventh Circuit's position that the NRC possesses the authority "to change its procedures on a case-by-case basis with timely notice to the parties involved." City of West Chicago v. NRC, 701 F.2d 632, 647 (7th Cir.1983) (citing NLRB v. Bell Aerospace Co., 416 U.S. 267, 294, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974)). There is no claim here that the Center lacked timely notice of the new "unavoidable and extreme circumstances" standard. The Commission announced its intention to adopt the standard in a policy statement published on August 5, 1998. Although the policy statement, alone, was not binding, it nonetheless informed the Center and other interested parties of the impending change. See Panhandle Eastern Pipe Line Co. v. FERC, 198 F.3d 266, 269 (D.C.Cir.1999) ("Th[e] advance-notice function of policy statements yields significant informational benefits, because policy statements give the public a chance to contemplate an agency's views before those views are applied to particular factual circumstances."). More importantly, the Center received express notice that the new standard would be applied in the Calvert Cliffs proceeding when the Commission adopted the standard in its referral order to the Licensing Board. Indeed, the Center responded to this notice when it objected to the referral order, and to the "unavoidable and extreme circumstances" test specifically, in its August 21, 1998 Motion to Vacate. See Petition's [sic] Motion to Vacate Order CLI-98-14, 7 (Aug. 21, 1998).

In short, the Center's argument that the Commission lacked authority to change an adjudicatory rule is simply wrong.

B. The "Unavoidable and Extreme Circumstances" Standard is a "Procedural" Rule that Was Properly Adopted Without Notice-and-Comment Rulemaking

*6 [2] We also hold that the disputed "unavoidable and extreme circumstances" standard embodies a procedural rule. Rules that "prescribe[ ] a timetable for asserting substantive rights" are procedural. Lamoille Valley R.R. Co. v. ICC, 711 F.2d 295, 328 (D.C.Cir.1983). And unless such rules "foreclose effective opportunity to make one's case on the merits," they need not be promulgated pursuant to notice-and-comment rulemaking. Id.

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[3] The disputed agency action in this case merely altered a standard for the enforcement of filing deadlines; it did not purport to regulate or limit the Center's substantive rights. In other words, the new rule was procedural, not substantive. See JEM Broadcasting Co. v. FCC, 22 F.3d 320, 327-28 (D.C.Cir.1994) (holding that a rule governing the content and timing of case filings is "procedural," even when it arguably "encodes the substantive value judgment that applications containing minor errors should be sacrificed to promote efficient application processing"). As the court noted in JEM, "agency housekeeping rules often embody a judgment about what mechanics and processes are most efficient." Id. at 328. This does not convert a procedural rule into a substantive one.

The NRC has expressed a clear and reasonable goal of expediting nuclear power plant license renewal proceedings, both to accommodate the large number of cases to be heard and to ensure fair processes for applicants and would-be intervenors alike. The adoption of the "unavoidable and extreme circumstances" standard did not foreclose participation by third parties seeking to intervene in the Calvert Cliffs proceeding; rather, to facilitate expedited case processing, the new rule merely required parties who failed to meet otherwise reasonable deadlines to demonstrate compelling reasons before they could obtain any extensions of time beyond prescribed deadlines.

The Center argues that, under Lamoille Valley, the NRC could not adopt the "unavoidable and extreme circumstances" standard except through notice-and-comment rulemaking, because the new rule, in conjunction with the other rules on intervention, "create[d] a regime which renders it impossible for the public to set forth substantive contentions." Petitioner's Supp. Br. at 10-11 (citing Lamoille Valley, 711 F.2d at 328). This is a specious claim. The Commission's determination to expedite license renewal proceedings resulted in tight schedules. However, would-be intervenors were not denied an effective opportunity to be heard. BG&E's application was publicly available for five months prior to the time when the Center was required to submit contentions. Even using the Center's preferred starting date, i.e., July 8, 1998 (when the NRC published a notice outlining the rights of third parties to seek a hearing in the Calvert Cliffs proceeding), the Center still had 85 days to prepare its contentions. This was a sufficient amount of time, especially considering that the default period for submitting contentions is only 75 days. See Rules of Practice, 43 Fed.Reg. 17,798, 17,799 (1978) (establishing that a pre-hearing conference is normally set 90 days after the initial hearing notice and noting that contentions are normally to be submitted 15 days prior to the prehearing conference, thus allowing 75 days between the initial hearing notice and the default deadline for contentions).

Thus, given that the prescribed deadline for filing contentions did not itself foreclose effective opportunity to be heard, a fortiori, the Commission's decision to tighten the standard for granting extensions of time did not, as the Center claims, "create a regime which render[ed] it impossible for the public to set forth substantive contentions."

C. NRC's Adoption of a New Procedural Standard Easily Survives "Arbitrary and Capricious" Review

*7 [4] The only remaining question at issue is whether the NRC's adoption of the new procedural standard in the Calvert Cliffs proceeding was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). It was not. A change to procedures in an adjudicatory order is not arbitrary or capricious when it merely refines an existing procedural standard and when no affected party has detrimentally relied on the old standard. See, e.g., Bell Aerospace, 416 U.S. at 294-95, 94 S.Ct. 1757; Ruangswang v. INS, 591 F.2d 39, 44-45 (9th Cir.1978).

NRC's adoption of a new procedural standard did not significantly or unreasonably change the regime pursuant to which requests for extensions of time are judged, because the "unavoidable and extreme circumstances" standard is not off the moorings of "good cause." See City of Orrville v. FERC, 147 F.3d 979, 988 n. 11 (D.C.Cir.1998) (noting that the Commission was within its discretion to use adjudication to refine its regulation's "good cause" standard to require a showing of "extraordinary circumstances"); In re Bjella, 806 F.2d 211, 216 (10th Cir.1986) (en banc) ("There is no significant distinction between a showing of good cause and a showing of unusual or extreme circumstances.").

Moreover, the Center has shown no detrimental reliance in this case. The Center was bound to follow prescribed deadlines for the submission of required contentions. They had no basis upon which to assume that those deadlines automatically would be waived upon request pursuant to the old good cause standard.

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Indeed, the Center has offered nothing to indicate that, in preparing their contentions, they acted to their detriment on the assumption that their requests for extension of time would be favorably considered pursuant to the old good cause test. Quite frankly, such an argument would be silly.

[5] In short, the Commission did not abuse its discretion in adopting the "unavoidable and extreme circumstances" test in the Calvert Cliffs adjudicatory proceeding. The Center makes a weak argument that the Commission's new procedural rule was arbitrary and capricious, because the agency offered no adequate explanation for the changed policy. See Petitioner's Supp. Reply Br. at 3. We disagree. As previously noted, the Commission's policy statement that immediately preceded the adoption of the adjudicatory order in the Calvert Cliffs proceeding fully explained the need for expedited case processing. 63 Fed.Reg. at 41,873-74. Given the wide latitude an agency has in designing its own proceedings, see Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 524-25, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978), the NRC's decision to expedite case processing in license renewal proceedings to accommodate an impending heavy docket was well within the realm of the agency's discretion. The policy statement, which was expressly cited in the Commission's referral order to the Licensing Board, adequately supported the Commission's adoption of the "unavoidable and extreme circumstances" test. The agency action easily survives arbitrary and capricious review.

D. The Center Has Shown No Prejudicial Error

*8 [6] In the end analysis, this case appears to be much ado about nothing. The Center has complained strenuously about the NRC's adoption of a new standard under which the agency will assess requests for extensions of time in which a petitioner must file contentions. But the Center has offered absolutely nothing to show how the promulgation of the new rule, even if, arguendo, in error, resulted in prejudice or other cognizable harm to them. See 5 U.S.C. § 706 ("[D]ue account shall be taken of the rule of prejudicial error."); see also Fried v. Hinson, 78 F.3d 688, 690-91 (D.C.Cir.1996) (dismissing petitioner's claim for lack of a showing that he had been prejudiced by the agency's adoption of modified procedures). We can find no prejudicial error in this case.

The Center's first request for an extension of time was filed with the Licensing Board on August 21, 1998. See Petitioner's Motion for Enlargement of Time (Aug. 21, 1998). The Board denied the request, applying the "unavoidable and extreme circumstances" test. The Center petitioned the Commission for review, claiming that, under the current schedule, it was entitled until September 30, 1998 "to make the required filings." See Petition for Review, 6- 7 (Sept. 11, 1998). The Commission overturned the Board's decision, granted the petition for review, and allowed the Center an extension of time until September 30, 1998 in which to file contentions. Subsequently, the Center requested "a one day extension of the September 30, 1998 filing date" to accommodate a Jewish holiday observed by Petitioner's attorneys. Petitioner's Motion to Vacate Pre-Hearing Conference or in Alternative for an Extension of Time, 2 (Sept. 18, 1999). This request was also granted. See In re Baltimore Gas & Elec. Co., ASLBP No. 98-749-01-LR, Memorandum and Order, Scheduling Matters and Electronic Hearing Database (Sept. 21, 1998), reprinted in J.A. 74. The Center missed the extended deadline, failing once again to file contentions within the prescribed time limit.

On October 1, rather than file the required contentions, the Center filed four different documents, none of which was labeled as a request for an extension. The Center argues that its October 1 "Motion to Vacate and Re-Schedule the Pre- Hearing Conference" should be construed as a request for an extension. Even if the so-called Motion to Vacate could be viewed as a request for a further extension of time in which to submit contentions, the Center's position would still fail. The principal problem here is that the motion was not a supported request for an extended deadline. Rather, it presented an argument that the Center should not be required to submit contentions before BG&E had submitted responses to staff RAIs. At oral argument, counsel for the Center candidly conceded that, as propounded in the Motion to Vacate, "the RAI's were our peg." See Tr. of Oral Argument March 3, 2000 at 49. This "peg," however, provided absolutely no support for a request for a further extension of time. It is clear that, under prevailing law, the Center had no right to the RAIs. See Union of Concerned Scientists v. NRC, 920 F.2d 50, 55-56 (D.C.Cir.1990). In fact, at oral argument, counsel conceded that the Center "did not have a right to discovery of the RAIs." See Tr. of Oral Argument March 3, 2000 at 49. This being the case, it can hardly be claimed that the Center could condition the

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filing of contentions on receipt of RAIs and answers thereto.

[7] At oral argument, counsel for the Center cited the Commission's Rules of Practice for Domestic Licensing Proceedings--Procedural Changes in the Hearing Process, 54 Fed.Reg. 33,168 (Aug. 11, 1989), in an effort to bolster the claim that the Center had a right to view RAI material before submitting contentions. Under the cited provision, "an intervention petitioner has an ironclad obligation to examine the publicly available documentary material pertaining to the [nuclear power] facility in question with sufficient care to enable the petitioner to uncover any information that could serve as the foundation for a specific contention." Id. at 33,170. In other words, a potential intervenor must review the NRC Public Document Room for any materials that might be relevant to formulating contentions. See Tr. of Oral Argument March 3, 2000 at 49-50. According to the Center, in order to satisfy this rule, a potential intervenor must have access to the RAIs (which are kept in the Public Document Room) before it can be required to file contentions. The Public Document Room argument comes much too late. The argument was never presented to the Commission and it was not raised in any of the many briefs that have been submitted to the court in this case. The claim is, in a word, untimely. See United Transp. Union v. Surface Transp. Bd., 114 F.3d 1242, 1244 (D.C.Cir.1997); Cronin v. FAA, 73 F.3d 1126, 1134 (D.C.Cir.1996).

***9** Even if we were to view the Public Document Room argument as one that naturally flows from the Center's other claims on RAIs, and thus properly within the compass of the petition for review before this court, we would nevertheless reject the argument as patently specious. The cited regulation merely says that an intervention petitioner is obliged "to examine the publicly available documentary material." Obviously, if a document has not been filed in the Public Document Room, or if it is filed too late to be considered by an intervention petitioner, then the petitioner cannot be held responsible for reviewing it. Nothing in the rule suggests otherwise. Therefore, we must surmise that the Center's belated Public Document Room argument is nothing more than an attempt to avoid the clear policy that denies would-be intervenors any entitlement to RAIs as a condition precedent to filing contentions.

There can be no doubt that, on the record before us, the Center suffered no prejudicial error when the Commission adopted the new "unavoidable and extreme circumstances" standard in the Calvert Cliffs proceeding. The Center sought and received from the NRC two extensions of time in which to file contentions. When they failed to meet the extended deadlines, their motion to intervene was properly denied.

III. CONCLUSION

For the reasons given above, the petition for review is denied.

END OF DOCUMENT

Copr. © West 2000 No Claim to Orig. U.S. Govt. Works

Grand Canyon Trust v. Babbitt, No. 2:98CV0803S (D. Utah, decided April 19, 2000)

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

FILED
CLERK, U.S. DISTRICT COURT
19 APR 00 AM 11:42
DISTRICT OF UTAH
BY: DEPUTY CLERK

* *

GRAND CANYON TRUST, a non-profit corporation; GRAND COUNTY, UTAH, a political subdivision of the State of Utah; DAVE BODNER; KEN SLEIGHT; COLORADO PLATEAU RIVER GUIDES, and unincorporated association; 3-D RIVER VISIONS, a Utah corporation; JOSEPH KNIGHTON; SIERRA CLUB, a non-profit corporation,

Plaintiffs,

vs.

BRUCE BABBITT, in his official capacity as Secretary of the Interior of the United States; UNITED STATES FISH AND WILDLIFE SERVICE; and RALPH MORGANWECK, in his official capacity as Regional Director (Region 6), Denver, United States Fish and Wildlife Service, and the U.S. NUCLEAR REGULATORY COMMISSION,

Defendants.

Case No. 2:98-CV-0803

MEMORANDUM DECISION ADDRESSING NUCLEAR REGULATORY COMMISSION'S MOTION TO DISMISS (Docket Entry # 20)

* *

I. INTRODUCTION

Defendant United States Nuclear Regulatory Commission ("NRC") moves to dismiss plaintiffs' claims against it for lack of subject matter jurisdiction pursuant of Fed. R. Civ. P. 12(b)(1) and

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12(h)(3). The full facts surrounding this matter are set forth in the pleadings and will not be repeated here. In brief, however, on a site approximately two miles northwest of Moab, Utah, on the west bank of the Colorado River, is a sizable deposit of tailings from milling uranium ore. Toxic pollutants from the site are alleged to be leaching through groundwater into the Colorado River and impacting two native fish, the Colorado Pike Minnow and the Razorback Sucker. Since 1962, the site has been owned by Atlas Corporation and operated under a license from the NRC. Atlas sought an amendment to its NRC license in order to close and clean up the site.[1] The licensing procedure raised environmental concerns and NRC, therefore, consulted with the United States Fish and Wildlife Service. Plaintiffs complain that the NRC in its administration of the Atlas license has violated the Endangered Species Act in various respects. NRC asserts that exclusive jurisdiction for review of its licensing decisions lies with the United States Courts of Appeal and that the claims against it should be dismissed as this court lacks subject matter jurisdiction.

---

[1]On May 28, 1999, subsequent to the filing of NRC's motion to dismiss, NRC amended the Atlas license. Decl. Of Joseph J. Holonich at ¶ 5. On December 27, 1999, NRC transferred the Atlas license to the Moab Mill Reclamation Trust. See Motion for Substitution of Parties.

II. MOTION TO DISMISS STANDARD

A party may move for a dismissal of a case based on lack of subject matter jurisdiction at any time. Fed. R. Civ. P. 12(b)(1). Whenever it appears that the court lacks subject matter jurisdiction, it shall dismiss the action. Id. 12(h)(3) "In reviewing a facial attack on the complaint, a district court must accept the allegations in the complaint as true." Holt v. United States, 46 F.3d 1000, 1002 (10th Cir. 1995). "When reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations." Id. at 1003. Plaintiff bears the burden of establishing that subject matter jurisdiction is proper. Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994).

III. DISCUSSION

The essence of plaintiffs' allegations is that the NRC has violated the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544 and its implementing regulations, in its administration of the Atlas license. NRC moves to dismiss plaintiffs' claims against it for lack of subject matter jurisdiction.

Challenges to NRC licensing decisions are governed by the Hobbs Act, 28 U.S.C. §§ 2341-2351. The Hobbs Act provides that courts of appeals shall have "exclusive jurisdiction to enjoin, set aside, suspend . . . all final orders of the [NRC] made reviewable by § 2239 of Title 42 [The Atomic Energy Act]." 28 U.S.C. 2342(4).[2] The Atomic Energy Act, 42 U.S.C. § 2239(b), provides that the Hobbs Act governs review of "[a]ny final order entered in any proceeding of the kind specified in subsection (a) of [§ 2239]." Subsection (a) proceedings are those "for the granting , suspending, revoking, or amending of any license". 42 U.S.C. § 2239(a)(1) (A). The Supreme Court in Florida Power & Light Co. v. Lorion, 470 U.S. 729 (1985), "broadly interpreted this jurisdictional grant, holding that decisions that are ancillary to licensing decisions may be challenged only in the court of appeals." Citizens Awareness Network, Inc. v. U.S. Nuclear Regulatory Comm'n, 854 F. Supp. 16, 17 (D. Mass. 1994)(characterizing Lorion, 470 U.S. 729 (1885)).

Plaintiffs attempt to evade the jurisdictional consequences of the Hobbs Act by urging that the NRC's violation of the ESA "does

[2]"The Hobbs Act actually refers to the Atomic Energy Commission, not the NRC. Pursuant to the Energy Reorganization Act of 1974 . . . 42 U.S.C. § 5841, the Hobbs Act now applies to final orders of the NRC." Envirocare of Utah, Inc. v. United States, 44 Fed. Cl. 474, 478 n. 4 (Fed. Cl. 1999).

not constitute a final order in a licensing proceeding", (Mem. in Opp'n at 6), for purposes of the Hobbs Act. Rather, plaintiffs assert that its claims "arise from the NRC's on-going failure to ensure that its regulation of the Atlas site does not result in jeopardy or a taking of the Colorado squawfish and razorback sucker of the adverse modification of critical habitat." (Mem. in Opp'n at 8).

Although plaintiffs' claims against the NRC are plead as violations of the ESA, the complaint on its face clearly reflects that those claims are in the context of and related to NRC's decision in licensing Atlas. See, Third Amended Complaint at pp. 2, 14, 18, 20, and 34-38. In a nutshell, plaintiffs allege that NRC in its licensing of Atlas has failed to take steps required of it by the ESA to protect fish in the Colorado River. The NRC actions of which plaintiffs complain are clearly ancillary to NRC's amendment of Atlas' license. The licensing procedure has been completed. As noted, the Hobbs Act grants exclusive jurisdiction to the courts of appeal with respect to NRC final licensing orders. Notwithstanding plaintiffs' ESA claims, the Hobbs Act is controlling. "'It is well settled that . . . a statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute' . . . .

Thus courts will dismiss a claim challenging NRC licensing decisions if it is brought under a more general jurisdictional statute." Envirocare of Utah, Inc. v. United States, 44 Fed. Cl. 474, 478 (Fed. Cl. 1999)(citations omitted). See also, Northwest Resource Info. Ctr., Inc. v. National Marine Fisheries Serv., 25 F.3d 872, 875 (9th Cir. 1994)(exclusive statutory grant of jurisdiction to Ninth Circuit takes precedence over Endangered Species Act); Southwest Center for Biological Diversity v. Federal Energy Regulatory Comm'n, 967 F. Supp. 1166, 1173 (D. Ariz. 1997)(claims alleging violation of Endangered Species Act by Federal Energy Regulatory Commission dismissed due to grant of exclusive jurisdiction to courts of appeals under Federal Power Act). In sum, the court agrees with NRC that both the language of the relevant statutes and the analogous case authority compels the conclusion that this court lacks subject matter jurisdiction over plaintiff's claims as to defendant NRC. See e.g., General Atomics v. U.S. Nuclear Regulatory Comm'n, 75 F.3d 536 (9th Cir. 1996)(under expansive interpretation of Hobbs Act, issue of whether purchaser of corporate licensee of NRC was jointly and severally liable for site cleanup was related to licensing over which Court of Appeals had exclusive jurisdiction); Citizens Awareness Network, Inc. v. Nuclear Regulatory Comm'n, 8554 F. Supp. 16 (D. Mass.1994)(underlying issue of National Environmental Policy Act claim related to

NRC licensing decision and therefore subject matter jurisdiction rests with courts of appeals); State of Michigan v. United States, 944 F.2d 1197 (6th Cir. 1993)(action to force NRC to prepare a supplemental environmental impact statement pursuant to National Environmental Policy Act was related to effects on licensing regulation and therefore subject to judicial review provisions of Hobbs Act).

IV. CONCLUSION

For the foregoing reasons, as well as those additional reasons outlined by NRC in its pleadings, defendant NRC's motion to dismiss plaintiffs' claims against it is GRANTED.

IT IS SO ORDERED.

DATED this 10th day of March, 2000.

BY THE COURT:

DAVID SAM
SENIOR JUDGE
U.S. DISTRICT COURT

ce

United States District Court
for the
District of Utah
April 19, 2000

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:98-cv-00803

True and correct copies of the attached were either mailed or faxed by the clerk to the following:

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Fields v. NRC, No. 1:98CVo1714 (EGS) (D.D.C., decided Feb. 7, 2000)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID A. FIELDS, Plaintiff, v. UNITED STATES NUCLEAR REGULATORY COMMISSION Defendant.	Civil Action No. 98-1714 (EGS) [27-1]

FILED
FEB 7 2000
...ON, CLERK
U.S. DISTRICT COURT

MEMORANDUM OPINION

Plaintiff David A. Fields, *pro se*, is a former Nuclear Shift Supervisor at Florida Power Corporation's ("FPC") Crystal River Nuclear Plant. Plaintiff alleges that the defendant, the Nuclear Regulatory Commission ("NRC"), violated the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2), when NRC published a letter stating that plaintiff had conducted unauthorized tests of the plant's safety system. Defendant has moved to dismiss plaintiff's complaint under Fed. R. Civ. P. 12(b)(1) and (6). Upon consideration of defendant's motion to dismiss, plaintiff's response in opposition, defendant's reply in support, and for the reasons detailed below, this Court concludes that defendant's motion to dismiss should be **GRANTED**.

I. Factual Background

In 1994, plaintiff and his team of control room operators at

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FPC's Crystal River 3 nuclear power plant became concerned that FPC's mandated operating curve, which set the parameters for maintaining hydrogen pressure, was unsafe.[1] To substantiate their claims about the operating curve's danger, plaintiff and his team performed tests on the plant's nuclear reactor during the September 4 and 5 midnight shifts.

Following the September 5 test, plaintiff and his team prepared a problem report that did not mention the September 4 test. In reaction to the event report, FPC transferred plaintiff to another position, and the NRC began a 22-month investigation.[2] On August 23, 1995, after learning of the September 4 test, FPC discharged plaintiff.

On July 10, 1996, NRC issued a letter concluding that

- the crew plaintiff supervised failed to meet the standards for operators of a nuclear power plant;
- plaintiff's unauthorized tests of the plant's safety system constituted a violation of the conditions of plaintiff's license to operate the plant; and
- instead of running unauthorized tests, plaintiff

---

[1] An operating curve includes a margin of error to ensure that the level of hydrogen pressure is within the design basis requirements of a nuclear power plant. Exceeding an operating curve is not a safety violation. However, when a design basis requirement is exceeded, it must be corrected immediately, reported to the NRC within one hour, and the facility must issue a problem report within 30 days.

[2] NRC eventually determined that plaintiff's concerns were valid and determined that the operating curve was actually a design basis curve.

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> should have raised his concerns about the plant's safety system higher within the FPC and the Nuclear Regulatory Commission ("NRC").

The letter also stated that "the unauthorized evolutions authorized and directed by [Fields] on September 4 and 5, 1994 constituted a violation of the conditions of [Fields'] 10 CFR Part 55 license." Compl., Ex. 2. The letter further stated that although the unauthorized evolutions were a significant violation, NRC would not undertake any formal enforcement action against Fields. *See id.*

II. Procedure

Plaintiff has since been trying to amend the record containing the NRC's conclusions. Plaintiff filed a § 211 discrimination action with the DOL, alleging that FPC terminated him for engaging in activities protected under the Energy Reorganization Act of 1974, 42 U.S.C. § 5851(1)(D)(1988). After an evidentiary hearing, the DOL granted FPC's motion for summary judgment, concluding that there was overwhelming evidence that plaintiff had acted deliberately and without authorization from FPC management when they conducted the tests.

Plaintiff appealed first to the ARB, and then to the 11th Circuit. Both affirmed the decisions below. The ARB adopted the DOL's recommendation, and concluded that FPC's decision to discharge plaintiff was based upon his and his team's reckless

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disregard as to whether a nuclear safety violation would occur. The 11th Circuit upheld the ARB's determination as "reasonable and supported by substantial evidence contained in the record." See Fields v. U.S. Department of Labor Administrative Review Board, 173 F.3d 811, 813 (11th Cir. 1999).

On July 9, 1998, plaintiff filed a claim in this Court under the Privacy Act, 5 U.S.C. § 552a(d)(2), challenging the NRC's findings. Defendant moved to dismiss the complaint on the grounds that plaintiff was improperly using the Privacy Act to attack the NRC's conclusion collaterally, and, in the alternative, that plaintiff could not state a claim for a Privacy Act violation. On May 11, 1999, the Court granted defendant's motion, dismissed the plaintiff's Privacy Act claim, and, *sua sponte*, gave plaintiff leave to file an amended complaint seeking review of the NRC's decision under the APA. *See* 5 U.S.C. § 706(2). Plaintiff filed his amended complaint on June 11, 1999. Defendant filed the pending motion to dismiss on July 19, 1999.

III. Discussion

A. *Fed. R. Civ. P. Rule 12(b)(6)*

Rule 12(b)(6) allows dismissal for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). A 12(b)(6) motion should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of

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his claims which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45 (1957). The court must construe the complaint in favor of the complaining party. *See Warth v. Seldin*, 422 U.S. 490, 501 (1975).

1. Administrative Procedure Act Claim

Defendant argues that plaintiff's APA claim doesn't pass Rule 12(b)(6) muster for two reasons. First, defendant claims that plaintiff has not complied with the pleading requirements of APA judicial review. Section 702 of the APA limits judicial review to "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." Here, while plaintiff argues that defendant's actions in investigating the tests and publishing its conclusions violated the APA, *see* 5 U.S.C. § 706(2), plaintiff has failed to cite any "relevant statute" under which he has been "aggrieved." Defendant is correct. Plaintiff's complaint is deficient under the APA.

Defendant further argues that the requisite "agency action" was not present here. "Agency action" is defined as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof." *See* 5 U.S.C. § 551(13). Defendant contends that the NRC letter stating its "opinion" does not qualify as agency action under this definition. Def. Mot. to

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Dismiss at 13. All the definitions of "agency action" require such action to have some sort of future effect. However, the NRC letter neither took action against plaintiff nor ordered him to do anything;[3] in addition, the letter did not affect plaintiff's license, since he had already lost it before he was fired.[4] Defendant is correct that plaintiff's claim lacks the requisite agency action to activate APA review.

2. Due Process Claim

Defendant also targeted plaintiff's due process claim for 12(b)(6) dismissal. Defendant argues that plaintiff's due process rights have not been violated because he has not been deprived of a property or a liberty interest. While loss of employment and injury to reputation may constitute a protected interest if they are combined, see Paul v. Davis, 424 U.S. 693, 701 (1976), separately, each is not enough to trigger due process protections. In Doe v. Department of Justice, 753 F.2d 1092, 1106 (D.C. Cir. 1985), our circuit elucidated the two-part stigma-plus test described in Paul. First, the government must stigmatize the litigant. Second, the resulting stigma must

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[3] For a thorough discussion of why the NRC letter does not fall into each definition of "agency action," see defendant's motion to dismiss at 14-16.

[4] Defendant adds that the agency informed plaintiff that the letter "do[es] not impose any restrictions on [plaintiff's] ability to be involved in licensed activities." Compl., Ex. 2.

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effect a change in status with respect to the government, like loss of employment or the right to be considered for government contracts. Here, defendant contends that plaintiff cannot satisfy either prong. It seems from plaintiff's complaint that his reputation was damaged by the issuance of the NRC letter; it is clear, however, that plaintiff's employment was not affected, because plaintiff was terminated and his license was revoked before the letter was issued, when FPC found out about the September 4 test.[5]

Accordingly, because plaintiff failed to cite a relevant statute under which he had been aggrieved under the APA, because there was no agency action in the instant case, and because plaintiff has not been deprived of a liberty or property interest, defendant's 12(b)(6) motion to dismiss is granted.

B. *Fed. R. Civ. P. 12(b)(1) and Issue Preclusion*

Defendant further argues that plaintiff's claims are outside

---

[5] Defendant further argues that plaintiff received all the process that he was due, since he had an opportunity to provide a response to the NRC letter at a name-clearing hearing. Any response would have been placed with the NRC's letter in the NRC's public document room. Dft.'s Mot. to Dismiss at 12. Defendant claims plaintiff did not file any such response. However, on at least one occasion, March 25, 1998, plaintiff requested that the NRC amend the letter. Plaintiff provided a "proposed statement correcting the record" with exhibits attached. NRC denied this request on June 19, 1998, on the grounds that the documents "provide[d] no new information and would not change the decisions made in these cases." Compl. Ex. 8.

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this Court's jurisdiction because of federal energy statutes,[6] and issue precluded because plaintiff has previously raised the same issue administratively and lost before three fora.[7] Because defendant's motion can be resolved on APA and due process grounds, the Court will not reach these arguments.

III. Conclusion

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss plaintiff's amended complaint [27-1] is **GRANTED**.

2/5/00
DATE

EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE

Notice To:

David A. Fields
7347 Applewood Drive
Inverness, FL 34450

Rudolph Contreras
Assistant United States Attorney
555 4th Street, N.W., Room 10-814
Washington, D.C. 20001

---

[6] Under § 189 of the Atomic Energy Act, 42 U.S.C. § 2239, and the Hobbs Act, 28 U.S.C. §§ 2341-2351, NRC licensing decisions are reviewable only in the Courts of Appeals. Defendant argues that, in as much as plaintiff's amended complaint constitutes a challenge to the NRC's exercise of its licensing function, this Court lacks jurisdiction.

[7] As is discussed above, plaintiff's claims concerning this occurrence have been heard by the DOL, DOL's Administrative Review Board (ARB), and the 11th Circuit.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

FEB 7 2000

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...COURT

DAVID A. FIELDS, Plaintiff, v. UNITED STATES NUCLEAR REGULATORY COMMISSION Defendant.	)	Civil Action No. 98-1714 (EGS) [27-1]

ORDER

Upon consideration of defendant's motion to dismiss [27-1], plaintiff's response in opposition, defendant's reply in support, and for the reasons detailed in the attached memorandum opinion, this Court concludes that defendant's motion to dismiss should be **GRANTED**. Accordingly, it is hereby

ORDERED that defendant's motion to dismiss plaintiff's amended complaint [27-1] is **GRANTED**.

2/5/00
DATE

EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE

Notice To:

David A. Fields
7347 Applewood Drive
Inverness, FL 34450

Rudolph Contreras
Assistant United States Attorney
555 4th Street, N.W., Room 10-814
Washington, D.C. 20001

Grand Canyon Trust v. NRC, No. 2:00CV-0288 ST (D. Utah, filed April 3, 2000)

AO 440 (Rev. 10/93) Summons in a Civil Action

United States District Court

CENTRAL DIVISION DISTRICT OF UTAH

GRAND CANYON TRUST,
Plaintiff,

V.

U.S. NUCLEAR REGULATORY COMMISSION,

Defendant.

SUMMONS IN A CIVIL CASE

CASE NUMBER:

2:00CV-0288ST

TO: (Name and address of defendant)

Annette L. Vietti-Cook
Secretary of the Commission
United States Nuclear Regulatory Commission
Washington, D.C. 20555-0001

YOU ARE HEREBY SUMMONED and required to serve upon PLAINTIFF'S ATTORNEY (name and address)

W. Cullen Battle, #A0246
Fabian & Clendenin
215 S. State Street, Suite 1200
Salt Lake City, UT 84111

Marie A. Kirk, Esq.
Susan D. Daggett, Esq.
Earthjustice Legal Defense Fund
1631 Glenarm Place, Suite 300
Denver, CO 80202

an answer to the complaint which is herewith served upon you, within 60 (sixty) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. You must also file your answer with the Clerk of this Court within a reasonable period of the time after service.

MARVIN D. ADAMS
CLERK

4/3/00
DATE

(BY) DEPUTY CLERK

Marie Kirk *
Susan Daggett *
Earthjustice Legal Defense Fund
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Telephone: (801) 531-8900

Attorneys for Plaintiff

*Application for admission
pro hace vice pending

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

GRAND CANYON TRUST,	*	Case No. 2:00CV-0288 ST
	*	
Plaintiff,	*	
v.	*	
	*	
U.S. NUCLEAR REGULATORY COMMISSION,	*	
	*	
Defendant.	*	
	*	

CERTIFICATE OF SERVICE

STATE OF UTAH)
: ss
COUNTY OF SALT LAKE)

I hereby certify that I caused copies of the COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF and the original SUMMONSES, copies of which are attached hereto, to

be mailed, by certified mail, return receipt requested, this 3rd day of April, 2000, to the following:

Annette L. Vietti-Cook
Secretary of the Commission
United States Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Honorable Janet Reno
Attorney General of the United States
10th and Constitution Avenue, N.W.
Room 4400
Washington, D.C. 20530

And to be hand delivered the same day to:

Paul Warner, U.S. Attorney
U.S. Attorney's Office
185 South State Street, 4th Floor
Salt Lake City, UT 84111

Dated this 3rd day of April, 2000.

W. Cullen Battle, # A0246
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Attorneys for Plaintiff

SUBSCRIBED AND SWORN to before me this 3rd day of April, 2000.

Charlene A. Wallace
Notary Public

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Attorneys for Plaintiff

*Application for admission
pro hace vice pending

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

GRAND CANYON TRUST,	*	Case No. 2:00 CV-0288 ST
	*	
Plaintiff,	*	
v.	*	
	*	
U.S. NUCLEAR REGULATORY COMMISSION,	*	
	*	
Defendant.	*	
	*	

COMPLAINT FOR DECLARATORY RELIEF

I. INTRODUCTION

1. This action is brought under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to compel the Nuclear Regulatory Commission ("NRC") to grant a fee waiver for the

production of government documents requested by the Grand Canyon Trust. This case involves a request for documents related to the financial capability of the NRC's licensee, the Atlas Corporation ("Atlas"), to clean up a massive radioactive waste site on the banks of the Colorado River. The Grand Canyon Trust and several other organizations sought information pursuant to FOIA to determine whether the NRC could fulfill its statutory obligations to ensure that adequate funding would be available to clean up the groundwater beneath the site and stop the toxic plume of contaminants flowing into the river.

2. Although the NRC identified a number of documents responsive to the FOIA request, the agency refused to grant the mandatory fee waiver to which the Grand Canyon Trust and the other requesters are entitled. According to the NRC's FOIA Officer, the requesters were barred from obtaining a fee waiver because the requesters are presently engaged in an adjudicatory proceeding before the NRC. The Grand Canyon Trust appealed this determination administratively.

3. In deciding the administrative appeal, the Secretary of the NRC rejected the FOIA Officer's reasoning but affirmed the denial of the fee waiver nonetheless, on the grounds that the FOIA request "d[id] not concern the operations or activities of the federal government" and "[would not] contribute significantly to the public's understanding of federal government operations or activities." As set forth below, the NRC's decision to deny the fee waiver violates FOIA. Because the Grand Canyon Trust has met its burden to show that the FOIA request is in the "public interest," the NRC's decision to deny the fee wavier must be reversed.

II. PARTIES

4. Plaintiff Grand Canyon Trust ("plaintiff") (also referred to as one of the "requesters") is a nonprofit organization based in Flagstaff, Arizona, with approximately 4,000 members. Its mission is to protect and restore the canyon country of the Colorado Plateau, including its spectacular landscapes, flowing rivers, clean air, diversity of plants and animals, and areas of beauty and solitude. Members of the Grand Canyon Trust raft, canoe, and fish the stretch of river adjacent to the Atlas site and also hike on the riverbanks, view wildlife, and seek solitude in the area immediately adjacent to the tailings pile.

5. Defendant NRC is an agency of the United States, and has the authority to grant the fee waiver that plaintiff seeks.

III. JURISDICTION AND VENUE

6. This Court has jurisdiction over this action under 5 U.S.C. § 552(a)(4)(B). Plaintiffs have exhausted their administrative remedies with respect to this action in accordance with 10 CFR § 9.29. This Court also has jurisdiction pursuant to 28 U.S.C. §§ 2201-2202 (declaratory judgment action), 28 U.S.C. § 1331 (federal question jurisdiction), and 5 U.S.C. § 706 (APA review).

7. Venue in this Court is proper under 5 U.S.C. § 552(a)(4)(B) because the Grand Canyon Trust maintains an office in Utah and because a significant number of its members reside in Utah. Moreover, the subject of the FOIA request, the Atlas tailings pile, is located in Utah.

IV. STATUTORY FRAMEWORK

8. Under the Freedom of Information Act ("FOIA"), a fee waiver is generally available to any requester upon a showing that the request is in the public interest. See 5 U.S.C.

§ 552(a)(4)(iii). Such disclosure is in the public interest if "it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." See 5 U.S.C § 552(a)(4)(iii). Once a requester meets its burden of showing that the request is in the public interest, a fee waiver is mandatory. See 5 U.S.C § 552(a)(4)(iii) ("Documents *shall* be furnished without any charge...if disclosure of the information is in the public interest") (emphasis added); see Friends of the Coast Fork v. U.S. Dep't of the Interior, 110 F.3d 53, 54 (9th Cir. 1997) ("FOIA requires the federal government to furnish documents to public interest groups free of charge...if the disclosure of the information is in the public interest").

9. NRC regulations set forth eight questions for requesters and a six-factor balancing test for the agency to evaluate whether a request is in the public interest. See 10 C.F.R § 9.41 (b)-(d). Based on the eight questions, a requester must show, for example, that the requester will disseminate the material widely, that the requester possesses the ability to utilize the information and will use it to contribute to public understanding, and that the request is not primarily in the requester's commercial interest. See id. Once the requester has answered the eight questions, the NRC must consider the following six factors to determine whether a fee waiver is in the public interest:

> (1) How the subject of the requested agency records concerns the operations or activities of the Government; (2) How the disclosure of the information is likely to contribute to an understanding of Government operations or activities; (3) If disclosure of the requested information is likely to contribute to the public understanding; (4) If disclosure is likely to contribute significantly to public understanding of Government operations or activities; (5) If, and the extent to which, the requester has a commercial interest that would be furthered by the disclosure of the requested agency records; and, (6) If the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison

> with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

See 10 C.F.R § 9.41(d).

V. FACTS

10. On September 22, 1999, the Grand Canyon Trust sent a FOIA request to the NRC for information in the NRC's possession related to the financial status and bankruptcy of the Atlas Corporation. The requesters sought this information because of their concern about pollution from the Atlas site, the government's cleanup plans, and, specifically, whether the NRC could assure that adequate resources are available to finance the cleanup. The Atlas Corporation at the time of the request was the licensee of the Atlas tailings pile, over which the NRC has regulatory jurisdiction.

11. The initial FOIA letter requested:

> All documents, correspondence and other material, including written, electronic and verbal communications, phone logs, etc. located in your records from September 1998 through September 1999 related to the Atlas Corporation's bankruptcy status and proceedings as well as any information on the financial status of the Atlas Corporation.

In that letter, plaintiffs specifically requested a waiver of fees associated with the request, noting:

> [n]either Earthjustice nor its clients would derive any income or commercial benefit from use of any of the documents. These documents will be used to increase the public understanding of government activities related to finalizing and funding a reclamation plan for the Atlas Mill Tailings pile while the Atlas Corporation is undergoing bankruptcy proceedings.

12. On September 29, 1999 the NRC sent a letter acknowledging its receipt of requesters' FOIA request and informed the requesters that more information was needed to make a determination to waive fees under 10 C.F.R. §9.41. On October 18, 1999, the NRC notified the requesters that the agency had found responsive documents, issued a statement of fees totaling

$383.26, and notified the requesters that more information was needed to make a determination to waive fees.

13. On October 27, 1999, the requesters sent the NRC a letter explaining in detail why the requesters satisfy each of the eight questions relevant for a waiver of fees as specified in 10 C.F.R § 9.41. Among other factors, the requesters explained that the information sought was expected to increase the public's understanding of the financing of the cleanup of the Atlas site, that the information would be disseminated to the public widely through newsletters, action alerts, meetings, and other means, and that the information was not in the commercial or private interest of the requesters.

14. On December 20, 1999, the NRC sent a letter acknowledging that the requesters had responded to fee waiver criteria (1)-(8) as requested. Nevertheless, in that same letter the NRC informed the requesters that the request for a fee waiver "cannot be favorably considered because the NRC is prohibited by law (5 U.S.C. 504) from funding 'parties intervening in regulatory or adjudicatory proceedings' before the NRC."

15. Prior to this FOIA request, in a separate matter, Earthjustice Legal Defense Fund filed a Request for Hearing and Petition for Leave to Intervene on behalf of the requesters and several other parties with the NRC on January 27, 1998. This petition alleged a number of shortcomings in the NRC's proposed amendment to Atlas's materials license to cap the tailings pile in place next to the Colorado River. The Petitioners' request for hearing and petition for leave to intervene was granted on February 17, 2000.

16. The language relied upon by the NRC FOIA Officer to deny the fee waiver is codified as part of the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504, which provides

that "(n)one of the funds in this Act...or subsequent Energy and Water Development Appropriations Acts shall be used to pay the expenses of, or otherwise compensate, parties intervening in regulatory or adjudicatory proceedings funded in such Acts." This statute governs the award of attorneys' fees in federal court and administrative proceedings; it does not reference FOIA or fee waivers under FOIA.

17. The plaintiff timely filed an administrative appeal of NRC's December 20, 1999 decision to deny the fee waiver on January 13, 2000. In the administrative appeal, the plaintiff notified NRC that its refusal to provide the requested fee waiver violated FOIA, that the agency had not met its burden to show that the fee waiver was not in the 'public interest,' and that section 504 is not relevant in deciding a fee waiver request pursuant to FOIA.

18. In a March 2, 2000 letter, the Secretary of the NRC determined that section 504 does not apply in this case because the requesters' petition to intervene was not granted until February 17, 2000; nevertheless, the NRC denied the administrative appeal. This time, the NRC concluded that the Grand Canyon Trust had not satisfied the public interest test because "[the] subject matter does not concern the operations or activities of the federal government" and "the documents are [not] likely to contribute significantly to the public's understanding of federal Government operations or activities." According to NRC, the plan to finalize and fund a cleanup at the Atlas site is merely a "licensee's activity that was subject to NRC approval" and does not concern the operations or activities of the federal government.

19. Atlas's reclamation plan was described by the NRC as a "federal proposed action" in an Environmental Impact Statement evaluating the environmental consequences of the project pursuant to the National Environmental Policy Act ("NEPA"). In addition, the proposed project

to reclaim the Atlas tailings pile by capping it in place was the subject of formal Endangered Species Act ("ESA") consultation as an "agency action" between the NRC and the U.S. Fish and Wildlife Service. The NRC offered an opportunity for a hearing to interested members of the public regarding Atlas's application to amend its Materials License to allow it to reclaim the tailings pile in place. See 59 Fed. Reg. 16665.

20. Because the NRC has finally denied plaintiff's administrative appeal in this matter, the Grand Canyon Trust has exhausted its administrative remedies as defined in 5 U.S.C. § 552(a)(6)(C)(i).

VI. CAUSE OF ACTION

21. Plaintiff has a statutory right under FOIA, 5 U.S.C. § 552, to a waiver of fees for the requested documents, and there is no legal basis for NRC's refusal to grant it.

VII. REQUEST FOR RELIEF

THEREFORE, plaintiff requests that this Court:

1. Reverse and remand the NRC decision with instructions to release the documents to plaintiffs and grant plaintiff a full fee waiver in accordance with 5 U.S.C. § 552(a)(4)(A)(iii);
2. Award plaintiff its costs and reasonable attorneys' fees in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and
3. Grant such other and further relief as the Court may deem just and proper.

Dated this 3rd day of April, 2000.

Respectfully submitted,

Marie A. Kirk, # 28,705
Susan D. Daggett, # 29,901
Earthjustice Legal Defense Fund
1631 Glenarm Place, Suite 300
Denver, CO 80202
Telephone: (303) 623-9466

W. Cullen Battle, # A0246
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215 S. State Street, Suite 1200
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Telephone: (801) 531-8900

Attorneys for Plaintiff

Plaintiff's Name and Address:

Grant Canyon Trust
HC64 Box 1801
Moab, UT 84532

Baxter v. State of New Jersey, No. ESX-L-3813-00 (Superior Court, N.J., filed April 14, 2000)

SUPERIOR COURT OF NEW JERSEY
CIVIL DIVISION
ESSEX VICINAGE
M D
APR 1 4
FINANCE DIVISION
RECEIVED/FILED

GULKIN, HOCK & LEHR, P.A.
354 Eisenhower Parkway
Livingston, New Jersey 07039
(973)740-8600
Attorneys for Plaintiff

EARL BAXTER and BETTY BAXTER, his wife Plaintiff	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: ESSEX COUNTY
vs.	DOCKET NO. L 3813 - 00
STATE OF NEW JERSEY and its agents, servants and/or employees; U.S. NUCLEAR REGULARTORY COMMISSION, its agents, servants and/or employees, UNITED STATES GOVERNMENT, its agents servants and/or employees, RICHARD W. MCKINLEY and JOHN DOES, 1-5 Defendants	CIVIL ACTION COMPLAINT

The plaintiffs, Earl Baxter and Betty Baxter, his wife, residing at 12 Dodd Terrace in the City of East Orange, County of Essex and State of New Jersey by way of complaint against the defendants, say:

1. On or about April 17, 1998, plaintiff, Earl Baxter was operating his vehicle travelling on South Clinton Street in the City of East Orange, County of Essex and State of New Jersey when the vehicle owned by defendant, the U.S. Government and operated by defendant, Richard W. McKinley, ran a stop sign impacting with the plaintiff's vehicle causing plaintiff's vehicle to spin and go up onto

the sidewalk.

2. At all times aforesaid, the defendants named herein were careless, reckless, negligent and grossly negligent in the ownership, operation, leasing, maintenance, management, control, supervision, servicing, repair, inspection and/or use of their motor vehicle(s) and as a direct and proximate result of the foregoing acts and/or omissions, any or all, proximately caused the motor vehicle accident as herein described, thereby proximately causing the plaintiff, Earl Baxter, to sustain severe and traumatic bodily injuries.

3. As a direct and proximate result of the foregoing, plaintiff, Earl Baxter was violently tossed about the inside of the vehicle, sustained injuries causing severe and permanent disability, permanent significant disfigurement, permanent loss of bodily function, or loss of body member in whole or in part, permanent consequential limitation of use of a body organ, or member; and/or medically determined injury or impairment of the non-permanent nature which prevented injured plaintiff from performing substantially all the material acts which constitute that person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment; and has otherwise been restricted in his bodily movements, conduct, activities and functions, past, present and future; has incurred or in the future will incur expenses for the treatment of said injuries, has been disabled and in the future will be disabled and unable to perform his usual functions, and employment, has been caused and in the future will be caused great pain and suffering, to his great loss and damage, was, still is and will in the future be required to incur expenses for the medical care required for the relief of said injuries.

WHEREFORE, plaintiff, Earl Baxter, demands judgment against the defendants as aforesaid, individually, jointly and/or severally, for damages, together with attorneys' fees, interest and costs of suit.

SECOND COUNT

1. The plaintiff, Earl Baxter, repeats the allegations of the First Count as if set forth herein and at length.

2. Plaintiff, Betty Baxter, is the lawful wife of plaintiff, Earl Baxter.

3. As a direct and proximate result of the injuries sustained by her husband due to the negligence of the defendants in the within accident, plaintiff, Betty Baxter, was caused to lose the comfort and consortium of her husband, was deprived of this society and services, and was required to provide special services and care to him and was required to incur medical expenses for the treatment of her husband's injuries.

WHEREFORE, plaintiff, Betty Baxter, demands judgment against the defendants, as aforesaid, individually, jointly and/or severally for damages, together with interest, attorneys' fees, and costs of suit.

JURY DEMAND

The plaintiffs hereby demand a trial by jury of all issues herein.

CERTIFICATION

Pursuant to Rule 4:5-1, I hereby certify that the within matter is not the subject of any other Court or arbitration proceeding nor is any other Court or arbitration proceeding presently contemplated.

I hereby certify that the within pleading was served within the time prescribed by the Rules of Court.

GULKIN, HOCK & LEHR, P.A.
Attorneys for Plaintiff

By: _____
GARY M. LEHR, ESQ.

DATED: April 14, 2000

GULKIN, HOCK & LEHR, P.A.
354 EISENHOWER PARKWAY
LIVINGSTON, NEW JERSEY 07039
(973) 740-8600
Attorneys for Plaintiffs

EARL BAXTER and BETTY BAXTER, his wife Plaintiff	: SUPERIOR COURT OF NEW JERSEY LAW DIVISION: ESSEX COUNTY :
vs.	: DOCKET NO. ESX-L-3813-00
STATE OF NEW JERSEY and its agents, servants and/or employees; U.S. NUCLEAR REGULATORY COMMISSION, its agents, servants and/or employees, UNITED STATES GOVERNMENT, its agents servants and/or employees, RICHARD W. MCKINLEY and JOHN DOES, 1-5 Defendants	: CIVIL ACTION : SUMMONS

FROM THE STATE OF NEW JERSEY, TO THE ABOVE NAMED DEFENDANT(S):

To the Defendant(s) Named Above:

The plaintiff, named above, has filed a lawsuit against you in the Superior Court of New Jersey. The complaint attached to this summons states the basis for this lawsuit. If you dispute this complaint, you must file a written answer or motion and proof of service with the deputy clerk of the Superior Court in the County listed above within 35 days from the date you received this summons, not counting the date you received it. (The address of each deputy clerk of the Superior Court is provided.) If the complaint is one in foreclosure, then you must file your written answer or motion and proof of service with the Clerk of the Superior Court, Hughes Justice Complex, CN-971, Trenton, New Jersey 08625. A filing fee* payable to the Clerk of the Superior Court and a completed Case Information Statement (available from the deputy clerk of the Superior Court) must accompany your answer or motion when it is filed. You must also send a copy of your answer or motion to plaintiff's attorney whose name and address appear above, or to the plaintiff, if no attorney is named above. A telephone call will not protect your rights; you must file and serve a written answer or motion (with fee and completed Case Information Statement) if you want the court to hear your defense.

If you do not file and serve a written answer or motion within 35 days, the court may enter

a judgment against you for the relief plaintiff demands, plus interest and costs of suit. If judgment is entered against you, the Sheriff may seize your money, wages or property to pay all or part of the judgment.

If you cannot afford an attorney, you may call the Legal Services office in the county where you live. A list of these offices is provided. If you do not have an attorney and are not eligible for free legal assistance, you may obtain a referral to an attorney by calling one of the Lawyer Referral Services. A list of these numbers is also provided:

DONALD F. PHELAN
Clerk of Superior Court

Dated: April 26, 2000

Name of Defendant to Be Served: U.S. NUCLEAR REGULATORY COMMISSION, its agents, servants and/or employees,

Address of Defendant to be Served: Mail Stop O-15B-18
Washington, DC 20555-0001

*$105.00 for Chancery Division Cases or $110 for Law Division Cases