No. 21-9593

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF NEW MEXICO, ex rel. HECTOR H. BALDERAS, Attorney General and the NEW MEXICO ENVIRONMENT DEPARTMENT,
Petitioners,

v.

NUCLEAR REGULATORY COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

On Petition for Review of Action by the
Nuclear Regulatory Commission

RESPONDENTS' REPLY TO PETITIONERS' RESPONSE TO MOTION TO DISMISS

TODD KIM
Assistant Attorney General
JUSTIN D. HEMINGER
Attorney
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
justin.heminger@usdoj.gov
(202) 514-5442

ANDREW P. AVERBACH
Solicitor
Office of the General Counsel
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852
andrew.averbach@nrc.gov
(301) 415-1956

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Judicial Decisions

Statutes

Regulations

Federal Register Notices

Adjudicatory Decisions of Nuclear Regulatory Commission

GLOSSARY

AEA	Atomic Energy Act of 1954
DOE	Department of Energy
EIS	Environmental Impact Statement
ISP	Interim Storage Partners, L.L.C.
NEPA	National Environmental Policy Act
NRC	Nuclear Regulatory Commission
NWPA	Nuclear Waste Policy Act

INTRODUCTION

We established in our motion to dismiss that (1) participation in agency proceedings is a prerequisite to judicial review under the Hobbs Act; and (2) with respect to challenges to NRC licenses, "participation" means invocation of the agency's adjudicatory process via a request to intervene. Although New Mexico acknowledges the first conclusion, it makes no effort to confront the second. It likewise ignores the NRC's rules of procedure ensuring that *all* contentions arising under NEPA can be raised by putative intervenors through the NRC's adjudicatory process. New Mexico *could* have sought to intervene in the adjudicatory proceeding and raised the issues it now seeks to raise before this Court, and, like the petitioners before the D.C. Circuit, it *could* have sought judicial review of the agency's resolution of its arguments if it was dissatisfied with the result. However, it chose not to follow this path, and its failure to seek to intervene before the agency precludes this Court's consideration of its petition here.

ARGUMENT

I. New Mexico did not become a "party aggrieved" by commenting on the draft or final Environmental Impact Statement.

A. "Participation" in an NRC licensing proceeding requires a request to intervene.

New Mexico relies upon its submission of comments on the draft and final Environmental Impact Statement ("EIS") for the ISP facility to satisfy the "participation" requirement. Response at 5-11. But it ignores the decisions we cited (Motion at 16-17) recognizing that providing comments to an agency is sufficient to obtain judicial review only where "agency proceedings [] do *not* require intervention as a prerequisite to participation." *ACA Int'l v. FCC*, 885 F.3d 687, 711 (D.C. Cir. 2018); *Water Transp. Ass'n v. ICC*, 819 F.2d 1189, 1192 (D.C. Cir. 1987); *Simmons v. ICC*, 716 F.2d 40, 43 (D.C. Cir. 1983).

There is no dispute that in an NRC licensing proceeding—unlike a rulemaking—intervention is a condition of participation. To implement Congress's direction to provide for adjudicatory hearings in licensing proceedings and pursuant to its general rulemaking authority, 42 U.S.C. §§ 2239, 2201(p), the NRC requires parties who seek to challenge a license application to submit contentions in support of their intervention requests. 10 C.F.R. § 2.309(a) ("Any person whose interest may be affected by a proceeding *and who desires to participate as a party* must file a written request for hearing and a specification of

the contentions which the person seeks to have litigated in the hearing." (emphasis added)). Courts have repeatedly upheld these contention admissibility requirements. *See BPI v. Atomic Energy Comm'n*, 502 F.2d 424, 426-29 (D.C. Cir. 1974); *Union of Concerned Scientists v. NRC*, 920 F.2d 50 (D.C. Cir. 1990).

The effect of these requirements is that, to obtain judicial review of a licensing decision, a party must have "successfully intervened in the proceeding *by submitting adequate contentions under 10 C.F.R. § 2.309*." *NRDC v. NRC*, 823 F.3d 641, 643 (D.C. Cir. 2016) (emphasis added). And the NRC communicated the intervention requirement to the public *in this case*. *See* 83 Fed. Reg. 44,070, 44,071-72 (Aug. 29, 2018) (providing notice of ISP's license application and explaining that "[t]hose permitted to intervene" by submitting admissible contentions "become parties to the proceeding").

New Mexico does not cite to a single case holding, as its argument necessarily suggests, that petitioners can unilaterally decide to forego the hearing opportunity that Congress created in Section 189 of the AEA and proceed directly to the courts of appeals, or that providing comments on a draft or final EIS somehow takes the place of a request for intervention. Such a ruling would undermine the exhaustion requirement that Congress carefully included in its design for the implementation of national nuclear policy, *Quivira Mining v. EPA*,

728 F.2d 477, 481 (10th Cir. 1984), and New Mexico has offered no basis for departure from the decades of precedent recognizing this requirement.

B. New Mexico could have raised its environmental contentions during the agency adjudication.

New Mexico asserts that its failure to participate in the adjudicatory proceeding should be excused because that process closed before the draft EIS for the ISP facility was published. Response at 6 n.2, 8. But its argument overlooks the process through which NEPA contentions can be raised before the agency.

Under NRC rules, an applicant for a license to construct and operate a spent fuel storage facility must submit to the agency, along with its application, an "Environmental Report" containing an analysis of each of the considerations required by NEPA. 10 C.F.R. §§ 51.45, 51.61. Interested parties must raise contentions arising under NEPA by challenging the analysis in the Environmental Report. 10 C.F.R. § 2.309(f)(2). If any deficiencies in that analysis are not cured in the draft or final EIS prepared by the NRC Staff or if those documents contain new information, participants in the proceedings may seek leave to file "new or amended environmental contentions" after the intervention deadline to challenge the analyses in those documents. *Id*.; *id*. § 2.309(c). These requirements have been upheld on judicial review and been applied in challenges to the issuance of licenses. *Union of Concerned Scientists v. NRC*, 920 F.2d at 56 (rejecting facial

challenge to NRC's procedural regulations, including the requirement that intervenors raise contentions arising under NEPA, to the extent possible, based upon the license applicant's Environmental Report); *see, e.g.*, *NRDC v. NRC*, 879 F.3d 1202, 1208-09 (D.C. Cir. 2018) (recognizing that intervenor that had previously challenged environmental analysis in the license application could have shown good cause to pursue a new contention challenging new information contained in draft EIS); *Beyond Nuclear v. NRC*, 704 F.3d 12, 22 (1st Cir. 2013) (affirming NRC's denial of admission of contentions challenging applicant's Environmental Report but noting that petitioner could raise new contentions if new and materially different information became available).

Thus, NRC has created an avenue for intervenors to raise arguments that the agency has not properly identified under NEPA the environmental impacts of proposed licensed activity. It simply requires that these challenges be raised at the earliest possible time, so that the agency can make licensing decisions based on all relevant environmental considerations and final decisions on licenses are not unnecessarily delayed. Indeed, the jurisdictionally proper petitions currently before the D.C. Circuit (i.e., those brought by petitioners challenging the Commission's decisions not to admit them as intervenors) include numerous assertions that the evaluation of the environmental impacts of the construction and operation of the ISP facility does not satisfy NEPA. *See Don't Waste Michigan v .*

NRC, No. 21-2048, Petition for Review, Document No. 1883596 (Feb. 2, 2021); *Sierra Club v. NRC*, No. 21-1104, Petition for Review, Document No. 1894902 (Apr. 14, 2021). New Mexico could likewise have challenged the information contained in (or omitted from) ISP's Environmental Report and pursued its challenge, as applicable, following publication of the draft and final EIS by the NRC Staff. It simply chose not to, and its suggestion that it lacked an opportunity to raise its NEPA arguments in the form of contentions before the agency is therefore unavailing.

C. The NRC is not divesting the Court of its jurisdiction.

New Mexico also asserts that an agency cannot "strip federal courts of the power of judicial review." Response at 9. That is correct. But the NRC has done no such thing. Agencies can define the procedures applicable to requests to intervene brought by third parties to proceedings. *BPI*, 502 F.2d at 426-29; *see Woodford v. Ngo*, 548 U.S. 81, 90-91 (2006) (recognizing that proper exhaustion includes "compliance with an agency's deadlines and other critical procedural rules "). Thus, the agency's authority to create procedures does not restrict the power of federal courts; it enables agencies to specify the avenues that are "appropriate and available" to intervenors who may seek to challenge agency decisions and to insist upon participation in accordance with these procedures as a "statutorily prescribed prerequisite" to judicial review. *Gage v. AEC*, 479 F.2d

1214, 1217-18 (D.C. Cir. 1973). New Mexico's inability to obtain judicial review is not the result of an alleged attempt by the NRC to "strip" the federal courts of power; it is the result of New Mexico's unilateral decision not to intervene in the NRC proceeding.

New Mexico's reliance upon *Massachusetts v. NRC*, 522 F.3d 115 (1st Cir. 2008), and *Clark & Reid Co. v. United States*, 804 F.2d 3 (1st Cir. 1986), is likewise unavailing. Response at 8-9. These decisions are consistent with Respondents' position—that, where such an opportunity is available, seeking to intervene in an administrative hearing before the NRC is a mandatory prerequisite to obtaining judicial review of an NRC licensing decision. Indeed, the court in *Clark & Reid* specifically recognized that the "party aggrieved" requirement "means that a petitioner must have been a party to the agency proceedings." 804 F.2d at 5. And unlike the petitioner in *Massachusetts*, New Mexico did not participate "directly and actually" in the adjudication before the agency, 522 F.3d at 131; it did not participate *at all*. This failure precludes judicial review here.

Nor does *Gage* support New Mexico's position (Response at 9). While the court in *Gage* stated that the AEA and Hobbs Act "make no distinction between orders which promulgate rules and orders in adjudicative proceedings," it did so only in considering whether to *extend* the exhaustion (i.e., intervention) requirement applicable to licensing decisions to rulemaking orders, and it ruled

that those challenging rulemaking orders *also* were required to participate before the agency, albeit through the notice-and-comment process. 479 F.2d at 1218. *Gage* did not relax the baseline assumption that those seeking judicial review of a decision for which a hearing was "appropriate and available" must seek to intervene in the adjudication before seeking judicial review.

Further, New Mexico's citation to *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985), to suggest that Congress intended for courts of appeals to review all final orders in licensing proceedings, Response at 8, does not advance its position. The Supreme Court's discussion in that case focused on whether judicial review was available in the courts of appeals, as opposed to district court, for a petitioner who filed a request under 10 C.F.R. § 2.206 that the NRC initiate a proceeding to modify, revoke, or suspend a license. Unlike New Mexico, the petitioner in that case had availed itself of the procedures available to it, and the Court held that the agency's decision denying that request was judicially reviewable under the Hobbs Act. 470 U.S. at 746. The Court did not interpret or apply the "party aggrieved" language in 28 U.S.C. § 2344; it did not even cite the provision. Nor did the Court suggest, as New Mexico asserts here, that a party could choose to avoid the necessary and available step of intervening in a proceeding for the issuance of a license and instead proceed directly to judicial review.

Finally, New Mexico appears to contend that it is a "party aggrieved" because it purportedly has Article III standing. Response at 11. Although Article III standing is a necessary prerequisite for federal court jurisdiction, it does not satisfy the "party aggrieved" requirement under the Hobbs Act. *See, e.g.*, *ACA Int'l*, 885 F.3d at 711; *see also Am. Trucking Ass'ns, Inc. v. ICC*, 673 F.2d 82, 85 n.4 (5th Cir. 1982).[1]

II. Neither the NWPA nor any other source of law provides an alternate basis for the Court to exercise jurisdiction.

We explained in our motion to dismiss that the NRC issued the license to ISP pursuant to its authority under the AEA to license privately owned spent fuel storage facilities and that challenges to the license were therefore governed by the judicial review provisions of that statute. Motion at 20-21 & n.14. We further noted that New Mexico's challenge had not identified any action that the agency had taken under the NWPA that would permit judicial review under that statutory scheme. *Id*.

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[1] New Mexico attempts to distinguish *Fleming v. USDA*, 987 F.3d 1093, 1098-99 (D.C. Cir. 2021), Response at 11-13, but it misses the point of our invocation of that case. We cited *Fleming* only because of the possibility that the Court might consider the exhaustion requirement of the AEA and the Hobbs Act to be non-jurisdictional. Either way, an attempt to intervene in a licensing proceeding is a prerequisite to judicial review.

New Mexico provides no meaningful response. Instead, it contends that the issuance of the license to ISP is "inextricably linked" to actions that the federal government (and, specifically, DOE) might take under the NWPA. Response at 13-14. Its assertion is neither relevant nor correct. Although the EIS considers actions that would be undertaken in connection with the construction by DOE of a permanent spent fuel repository, that flows from the agency's responsibility under NEPA to identify direct and indirect environmental impacts of a proposed action—here, issuance of the license. But the NRC's analysis in an EIS of anticipated impacts from separate (and independently licensed) actions undertaken pursuant to the NWPA does not mean that issuance of the license to ISP depends upon NWPA activities or somehow takes the issuance of the license outside the ambit of the AEA.

New Mexico relatedly notes that a provision of the ISP license requires ISP to enter into contracts with the entities (including, potentially, DOE) that own title to the fuel to be stored, calling for these entities to bear responsibility for providing operational funding for the facility, and it asserts that the license therefore "contemplates federal government use of a privately-owned ISFSI." Response at 14, 15-16 (citing ISP License, Motion Exhibit 5 at ¶ 19). However, New Mexico fails to mention that the license requires a contract with DOE *or* the private entities that hold title to the spent fuel being stored, and that during the adjudicatory

proceeding before the NRC (which New Mexico ignored), ISP disclaimed reliance on DOE being the title-holder of the fuel involved unless and until Congress passed legislation permitting such an arrangement. *Interim Storage Partners LLC*, CLI-20-14, 92 N.R.C. 463, 467-69 (Dec. 17, 2020). The license thus does not permit activity that the government would undertake pursuant to the NWPA; it contemplates the storage by a private company of spent fuel owned by private entities in accordance with the AEA, *see Bullcreek v. NRC*, 359 F.3d 536, 542 (D.C. Cir. 2004), and it preserves the *possibility* of the facility accepting DOE-titled fuel in the event of a change in legislation. This issue was addressed in the adjudicatory proceeding conducted before the Commission pursuant to the AEA and is now before the D.C. Circuit pursuant to the Hobbs Act. It does not implicate the NWPA's judicial review provisions.

Finally, New Mexico asserts that the Court should ignore the participation requirement because the NRC acted outside the scope of its authority. Response at 17 (citing *Leedom v. Kyne,* 358 U.S. 184 (1958)). Its argument is unavailing. As New Mexico acknowledges, Response at 17 & n.3, the *Leedom* exception serves to protect parties against "absolutely uncontrolled and arbitrary action"—a condition refuted by the availability (and pursuit by other parties) of adjudicatory remedies before the Commission and the courts of appeals. *See Quivira Mining*, 728 F.2d at 484. Moreover, invocation of the *Leedom* exception based on New Mexico's bare

allegation that the NRC acted "not in accordance with the law," Response at 17, would swallow the rule and incentivize litigants to evade the proper path for administrative exhaustion and judicial review set forth in the AEA and the Hobbs Act.

CONCLUSION

The petition should be dismissed for lack of subject-matter jurisdiction.

Respectfully submitted,

/s/ Justin D. Heminger
TODD KIM
Assistant Attorney General
JUSTIN D. HEMINGER
Attorney
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
justin.heminger@usdoj.gov
(202) 514-5442

/s/ Andrew P. Averbach
ANDREW P. AVERBACH
Solicitor
Office of the General Counsel
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852
andrew.averbach@nrc.gov
(301) 415-1956

January 7, 2022

CERTIFICATE OF COMPLIANCE WITH
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/s/ Andrew P. Averbach
Andrew P. Averbach

Counsel for Respondent
U.S. Nuclear Regulatory Commission

CERTIFICATE OF SERVICE

I certify that on January 7, 2022, I served a copy of RESPONDENTS' REPLY TO PETITIONERS' RESPONSE TO MOTION TO DISMISS upon counsel for the parties in this action by filing the document electronically through the CM/ECF system. This method of service is calculated to serve counsel at the following e-mail addresses:

Bruce C. Baizel
bruce.baizel@state.nm.us

William Gregory Grantham
wgrantham@nmag.gov, swright@nmag.gov

Justin Heminger
justin.heminger@usdoj.gov; efile_app.enrd@usdoj.gov

P. Cholla Khoury
ckhoury@nmag.gov

Zachary E. Ogaz
zogaz@nmag.gov

Arnold Bradley Fagg
brad.fagg@morganlewis.com

Ryan Kennedy Lighty
ryan.lighty@morganlewis.com

/s/ Andrew P. Averbach
Andrew P. Averbach

Counsel for Respondent
U.S. Nuclear Regulatory Commission