

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DON'T WASTE MICHIGAN, et al.,)	
)	
Petitioners,)	No. 21-1048 (consolidated with
)	21-1055, 21-1056, 21-1179,
vs.)	21-1127, 21-1229, 21-1130,
)	21-1131)
UNITED STATES REGULATORY)	
COMMISSION and UNITED)	
STATES OF AMERICA,)	REPLY TO OPPOSITIONS TO
)	MOTION FOR SUPPLEMENTAL
Respondents,)	BRIEFING
)	
and)	
)	
INTERIM STORAGE PARTNERS,)	
)	
Intervenor.)	

Comes now Sierra Club and for its Reply to Oppositions to Motion for Supplemental Briefing, states to the Court as follows:

1. At the outset, there are several tangential claims made in Respondents' Opposition that are a distraction from the issues the Court should consider. First, Respondents criticize Sierra Club for filing the Motion for Supplemental Briefing 9 days after reply briefs were filed. But a reply brief can only respond to points raised in the Respondents' brief. The decision in *West Virginia v. EPA*, 142 S.Ct. 2587 (2022), was issued on June

24, 2022, after Respondents' brief was filed. So Sierra Club could not have argued *West Virginia* in the reply brief.

2. Respondents also point to Don't Waste Michigan et al. not joining in Sierra Club's motion, calling Don't Waste Michigan Sierra Club's co-petitioner. Don't Waste Michigan and Sierra Club were not co-petitioners in the agency proceedings nor in seeking review in this Court. Both parties filed separate petitions for judicial review. Sierra Club and Don't Waste Michigan filed joint briefs only because all of the petitioners had to decide how to apportion the very restrictive word limitation in the briefs imposed by the Court.

3. As explained in Sierra Club's Motion, Sierra Club did not waive the issue of the agency's lack of authority to license the ISP storage facility. ISP describes the word limitation in the briefs as reasonable. On the contrary, a reasonable limitation would have been the 30,000 word limitation agreed to by all parties, including the Respondents and ISP, rather than the 20,000 words ordered by the Court. Additionally, the Court required Sierra Club and Don't Waste Michigan to incorporate their NEPA claims in the same brief without any additional words allowed, even though the NEPA claims were raised as separate petitions for review. Furthermore, when the initial briefs

were filed, the *West Virginia* case had not been decided yet. On these facts, Sierra Club has not waived this issue.

4. Regarding the merits, Respondents claim that *West Virginia* is not a new statement of the law and that Sierra Club should have anticipated the *West Virginia* decision. But if that case was not a new statement of law why did Justice Gorsuch and Justice Alito feel it necessary to issue a lengthy concurring opinion defining and explaining the major question doctrine? And although Chief Justice Roberts' lead opinion refers to prior cases as providing the background for the major questions doctrine, as Sierra Club's Motion explained, those prior cases did not articulate the major questions doctrine. So Sierra Club should not be criticized for not briefing the issue.

5. Also, as explained in Sierra Club's Motion, the major questions doctrine and the *West Virginia* decision apply to Sierra Club's NEPA claims. The point of the *West Virginia* decision is that for a major question, agency action is beyond the scope of the agency's authority unless Congress has specifically granted the agency that authority. In this case, Congress has not specifically granted the NRC the authority to limit public participation in the NEPA process to the adjudicatory proceeding. In fact, the NRC procedure is contrary to NEPA's requirement for public participation to the fullest extent

possible. Furthermore, the NRC's NEPA procedure is designed to promote, or at least has the effect of promoting, the interests of the nuclear industry, rather than the public interest. As Justice Gorsuch said in his concurring opinion in *West Virginia*, without the major questions doctrine, "Powerful special interests, which are sometimes 'uniquely' able to influence the agendas of administrative agencies, would flourish while others would be left to ever-shifting winds." *West Virginia v. EPA*, 124 S.Ct. 2587 (2022). Surely, limiting public participation in NEPA, which has been called "the Magna Carta of environmental law," is a major question.

WHEREFORE, Sierra Club requests that the Court grant the Motion for Supplemental Briefing.

/s/ *Wallace L. Taylor*

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 643 words.

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/s/ *Wallace L. Taylor*

Wallace L. Taylor

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of August, 2022, I filed the foregoing Motion For Supplemental Briefing in the Court's electronic case filing system, which according to its protocols would automatically be served upon all counsel of record.

/s/ *Wallace L. Taylor*

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