

NUCLEAR REGULATORY COMMISSION VIOLATES NEPA BY ALLOWING LICENSING DECISIONS TO STAND WHILE NEPA DEFECTS ARE CORRECTED

Oglala Sioux Tribe v. U.S. Nuclear Regulatory Commission
2018 U.S. App. LEXIS 20215

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The District of Columbia Circuit recently held that the U.S. Nuclear Regulatory Commission's practice of leaving licensing decisions in effect while undertaking to cure defects in an EIS, unless an intervening party can prove irreparable harm, was a violation of NEPA.

The case arose after a mining company applied to the NRC in 2009 for a license to construct a uranium mine in the Black Hills of South Dakota. In 2014, the NRC staff published an EIS and issued an initial decision to grant the license. The tribe moved to intervene, under an administrative process allowing persons to intervene and request a stay of the decision before an NRC licensing board. After a hearing, the board found that the EIS failed to correctly analyze the project's impact on cultural resources.

But the board still denied the tribe's request for a stay on the ground that the tribe had failed to demonstrate irreparable harm to its cultural resources. Further, rather than suspending the license, the board directed staff to cure the EIS's defects while allowing the license to remain in effect. The record showed that allowing licenses to remain in effect while NEPA violations were being corrected was part of the NRC's "settled practice."

On appeal before the D.C. Circuit, the court emphasized that NEPA requires federal agencies to conduct their environmental review *before* approving projects. The NRC's practice of allowing licenses to stand notwithstanding NEPA deficiencies, unless an intervenor shows irreparable harm, was tantamount to rewriting NEPA and vitiating its requirements.

The court also noted that NRC's practice placed the tribe in a "classic Catch-22" because the NRC required the tribe to show irreparable harm to stay the license, but such harm could only likely be shown through NEPA-compliant cultural surveys, which could occur too late in time to enable the tribe to halt the project.

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