

L. Grubert
2. Lit File

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NUCLEAR ENERGY INSTITUTE, INC.,
NATURAL RESOURCES DEFENSE
COUNSEL AND STATE OF NEVADA,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

Case No. 01-1258
and consolidated cases

**NUCLEAR ENERGY INSTITUTE, INC.'S OPPOSITION TO NEVADA'S
"SUGGESTION REGARDING ORDER IN WHICH CASES SHOULD BE ARGUED"**

I. INTRODUCTION

Petitioner Nuclear Energy Institute, Inc. ("NEI") opposes Petitioner State of Nevada's ("Nevada") "Suggestion Regarding Order in Which Cases Should Be Argued" ("Suggestion"), dated December 10, 2002. Nevada's Suggestion seeks to have three separate sets of cases – denominated as the "Recommendations Case" (No. 01-1516); the "EPA Case" (the instant case, No. 01-1258); and the "NRC Case" (No. 02-1116) – argued in that order. As discussed below, however, the Suggestion is premature, illogical, and likely to result in confusion. Accordingly, it should be rejected.

II. ANALYSIS

At the outset, Nevada's Suggestion is highly premature. Although the three sets of cases are to be heard *seriatim* "on the same day or the same week, and before the same panel, in September 2003,"¹ a merits panel has not yet been designated. Clearly, a decision on the order of oral argument should await establishment of the panel that will be hearing the cases and decided by it.

More substantively, however, hearing the cases in the order presented in the Suggestion would be illogical and, thus, likely to create confusion. The pending cases involve individual and discrete actions by: (a) three independent federal agencies—EPA, NRC, and DOE; (b) the Secretary of Energy ("Secretary"); and (c) the President of the United States. These actions were taken in a methodical sequence, consistent with specific statutory prescriptions. The interrelationship and significance of each action is best understood if the cases are heard in an order consistent with the legislated framework.

In brief, the Energy Policy Act of 1992 ("EnPA")² first directs EPA to establish radiological standards for a radioactive waste disposal repository at Yucca Mountain, based on its rulemaking authority grounded in the Atomic Energy Act.³ The EPA case turns on the substantive provisions of EnPA, and EPA's standards are the only issue raised in the EPA case. Specifically, NEI challenges EPA's groundwater standard for Yucca Mountain on the grounds that it is beyond the scope of EPA's mandate under EnPA, and that it is substantively arbitrary

¹ See Order filed November 7, 2002.

² 42 U.S.C. § 10141 note, Energy Policy Act, Pub. L. No. 102-486, tit. VIII, §801.

³ 42 U.S.C. §§ 2011 *et seq.*

and capricious because it is based on obsolete science.⁴ These issues are unique and do not overlap with any issues raised in either the NRC case or the Recommendations case.

The EnPA also requires the NRC to modify its regulations pertaining to radioactive waste disposal, as necessary, to be consistent with the EPA's Yucca Mountain radiological standards.⁵ The NRC challenge relates solely to the regulations promulgated by NRC governing the licensing of Yucca Mountain.

The Recommendations Case involves an entirely different statute, the Nuclear Waste Policy Act ("NWPA").⁶ Under NWPA, DOE is charged with establishing criteria for determining the suitability of Yucca Mountain as the location of a geologic repository. The NWPA – invoking the National Environmental Policy Act⁷ – requires an Environmental Impact Statement addressing the establishment of a repository at Yucca Mountain; as well as evaluation of the suitability of Yucca Mountain for a repository by the Secretary and recommendation of the site to the President, and a final determination concerning Yucca Mountain by the President in the form of a recommendation to Congress.

The actions by these separate agencies, in fact, all took place in the order described, one-by-one, each building upon the other. EPA's standards (40 C.F.R. Part 197) were issued on June 13, 2001 (66 Fed. Reg. 32,074); NRC's regulations (10 C.F.R. Part 63) on November 2, 2001 (66 Fed. Reg. 55,732); and DOE's criteria (10 C.F.R. Part 963) on November 14, 2001 (66 Fed. Reg. 57,298). Subsequently, DOE issued its Environmental Impact Statement for Yucca Mountain,

⁴ This case has been fully briefed and was previously scheduled for oral argument on February 20, 2003.

⁵ As with the EPA, the NRC's relevant rulemaking authority is grounded in the Atomic Energy Act.

⁶ 42 U.S.C. §§ 10101 *et seq.*

⁷ 42 U.S.C. §§ 4321 *et seq.*

dated February 2002; the Secretary recommended the site to the President on February 14, 2002; and the President approved the site and recommended it to Congress on February 15, 2002. A clear understanding of the individual steps and their interrelationship will best be served through a consideration of each step in the chronological order in which it occurred. Specifically, if anything:

- (1) the EPA Case should be heard first;
- (2) followed by the NRC Case; and
- (3) concluding with the Recommendations Case.

Nevada maintains that arguing the Recommendations Case first "is more consistent with the structure of the NWPA and the legal regime for the selection and licensing of a repository created by that statute," and that "[n]either NRC nor EPA has any role in . . . [the] decision" as to whether or not Yucca Mountain be developed as a repository.⁸ As discussed above, however, the actions under consideration in the EPA case do not involve NWPA, but only involve EnPA. Moreover, the NRC and EPA clearly *do* have a role in the Yucca Mountain site selection process. As discussed above, regulations of those two agencies were essential to DOE's development of its own criteria — as set forth in 10 C.F.R. Part 963 — and the subsequent site-selection recommendations. Regardless of any allegations in Nevada's brief to the contrary, however, it is incontrovertible that the promulgations of EPA's and NRC's regulations were separate individual actions of independent federal agencies, wholly apart from any authority of DOE.⁹ In fact, as discussed above, it was (and continues to be) DOE that was subject to the statutorily prescribed regulations of EPA and the NRC, not vice versa.

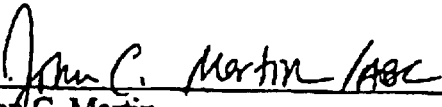
⁸ Suggestion, p. 4.

⁹ Nevada admits that the NRC's regulations are premised on EPA's Rule. Suggestion, at 5.

III. CONCLUSION

For the foregoing reasons, the Court should reject Nevada's Suggestion.

Respectfully submitted,



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Dated: December 24, 2002

CERTIFICATE OF SERVICE


I hereby certify that one true and correct copies of the Nuclear Energy Institute, Inc.'s Opposition To Nevada's "Suggestion Regarding Order In Which Cases Should Be Argued" was served on this 24th day of December, 2002, by regular U.S. mail, on the following:

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