



NUCLEAR ENERGY INSTITUTE

Michael A. Bauser  
Associate General Counsel

December 8, 2003

**BY HAND DELIVERY**

Mark J. Langer, Clerk  
United States Court of Appeals  
for the District of Columbia Circuit  
Room 5423, U.S. Courthouse  
333 Constitution Avenue, N.W.  
Washington, DC 20001

Re: Nuclear Energy Institute, Inc. v. Environmental Protection Agency, et al. No. 01-1258  
(Consolidated with No. 01-1268, 01-1295, 01-1425, 01-1426, 01-1516, 02-1036, 02-1077,  
02-1116, 02-1179, 02-1196, 03-1009, and 03-1058)

Dear Mr. Langer:

Enclosed please find for filing an original plus four copies of the "Response of Nuclear Energy Institute, Inc. in Opposition to 'Petitioners' Motion to Require Respondents to Supplement the Record on Review."

Thank you for your assistance.

Sincerely,

A handwritten signature in cursive script that reads "Michael A. Bauser".

Michael A. Bauser  
Counsel of Record  
Nuclear Energy Institute, Inc.

Enclosures

cc (w/enclosure): Service List

**ORAL ARGUMENT SCHEDULED FOR JANUARY 14, 2004**

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

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NUCLEAR ENERGY INSTITUTE, INC., )

Petitioner, )

v. )

ENVIRONMENTAL PROTECTION )

AGENCY, et al., )

Respondents. )

No. 01-1258

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(Consolidated with No. 01-1268, 01-1295,  
01-1425, 01-1426, 01-1516, 02-1036, 02-1077,  
02-1116, 02-1179, 02-1196, 03-1009, and 03-1058)

**RESPONSE OF NUCLEAR ENERGY INSTITUTE, INC. IN OPPOSITION TO  
“PETITIONERS MOTION TO REQUIRE RESPONDENTS TO SUPPLEMENT THE  
RECORD ON REVIEW”**

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**I. INTRODUCTION**

Pursuant to FRAP 27(a) and D.C. Cir. Rule 27, the Nuclear Energy Institute, Inc. (“NEI”) hereby responds to “Petitioners’ Motion to Require Respondents to Supplement the Record on Review” (“Motion”), dated November 25, 2003. As discussed below, the Motion is entirely without basis. Moreover, most of the documents Petitioners seek to have added to the record are, in fact, already there. Further, any request for supplementation is now too late. Accordingly, the Motion should be denied.

## II. ANALYSIS

### A. The Motion Lacks Basis

In No. 02-1077 Petitioners challenge the recommendation of the Secretary of Energy to the President and recommendation of the President to Congress to approve the designation of Yucca Mountain as a repository site.<sup>1</sup> In Nos. 02-1179 and 02-1196 Petitioners challenge the Final Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada ("FEIS"), which formed a basis for the recommendations.<sup>2</sup> The instant Motion seeks supplementation of the record for the FEIS.

In evaluating the impact of a repository at Yucca Mountain, the FEIS considered both the "Proposed Action" and a "No-Action Alternative." Under the "Proposed Action," the Department of Energy ("DOE" or "Department") would construct, operate, monitor, and eventually close a geologic repository for the disposal of spent nuclear fuel and high-level radioactive waste at Yucca Mountain. Under the "No-Action Alternative," DOE would not proceed with a repository. Rather, spent nuclear fuel and high-level radioactive waste would continue to be stored on-site by operators of commercial nuclear facilities and DOE.

Because of the highly speculative nature of attempting to predict human behavior and events thousands of years into the future, DOE considered two No-Action Alternative scenarios. One scenario considered continued on-site dry storage under institutional control for at least 10,000 years, the same period of time over which performance of the geologic repository is evaluated. The other scenario evaluated the impacts of dry storage under institutional control for approximately 100 years, followed by a period of no effective institutional control out to 10,000

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<sup>1</sup> See 42 U.S.C. § 10134(a).

<sup>2</sup> See *id.*

years. Under institutional control, the monitoring and maintenance of storage facilities would ensure that radiological releases to the environment and radiation doses to workers and the public would remain within Federal limits and DOE Order requirements. Without institutional control, facilities would be allowed to degrade and deteriorate, leading to the eventual breach of containers and assumed release of radionuclides to the environment.<sup>3</sup>

In their Motion, Petitioners seek to supplement the record with what they characterize as “certain key documents which have only recently been disclosed in response to . . . Freedom of Information Act . . . requests.”<sup>4</sup> According to Petitioners, these “striking documents” reveal that DOE had concluded “that the risk of nuclear criticality in the casks in which nuclear waste will be shipped to the Yucca Mountain repository” actually had “a far higher probability of occurring” than had been previously disclosed by the Department.<sup>5</sup> Continuing in this vein, Petitioners ominously refer to “lethally efficient ‘dirty bombs’” and “criticality-induced cask explosions.”<sup>6</sup> The Motion also hypothesizes criticality occurring within the Yucca Mountain repository itself, and the potential impact of “a cask explosion” leading to “a chain of cask ruptures.”<sup>7</sup>

As discussed below in Part II.B, most of the documents Petitioners seek to have included in the record are already there. More fundamentally, however, none of the materials Petitioners would have this Court direct be added to the record have anything, whatever, to do with spent nuclear fuel transportation; repository disposal; or the described events. Viewed objectively, the

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<sup>3</sup> See, e.g., Joint Appendix pp. JA-703 –732, as filed in Case Nos. 01-1516, 02-1036, 02-1077, 02-1179, and 02-1196 (hereinafter “JA”).

<sup>4</sup> Motion, p. 1.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Motion, p. 4.

Motion appears to constitute an attempt to manipulate the normal course of these proceedings and distort the record through innuendo.<sup>8</sup>

The documents themselves consist of a 12-page excerpt from a report, together with an apparently related e-mail; and four meeting reports of a Senior Technical Review Panel established by DOE to assist in preparing a Continuous Storage Analysis Report (collectively, "CSAR Meeting Reports").<sup>9</sup> Simple inspection of these documents reveals that, contrary to Petitioners' representations, they all pertain not to spent fuel transportation and repository disposal - as envisioned under the Proposed Action - but to just the opposite; i.e., where no action is taken and spent fuel is simply abandoned and left unattended in on-site dry storage casks at commercial nuclear power plants and other facilities for thousands of years under a No-Action Alternative scenario.

By contrast, in the case of the Proposed Action, fuel is transported in special transportation casks specifically engineered, fabricated, and actively maintained to preclude criticality even under conditions where fuel is in its most reactive state and considering the inleakage of water.<sup>10</sup> It is then placed in a geologic repository specifically designed, constructed, and operated so as to preclude the occurrence of criticality.<sup>11</sup> On their face the proffered

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<sup>8</sup> In this connection it is relevant to note that, throughout these cases, Petitioners have attempted to create a new, parallel administrative record, separate and apart from that actually compiled below. This effort is embodied in a series of attempts to supplement the record, of which the instant Motion is only the latest; and the compilation of a so-called "Supplemental Appendix," now almost 1,000 pages in length when the documents accompanying the instant Motion are included.

<sup>9</sup> The CSAR was once planned by the Department to serve as a collection of information relevant to the No-Action Alternative but was never completed. See Declaration of Jane R. Summerson, ¶ 11, attached to "Respondents' Opposition to Petitioners' Second Motion to Supplement the Administrative Record," Nov. 22, 2002.

<sup>10</sup> These requirements are imposed by the Nuclear Regulatory Commission ("Commission"). See 10 C.F.R. § 71.55(b), (e). Under Section 180 of the Nuclear Waste Policy Act, transportation of spent fuel may only be made "in packages that have been certified for such purpose by the Commission." 42 U.S.C. § 10175.

<sup>11</sup> The probability of criticality has been analyzed to be so low as to not require consideration pursuant to Commission regulations in 10 C.F.R. § 63.114 (requiring evaluation of only events having at least one chance in 10,000 of occurring over 10,000 years). Further, even if criticality were to occur, the impact on repository performance would not be significant. See JA-965 -968. See also JA-633 -643.

documents are in no way pertinent to conditions and occurrences associated with such spent nuclear fuel transportation and repository disposal. Rather than being relevant to such activities - the Proposed Action evaluated in the FEIS - they are associated with the No-Action Alternative scenario involving continued on-site storage at surface facilities, followed by loss of institutional control, abandonment, and degradation over 10,000 years.<sup>12</sup>

B. Most of the Proffered Documents Are Already in the Certified Record

Not only is there no basis in the Motion for ordering supplementation of the record as requested, doing so would largely be meaningless. This is because at least three of the five proffered documents<sup>13</sup> were included in the record as originally certified.<sup>14</sup> Of the two other documents, one is simply a slightly edited version of one of the three already included.<sup>15</sup>

C. The Motion Is Out of Time

In all events, the proffer of all of the subject materials comes too late. DOE's letters transmitting the subject documents, included in the Attachment to the Motion, reveal that the underlying Freedom of Information Act (FOIA) request was not submitted by Petitioners until August 14, 2003. Petitioner Nevada filed its case June 6, 2002, and all briefing - including the filing of final briefs with references to the deferred joint appendix - was complete on May 28,

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<sup>12</sup> The FEIS did, in fact, consider criticality in evaluating impacts associated with the no institutional control scenario under the No-Action Alternative. See JA-1267, JA-1586 -1587.

<sup>13</sup> The CSAR Meeting Reports referencing meetings of February 10, April 3, and June 5, 1998.

<sup>14</sup> See Non-Sensitive Documents - Master Index for the Administrative Record for the Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada, items 3320, 3323, and 3341. Petitioners actually brought two of these documents (CSAR Meeting Reports referencing meetings of February 10 and June 5, 1998) to the Court's attention more than a year ago. See Attachment to "Petitioners' Reply in Support of Motion to Supplement the Administrative Record," Dec. 6, 2002.

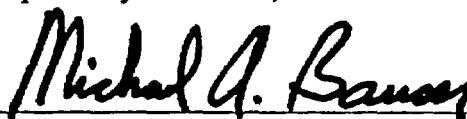
<sup>15</sup> Compare CSAR Meeting Report referencing meeting of February 9, 1998, with CSAR Meeting Report referencing meeting of February 10, 1998.

2003. Oral argument is currently set for January 14, 2004, only a little more than a month from now. Clearly, both the FOIA request and any proffer of additional documents could and should have been made months earlier than they were.

### III. SUMMARY AND CONCLUSION

Petitioners' Motion provides no basis for supplementation of the certified record. Moreover, most of the subject documents are already in the record, and any request for supplementation is now is now too late. Accordingly, the Motion should be denied.

Respectfully submitted,

A handwritten signature in black ink, reading "Michael A. Bauser". The signature is written in a cursive style with a horizontal line underneath it.

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Dated: December 8, 2003

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02-1116, 02-1179, 02-1196, 03-1009, and 03-1058)

I hereby certify that I have this day served copies of the foregoing "Response of Nuclear Energy Institute, Inc. in Opposition to 'Petitioners' Motion to Require Respondents to Supplement the Record on Review'" upon those listed in the attached service list by U.S. mail, first class, postage prepaid.

Dated: December 8, 2003



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