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FOR: The Commission

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SUBJECT: LITIGATION REPORT - 2004 - 03

Nuclear Energy Institute v. EPA (and consolidated cases), No. 01-1258 (D.C. Cir., decided July 9, 2004)

This 100-page opinion from the D.C. Circuit (Edwards, Henderson & Tatel, JJ.) decides a wide variety of Yucca Mountain issues. The opinion resolves some thirteen petitions for review filed against three government agencies, the NRC, EPA and DOE. Ultimately, the court rejected all but one of the petitioners' challenges (their challenge to the 10,000 year compliance period set out in EPA and NRC rules).

Below, we describe the court's opinion at some length, in particular the rulings that affect the NRC directly.

Nevada's Challenge to the 10,000-Year Compliance Period

The court sustained Nevada's challenge to EPA's radiation-protection standards for Yucca Mountain, which required compliance with certain dose limits over a 10,000-year period. According to the court, the 10,000-year compliance period was not, as required by section 801(a) of the Energy Policy Act (EnPA)¹, "based upon and consistent with" the findings of the National Academy of Sciences (NAS) in its 1995 report, *Technical Bases for Yucca Mountain Standards* (NAS Report). The court vacated the 10,000-year compliance period and remanded the matter to EPA with instructions to "either issue a revised standard that is 'based upon and consistent with' NAS's findings and recommendations or return to Congress and seek legislative authority to deviate from the NAS Report."²

In reaching this holding, the court contrasted the recommendations of the NAS Report with what EPA said about establishing a 10,000-year compliance period. The court emphasized that

¹Pub. L. No. 102-486, § 801(a) (1992).

²*NEI v. EPA*, slip op. at 31.

EPA's radiation-protection standards did not require compliance during the period when peak radiation doses would be expected from Yucca Mountain. Quoting at length from the NAS Report, the court noted that "NAS unequivocally recommended a standard pegged to the time when radiation doses reach their peak," and that NAS "expressly rejected 10,000 years as a proper benchmark."³ The court then rejected EPA's argument that policy considerations justified its deviation from NAS's recommendations:

Simply stating that standard-setting has "policy aspects" cannot transform NAS's statement that "we recommend that compliance assessment be conducted for the time when the greatest risk occurs, within the limits imposed by long-term stability of the geologic environment," into, as EPA would seemingly have it, "we recommend that compliance assessment be conducted for the period that lacks scientific basis but that best meets EPA's policy goals."⁴

The court said that it might have reached a different conclusion had EPA "taken the Academy's recommendations into account and then tailored a standard that accommodated the agency's policy concerns," rather than "unabashedly reject[ing] NAS's findings" by promulgating a "radically different standard . . . that the Academy had expressly rejected."⁵

The court's decision to vacate EPA's rule also impacted the NRC's licensing criteria for Yucca Mountain. As required by EnPA § 801(b)(1), NRC promulgated licensing criteria in Part 63 "consistent" with EPA radiation-protection standards, including EPA's 10,000-year compliance period. Thus, said the court, the NRC must reconsider the compliance period in Part 63 after EPA (on remand) finishes revising its standard:

In light of NRC's obligation under EnPA to maintain licensing criteria that are consistent with the public health and safety standards promulgated by EPA . . . and our holding above vacating EPA's selection of a 10,000-year period for assessing compliance with its public health and safety standards . . . we likewise vacate NRC's identical compliance period in part 63 and direct NRC to reconsider the period on remand once EPA has complied with our opinion.⁶

Other Challenges to NRC Regulations

Nevada also argued that part 63 violates the Nuclear Waste Policy Act (NWPA) because it (1) does not require that waste be isolated primarily by geologic means; and (2) contains no specific standards governing the performance of individual engineered barriers. Nevada next

³*Id.* at 27.

⁴*Id.* at 30.

⁵*Id.* at 26.

⁶*Id.* at 74 (internal citations omitted).

argued that part 63 violates EnPA because it (allegedly) does not require Yucca Mountain to comply with EPA's part 197 prior to construction. Finally, Nevada argued that part 63 improperly precludes challenges to the peak-radiation-dose calculations in DOE's environmental impact statement (EIS), and that the rule incorporates a "lax" "reasonable expectation" standard for assessing Yucca Mountain's ultimate performance.

The court turned first to Nevada's "primary barrier" and "multiple barrier" arguments. According to the court, nothing in the NWPB "even remotely compels NRC to adopt requirements and criteria that put the greatest burden for isolating waste on a repository's geologic barrier potential."⁷ The court concluded that NRC's existing multiple-barrier requirement in part 63 is sufficient to meet the requirements of the NWPB.⁸ The court then rejected Nevada's challenges to the NRC's use of total-system-performance assessment in part 63, stating that "NRC's detailed analysis supporting its decision to evaluate the performance of the Yucca Mountain repository based on the barrier system's overall performance," rather than barrier-by-barrier performance, was reasonable and permissible.⁹

The court next rejected Nevada's argument that part 63 violates the EnPA because it only requires that NRC "consider" whether Yucca Mountain will meet certain performance objectives, which are based on EPA standards. The court did not address the merits of this claim, concluding that Nevada had waived its argument by failing to raise it before the NRC during notice-and-comment rulemaking on part 63.¹⁰

The court disposed of Nevada's "reasonable expectation" argument based on representations in the NRC's brief that there is "no consequential difference" between that standard and the more familiar "reasonable assurance" standard used in other licensing contexts.¹¹ During oral argument, Nevada's counsel "deemed NRC's representation sufficient to satisfy its claim."¹²

Again relying on representations made by the NRC in its brief, the court rejected Nevada's claim that part 63 precludes challenges to the peak dose calculations in DOE's EIS. The court concluded that NRC regulations "impose[] no 'categorical limitation' on any challenge to DOE's peak dose calculations and that . . . parties to the proceeding may challenge the practicability of

⁷*Id.* at 65.

⁸*Id.* at 67-68.

⁹*Id.* at 70-71.

¹⁰*Id.* at 71-72.

¹¹*Id.* at 76.

¹²*Id.*

adopting aspects of DOE's EIS, including the peak dose calculations, based on 'substantial new information.'"¹³

Along the way, the court rejected an NRC jurisdictional argument that many of Nevada's claims were out of time. The court said that Nevada's case fell at least in part under the NWPA 180-day time limit for suits, rather than (as we had argued) under the Hobbs Act's 60-day deadline.¹⁴

Remaining Issues

The court rejected a variety of challenges to the EPA rule and to DOE action. In the EPA cases, the court upheld regulations establishing a controlled area and a separate groundwater-protection standard. (NEI had challenged the separate groundwater standard). In the DOE cases, the court rejected Nevada's constitutional argument that Congress improperly discriminated against Nevada in the development of the nation's high-level-waste-disposal program. The court also held that the President's approval of a congressional resolution in favor of DOE's Yucca Mountain site recommendation established new law, rendering Nevada's challenges to DOE's site-selection process moot.

Finally, the court declared Nevada's challenge to DOE's environmental impact statement unripe because the EIS could be reviewed later. The court said that because Nevada's EIS challenges "presumably will not have been passed on by any court prior to relevant NRC proceedings ..., there is no reason to assume that [NRC regulations] will bar consideration of Nevada's substantive claims in the relevant NRC administrative proceedings."¹⁵

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¹³ *Id.* at 75.

¹⁴ *Id.* at 52-58.

¹⁵ *Id.* at 99.