

NUCLEAR REGULATORY COMMISSION

10 CFR Part 51

[Docket No. PRM-51-9]

State of Nevada;
Receipt of Petition for Rulemaking

AGENCY: Nuclear Regulatory Commission.

ACTION: Petition for rulemaking; Notice of receipt.

SUMMARY: The Nuclear Regulatory Commission (NRC) has received and requests public comment on a petition for rulemaking filed by the State of Nevada (petitioner). The petition has been docketed by the NRC and has been assigned Docket No. PRM-51-9. The petitioner is requesting that the NRC amend the regulation that governs adoption of an environmental impact statement prepared by the Secretary of Energy in proceedings for issuance of a construction authorization or materials license with respect to a geological repository. The petitioner believes that the current regulation, as written, violates the National Environmental Policy Act of 1969, as amended (NEPA), the Nuclear Waste Policy Act of 1982, as amended (NWPA), and a recent court of appeals decision.

DATE: Submit comments by (75 days following publication in the *Federal Register*).

Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given except as to comments received on or before this date.

ADDRESSES: You may submit comments by any one of the following methods. Please include the following number PRM-51-9 in the subject line of your comments. Comments on petitions submitted in writing or in electronic form will be made available for public inspection. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including personal information such as social security numbers and birth dates in your submission.

Mail comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Attention: Rulemaking and Adjudications staff.

E-mail comments to: SECY@nrc.gov. If you do not receive a reply e-mail confirming that we have received your comments, contact us directly at (301) 415-1966. You may also submit comments via the NRC's rulemaking website at <http://ruleforum.llnl.gov>. Address comments about our rulemaking website to Carol Gallagher, (301) 415-5905; (e-mail cag@nrc.gov). Comments can also be submitted via the Federal eRulemaking Portal <http://www.regulations.gov>.

Hand deliver comments to 11555 Rockville Pike, Rockville, Maryland, between 7:30 am and 4:15 pm on Federal workdays.

Publicly available documents related to this petition may be viewed electronically on the public computers located at the NRC Public Document Room (PDR), O1 F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland. The PDR reproduction contractor will copy documents for a fee. Selected documents, including comments, may be viewed and downloaded electronically via the NRC rulemaking website at <http://ruleforum.llnl.gov>.

Publically available documents created or received at the NRC after November 1, 1999 are also available electronically at the NRC's Electronic Reading Room at <http://www.nrc.gov/reading--rm/adams.html>. From this site, the public can gain entry into the NRC's Agencywide Documents Access and Management System (ADAMS), which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC PDR Reference staff at 1-800-397-4209, 301-415-4737 or by e-mail to pdr@nrc.gov.

For a copy of the petition, write to Michael T. Lesar, Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.

FOR FURTHER INFORMATION CONTACT: Michael T. Lesar, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Telephone: 301-415-7163 or Toll-Free: 1-800-368-5642 or E-mail: MTL@NRC.Gov.

SUPPLEMENTARY INFORMATION:

Background

The NRC has received a petition for rulemaking dated April 8, 2005, submitted by the State of Nevada (petitioner) entitled "Petition by the State of Nevada to Amend 10 CFR 51.109." The petitioner requests that the NRC amend 10 CFR 51.109 because it believes the current regulation violates the NEPA, NWSA, and the decision in *Nuclear Energy Institute, Inc. v. Environmental Protection Agency*, 373 F. 3d 1251 (D.C. Cir. 2004) (*NEI*). The petitioner recommends that 10 CFR 51.109(a)(2) be deleted and proposes a new paragraph (h) to correct what it believes is an error regarding limitations on potential challenges to NRC's adoption of the Department of Energy's (DOE's) final environmental impact statement (FEIS). The NRC has determined that the petition meets the threshold sufficiency requirements for a petition for rulemaking under 10 CFR 2.802. The petition has been docketed as PRM-51-9. The NRC is soliciting public comment on the petition for rulemaking.

Discussion of the Petition

The petitioner notes that sections 114(a)(1)(D) and (f)(1) of the NWSA require DOE to prepare an FEIS in connection with its recommendation of the Yucca Mountain, Nevada site as a geologic repository for the disposal of reactor spent fuel and other high-level radioactive waste, and that DOE issued the FEIS in February 2002 (DOE/EIS-0250). The petitioner also

notes that section 114(f)(4) of the NWPAA provides that an FEIS “shall, to the extent practicable, be adopted by the Commission in connection with the issuance by the Commission of a construction authorization and license for such repository,” and that “[t]o the extent such statement is adopted by the Commission, such adoption shall be deemed to also satisfy the responsibilities of the Commission under [NEPA] and no further consideration shall be required, except that nothing in this subsection shall affect any independent responsibilities of the Commission to protect the public health and safety under the Atomic Energy Act of 1954.”

The petitioner also notes that 10 CFR 51.109 implements NWPAA section 114(f)(4). The petitioner believes that the NRC has added three special provisions to § 51.109 that are not in the NWPAA. The petitioner states that 10 CFR 51.109 provides for special procedures for litigation of NEPA issues that are not in the NWPAA and contradict procedures that apply to litigation of safety issues under the NWPAA and Atomic Energy Act. The petitioner also believes that § 51.109 provides for the NRC to adopt any supplement to the original DOE FEIS and notes that NWPAA section 114(f) does not mention FEIS supplements. Lastly, the petitioner believes that § 51.109 contains special provisions that specify precisely when the NRC will adopt the Yucca mountain FEIS that are not in the NWPAA.

The petitioner states that “[w]ith regard to the special litigation procedures, 10 CFR 51.109(a)(2) conditions the admissibility of a contention that the NRC should not adopt the DOE FEIS (or supplemental FEIS) on satisfaction, to the extent possible, of the standards for reopening a closed record under 10 CFR 2.326.” The petitioner believes that the principal difference between this contention standard and the contention standard in 10 CFR 51.109(f) that applies to other issues is that § 2.326 requires submission of admissible evidence, while § 2.309(f) does not. The petitioner states that under § 2.326 that is referenced in § 51.109(a)(2), a motion to reopen must include admissible evidence. The petitioner cites 54

FR 33168, 33171; (August 11, 1989) and states that the regulatory history of 10 CFR 2.309(f) is clear that “the factual support necessary to show that a genuine dispute exists need not be in affidavit or formal evidentiary form and need not be of the quality necessary to withstand a summary disposition motion.”

The petitioner states that the special adoption standards were promulgated by the NRC in 1989 (54 FR 27864; July 3, 1989) and appear as follows in 10 CFR 51.109(c):

The presiding officer will find that it is practicable to adopt any environmental impact statement prepared by the Secretary of Energy in connection with a geologic repository proposed to be constructed under Title I of the Nuclear Waste Policy Act of 1982, as amended, unless: (1)(i) The action proposed to be taken by the Commission differs from the action proposed in the license application submitted by the Secretary of Energy; and (ii) The difference may significantly affect the quality of the human environment; or (2) Significant and substantial new information or new considerations render such environmental impact statement inadequate.

The petitioner states that this regulation was adopted over the objections of the Council on Environmental Quality (CEQ). The petitioner notes that the CEQ comments are available on the NRC’s Licensing Support Network (NRC 000024546) and believes they support Nevada’s comments on the 1989 rulemaking emphasizing that NEPA does not allow NRC to adopt the DOE FEIS without a full and independent review of that FEIS. The petitioner cites *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 372 (1989) and *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979) in stating that CEQ’s views on NEPA requirements are entitled to “substantial deference.”

The petitioner believes that the NRC conceded that “Congress did not speak to the precise question of the standard to be used in deciding whether adoption of DOE’s environmental impact statement is practicable” and that “our construction is not the only one that might be proposed” (54 FR 27866; July 3, 1989) to defend the agency’s interpretation of NWPA section 114(f)(4). The petitioner states that the NRC’s approach cannot be reconciled

with what it believes is the admonition in NEPA section 102 for agencies to follow the statutory procedures “to the fullest extent possible.” The petitioner cites *Calvert Cliffs’ Coordinating Comm., Inc v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109, 1115 (D.C. Cir. 1971) in stating that NEPA’s procedural requirements must be enforced “unless there is a clear conflict of *statutory* authority.”

The petitioner states that the adoption standard in 10 CFR 51.109(c) cannot be reconciled with certain portions of the NWPA’s legislative history and cites the following excerpts from the *Congressional Record*: 128 Cong. Rec. S4302 (April 29, 1982) the NRC licensing process would include “a detailed evaluation of the health and safety and environmental aspects of the proposed project” and 128 Cong. Rec S15669 (December 20, 1982) (statement on the Senate floor that the bill should “preserve the integrity and full scope of the NRC licensing review and environmental analysis under the National Environmental Policy Act.”)

The petitioner states that in the *NEI* decision, Nevada challenged the adequacy of DOE’s FEIS supporting the recommendation of the Yucca Mountain site. The Court held that any challenge to the FEIS that might be adopted in support of a future NRC construction authorization or licensing decision or used by the Department of Energy in support of a future transportation-alternative selection was not ready for review because “the effect of the FEIS will not be felt in a concrete way by Nevada until it is used to support some other final decision of DOE or NRC” and “Nevada may raise its substantive claims against the FEIS if and when NRC or DOE makes such a final decision.” 373 F.3d at 1313. The court noted the representation of NRC counsel at oral argument that “Nevada will be permitted to raise its substantive challenges to the FEIS in any NRC proceeding to decide whether to adopt the FEIS” and agreed with NRC’s acknowledgment that “it would not be ‘practicable’ to adopt the FEIS unless it meets the

standards for an ‘adequate statement’ under the NEPA and the Council on Environmental Quality’s NEPA regulations.” *Id.* At 1313-1314. The Court further stated that the NWPA “cannot reasonably be interpreted to permit NRC to premise a construction-authorization or licensing decision upon an EIS that does not meet the substantive requirements of the NEPA or the Council on Environmental Quality’s NEPA regulations.” *Id.* At 1314.

The petitioner states that the Court specifically addressed the NRC adoption standards in 10 CFR 51.109(c) and noted the NRC’s representation that “NRC will not construe the ‘new information or new considerations’ requirement to preclude Nevada from raising substantive objections against the FEIS in administrative proceedings.” *Id.* The petitioner states that after oral argument the NRC sent a letter to the Court attempting to explain this regulation. The petitioner believes that contrary to NRC’s representations at oral argument, the letter states that although 10 CFR 51.109(c) did not limit the NEPA issues that could be raised on judicial review, it would limit what NEPA issues could be raised in the NRC licensing hearing. The petitioner states that the Court responded in the *NEI* decision that the suggested distinction in the letter between what could be raised on judicial review and what could be raised in the NRC licensing hearing “makes no sense. Nevada’s claims have not been adjudicated on the merits here and presumably will not have been passed upon by any court prior to the relevant NRC proceedings. The [Nevada] claims thus would certainly raise ‘new considerations’ with regard to any decision to adopt the FEIS. Moreover * * * any substantive defects in the FEIS clearly would be relevant to the ‘practicability’ of adopting the FEIS.” *Id.* The petitioner states that the Court concluded that “Government counsel’s unequivocal representation to the court during oral argument that Nevada will not be foreclosed from raising substantive claims against the FEIS in administrative proceedings comports with the terms of the regulation and reflects a reasonable and compelling interpretation.” *Id.*

The petitioner has concluded that 10 CFR 51.109 must be amended because it believes that the NRC has not formally adopted the Court's interpretation of this regulation in the *NEI* decision. The petitioner has also concluded that the special litigation procedures in 10 CFR 51.109(c) violate NEPA. The petitioner believes that section 102(2)(C) of NEPA requires an FEIS to be considered in the "*existing* agency review processes" [emphasis added] and that NRC is attempting to use a different review process applicable only to NEPA where interested persons must satisfy additional pleading requirements that do not apply. The petitioner cites *Calvert Cliffs*, 40 CFR 1505.1, and *Aberdeen & Rockfish R. Co. v. SCRAP*, 422 U.S. 289, 320 (1975).

The Petitioner's Proposed Amendment

The petitioner requests that 10 CFR 51.109 be amended by deleting paragraph (a)(2) and adding a new paragraph (h) to read as follows:

Nothing in this section shall be construed to limit the ability of any party or interested governmental participant to challenge in a licensing hearing any environmental impact statement (Including any supplement thereto) prepared by the Secretary of Energy on the ground that such statement violates NEPA or the regulations of the Council on Environmental Quality, provided that the challenge is not barred by traditional principles of federal collateral estoppel. Collateral estoppel shall not bar the admission of a NEPA contention if the standards in subparagraph (c)(1) and (c)(2) of this section are met, provided that the change in the proposed action or new information or considerations became known after the litigation in question.

The petitioner believes the proposed amendment gives explicit effect to the representations of counsel adopted by the court and provides "appropriate effect" to 10 CFR 51.109(c) "within the appropriate context of traditional Federal collateral estoppel principles." The petitioner also believes issues raised regarding special litigation procedures in 10 CFR 51.109(a)(2) can be resolved only by deleting that paragraph "with the result that the admission of NEPA contentions will be guided by the same principles in 10 CFR 2.309(f) that apply to other kinds of contentions."

The Petitioner's Conclusion

The petitioner concludes that 10 CFR 51.109(a)(2) as currently written violates the NEPA, NWPA, and the decision in *NEI v. EPA* with regard to special litigation procedures. The petitioner requests that the NRC amend 10 CFR 51.109 by deleting paragraph (a)(2) and adding a new paragraph (h) as detailed in its petition for rulemaking.

Dated at Rockville, Maryland, this 8th day of August, 2005.

For the Nuclear Regulatory Commission.

/RA/

Andrew L. Bates,
Acting Secretary of the Commission.