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PETITION RULE PRM 51-9
(70FR 47148)

October 26, 2005

Annette L. Vietti-Cook
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Attn: Rulemaking and Adjudications Staff

Re: Comments of the U.S. Department of Energy on the State of Nevada's Petition for Rulemaking – PRM-51-9

Dear Ms Vietti-Cook:

The U.S. Department of Energy hereby submits the enclosed comments in response to the petition for rulemaking filed by the State of Nevada (April 8, 2005), which petition was noted in the *Federal Register* on August 12, 2005 at 70 Fed. Reg. 47,148.

Very truly yours,

Ben McRae

James B. McRae
Assistant General Counsel
for Civilian Nuclear Programs

Enclosure

Template = SECY-067

SECY-02

COMMENTS OF THE U.S. DEPARTMENT OF ENERGY ON THE STATE OF NEVADA'S PETITION FOR RULEMAKING 70 FED. REG. 47,148 (AUGUST 12, 2005) – DOCKET NO. PRM-51-9

INTRODUCTION

On August 12, 2005, the U.S. Nuclear Regulatory Commission ("NRC" or "the Commission") published in the *Federal Register* a notice soliciting public comment on a petition for rulemaking submitted on April 8, 2005 by the State of Nevada ("Nevada" or "the state"). *See* 70 Fed. Reg. 47,148. Nevada requests that the NRC amend the provisions of 10 C.F.R. § 51.109, the regulation that governs the adoption by the NRC of a final environmental impact statement ("FEIS") prepared by the U.S. Department of Energy ("DOE" or "the Department") in proceedings for the issuance of a construction authorization or materials license with respect to a geologic repository. Nevada alleges that the regulation violates the National Environmental Policy Act of 1969 ("NEPA"), the Nuclear Waste Policy Act of 1982 ("NWPA"), and the decision of the U.S. Court of Appeals for the D.C. Circuit in *Nuclear Energy Institute, Inc. v. U.S. Environmental Protection Agency*, 373 F.3d 1251 (D.C. Cir. 2004) ("*NEI*").

The rulemaking that Nevada requests is not warranted. The regulation at issue comports with the NRC's responsibilities under both NEPA and the NWPA, and nothing in the *NEI* case supports Nevada's claim that the regulation must be revised.

BACKGROUND

As is relevant here, 10 C.F.R. § 51.109 provides as follows:

> (a)(1) In a proceeding for issuance of a construction authorization for a high-level radioactive waste repository at a geologic repository operations area . . . , the NRC staff shall, upon the publication of the notice of hearing in the Federal Register, present its position on whether it is practicable to adopt, without further supplementation, the environmental impact statement (including any supplement thereto) prepared by the Secretary of Energy. . . . In discharging its responsibilities under this paragraph, the staff

shall be guided by the principles set forth in paragraphs (c) and (d) of this section.

(2) Any other party to the proceeding who contends that it is not practicable to adopt the DOE environmental impact statement, as it may have been supplemented, shall file a contention to that effect within thirty (30) days after the publication of the notice of hearing in the Federal Register. Such contention must be accompanied by one or more affidavits which set forth factual and/or technical bases for the claim that, under the principles set forth in paragraphs (c) and (d) of this section, it is not practicable to adopt the DOE environmental impact statement, as it may have been supplemented. The presiding officer shall resolve disputes concerning adoption of the DOE environmental impact statement by using, to the extent possible, the criteria and procedures that are followed in ruling on motions to reopen under §2.326 of this chapter.

(b) In any such proceeding, the presiding officer will determine those matters in controversy among the parties within the scope of NEPA and this subpart, specifically including whether, and to what extent, it is practicable to adopt the environmental impact statement prepared by the Secretary of Energy in connection with the issuance of a construction authorization and license for such repository.

(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.

(d) To the extent that the presiding officer determines it to be practicable, in accordance with paragraph (c) of this section, to adopt the environmental impact statement prepared by the Secretary of Energy, such adoption shall be deemed to satisfy all responsibilities of the Commission under NEPA and no further consideration under NEPA or this subpart shall be required.

This regulation was promulgated on July 3, 1989, having first been proposed on May 5, 1988. *See* 54 Fed. Reg. 27,864; 53 Fed. Reg. 16,131.

The regulation implements NWPA § 114(f)(4), which provides that "[a]ny environmental impact statement prepared in connection with a repository proposed to be constructed by the Secretary under this subtitle 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." *See* 42 U.S.C. § 10134(f)(4). The NWPA continues 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 that "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." *Id.*

Nevada acknowledges that 10 C.F.R. § 51.109 "in most respects tracks the language" of NWPA § 114(f)(4), save for "three special provisions added by the Commission [that] are not found in the statute." Petition at 2. The first of these, according to Nevada, is that the regulation "provides for special procedures for litigation of NEPA issues that are not in the NWPA and that contradict the procedures that apply to litigation of safety issues under the NWPA and the Atomic Energy Act." Petition at 2. Specifically, Nevada points to 10 C.F.R. § 51.109(a)(2), which requires that any contention asserting that it is not "practicable" for the NRC to adopt the DOE FEIS "must be accompanied by one or more affidavits which set forth factual and/or technical bases for the claim" and which provides that the "presiding officer shall resolve disputes concerning adoption of the DOE environmental impact statement by using, to the extent possible, the criteria and procedures that are followed in ruling on motions to reopen under § 2.326 of this chapter." As Nevada notes, the "principal difference between this contention

standard, and the contention standard in 10 C.F.R. § 2.309(f) that applies to other issues, is that the former requires submission of admissible evidence, while the latter does not." Petition at 2.

Second, Nevada says that the "regulation provides for the NRC to adopt a DOE supplement to its original [FEIS], if there is such a supplement." Petition at 2.[1] According to the state, "[s]ection 114(f) of the NWPA does not mention FEIS supplements." *Id.*

Third, Nevada alleges, the regulation provides "special standards, not found in the NWPA, that specify in some detail precisely when the NRC will adopt the Yucca Mountain EIS." Petition at 2. In this regard, Nevada is referring to paragraph (c) of 10 C.F.R. § 51.109, which provides, in pertinent part, that the "presiding officer will find it practicable to adopt" the DOE FEIS "unless: (1)(i) The action proposed to be taken by the Commission differs from the action proposed in the license application" submitted by DOE, 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." *See* 10 C.F.R. § 51.109(c)(1)-(2).

To address what it perceives to be discrepancies between the terms of 10 C.F.R. § 51.109 and the provisions of NWPA § 114(f)(4), Nevada requests that the regulation be revised in two respects. First, Nevada proposes that subparagraph (2) of paragraph (a) be deleted in its entirety. Second, the state would have the NRC add to the end of § 51.109 a new paragraph (h), which would read as follows:

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[1] Presumably, Nevada is referring to that portion of 10 C.F.R. § 51.109(a)(1) which provides that the "NRC staff shall, upon the publication of the notice of hearing in the *Federal Register*, present its position on whether it is practicable to adopt, without further supplementation, the environmental impact statement (*including any supplement thereto*) prepared by the Secretary of Energy." (emphasis added).

> 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.

Petition at 6, 7. As discussed below, the arguments Nevada makes for why the NRC should adopt these changes do not withstand scrutiny, and there is no reason for the NRC to revisit 10 C.F.R. § 51.109.[2]

DISCUSSION

The regulation that Nevada seeks to have revised was promulgated over 16 years ago. The state filed comments objecting to the regulation as proposed. *See* Nevada's Comments on NRC's Proposed "NEPA Review Procedures for Geologic Repositories for High-Level Waste"

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[2] Although, as was noted above, Nevada observes that 10 C.F.R. § 51.109(a)(1) refers to the possibility of the DOE EIS being "supplemented," whereas NWPA § 114(f)(4) "does not mention FEIS supplements," Petition at 2, the state does not otherwise appear to be asking that the NRC revise the regulation with respect to this point. No such revision would be warranted in any event. For it is clear that, while NWPA § 114(f)(4) does not specifically address the matter of supplementation, nothing on the face of the statute precludes the NRC from adopting the EIS, as supplemented. Moreover, as the NRC explained in the preamble to the proposed rule, the very reason the regulation "provide[s] for the timely submission by DOE of supplemental environmental impact statements" is that the NRC "may . . . be unable to adopt" the DOE EIS "unless it has been supplemented to take into account significant new information such as that developed during the course of construction as part of the performance confirmation program or significant changes in the plans of DOE since the time of its site recommendation to the President." *See* 53 Fed. Reg. 16,141 (May 5, 1988), *citing* 40 C.F.R. § 1502.9(c)(1) (Council on Environmental Quality ("CEQ") regulation providing that agencies "shall prepare supplements to either draft or final environmental impact statements if: (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.").

(April 1, 1988); 54 Fed. Reg. 27,865-866 (July 3, 1989). Nevada argued then – as it argues now – that the regulation that the NRC proposed (and that it subsequently adopted) would violate the NRC's responsibilities under NEPA and the NWPA. The NRC rejected those arguments. Nevada was then afforded an opportunity under the Hobbs Act to obtain direct judicial review of the regulation within 60 days of its promulgation and to seek a determination from the U.S. Court of Appeals that the regulation was unlawful. *See* 28 U.S.C. §§ 2342(4), 2344; 42 U.S.C. § 2239(b)(1). Nevada failed to pursue that opportunity and obtain such a determination.

Nevada now attempts to revisit, in the guise of a petition for rulemaking, what are basically the same legal arguments it made, and then effectively abandoned, some 16 years ago. Against this backdrop, Nevada faces a particularly heavy burden to identify some compelling justification for the regulatory revisions it is now proposing. The state has failed to make any such showing.

I. The Regulation Comports with NEPA and the NWPA.

Nevada sets forth a number of arguments intended to establish that the "special standards" under 10 C.F.R. § 51.109(c) that "specify . . . when the NRC will adopt the Yucca Mountain EIS," as well as the "special procedures for litigation of NEPA issues" under 10 C.F.R. § 51.109(a)(2), are contrary to NEPA and the NWPA. Petition at 2. Those arguments are without merit.

A. The NRC's Procedures for the Adoption of the DOE FEIS Under 10 C.F.R. § 51.109(c) Do Not Violate Either NEPA or the NWPA.

Nevada puts forth three arguments why the FEIS adoption procedures under 10 C.F.R. § 51.109 are allegedly unlawful and must be revised. In each case, Nevada identifies nothing that the NRC did not already consider in proposing and promulgating the regulation some 16

years previously, nor does the state explain why its regurgitation of these very same points should prompt the NRC to revise the regulation now.

First, Nevada points out that the NRC adopted those procedures in 1989 "over the objections of the Council on Environmental Quality," which during the rulemaking had supposedly agreed with the state's position that "NEPA does *not* allow NRC to adopt the DOE FEIS without a full and independent review of the FEIS." Petition at 3 (emphasis in original). The "views of CEQ on what NEPA requires," Nevada adds, "are entitled to 'substantial deference.'" *Id., citing Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989); *Andrus v. Sierra Club*, 442 U.S. 347 (1979).

The NRC already addressed the CEQ's concerns in the original rulemaking, explaining in the preamble to the final regulation why those concerns were not dispositive. As the NRC pointed out then, the CEQ's comments did not "fully take into account the detailed scheme for environmental review established by NWPA." 54 Fed. Reg. 27,866 (July 3, 1989). In this regard, the NRC noted, the CEQ's comments had failed to provide any analysis of the "related provisions of the statute," nor had those comments examined the "legislative history [of the NWPA] which, as described in the preamble to the proposed rule, supports [the NRC's] point of view." *Id.* For that reason, the NRC said that it found the CEQ's comments unpersuasive, and that it "continue[d] to believe that it is clear – at least in the debates of the House of Representatives with respect to the bill which, with amendments, was enacted into law – that the Commission role was intentionally to be directed to health and safety issues" to the exclusion, "absent new information or new considerations," of "issues arising under NEPA." *Id.*

If Nevada believed that the regulatory provisions regarding FEIS adoption that the NRC promulgated in July 1989 were unlawful, the state could, and should, have pursued judicial relief

at that time. Having failed to do so, there is nothing in Nevada's petition, which merely recycles arguments previously made and rejected, that should cause the NRC to revisit now the legal analysis that it undertook, and the conclusions that it reached, some 16 years ago.

Nevada's second argument why the NRC should revise the regulation with respect to EIS adoption is that the NRC's approach "cannot be reconciled with the admonition in Section 102 of NEPA for agencies to follow the statutory procedures 'to the fullest extent possible.'" Petition at 3. "NEPA's procedural requirements," Nevada asserts, "must be enforced 'unless there is a clear conflict of *statutory* authority.'" *Id., quoting Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1115 (D.C. Cir. 1971) (emphasis in original). In an attempt to bolster this argument, Nevada points to misleadingly selective portions of the preamble to the final regulation so as to quote the NRC as stating 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.'" *Id., quoting* 54 Fed. Reg. 27,865 (July 3, 1989).

In fact, what the NRC said when it promulgated the regulation was that

> we believe it to be a *fair reading of Congressional intent* [under the NWPA] that NRC can adequately exercise its NEPA decisionmaking responsibility with respect to a repository by relying upon DOE's environmental impact statement. . . . [T]he timing requirement – under NWPA, a three-year licensing process for a unique facility, involving standards of exceptional complexity, requiring disputatious predictions of future human activity and natural processes for thousands of years – supplies practical support for our interpretation. 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 *if* our construction is not the only one that might be proposed, it seems to us to be, *at a minimum*, "permissible."

54 Fed. Reg. 27,865 (emphasis added). Responding to Nevada's comments on this score at the time, the NRC further stated that it "firmly believes that the [NWPA] was intended to have all

matters associated with the environmental impacts of repository development considered and decided, to the fullest extent practicable, apart from NRC licensing proceedings." *Id.* This interpretation, the NRC added, "is supported both by the specific legislative and judicial review procedures built into the statutory structure and by the accompanying legislative history." *Id.*

Further, in responding to one commenter's assertion that the NRC "should not rely on there having been a court ruling with regard to the adequacy of DOE's environmental impact statement in advance of the Commission's licensing decision," the NRC stated that, "[i]n fact, such reliance is not essential." 54 Fed. Reg. 27,866. The NRC acknowledged its "expectation that, under NWPA, a petition for review of the FEIS would need to have been filed roughly contemporaneously with DOE's submission of a license application to NRC," and that "judgment might have been entered within the three years envisaged for Commission." *Id.* But the NRC made it clear that "[w]hether or not this proves to be the case is not controlling," because the "standard for adoption does not rest upon collateral estoppel principles." *Id.*

In short, contrary to the representations Nevada makes in its petition, the NRC *did* conclude when it promulgated the FEIS adoption procedures in 1989 that Congress had through enactment of the NWPA meant to alter fundamentally the NRC's responsibilities under NEPA with respect to the licensing of a geologic repository.[3] Nevada may disagree with the NRC's interpretation of the NWPA, and it may dispute that the NRC's NEPA responsibilities were changed thereby, but the state had its chance to bring a judicial challenge to the Commission's

[3] *See, e.g.*, 54 Fed. Reg. 27,868 (agreeing with comments to the effect that the NRC's "essential responsibility under NWPA is to address radiological safety issues under the Atomic Energy Act," and that the "requirements of NEPA were substantively modified as they apply to the high-level nuclear waste program."); 53 Fed. Reg. 16,136 (explaining that, "[i]n light of the policies and procedures established by the [NWPA], the Commission regards the scope of its NEPA review to be narrowly constrained.").

position when the regulation was promulgated 16 years ago. Nevada's resort to the same arguments that it made during the rulemaking but then failed to pursue when those arguments were rejected provides no basis for the NRC to revise the regulation today. To the contrary, the NRC acted well within its discretion in promulgating that regulation, which is lawful under both NEPA and the NWPA.

Finally, Nevada's third argument why the adoption standard in 10 C.F.R. § 51.109(c) should be revised is that, allegedly, the standard "cannot be reconciled with important portions of the NWPA's legislative history." Petition at 4. Once again, the legislative history on which Nevada relies was expressly considered by the NRC during the rulemaking. These alleged "important portions" of the NWPA's legislative history consist of a couple of Senate floor statements to effect that the "NRC licensing process would include 'a detailed evaluation of the health and safety and environmental aspects of the proposed project,'" and that the Senate bill then under discussion "should 'preserve the integrity and full scope of the NRC licensing review and environmental analysis under the National Environmental Policy Act.'" *Id.*, *citing* 128 Cong. Rec. S4302 (April 29, 1982); 128 Cong. Rec. S15669 (Dec. 20, 1982).

The Senate floor statements that Nevada touts provide no support for the state's request that the regulation be revised. In the first place, when the NRC previously considered these very same snippets of the NWPA's legislative history during the rulemaking process, the Commission found the entire legislative history in the Senate, including those specific floor statements, to be "less illuminating" than that of the corresponding House bill, insofar as the Senate bill, in contrast to the House bill, "differ[ed] substantially from the final legislation." *See* 53 Fed. Reg. 16,137. Indeed, as the NRC recognized, House bill H.R.3809 was the origin of the particular provision in the NWPA that requires the NRC to adopt the DOE FEIS "to the extent

practicable," a provision that the report accompanying H.R.3809 explained as meaning that the DOE FEIS was "'to suffice regarding the issues addressed and not be duplicated by the Commission unless the Commission determines, in its discretion, that significant and substantial new information or new considerations render the Secretary's statement inadequate as a basis for the Commission's determinations.'" 53 Fed. Reg. 16,136-137, *quoting* H.R. Rep. 97-491, Part 1, 53-54.

Under the Senate bill in question, S.1662, the NRC would have had – in contrast to the NWPA as ultimately enacted – a "more substantive role with respect to implementation of NEPA." 53 Fed. Reg. 16,137. In particular, S.1662 contained "no direction to the Commission to adopt the DOE environmental impact statement," a critical difference that puts into context Senator Simpson's remark on April 29, 1982, cited by Nevada, that the NRC licensing process "would provide opportunities for a 'detailed evaluation of the health and safety *and environmental* aspects of the proposed project.'" *Id.*, *quoting* 128 Cong. Rec. S4302 (emphasis in original). As for the statement by Senator Mitchell on December 20, 1982, also cited by Nevada, that the "national nuclear waste policy should 'preserve the integrity and full scope of the NRC licensing review and environmental analysis under'" NEPA, the NRC aptly concluded that the "broad scope of his remarks leaves it of doubtful import in the context of geologic repositories alone." 53 Fed. Reg. 16,137, *quoting* 128 Cong. Rec. S15669.[4]

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[4] *See also* Memorandum from Martin G. Malsch, then NRC Deputy General Counsel, to NRC Chairman Palladino, *et al.*, (April 14, 1986), advising the Commission specifically with respect to potential NRC regulations to implement NEPA in connection with a geologic repository for high-level waste, LSN # NRC000006163, at 7 n.5 (dismissing the "floor remarks" by Senator Mitchell and others as "not useful legislative history," in that they were "contrary to the plain language of the Senate-passed bill which in section 114(f) provided specifically that 'compliance with the procedures and requirements of this Act [NWPA] shall be deemed

(continued...)

In any case, as the NRC has previously noted, the "remarks of a single legislator . . . are not controlling in analyzing legislative history." 53 Fed. Reg. 16,137, *citing Chrysler Corp. v. Brown*, 441 U.S. 281 (1979). Such flimsy evidence – which the NRC expressly considered, and properly discounted, back when it first promulgated 10 C.F.R. § 51.109 – provides no more basis to consider revision of that regulation today.

B. The NRC's Procedures for the Submission of Contentions Under 10 C.F.R. § 51.109(a)(2) Do Not Violate Either NEPA or the NWPA.

Nevada also alleges that the "special litigation procedures in 10 C.F.R. § 51.109(a)(2) are in violation of NEPA" insofar as "[s]ection 102(2)(C) of NEPA requires that an FEIS must be considered in the '*existing* agency review processes,' [emphasis added] not some different review process applicable only to NEPA," where "interested persons must satisfy additional pleading requirements that would otherwise not apply." Petition at 6, *citing Calvert Cliffs' Coordinating Comm*; 40 C.F.R. § 1505.1; *Aberdeen & Rockfish R.Co. v. SCRAP*, 422 U.S. 289, 320 (1975). This allegation proceeds from the same fatal defect that pervades Nevada's petition

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adequate considerations of need for the repository.'") That memorandum also contains, at 4-8, a lengthy recitation of the legislative history of NWPA § 114(f), and concludes with respect to it:

> Thus the useful legislative history of section 114(f) is confined essentially to two House committee reports and the House floor summary of the bill by Congressman Udall. If we eliminate language from these materials that merely restates or closely paraphrases the actual bill language, two types of statements still remain as useful elaborations of Congressional intent. First there is the statement in the House Interior Committee Report that adoption "to the extent practicable" means that the DOE statement is to be adopted by the Commission and to satisfy NRC's NEPA review obligations "unless the Commission determines, in its discretion, that significant and substantial new information or new considerations render the Secretary's statement inadequate as the basis for the Commission's deliberations." Then there is the summary of the bill used during House floor consideration and prepared by Congressman Udall which states that "the Commission will have to supplement any environmental impact statement [by DOE] with considerations of the public health and safety required under the Atomic Energy Act of 1954 . . . ."

Id. at 8.

generally: the state's failure to acknowledge that, as the NRC has perceived, the NWPA significantly channeled the NRC's responsibilities under NEPA with respect to the licensing of a geologic repository. *See* section I.A. above. Nevada identifies nothing on the face of the NWPA that would limit the NRC's discretion to adopt the "special litigation procedures" set forth at 10 C.F.R. § 51.109(a)(2), nor does Nevada argue that the NRC somehow abused its discretion in adopting the procedures it did.[5] In light of this, Nevada's arguments as to the type of procedures that the NRC is allegedly obligated to provide under NEPA, as if the Commission's NEPA responsibilities had not been altered by the NWPA in the context of the licensing of a geologic repository, are simply beside the point.

II. The Court in *NEI* Said Nothing that Warrants the NRC's Revising the Regulation.

Finally, Nevada asserts that 10 C.F.R. § 51.109 must be revised insofar as "any Commission interpretation" of that regulatory provision which would be "at odds with [NRC] counsel's representation at oral argument [in the *NEI* case] would be clearly unlawful." Petition at 5. The state continues that the "Commission itself has not formally adopted its counsel's and the Court's interpretation, and its current regulation is directly at odds with that interpretation." *Id.* at 5-6. Therefore, Nevada concludes, the "Commission must correct the regulation." *Id.* at 6.

This argument simply does not parse. As the court in *NEI* recognized, to the extent that Nevada's NEPA-based challenges had not been mooted by Congress's enactment of its siting Resolution, they were as yet unripe. *See NEI*, 373 F.3d at 1313 ("Nevada's substantive claims against the FEIS will not be fit for judicial review until the FEIS is used to support a concrete and final decision," and "[w]e do not yet know whether or to what extent NRC will adopt DOE's

[5] In any event, Nevada declined to seek judicial review of the NRC's "special litigation procedures," and to make such arguments, when those were first promulgated in 1989. The state offers no good reason why the NRC should revisit this portion of its regulation 16 years later.

FEIS in support of any decision to authorize construction or license the operation of a repository at Yucca."). Nothing in the NRC's regulations, however, deprives Nevada of its opportunity to mount a substantive challenge to those portions of the DOE FEIS for which review by the NRC is necessary or appropriate in light of the statutory structure of the NWPA.

While Nevada may not relish the thought that, in undertaking such a challenge, it will be required to provide affidavits setting forth the factual and technical bases for any claim that it is not "practicable" for the NRC to adopt the DOE FEIS, the state has failed to show that this higher threshold for contention admissibility runs afoul of either the NWPA or NEPA, or that it deprives the state of any legally-cognizable right to be heard. To the contrary, as was explained previously – and as the NRC itself recognized when it first adopted the provisions of the 10 C.F.R. § 51.109 – Congress's intent in enacting NWPA § 114(f) was to focus the NRC's attention on radiological health and safety issues in its licensing proceedings and to preclude its engaging in a lengthy, open-ended inquiry into NEPA issues related to the DOE FEIS.

Certainly, nothing in the *NEI* decision supports Nevada's argument that the regulation must be revised. Rather, the court in *NEI* observed that, if and when Nevada's NEPA-based challenges (if any) might become ripe, there was "no reason to assume that" the provisions of 10 C.F.R. § 51.109, as they currently read and as interpreted by the NRC, would "bar consideration of Nevada's substantive claims in the relevant NRC administrative proceedings." *See NEI*, 373 F.3d at 1314. Nowhere did the court address the scope of any such claims by Nevada in NRC proceedings nor prescribe how the NRC was to apply the provisions of 10 C.F.R. § 51.109 in conducting those proceedings.

Indeed, it strains credulity to think that the U.S. Court of Appeals would rule that, while Congress mandated that the NRC adopt the DOE FEIS to the extent practicable, it is legally

impermissible for the NRC to require Nevada to demonstrate with specificity bearing on significance why the NRC should not adopt the FEIS. Nothing in the court's decision supports Nevada's claim that the NRC must now revise the provisions of 10 C.F.R. § 51.109 so as to allow the state to engage in the very administrative proceedings that Congress sought to minimize to the extent practicable, thereby diverting considerable resources of the Commission and the parties from the overarching task of evaluating the safety case for the repository at Yucca Mountain.

As for the statements of counsel at or following oral argument upon which Nevada now relies, such statements cannot displace the plain meaning of a duly adopted regulation (even if the substance of the statements cited by Nevada might have that effect, which DOE disputes). If, on the other hand, Nevada is arguing that the statements made by counsel to the court in the *NEI* case regarding the state's opportunity to challenge the DOE FEIS in the NRC licensing proceeding have been transmuted into a finding by the court either that the procedures set forth at 10 C.F.R. § 51.109 are inconsistent with NEPA or the NWPA, or that the NRC's interpretation of its own regulation is somehow impermissible, such an argument is obviously misplaced. While the court took note of the provisions of 10 C.F.R. § 51.109, it is indisputable that neither the lawfulness of the regulation nor the validity of the NRC's interpretation of those provisions was before the court in *NEI*.[6] Accordingly, no matter how Nevada might seek to characterize counsel's statements, or the court's reference to those statements, nothing in *NEI* can plausibly be construed as requiring the NRC to revise 10 C.F.R. § 51.109 as Nevada now demands.

[6] Again, the Hobbs Act requires that any legal challenge to 10 C.F.R. § 51.109 had to have been brought within 60 days of the regulation's promulgation in July 1989.

CONCLUSION

For the reasons given above, Nevada's petition for rulemaking should be denied.

From: "Harlow, David" <dharlow@hunton.com>
To: <SECY@nrc.gov>
Date: Wed, Oct 26, 2005 4:27 PM
Subject: Comments on Petition for Rulemaking -- Docket No. PRM-51-9; 70 Fed. Reg. 47,148 (Aug. 12, 2005)

Attached for filing in the above-captioned docket are the comments of the U.S. Department of Energy on the State of Nevada's Petition for Rulemaking.

Please do not hesitate to call me at (202) 955-1568 if you should have any difficulty retrieving this attachment.

Thank you.

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