

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

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Petitioner,)	
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U.S. NUCLEAR REGULATORY COMMISSION)	
and the UNITED STATES OF AMERICA,)	Case No. <u>05-1350</u>
)	
Respondents.)	
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**PETITIONER'S OPPOSITION TO
RESPONDENT'S MOTION TO DISMISS**

On October 24, 2005, Respondent U.S. Nuclear Regulatory Commission ("NRC") moved to dismiss the State of Nevada's petition for review for lack of constitutional standing.

As this Court knows, the federal effort to develop a repository for the permanent disposal of nuclear reactor spent fuel and other high level radioactive waste at Yucca Mountain, Nevada is an unprecedented and massive undertaking. *See NEI, Inc. v. EPA*, 373 F.3d 1251, 1258-61 (D.C. Cir. 2004). As explained below, NRC's motion to dismiss in this Yucca Mountain related case should be denied because it completely ignores both (1) well-established precedent regarding standing in cases involving injuries to procedural rights and (2) the concrete injuries Nevada will suffer if an unfair and biased NRC licensing adjudication leads to the licensing of an unsafe repository that pollutes Nevada's ground water and damages Nevada's economy. Even now, in the pre-licensing stage, Nevada is being injured by the withdrawal of public lands in a corridor in Nevada

over three hundred miles long that the federal government wants to use for transporting reactor spent fuel and other high level radioactive waste to Yucca Mountain, assuming it is licensed by NRC.

NEVADA'S PETITION FOR REVIEW

Nevada's petition for review challenges NRC's refusal to amend its so-called "waste confidence" rule to eliminate a prejudgment of the merits of the Department of Energy's ("DOE's") application to NRC for a license to construct and operate a geologic repository at the Yucca Mountain site in southern Nevada.¹ The prejudgment comes about because the waste confidence rule, as it now stands, rests on a specific NRC finding of fact that a geologic repository will be available in the United States to receive nuclear reactor spent fuel by the year 2025, 10 C.F.R. § 51.23(a) (2005), and this schedule now requires that DOE's Yucca Mountain application to NRC be granted. This finding of fact that a repository will be available by the year 2025 serves as the essential justification for NRC rules in 10 C.F.R. § 51.23(b) (2005) (and elsewhere) that prohibit any consideration under NEPA of the environmental impacts of long-term or indefinite storage of spent reactor fuel at licensed reactor sites or at licensed independent spent fuel storage facilities.

The waste confidence rule is not included in 10 C.F.R. Part 63, which contains most of NRC's substantive rules for the licensing of Yucca Mountain. It was never Nevada's concern that the 2025 availability finding would be overtly cited at the beginning of the licensing proceeding for the proposition that the license application must be granted. Rather, Nevada's concern is that the 2025 finding will have a subtle,

¹ The NRC application is now overdue. By law, the application was to be filed by October 21, 2002, ninety days after the President's recommendation of Yucca Mountain came into effect. 42 U.S.C. §10134(b)(2005). DOE is still preparing the application.

pervasive and corrosive effect on the entire proceeding without even being cited. Nevada insists on the right to have the NRC judge the Yucca application on its merits, without the NRC being influenced in any way by an arbitrary need to meet a 2025 schedule for availability of a repository that can only be Yucca Mountain.

Nevada became even more alarmed when NRC refused to adopt what Nevada thought was an effective and easy solution: commence a rulemaking proceeding before the Yucca application is filed to eliminate the 2025 repository availability date so that there would be an extended NRC schedule that would allow time to find, develop, and license another repository if the Yucca application failed. Nevada believed the 2025 date could be eliminated based on previous analyses by NRC (and others) indicating that nuclear reactor spent fuel could be stored safely at reactor and separate spent fuel storage sites for many years after 2025, obviating the need for a repository to be available by this date.

In sum, Nevada's petition for review presents the issue whether the 2025 finding of repository availability in the waste confidence rule must be amended to avoid a prejudgment of the Yucca Mountain application and a consequent deprivation of Nevada's right to a neutral agency decision-maker in the formal licensing adjudication.

NRC'S STANDING ARGUMENT

NRC states that, "[p]resumably, the injury in fact on which Nevada must rely for standing in the present case is the continuation of this supposed 'bias' resulting from the Commission's refusal to amend the waste confidence rule." NRC Motion to Dismiss, at 3. NRC recognizes that Nevada is opposed to the Yucca Mountain project and that Nevada will be a party in the Yucca Mountain licensing proceeding afflicted by the

alleged bias. *Id.* at 3, n. 2. But NRC states that Nevada’s injury is “conjectural,” because it is “grossly misconstruing the waste confidence rule.” *Id.* at 4. In a similar vein, NRC argues that Nevada’s belief that the waste confidence rule will prejudice the Yucca Mountain licensing proceeding “is flatly contradicted in the decision Nevada seeks to have reviewed in this Court” because NRC will re-evaluate the 2025 availability date if the Yucca Mountain license application is denied. *Id.* at 5-6. NRC concludes from this that Nevada’s injury is thus only conjectural and hypothetical. *Id.* at 6.

ARGUMENT

A. NRC Fails to Account for Precedent on Procedural Injury

As NRC noted, Nevada will be a party in NRC’s Yucca Mountain licensing proceeding. 10 C.F.R. § 2.309(d)(2)(iii). This proceeding will be conducted by NRC as a formal adjudication. 10 C.F.R. § 2.700. Any prejudgment by NRC of the Yucca Mountain application, before the adjudicatory hearing even begins, will violate Nevada’s right to a neutral decision-maker in this adjudication. The right to a neutral decision-maker is a procedural one, and thus the legal right at issue in this case is a procedural right.

A violation of a procedural right does not automatically confer standing. Standing in a procedural rights case depends on whether the procedural rights in question (here the right to a neutral decision-maker) “are designed to protect some threatened concrete interest of [petitioner] that is the ultimate basis of his standing.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n. 8 (1992). “[W]hile we relax the imminence and redressability requirements, the procedural rights plaintiff must still satisfy the general requirement of the constitutional standards of particularized injury and

causation.” *Center for Law and Education v. Department of Education*, 396 F.3d 1152, 1159 (D.C. Cir. 2005). However, importantly, “this Court assumes the causal relationship between the procedural defect and the final agency action,” leaving the irreducible requirement that “[a]ppellants must still demonstrate a causal relationship *between the final agency action and the alleged injuries.*” *Id.* at 1159, 1160 (emphasis added).

For example, in a NEPA case (NEPA is essentially a procedural statute), a plaintiff must show that “the particularized injury that the plaintiff is suffering, or is likely to suffer, is fairly traceable *to the agency action that implicated the need for an EIS.*” *Florida Audubon Society v. Bentsen*, 94 F.3d 658, 669 (D.C. Cir. 1996) (*en banc*) (emphasis added). *See also Wyoming Outdoor Council v. U.S. Forest Service*, 165 F. 3d 43, 51 (D.C. Cir. 1999) (“In cases involving alleged procedural errors, the plaintiff must show that *the government act performed without the procedure* will cause a distinct risk to a particularized interest of the plaintiff.”) (emphasis added; internal quotation marks and citations omitted); *Shays v. Federal Election Commission*, 414 F.3d 76, 91 (D.C. Cir. 2005); *Electric Power Supply Ass’n v. FERC*, 391 F.3d 1255, 1262 (D.C. Cir. 2004).

Just like the plaintiff in *Center for Law and Education*, NRC “appears to misunderstand the difference between the ‘procedural right’ and the ‘concrete interest’ in a procedural rights case.” 396 F.3d at 1159. In the instant case, the constitutional standing inquiry cannot focus and then simply stop at the procedural injury itself, as NRC assumes. Instead, the standing inquiry properly focuses on (1) whether Nevada will likely suffer a concrete injury to its interests fairly traceable to the underlying agency action in which the prejudgment will allegedly occur (here, the licensing and consequent

construction and operation of the Yucca Mountain geologic repository), and (2) whether the right to a neutral decision-maker is a right that is designed to assist Nevada in vindicating those interests.

As the attached affidavit of Robert R. Loux shows, Nevada will suffer a concrete injury from the underlying agency action in this case.² Nevada is of course interested in protecting the citizens and environment of the State from all of the radioactive and other hazards arising from Yucca Mountain. More narrowly, in terms of clearly cognizable legal harm, the Loux affidavit makes clear that the licensing, construction and operation of the Yucca Mountain repository will damage Nevada's governmental interests in public projects and tax revenues and, more importantly, in allocating and protecting the ground waters of the State from radioactive contamination. Even now, in the pre-licensing stage, Nevada is being injured by the withdrawal of public lands in a corridor in Nevada over three hundred miles long that the federal government wants to use for transporting reactor spent fuel and other high level radioactive waste to Yucca Mountain, assuming it is licensed by NRC. This withdrawal prevents Nevada from using the corridor for public roads, bridges, and maintenance, or for other public infrastructure projects.

Moreover, there can be no question that the due process right to a neutral decision-maker is intended to benefit Nevada (and other parties) by allowing it to vindicate those interests through participation as a party in a full and fair adjudicatory hearing before NRC. Section 189a of the Atomic Energy Act of 1954, as amended, 42 U.S.C. §2239(a).

² NRC's rules regarding petitions for rulemaking have no standing requirement. 10 C.F.R. § 2.802. Therefore, the Loux affidavit was not submitted to NRC as part of Nevada's petition.

**B. NRC's Argument Conflicts With the Court's Duty to
Determine Jurisdiction before Reaching the Merits**

NRC states that it “would need to re-evaluate the 2025 [repository] availability date” if DOE’s Yucca Mountain license application is denied, NRC Motion to Dismiss at 6, thereby *conceding* Nevada’s essential point that the waste confidence finding of repository availability by 2025 presumes that the Yucca Mountain license application will be granted. NRC argues that its stated willingness to entertain Nevada’s arguments against Yucca Mountain in the licensing proceeding, and its willingness to reopen the waste confidence finding after (but not before) the Yucca Mountain licensing proceeding is over, shows there is no prejudgment and that Nevada’s injury is conjectural and hypothetical. NRC Motion to Dismiss at 5-6.

In short, NRC’s legal theory seems to be that no one’s rights are violated by an egregious prejudgment of adjudicatory facts so long as the decision-maker simply promises not to dismiss out of hand all contrary arguments in the proceeding and, if necessary, to retract the rules and statements at issue if the complainant ultimately manages to prevail. This completely ignores the subtle and pervasive effect of prejudgment and would make it impossible to disqualify even the most biased tribunal. Once the license has been granted, the bias cannot be retroactively undone. However, if we put aside the problems with NRC’s argument and instead focus on its essential nature, what NRC is arguing is that Nevada will not be injured because the NRC has not prejudged the case. This “standing” argument goes to the heart of the *merits* of this case. NRC is simply claiming the Nevada has no standing because the prejudice it alleges will not occur.

In a very recent case, *Commonwealth of Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005), this Court confronted a situation where arguments about standing overlapped with the merits, with no certain resolution. The essential problem is how to heed the Supreme Court's instruction in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), to resolve Article III standing questions before addressing the merits, where the standing and merits questions overlap and it is not possible to resolve one question before the other. As this Court noted in *Commonwealth of Massachusetts v. EPA*, the Supreme Court in *Steel Co.* appears to have presumed that the two questions would never completely overlap in Article III standing cases, although they might overlap in statutory standing cases.

This dilemma illustrates well the wisdom of the Supreme Court's (and this Court's) approach to standing in cases of alleged procedural injury, discussed in A. *supra*, which avoids the dilemma entirely. NRC wrongly presumes that, for standing purposes, the only legally cognizable harm that can befall Nevada in this case is the "continuation of this supposed 'bias'" from the waste confidence rule. NRC Motion to Dismiss at 3. But there can never be standing separate from the merits in a purely procedural rights case if the petitioner is limited to demonstrating that it will suffer an injury to its procedural rights traceable to the alleged procedural violation. There obviously can be no demonstration of an injury to one's procedural rights without a finding of a procedural violation, but such a finding involves the merits of the case. The proper standing inquiry avoids this circle by not asking whether the petitioner will likely suffer some *procedural* harm or injury that is fairly traceable *to the procedural violation*. Rather, the standing question is whether the procedural right in question was designed to

protect the petitioner's interests and whether the petitioner will likely suffer some *substantive* harm or injury to its interests that is fairly traceable to a possible *outcome* in the underlying proceeding where the procedures will apply. Here, the outcome by which injury must be measured is the granting of a license for the Yucca Mountain repository. As explained above, Nevada will clearly suffer a particularized and concrete injury if the Yucca Mountain repository is licensed.

CONCLUSION

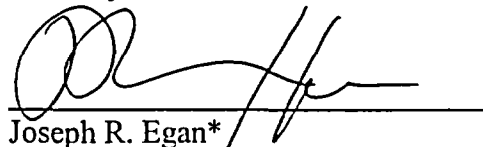
NRC's Motion to Dismiss should be denied.

Respectfully submitted,

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Attorneys for Petitioner

A handwritten signature in black ink, appearing to be 'J. Egan', written over a horizontal line.

Joseph R. Egan*
Counsel of Record

*Member, D.C. Circuit Bar
Dated: November 7, 2005

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STATE OF NEVADA)	
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v.)	
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U.S. NUCLEAR REGULATORY)	
COMMISSION AND THE UNITED)	
STATES OF AMERICA,)	
)	
Respondents.)	

No. 05-1350

AFFIDAVIT OF ROBERT R. LOUX

I, ROBERT R. LOUX, do hereby swear that the following matters are true and correct based on my personal knowledge:

1. I am the Executive Director of the Nevada Agency for Nuclear Projects ("Agency"), the Agency vested by state law to carry out all of the duties and responsibilities imposed on the State of Nevada ("State"), by the Nuclear Waste Policy Act ("NWPA"), as amended. 42 U.S.C. 10101, *et seq.* I have been the Executive Director of the Agency since 1983.
2. The primary responsibilities of the Agency are to oversee and evaluate the U.S. Department of Energy's ("DOE's") programs to develop an application to the U.S. Nuclear Regulatory Commission ("NRC") to construct and operate a repository at Yucca Mountain in southern Nevada for the disposal of spent nuclear reactor fuel and other high-level radioactive waste and to represent the State's interests before the NRC. My position also involves assessing the impacts of a repository at Yucca mountain and regularly tracking and evaluating the DOE and

NRC Yucca Mountain efforts. That is the basis of my personal knowledge of the matters stated in this Affidavit.

3. If constructed, the Yucca Mountain repository would rank among the largest and most irreversible public works projects in history. The expected cost of the project (which government sources currently estimate at over \$60 billion), the enormous risk to the State's environment and economy, and the potential risks to public health for many thousands of years make this project unique among those presently proposed for the State.

4. The construction and operation of a geologic repository at Yucca Mountain, Nevada for the disposal of nuclear reactor spent fuel and other high-level radioactive wastes will require the withdrawal of ground water. Moreover, the disposal of these wastes in Yucca Mountain will inevitably contaminate the ground water with radioactive materials. This directly harms Nevada's sovereign interests because, under Nevada law, all ground waters are owned by the people of Nevada and administered by the State. Nevada Revised Statutes 533.025.

5. Finally, even in the pre-licensing stage, DOE's efforts to advance its Yucca Mountain repository project are causing other concrete and immediate injuries to Nevada's governmental interests and to the interests of its citizens. Public lands in a corridor in Nevada over three hundred miles long have been withdrawn so that DOE will eventually be able to transport spent nuclear fuel and other high level radioactive waste to Yucca Mountain. See 70 Fed. Reg. 51029, August 29, 2005. As a result, these lands cannot now be used for public roads, bridges, and maintenance, other public infrastructure projects, or private ranching and farming.

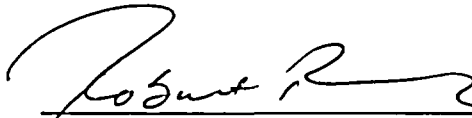
6. (a) The greatest threat to Nevada's economy and way of life from the repository stems from the intense negative perception and stigma associated by the public with a high-level radioactive waste repository, combined with the particular vulnerability of the Nevada

economy to changes in its public image, due to its reliance on the tourism and gaming industries;

(b) Each one-percent decline in spending in Clark County could produce an annual loss of 7,000 jobs and \$200 million in income (a conservative assumption in comparison to analogous cases);

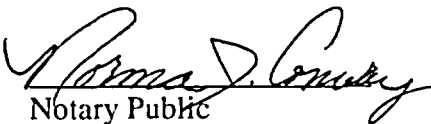
(c) Should just one hotel/casino decide not to locate in Nevada in the future, the immediate impact to Southern Nevada could be upwards of 14,200 jobs and almost \$500 million lost to the local economy;

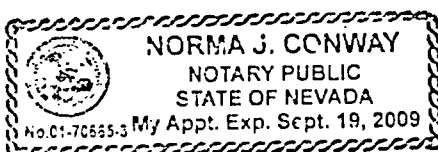
(d) The fiscal impact upon Nevada's state agencies, in year one of a decades-long Yucca Mountain project, has been calculated conservatively at \$486,485,229. (*Fiscal Impacts to the State of Nevada* [August 2000] by Urban Environmental Research, L.L.C.).


ROBERT R. LOUX

STATE OF NEVADA)
) S.S.
COUNTY OF)

SUBSCRIBED AND SWORN to before me, a Notary Public for the State of Nevada,
appeared ROBERT R. LOUX and set his hand to the above document on this 4th day of
NOVEMBER, 2005.


Notary Public



CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petitioner's Opposition To Respondent's Motion To Dismiss was served this 7th day of November, 2005 via U.S. First Class Mail, on the following individuals:

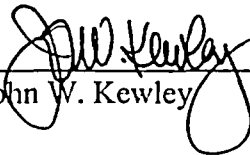
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