

No. 05-1350

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

STATE OF NEVADA,

Petitioner,

v.

U.S. NUCLEAR REGULATORY COMMISSION
and the UNITED STATES OF AMERICA,

Respondents.

ON PETITION TO REVIEW AN ORDER OF THE
U.S. NUCLEAR REGULATORY COMMISSION

FINAL BRIEF FOR THE RESPONDENTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES.

1. **Parties:** The parties to this case are the State of Nevada as petitioner, and the United States Nuclear Regulatory Commission (NRC) and the United States of America as respondents.

There are no intervenors or *amici*.

2. **Ruling Under Review:** The petition challenges a decision by the NRC to deny Nevada's petition asking the NRC to amend the agency's "Waste Confidence Rule," 10 C.F.R. 51.23 (RA-2). The NRC's denial of Nevada's petition was published in the Federal Register at 70 Fed. Reg. 48329 (Aug. 17, 2005) (JA 93).

3. **Related Cases:** This case has not been before this Court or any other Court. There are no related cases.

Respectfully submitted,



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June 13, 2006

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*Authorities upon which respondents chiefly rely are marked with asterisks.

GLOSSARY

AEA	Atomic Energy Act
DOE	U.S. Department of Energy
ISFSI	Independent Spent Fuel Storage Installation
JA	Joint Appendix
NEPA	National Environmental Policy Act
NRC	U.S. Nuclear Regulatory Commission
NWPA	Nuclear Waste Policy Act
RA	Regulatory Addendum

JURISDICTION

Subject Matter Jurisdiction. The Court has jurisdiction under the Hobbs Act, 28 U.S.C. 2341-51, to review the Nuclear Regulatory Commission's denial of Nevada's petition for rulemaking. *See, e.g., Bullcreek v. NRC*, 359 F.3d 536 (D.C. Cir. 2004). Under 28 U.S.C. 2342, the courts of appeals have exclusive jurisdiction over agency actions made reviewable by section 189(b) of the Atomic Energy Act (AEA), 42 U.S.C. 2239(b), and section 189(b) in turn makes agency actions specified in section 189(a) of the AEA reviewable. These actions include rulemaking. The Hobbs Act allows 60 days for the filing of petitions for review. *See* 28 U.S.C. 2344. Nevada's petition was timely.

Standing. We argued in a motion dated October 24, 2005, that Nevada's petition for review should be dismissed for lack of standing. In accordance with the Court's order of January 10, 2006, we reiterate our standing arguments in this brief (Argument, Point I, *infra*).

ISSUES PRESENTED

1. Whether Nevada has standing to challenge the NRC's denial of Nevada's petition to amend the agency's 1990 "Waste Confidence Rule," where the harm Nevada relies on for standing is an unsupported assertion that this rule will bias the agency in favor of licensing the Yucca Mountain reactor spent fuel repository (which Nevada opposes).

2. Whether the NRC acted outside its discretion when it denied Nevada's petition to amend its 1990 Waste Confidence Rule as Nevada had requested, where the agency found that there had been no significant change in fact or law compelling commitment of scarce agency resources to the comprehensive rulemaking that Nevada's proposed amendment would entail.

STATEMENT OF THE CASE

In 1984 the NRC first issued its so-called “Waste Confidence Rule.” *See* 10 C.F.R. 51.23 (RA-2). The rule addressed a then-controversial (and much litigated) question under the National Environmental Policy Act (NEPA) -- to what extent must the NRC, when licensing new nuclear power reactors, analyze the environmental effects of long-term spent fuel storage beyond license expiration. The rule determined generically that (1) spent fuel can be stored safely, and without significant environmental impacts, for at least 30 years beyond the operating life of a reactor, and (2) there is reasonable assurance that there would be at least one permanent geologic repository for spent fuel disposal in place by 2009. A later rulemaking extended the expected date for a repository to 2025. Over the years, the NRC has twice revisited the Waste Confidence Rule, modifying it in 1990 and reaffirming it in 1999.

The current lawsuit involves Nevada’s petition for rulemaking, filed last year, asking the NRC to revoke the Waste Confidence Rule’s prediction that a geologic repository would be available by 2025. Nevada suggested replacing the NRC’s current rule with Nevada’s own proposal. Nevada’s proposal would leave the timing of a permanent geologic repository indeterminate and declare simply that a repository would be ready before storage causes significant safety or environmental impacts. Nevada urged the rule change, it said, because the NRC’s 2025 prediction would prove accurate only if the NRC were to approve the only repository site now under consideration, the one at Yucca Mountain, Nevada -- a site Nevada opposes. *See generally Nuclear Energy Institute v. EPA*, 373 F.3d 1251 (D.C. Cir. 2004). Leaving the NRC’s 2025 prediction intact, Nevada maintained, would infect the NRC’s Yucca Mountain licensing proceeding with unacceptable agency bias.

The NRC turned down Nevada's rulemaking petition. *See* 70 Fed. Reg. 48329 (Aug. 17, 2005) (JA 93). The NRC said, among other things, that Nevada had "not shown any significant and pertinent unexpected event that raises substantial doubt about the continuing validity of the 1990 Waste Confidence findings," *id.* at 48333 (JA 97), that the agency decidedly was not biased and would license the proposed Yucca Mountain repository only if it met all safety and environmental standards, and that the NRC remained free to alter its Waste Confidence Rule if necessary but saw no reason to devote scarce agency time and resources to a new, and potentially complex, waste confidence rulemaking now.

Nevada then filed this petition for review. We moved to dismiss it for lack of standing, arguing that Nevada had shown nothing in the way of harm except a bare, implausible claim of agency bias. A motions panel of this Court referred our motion to the merits panel and directed the parties to address the standing question in their briefs.

STATEMENT OF FACTS

The Waste Confidence Rule. The NRC's Waste Confidence Rule, 10 C.F.R. 51.23 (RA-2), consists of two determinations. The first finds that the spent fuel generated in a nuclear power reactor can be stored safely for at least 30 years beyond the end of the operating license for that nuclear power reactor:

The Commission has made a generic determination that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond the licensed life for operation ... of that reactor at its spent fuel storage basin or at either onsite or offsite independent spent fuel storage installations.

10 C.F.R. 51.23(a) (RA-2). The second is that, before the 30 years have passed, and "within the first quarter of the twenty-first century," or by 2025, there will be a repository for permanent disposal of the stored fuel:

Further, the Commission believes there is reasonable assurance that at least one mined geologic repository will be available within the first quarter of the twenty-first century, and sufficient repository capacity will be available within 30 years beyond the licensed life for operation of any reactor to dispose of the ... spent fuel originating in such reactor

Id.

These two waste confidence determinations, together with the environmental analyses that underlie them, apply to reactor licensing proceedings and proceedings to license independent spent fuel storage installations (ISFSIs). *See* 10 C.F.R. 51.23 (RA-2). “Waste confidence” eliminates the need to address under NEPA the environmental impacts of the storage of spent fuel beyond the operating life of the reactor:

Accordingly, ... no discussion of any environmental impact of spent fuel storage in reactor facility storage pools or independent spent fuel storage installations (ISFSI) for the period following the term of the reactor operating license or amendment or initial ISFSI license or amendment for which application is made, is required in any environmental report, ... impact statement, ... assessment or other analysis prepared in connection with the issuance or amendment of [these licenses]

10 C.F.R. 51.23(b) (RA-2).

The rule grew out of one of this Court’s cases, *Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979), which agreed with the Commission that impacts of extended on-site storage of spent fuel need not be considered in reactor licensing proceedings unless such storage was reasonably foreseeable and not merely a theoretical possibility. This Court remanded the case to the Commission to determine whether there was “reasonable assurance that an off-site storage solution will be available by the years 2007-2009, the expiration of the plants’ operating licenses, and if not, whether there is reasonable assurance that the fuel can be stored safely at the sites beyond those dates.” *Id.* at 419. The Court noted that “the breadth of the questions involved and the fact that the ultimate determination can never rise above a prediction suggest that the

determination may be a kind of legislative judgment for which rulemaking would suffice.” *Id.* at 417.

The NRC first issued its Waste Confidence Rule in 1984. *See* 49 Fed. Reg. 34688 (August 31, 1984) (JA 8). The 1984 rule looked to having a repository by 2007-09, the date the *Minnesota* decision had mentioned. The NRC said at the time, in the underlying Waste Confidence Decision itself,¹ 49 Fed. Reg. 34658 (August 31, 1984) (JA 5), that predicting when a repository would be available would necessarily require review later in light of significant and pertinent events. *Id.* at 34660 (JA 7). The first such review was completed in 1990, when the NRC promulgated the current text of section 51.23 (RA-2), which moved the predicted date of repository availability out to 2025. *See* 55 Fed. Reg. 38472 (September 18, 1990) (JA 9).

In its 1990 waste confidence review, the Commission indicated that it expected that by the year 2000 the Department of Energy (DOE) would make the statutorily-required decision whether Yucca Mountain was a suitable site for an NRC-licensed permanent waste repository, *id.* at 38477 (JA 12), and that if DOE decided it was not, there would still be “25 years for the attainment of repository operations at another site.” *Id.* at 38495 (JA 16). Twenty-five years was DOE’s estimate of the time it would take to make another repository available if Yucca Mountain

¹The “Waste Confidence Decision” was the result of the rulemaking conducted partially in response to *Minnesota*. In its Decision, the Commission concluded (1) that safe disposal of spent fuel in a geologic repository was technically feasible, (2) that such a repository would be available by 2007-09, (3) that spent fuel would be managed safely until the repository was available, (4) that the fuel could be stored safely for at least 30 years beyond the expiration of any reactor’s operating license, and (5) that independent onsite or offsite spent fuel storage would be made available if needed. 49 Fed. Reg. at 34659-60 (JA 6-7). The second and fourth findings were incorporated into the Waste Confidence Rule, 10 C.F.R. 51.23 (RA-2), where they served as the basis for the conclusion, stated in section 51.23(b) (RA-2), that it was not necessary to analyze under NEPA the environmental impacts of spent fuel storage beyond the operating life of a reactor.

were found unsuitable. *Id.* at 38494 (JA 15). The Commission calculated the 2025 date on the basis of the expected date for DOE's site-suitability finding.

Nevada participated in the 1990 rulemaking. It did not argue then, as it does in this lawsuit, that the NRC's 2025 prediction date in the rule would inject agency "bias" into any licensing proceeding on Yucca Mountain, but Nevada did argue for longer times in the rule. The NRC had concluded that waste could be safely stored on site for at least 100 years -- forty years of operation under the initial license, 30 more years under a renewed license, and at least 30 more years after the license had expired. In this 100 years, the agency imagined that some of the storage would be in pools and some in dry casks. *See id.* at 38472 (JA 9). Nevada, however, urged the agency to make a finding that spent fuel could be stored in dry casks alone for at least 100 years. *See id.* The Commission declined to make such a finding. "Although the Commission does not dispute the statement that dry spent fuel storage is safe and environmentally acceptable for a period of 100 years, the Commission does not find it necessary to make that specific finding in this proceeding." *Id.* at 38472-3 (JA 9-10).

In 1999, the agency considered whether to review the rule again and concluded that a comprehensive evaluation of the Waste Confidence Decision and Rule was not necessary at that time, that "experience and developments since 1990 confirm the Commission's 1990 Waste Confidence findings." 64 Fed. Reg. 68005 (Dec. 6, 1999) (JA 47). Between 1990 and 1999, DOE was nearing completion of its program for characterizing Yucca Mountain as a potential repository. DOE had published a viability assessment and a draft environmental impact statement, and it expected to make the statutorily required recommendation regarding suitability by 2001 and to file an application in 2002. *See id.* at 68006 (JA 48). Also, the Commission itself had issued proposed rules that contained standards that the Yucca Mountain site would

have to meet. *See id.* The Commission concluded that there had been “substantial progress toward consideration and possible licensing of a repository.” *Id.* Also, between 1990 and 1999 there had been “no major shifts in national policy, no major unexpected institutional developments, no unexpected technical information” that would warrant a detailed reevaluation of the decision and rule. *Id.* at 68007 (JA 49).

In early 2002, about a year later than the Commission had expected in 1999, DOE recommended the Yucca Mountain site for the development of a repository (JA 50), thereby setting in motion the approval process set forth in sections 114-16 of the Nuclear Waste Policy Act (NWP). *See especially* 42 U.S.C. 10134(a)(1)-(2), 10135(b), and 10136(b)(2). The President then recommended the site to Congress (JA 54); Nevada, exercising authority given it by section 116(b) of the NWP, 42 U.S.C. 10136(b), submitted a notice of disapproval of the site recommendation; and Congress responded by holding hearings and ultimately passing a joint resolution approving the development of a repository at Yucca Mountain.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That there hereby is approved the site at Yucca Mountain, Nevada, for a repository, with respect to which a notice of disapproval was submitted by the Governor of the State of Nevada on April 8, 2002.

The President signed the resolution on July 23, 2002. *See* Pub. L. No. 107-200, codified at 42 U.S.C. 10135 Note (Supp. IV 2004). *See Nuclear Energy Institute v. EPA*, 373 F.3d at 1260.

Nevada’s Petition for Rulemaking. On March 1, 2005, Nevada filed a petition with the NRC asking the agency to institute a rulemaking to revise the agency’s Waste Confidence Rule. JA 75. Nevada proposed language for 10 C.F.R. 51.23(a) (RA-2) that would retain a “waste confidence” finding but would not include a definite prediction of when a waste repository would be available:

The Commission has made a generic determination that there is reasonable assurance all licensed reactor spent fuel will be removed from storage sites to some acceptable disposal site well before storage causes any significant safety or environmental impacts.

Rulemaking Petition at 14 (JA 88). As Nevada has made clear in its pleadings before this Court, Nevada believes that spent nuclear fuel can be stored onsite for several hundred years. *See* Brief at 9. Nevada thus sees no need for deadlines or end dates for storage. Nevada wants the NRC to adopt such language so that the fate of Yucca Mountain can be “decoupled” from the fate of nuclear power, *id.*, that is, in Nevada’s view, so that the licensing of plants can continue even if the NRC denies a license for Yucca Mountain. Nevada’s rulemaking petition pointed in particular to the Waste Confidence Rule’s prediction that a repository would be available by 2025. *See* Rulemaking Petition at 7-11 (JA 81-85). Nevada’s petition asserted that the 2025 prediction would infect the NRC’s Yucca Mountain licensing proceeding with unacceptable “prejudgment.” *See id.* at 10 (JA 84).

The NRC’s Rulemaking Decision. On August 17, 2005, the NRC denied Nevada’s rulemaking petition. *See* 70 Fed. Reg. 48329 (JA 93). In its petition, Nevada had argued that two pieces of information constituted “significant and pertinent unexpected events” that should trigger a review of the Waste Confidence Rule. First, the NRC’s determination that a repository would be available by 2025 had been based, according to Nevada, on the “express finding” that the “acceptability” of Yucca Mountain would be decided by the year 2000, but now it was known that the acceptability of Yucca Mountain would not be decided before 2010 at the earliest. Second, the NRC had assumed, according to Nevada, that there would be 25 years between a finding of unacceptability and the availability of a repository at a different site, but now it was clear that if Yucca Mountain were found unacceptable in 2010, a new repository would not be available until at least 2035. *See* Rulemaking Petition at 7-8 (JA 81-82).

In denying Nevada's petition, the NRC explained that its 2025 date had not assumed a finding of "acceptability" -- in other words, it had not assumed a favorable licensing decision by the NRC -- by 2000; nor had the NRC assumed 25 years between a finding of unacceptability of Yucca Mountain and the availability of a repository at another site; rather, the NRC said that it merely had expected DOE to decide on site "suitability" by "about" 2000, and had assumed 25 years between a DOE finding of *unsuitability* and the availability of a repository elsewhere. *See* 70 Fed. Reg. at 48332-33 (JA 96-97), *citing* 55 Fed. Reg. at 38477 (JA 12) and 38494-95 (JA 15-16). As noted above, the finding of "suitability" triggers the elaborate process that, years later, ends in a licensing determination by the NRC. The NRC pointed out that, in fact, DOE made its "suitability" determination in early 2002, thus substantially meeting the NRC's expectation that DOE would do so in "about" 2000. *See* 70 Fed. Reg. at 48332 (JA 96).

The NRC said that, in 1990, when it made its 2025 prediction, the agency could not have been thinking that Yucca Mountain's ultimate "acceptability" would be determined by 2000, because in 1990 DOE's application wasn't expected until 2001. *See id.* at 48333 (JA 97). An unfavorable decision on the application would not have come for several years, and thus another site necessarily would not have become available until after 2025. *Id.*

Moreover, the Commission doubted that the agency could choose any date for an "acceptability" finding without opening itself to charges of prejudgment and bias.

[I]f the Commission were to assume that a license for the Yucca Mountain site might be denied in 2015 and establish a date 25 years hence for the "availability" of an alternative repository (*i.e.*, 2040), it would still need to presume the "acceptability" of the alternate site to meet that date.

Id. Nevada's rulemaking petition sought to avoid this difficulty by proposing rule language that did not mention a particular date. *See* Rulemaking Petition at 9 (JA 83). The NRC found Nevada's approach unsatisfactory:

We find this approach inconsistent with that taken in the 1984 Waste Confidence Decision because it provides neither the basis for assessing the degree of assurance that radioactive waste can be disposed of safely nor the basis for determining when such disposal will be available.

70 Fed. Reg. at 48333 (JA 97). The NRC also wondered why it was being charged with prejudgment in 2005 when, even in 1990, with an expected Yucca Mountain application date of 2001, a repository could be available in 2025 only if the agency acted favorably on the application. *Id.* The NRC emphasized its commitment to “a fair and comprehensive” Yucca Mountain adjudication -- which, the NRC said, could result in denying a Yucca Mountain license. *Id.*

Thus, the NRC recognized that it might one day have to revisit the Waste Confidence Rule, certainly if the Yucca Mountain licensing proposal proved unacceptable. *Id.* But the agency said that launching a rulemaking now “would not be a prudent use of the agency’s limited resources.” *Id.* at 48331 (JA 95). The NRC stressed the complexity of a new waste confidence inquiry:

Petitioner states that it is not asking NRC to reopen its general finding that one or more safe geologic repositories can be made available on a timely basis. Petition at 7. Nevertheless, because the findings are interrelated, reopening the Waste Confidence inquiry, even if somehow limited in this manner, could be expected to become a large endeavor covering most of the questions considered in the 1990 findings; *e.g.*, multiple questions concerning the timeliness of repository availability and conditions for the extended safe storage of [spent nuclear fuel].

*Id.*²

²Nevada claims that the NRC made an “unprecedented departure from standard NRC practice” when the agency did not solicit public comment on Nevada’s rulemaking petition. Brief at 10. But the agency has at least twice in recent years denied a rulemaking petition without first seeking public comment. *See* 67 Fed. Reg. 66074 (Oct. 30, 2002) (JA 70) (denial of Nuclear Energy Institute’s petition to establish by rule a process for considering petitions that argue that a state or local law is preempted under the AEA); *see also* 68 Fed. Reg. 9023 (February 27, 2003) (JA 73) (denial of Nevada’s petition to revise 10 C.F.R. Part 63, the NRC’s rules on Yucca Mountain, denial upheld by this Court in *Nuclear Energy Institute v. NRC*, 373

SUMMARY OF ARGUMENT

1. Nevada's petition to this Court should be dismissed for lack of standing. A petitioner must show some injury-in-fact. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Moreover, such injury must be actual or imminent. *Id.* at 564 n.2. Nevada asserts only that it will be injured by prejudice and bias it claims the Waste Confidence Rule introduces into the pending Yucca Mountain licensing proceeding, but Nevada offers nothing but speculation in support of its claim.

The Waste Confidence Rule on its face has no application to the Yucca Mountain licensing proceeding and does not in any way purport to pre-determine adjudicative facts on the safety or acceptability of Yucca Mountain. The rule is a "legislative" prediction, as this Court recognized in *Minnesota*, and serves only to put a reasonable limit on environmental analyses prepared for licensing proceedings on reactors and independent spent fuel storage facilities.

Nevada's claim is nothing more than a vague charge that the Commissioners who will preside over a Yucca Mountain licensing proceeding will somehow be biased in favor of issuing the license in order to confirm a 16-year-old prediction by other, long-departed Commissioners. Nevada offers no evidence to support its bias claim, and thus cannot overcome what this Court has called the "presumption of regularity" in administrative officials. *See, e.g., Advanced Communications Corp. v. FCC*, 376 F.3d 1153, 1159 (D.C. Cir. 2004).

2. The NRC was neither arbitrary nor capricious in denying Nevada's rulemaking petition, for Nevada failed to show that there were compelling reasons for the NRC to undertake what would necessarily have been a wide-ranging and resource-draining re-evaluation of its 1990 waste confidence findings. It was rational for the NRC to decline to initiate an immediate

F.3d at 1289).

rulemaking, given the lack of significant new developments after the NRC's last examination of the Waste Confidence Rule, the scarcity of agency rulemaking resources, and the flimsiness of Nevada's bias claim.

Nevada also argues, paradoxically, that it is somehow "irrational and irresponsible" of the agency to promise that it will reconsider its waste confidence findings if DOE abandons its efforts at Yucca Mountain or the NRC finds the site unacceptable. Brief at 17. Nevada asks, what if, at that late date, the NRC conducts a waste confidence rulemaking and concludes that the agency cannot have confidence that spent fuel can be safely stored until an alternative repository site is found? *Id.* But the agency might face the same difficulty in the rulemaking proceeding that Nevada wants the agency to conduct now. Moreover, it is a difficulty that can be faced, whenever such a rulemaking might have to be conducted, for Yucca Mountain is not the only way to deal safely with spent fuel: Interim storage at centralized locations and reprocessing are two options being considered by Congress, and under the existing Waste Confidence Rule spent fuel from a new generation of reactors could be stored safely onsite into the next century.

ARGUMENT

Standard of Review.

The Court is to judge whether the NRC's denial of Nevada's rulemaking petition is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" *See* 5 U.S.C. 706(2)(A). The Court's review of such a denial is unusually deferential.

As "the parameters of the 'arbitrary and capricious' standard will vary with the context of the case," our review is particularly deferential when "the agency's determination is essentially a legislative one." *WWHT, Inc. v. FCC*, 656 F.2d 807, 817 (D.C. Cir. 1981). Accordingly, "we will overturn an agency's decision not to initiate a rulemaking only for compelling cause, such as plain error of law or a fundamental change in the factual premises previously considered by the agency." *Nat'l Customs Brokers & Forwarders Ass'n of Am., Inc. v. United States*, 883 F.2d 93, 96-97 (D.C. Cir. 1989).

Midwest Independent Transmission System Operator, Inc. v. FERC, 388 F.3d 903, 910-11 (D.C. Cir. 2004); *see also EMR Network v. FCC*, 391 F.3d 269, 273 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 2925 (2005). In *Midwest*, the agency was sued for having denied rulemaking petitions. In the opening paragraph of its decision, the Court said, “Because we order rulemaking ‘only in the rarest and most compelling of circumstances,’ *WWHT, Inc. v. FCC*, 656 F.2d 807, 818 (D.C. Cir. 1981), and because we defer to an agency’s view of its own regulatory priorities, we deny the petition for review.” 388 F.3d at 906.

An attempt to show agency bias must overcome what this Court frequently has called the “presumption of regularity.” *See, e.g., Advanced Communications Corp. v. FCC*, 376 F.3d 1153, 1159 (D.C. Cir. 2004); *Turner v. Department of Navy*, 325 F.3d 310, 318 (D.C. Cir. 2003).

“[C]ourts assume administrative officials ‘to be men [and women] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.’” *Louisiana Ass’n of Independent Producers and Royalty Owners v. FERC*, 958 F.2d 1101, 1115 (D.C. Cir. 1992), quoting *Withrow v. Larkin*, 421 U.S. 35, 55 (1975). “[O]ur law assumes integrity in individual members, and requires direct evidence of bias, or some other personal interest, to overcome that assumption.” *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1106 n.7 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 869 (1988).

I. Nevada Is Not Injured by the Waste Confidence Rule and Therefore Does Not Have Standing.

A. Nevada Has Not Shown Agency Bias or Any Other Concrete and Imminent Harm.

Nevada argues that it has standing in part because the NRC’s 1990 Waste Confidence Rule, particularly its prediction of a repository by 2025, effectively prejudices DOE’s Yucca Mountain license application and has therefore deprived Nevada of the right to a neutral agency

decision maker in the upcoming Yucca Mountain licensing proceeding. *See* Brief at 13-14. According to Nevada, the Waste Confidence Rule prejudges a question of adjudicative fact, namely, whether Yucca Mountain will be found safe and given a license by 2025. *See* Brief at 14-16. Nevada has even gone so far as to assert that this prejudgment will have “a subtle, pervasive and corrosive effect on the entire [Yucca Mountain] proceeding,” Opposition to the NRC’s Motion to Dismiss at 2-3, and that the rule “impos[es] an extraordinary bias on NRC’s upcoming licensing proceeding” Petition at 1.

Nevada’s claim of “extraordinary bias” is implausible on its face. It rests on unsupported speculation that the Waste Confidence Rule’s 2025 prediction will affect the mind-set of present or future Commissioners. Speculation is not enough for Article III standing. Nevada must show that it meets the “irreducible constitutional minimum” of standing, *i.e.*, injury-in-fact, causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). “The burden on a party challenging an administrative decision in the court of appeals is to show a substantial probability that it has been injured, that the [respondent] caused its injury, and that the court could redress that injury.” *Nuclear Energy Institute v. EPA*, 373 F.3d at 1265, *quoting Rainbow/PUSH Coalition v. FCC*, 330 F.3d 539, 542 (D.C. Cir. 2003) (internal quotation marks omitted). “First, the plaintiff must have suffered an injury in fact -- an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.” *Lujan*, 504 U.S. at 560 (internal quotation marks, footnote, and citations omitted). The concept of imminence “cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes -- that the injury is *certainly* impending.” *Id.* at 564 n.2 (quotation omitted). “There is quite a gulf between the antipodes of standing doctrine -- the ‘imminent’ injury that suffices and the merely ‘conjectural’

one that does not. We have insisted that to escape the latter characterization the claimant must show a substantial ... probability of injury.” *DEK Energy Company v. FERC*, 248 F.3d 1192, 1195 (D.C. Cir. 2001).

There is no “substantial probability of injury” in the case at hand.³ For reasons given more fully below, the Waste Confidence Rule has no legal effect at all in the Yucca Mountain licensing proceeding -- the Rule applies only to licensing reactors and temporary storage facilities -- and therefore prejudices no issue that could arise in that proceeding. Nevada’s implied notion that the Commission will be biased in favor of licensing Yucca Mountain, solely to make its waste confidence predictions come true, is the most purely “conjectural” injury imaginable.

Nevada emphasizes that its standing rests not solely on some *procedural* harm traceable to a procedural violation, but fundamentally on whether Nevada could suffer some concrete harm as a result of the procedural violation. Brief at 11. To support its claim of possible concrete harm, Nevada attaches to its brief an affidavit from the Executive Director of the Nevada Agency for Nuclear Projects; in the affidavit the Executive Director set out the harms he believes would be done to Nevada by the licensing of Yucca Mountain. This affidavit might establish Nevada’s interest in participating in the Yucca Mountain licensing proceeding, but it says nothing about Nevada’s standing to challenge the NRC’s decision not to revise its Waste Confidence Rule.

To show procedure-based standing (bias, in this case), Nevada must show not just potential substantive harm but an actual procedural violation. Nevada has shown none. Even under case law cited by Nevada, the State must show that one of its procedural rights has been

³Nevada is correct that the standing and merits inquiries overlap in this case. But this overlap does not preclude threshold dismissal of Nevada’s petition for review for lack of standing. This Court often has “disposed of cases on standing grounds after [a] merits-laden determination that a plaintiff’s claim ‘ha[d] no foundation in law.’” *Taylor v. FDIC*, 132 F.3d 753, 767 (D.C. Cir. 1997), quoting *Claybrook v. Slater*, 111 F.3d 904, 907 (D.C. Cir. 1997).

violated, and that “it is substantially probable that the procedural breach will cause the essential injury to the plaintiff’s own interest.” *Center for Law and Education v. Department of Education*, 396 F.3d 1152, 1159 (D.C. Cir. 2005). In *Center*, this Court concluded that “the chain of causation between the alleged procedural violation and the concrete interest is speculative at best.” *Id.* The chain will certainly be speculative where, as here, there is not even a *prima facie* showing of the procedural wrong Nevada relies on -- bias.

Nevada’s conclusory assertions of institutional bias arising out of the Waste Confidence Decision and Rule do not come close to overcoming what this Court frequently has called the “presumption of regularity.” See the cases cited above in our discussion of the standard of review. Indeed, Nevada’s claim of procedural defect assumes a *lack* of agency integrity, directly contradicting established administrative law. Nevada’s notion that the Waste Confidence Rule will subtly pervade the Yucca Mountain licensing proceeding amounts to a claim that the NRC will be significantly biased in the direction of licensing Yucca Mountain, even in the face of contrary evidence, solely to keep the agency’s 1990 waste confidence prediction (a repository by 2025) from turning out wrong. This is a serious and baseless charge that should be rejected. Nevada has offered nothing but bare, self-serving speculation in support of its claim. There is no evidence that the Commissioners who will preside over a Yucca Mountain licensing proceeding will be biased by the Waste Confidence Rule in favor of issuing the license. One could wonder whether so subtle and pervasive an effect would even be redressable by a judicially mandated rule change.

The Commission’s denial of Nevada’s petition for rulemaking explicitly stated what the law always implies, “that the Commission remains committed to a fair and comprehensive

adjudication” 70 Fed. Reg. 48329, 48333 (JA 97). Nevada has given no reasons to look behind the NRC’s expressed commitment to the rule of law.

B. The Waste Confidence Rule is a Legislative Finding That Has No Legal Effect in the Yucca Mountain Licensing Proceeding.

Nevada attempts to prove prejudice and bias by asserting that the Waste Confidence Rule constitutes an “egregious prejudice of adjudicatory fact.” *See* Brief at 14-16; *see also* Opposition at 7. However, the Waste Confidence Rule does not even apply to the Yucca Mountain licensing proceeding and therefore does not bind the judges in that proceeding. To the contrary, the outcome of that proceeding determines the validity of the Waste Confidence Rule, not the other way around, and, contrary to Nevada’s view, *see* Petition at 13-14, DOE retains the burden of proof in that proceeding. *See* 10 C.F.R. 2.325 (RA-1) and 2.1000 (RA-1).

Nevada is able to suggest prejudice and bias only by grossly misconstruing the Waste Confidence Rule. Nevada essentially assumes that the two determinations in the Waste Confidence Rule amount to fact findings applicable to any case involving spent fuel. But Nevada’s assumption is undercut by the plain text of the rule itself. That text makes clear that the two determinations operate only to establish a categorical exclusion under NEPA. *See* 10 C.F.R. 51.23(b) (RA-2). Moreover, the exclusion in turn operates only in licensing proceedings for reactors or independent spent fuel storage installations (ISFSIs). *See id.* The proceeding on DOE’s application to build a repository at Yucca Mountain will not be such a proceeding.

For example, the presiding officer in that proceeding could not plausibly reject Nevada’s contentions on the ground that the NRC had already determined that there was reasonable assurance that the repository would open. Nor in a proceeding on an application to renew the license for an ISFSI could the presiding officer deny the application on the grounds that Yucca Mountain would be open by 2025 and therefore no extension of the ISFSI license was needed. In

other words, the Waste Confidence Rule does not unlawfully foreclose the outcome of any licensing proceeding. It simply provides direction on how to handle environmental (NEPA) issues in certain types of licensing proceedings (but not the Yucca Mountain licensing proceeding).

Nevada makes the absurd claim that a disinterested person would see that the Waste Confidence Rule prejudices the *precise* nature of the geologic materials at Yucca Mountain, the *precise* nature of the waste to be disposed of there, and even factual disputes about possible misconduct such as falsification of records. *See* Brief at 16. But such questions are not themselves decided by the Waste Confidence Rule. As this Court understood in *Minnesota*, the Waste Confidence Rule does not reflect an adjudicated conclusion about particular geology, particular waste, particular cases of misconduct, or particular technology proposed for Yucca Mountain. Rather, the Rule rests on “expert opinions and forecasts,” typical of “legislative” rather than “adjudicative” decisions. *See American Airlines, Inc. v. CAB*, 359 F.2d 624, 633 (D.C. Cir. 1966) (*en banc*), *cert. denied*, 385 U.S. 843 (1966).⁴ “[T]he breadth of the questions involved and the fact that the ultimate determination can never rise above a prediction suggest that the determination may be a kind of *legislative* judgment for which rulemaking would suffice.” 602 F.2d at 417 (emphasis added).

Being no more than a prediction, the Waste Confidence Rule is, course, subject to being falsified by the outcome of the Yucca Mountain licensing proceeding, or some other significant

⁴The distinction between “adjudicatory” and “legislative” facts is “widely accepted.” *Ass’n of National Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1162 n.20 (D.C. Cir. 1979). *See, e.g., Friends of the Earth v. EPA*, 966 F.2d 690, 693-94 (D.C. Cir. 1992); *Hart v. Sheahan*, 396 F.3d 887, 894 (7th Cir. 2005). *See generally* Fed. R. Evid. 201, *Advisory Committee Notes* (1972); Richard J. Pierce, Jr., *Administrative Law Treatise*, § 10.5, at 735-37 (4th ed. 2002) (distinguishing between legislative and adjudicatory facts).

event, as the NRC made clear in denying Nevada's rulemaking petition: "Should the Commission's decision [on Yucca Mountain] be unfavorable and should DOE abandon the site, the Commission would need to reevaluate the 2025 availability date, as well as other findings" 70 Fed. Reg. at 48333 (JA 97). The agency has in the past demonstrated its willingness to reevaluate its waste confidence findings, for it did so in 1990.

There is, in short, no reason for this Court to credit Nevada's claim that the Waste Confidence Rule, if left unchanged, will have an insidious or prejudicial effect on the Yucca Mountain licensing proceeding.

II. The NRC Acted Reasonably in Denying Nevada's Rulemaking Petition.

Judicial review of an agency refusal to initiate rulemaking is extremely narrow -- "particularly deferential," as this Court has put it. *Midwest Independent Transmission System Operator, Inc. v. FERC*, 388 F.3d at 910. Here the NRC gave a number of reasons for rejecting Nevada's rulemaking petition: Nevada had "not shown any significant and pertinent unexpected event that raises substantial doubt about the continuing validity of the 1990 Waste Confidence findings" (70 Fed. Reg. at 48333) (JA 97); it would take a large commitment of scarce agency resources to undertake the rulemaking Nevada wants; and Nevada's own proposal does not solve the problems it sees. Hence it was hardly irrational, or arbitrary and capricious, for the NRC to reject Nevada's petition.

A. Nevada's Rulemaking Petition Did Not Provide Sufficient Reason for the NRC to Undertake a Waste Confidence Rulemaking.

Nevada has not shown sufficient reason compelling the NRC to undertake what would necessarily be a wide-ranging and resource-draining re-evaluation of its 1990 waste confidence findings. Nevada attacks the Waste Confidence Rule's 2025 prediction on the ground that the Yucca Mountain site could not be rejected and an alternative site still made available before

2025. *See* Brief at 8. But the same was true when the NRC made its current waste confidence findings in 1990, for at that time the agency did not expect a DOE application until 2001. In 1999 the NRC announced its disinclination to redo its waste confidence finding, given that DOE's Yucca Mountain project remained viable. *See* 64 Fed. Reg. at 68006-07 (JA 48-49). That was still so in 2005 when Nevada filed its petition for rulemaking. Nevada fails to understand that the NRC's 2025 prediction rested on an estimate not of when the NRC would act on DOE's license application but of when DOE would make the statutorily-required site "suitability" finding, which precedes any licensing proceeding. As things have turned out, DOE made that finding roughly when the NRC thought it would, a point the NRC made in rejecting Nevada's rulemaking petition. 70 Fed. Reg. at 48332-33 (JA 96-97).

The NRC's decision on Nevada's petition also pointed out that *any* attempt to use a *licensing* date as the basis for estimating a date on which a repository would be available would open the NRC to Nevada's "bias" claims:

[I]f the Commission were to assume that a license for the Yucca Mountain site might be denied in 2015 and establish a date 25 years hence for the "availability" of an alternative repository (*i.e.*, 2040), it would still need to presume the "acceptability" of the alternative site to meet that date.

Id. at 48333 (JA 97). And the agency reasonably did not think that it could avoid choosing some date for repository availability, for there needed to be some measure of the degree of its confidence. *Id.*

The NRC denied Nevada's petition also because launching the rulemaking "would not be a prudent use of the agency's limited resources." *Id.* at 48331 (JA 95). Nevada had asserted that it was not asking the NRC to reopen its general finding that one or more repositories could be made available in a timely way, *see* Rulemaking Petition at 7 (JA 81), but the NRC pointed out in response that all the waste confidence findings were interrelated, and reconsidering one could

lead to “a large endeavor covering most the of questions considered in the 1990 findings; *e.g.*, multiple questions concerning the timeliness of repository availability and conditions for the extended safe storage of [spent nuclear fuel].” 70 Fed. Reg. at 48331 (JA 95).

The NRC’s view that the scope of a waste confidence rulemaking would necessarily be wide is confirmed by Nevada’s own brief in this Court, for in the last section of its Argument Nevada now makes clear that it thinks that such a proceeding would necessarily consider the fundamental questions of when a repository might become available, and whether spent fuel could be stored safely until then. *See* Brief at 17-18. While the NRC recognized that, depending on developments in the Yucca Mountain licensing proceeding, it might have to revise its Waste Confidence Rule some day, the agency reasonably concluded that such a wide-ranging rulemaking need not be undertaken now, certainly not for the insufficient reasons Nevada proffered, given the substantial resource commitment a new waste confidence rulemaking would entail. *See* 70 Fed. Reg. at 48331 (JA 95). This agency determination is precisely the sort of “legislative”-type judgment to which this court should defer. *See Midwest Independent Transmission System Operator, Inc. v. FERC*, 388 F.3d at 910-11. This Court ought not “override [the agency’s] view of its own priorities and compel new rulemaking.” *Id.* at 913.

B. The Agency Can Reasonably Reconsider the Waste Confidence Rule If the Yucca Mountain Site Is Not Licensed.

Nevada argues that the agency’s expressed willingness to change the 2025 date if Yucca Mountain fails is “irrational and irresponsible.” Brief at 17. “What would the NRC do ... if, hypothetically, [after Yucca Mountain failed,] it found no repository would be available until 2040 but that spent fuel could *not* be stored safely at reactor sites in the meantime?” *Id.* at 18. But “[i]f, as Nevada expects, the continued safety of spent fuel storage at reactor sites is confirmed [in a rulemaking now] even if Yucca fails, the dilemma is avoided.” *Id.*

This is an altogether peculiar -- and faintly self-contradictory -- way to argue. The NRC could just as easily face what Nevada calls the “dilemma” in a rulemaking now as in a rulemaking after Yucca Mountain failed, for the conclusion of the rulemaking that Nevada seeks might be that “no repository would be available until 2040 and spent fuel could not be stored safely at reactor sites in the meantime.” Moreover, the conclusion of a later rulemaking, after Yucca Mountain failed, might be what Nevada thinks the conclusion of its preferred rulemaking now would be -- that wastes could be stored safely for hundreds of years. Nevada does not say why the NRC must reexamine such questions now.

But even if a rulemaking conducted after a failure of Yucca Mountain ended without confidence that wastes could be stored safely at reactors until a repository became available, other ways of dealing with the waste would have to be found. Such ways are already being considered. For example, the NRC has extended to 2046 the license for the ISFSI at the Surry nuclear power plant, *see* 70 Fed. Reg. 10695 (Mar. 4, 2005) (JA 74); the NRC has also issued a 20-year license to Private Fuel Storage, a large away-from-reactor ISFSI. *See* 71 Fed. Reg. 10068 (Feb. 28, 2006) (JA 98). Also, Congress is considering alternatives. For example, section 953 of the Energy Policy Act of 2005, Pub. L. 109-58, directs DOE to “conduct an advanced fuel recycling technology research, development, and demonstration program ... to evaluate proliferation-resistant fuel recycling and transmutation technologies that minimize environmental and public health and safety impacts” *See* 42 U.S.C. 16273; *see also* H.R. Rep. No. 109-86, at 87-88 (2005) (JA 91-92) (DOE directed to act to begin interim storage of commercial spent fuel at DOE sites).

In its Petition for Review in this Court, Nevada charges the NRC with “irrationally and prejudicially coupl[ing] the future of nuclear power ... to the success of Yucca.” Petition at 10. Of course, the NRC has done nothing of the kind. As we’ve just said, there are alternatives to Yucca Mountain, and even Nevada’s own rulemaking petition concedes that spent fuel from a new generation of plants not yet built could be stored safely onsite into the next century. *See* Rulemaking Petition at 14 (JA 88).

Nonetheless, the supposed coupling between Yucca and nuclear power’s future is at the core of Nevada’s position before this Court. Nevada has long been at pains to make clear that its opposition to a repository at Yucca Mountain is not opposition to nuclear power. *See, e.g.*, “Statement of Reasons Supporting the Governor of Nevada’s Notice of Disapproval of the Proposed Yucca Mountain Project,” at 1 (April 8, 2002) (JA 55). Nevada would therefore, presumably, welcome an NRC decision that agreed with Nevada’s view that spent fuel can be stored safely at reactor sites for hundreds of years.

But Nevada has tried to pry such a decision out of the agency by means of a charge of bias, an absurd charge that can be supported only by ignoring the character of the Waste Confidence Rule itself, and by ignoring the tens of millions of dollars the NRC spends every year in preparation for a comprehensive and unbiased Yucca Mountain licensing proceeding, one with more formal and elaborate procedures than required by the Administrative Procedure Act. *See* 10 C.F.R. 2.310(f) (RA-1) and 2.700 (RA-1).

In the midst of these costly preparations for the Yucca Mountain licensing proceeding, Nevada now asks this Court to distract the NRC by directing it to engage in an expensive rulemaking that Nevada seeks for the sake of decoupling what the NRC has not coupled, a rulemaking, moreover, that might not turn out precisely as Nevada wants. Nevada has not

established the "rarest and most compelling of circumstances" sufficient to upset an NRC decision not to redo its Waste Confidence Rule at this time. *Midwest*, 388 F.3d at 906.

CONCLUSION

For the foregoing reasons, the Court should dismiss the petition for review for lack of standing. In the alternative, the Court should uphold the NRC's denial of Nevada's rulemaking petition.

Respectfully submitted,

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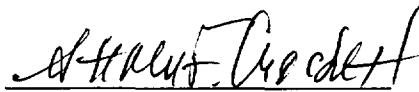
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**CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMIT IN FRAP 32(a)(7)(B)**

I hereby certify that the number of words in the Final Brief for Respondents, excluding Table of Contents, Table of Authorities, Glossary, Addendum, and Certificates of Counsel, is 7760, as counted by the Corel WordPerfect 10 program.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2006, copies of Final Brief for the Respondents were served by mail, postage prepaid, upon the following counsel:

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REGULATORY ADDENDUM

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10 C.F.R. 2.310(f) Selection of hearing procedures.

Upon a determination that a request for hearing/petition to intervene should be granted and a hearing held, the Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on the request/petition will determine and identify the specific hearing procedures to be used for the proceeding as follows—

.....
(f) Proceedings on an application for initial construction authorization for a high-level radioactive waste repository at a geologic repository operations area noticed pursuant to §§2.101(f)(8) or 2.105(a)(5), and proceedings on an initial application for a license to receive and possess high-level radioactive waste at a geologic repository operations area must be conducted under the procedures of subparts G and J of this part. Subsequent amendments to a construction authorization for a high-level radioactive geologic repository, and amendments to a license to receive and possess high level radioactive waste at a high level waste geologic repository may be conducted under the procedures of subpart L of this part, unless all parties agree and jointly request that the proceeding be conducted under the procedures of subpart N of this part.
.....

10 C.F.R. 2.325 Burden of proof.

Unless the presiding officer otherwise orders, the applicant or the proponent of an order has the burden of proof.

10 C.F.R. 2.700 Scope of subpart G.

The provisions of this subpart apply to and supplement the provisions set forth in subpart C of this part with respect to enforcement proceedings initiated under subpart B of this part unless otherwise agreed to by the parties, proceedings conducted with respect to the initial licensing of a uranium enrichment facility, proceedings for the grant, renewal, licensee-initiated amendment, or termination of licenses or permits for nuclear power reactors, where the presiding officer by order finds that resolution of the contention necessitates resolution of: issues of material fact relating to the occurrence of a past event, where the credibility of an eyewitness may reasonably be expected to be at issue, and/or issues of motive or intent of the party or eyewitness material to the resolution of the contested matter, proceedings for initial applications for construction authorization for high-level radioactive waste repository noticed under §§2.101(f)(8) or 2.105(a)(5), proceedings for initial applications for a license to receive and possess high-level radioactive waste at a geologic repository operations area, and any other proceeding as ordered by the Commission. If there is any conflict between the provisions of this subpart and those set forth in subpart C of this part, the provisions of this subpart control.

10 C.F.R. 2.1000 Scope of subpart J.

The rules in this subpart, together with the rules in subparts C and G of this part, govern the procedure for an application for authorization to construct a high-level radioactive waste repository at a geologic repository operations area noticed under §§2.101(f)(8) or 2.105(a)(5), and for an application for a license to receive and possess high level radioactive waste at a

geologic repository operations area. The procedures in this subpart take precedence over those in 10 CFR part 2, subpart C, except for the following provisions: §§2.301; 2.303; 2.307; 2.309; 2.312; 2.313; 2.314; 2.315; 2.316; 2.317(a); 2.318; 2.319; 2.320; 2.321; 2.322; 2.323; 2.324; 2.325; 2.326; 2.327; 2.328; 2.330; 2.331; 2.333; 2.335; 2.338; 2.339; 2.342; 2.343; 2.344; 2.345; 2.346; 2.348; and 2.390. The procedures in this subpart take precedence over those in 10 CFR part 2, subpart G, except for the following provisions: §§2.701, 2.702; 2.703; 2.708; 2.709; 2.710; 2.711; 2.712.

10 C.F.R. 51.23 Temporary storage of spent fuel after cessation of reactor operation—generic determination of no significant environmental impact.

(a) The Commission has made a generic determination that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin or at either onsite or offsite independent spent fuel storage installations. Further, the Commission believes there is reasonable assurance that at least one mined geologic repository will be available within the first quarter of the twenty-first century, and sufficient repository capacity will be available within 30 years beyond the licensed life for operation of any reactor to dispose of the commercial high-level waste and spent fuel originating in such reactor and generated up to that time.

(b) Accordingly, as provided in §§51.30(b), 51.53, 51.61, 51.80(b), 51.95 and 51.97(a), and within the scope of the generic determination in paragraph (a) of this section, no discussion of any environmental impact of spent fuel storage in reactor facility storage pools or independent spent fuel storage installations (ISFSI) for the period following the term of the reactor operating license or amendment or initial ISFSI license or amendment for which application is made, is required in any environmental report, environmental impact statement, environmental assessment or other analysis prepared in connection with the issuance or amendment of an operating license for a nuclear reactor or in connection with the issuance of an initial license for storage of spent fuel at an ISFSI, or any amendment thereto.

(c) This section does not alter any requirements to consider the environmental impacts of spent fuel storage during the term of a reactor operating license or a license for an ISFSI in a licensing proceeding.