

July 1, 2002

Mark Langer, Clerk  
U.S. Court of Appeals for the  
District of Columbia Circuit  
333 Constitution Avenue, N.W.  
Washington, D.C. 20001-2873

RE: State of Nevada v. Nuclear Regulatory Commission, No. 02-0116

Dear Mr. Langer:

Please file the enclosed "Federal Respondents' Reply to Motion to Dismiss." We have submitted an original and four copies. Please date stamp the enclosed copy of this letter to indicate date of receipt and return it to me in the enclosed envelope, postage pre-paid, at your convenience.

Thank you.

Sincerely,

*/R/*

John F. Cordes  
Solicitor  
Office of the General Counsel

Enclosure: As stated

cc: service list

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NEVADA, et al., )  
 )  
 Petitioners, )  
 )  
 v. )  
 )  
 NUCLEAR REGULATORY COMMISSION )  
 and THE UNITED STATES OF AMERICA, )  
 )  
 Respondents. )  
 )

No. 02-1116

**FEDERAL RESPONDENTS’ REPLY TO RESPONSE TO MOTION TO DISMISS**

As our motion to dismiss explains, the Hobbs Act gives parties who challenge a Nuclear Regulatory Commission (NRC) rule 60 days to file suit.<sup>1</sup> Here, petitioners waited more than five months to challenge 10 C.F.R. Part 63, an NRC rule concerning a proposed Department of Energy waste repository. Petitioners rely on the Nuclear Waste Policy Act (NWPA), which allows 180 days for suits attacking final NRC actions “under” that Act.<sup>2</sup> But petitioners do not explain how Part 63 is an NRC action “under” the NWPA -- given that the NWPA gave the NRC no rulemaking authority and in fact expressly required the NRC to issue repository licensing rules “under *other* provisions of law.”<sup>3</sup>

At the center of petitioners’ position is an intricate claim that, notwithstanding the NWPA’s directive to use “other” rulemaking authority, the NRC needed NWPA authority to issue Part 63. Absent the NWPA, petitioners say, the NRC lacked authority to regulate a DOE waste repository. Hence, according to petitioners, Part 63 was issued “under” the NWPA. Petitioners are quite wrong about this, as we explain below. Petitioners also raise other arguments, equally unpersuasive. But we begin with the NRC’s regulatory authority over a DOE repository.

---

<sup>1</sup> See Motion to Dismiss, at 16-17, *citing* 28 U.S.C. § 2342; 42 U.S.C. § 2239(a) & (b).

<sup>2</sup> See NWPA, § 119, 42 U.S.C. § 10139.

<sup>3</sup> See NWPA, § 121(b), 42 U.S.C. § 10141(b) (emphasis added).

As we shall see, that authority derives from the NRC's 1974 enabling legislation, the Energy Reorganization Act, not (as petitioners would have it) from the later-enacted NWPAA.

1. Petitioners assert that "absent the NWPAA, the NRC would not have had legal authority to regulate DOE's disposal of nuclear waste."<sup>4</sup> This argument is incorrect. Although the Atomic Energy Act does generally exempt DOE from the NRC's regulatory jurisdiction,<sup>5</sup> section 202 of the Energy Reorganization Act of 1974 removed that exemption in relevant part and gave the NRC "licensing and related regulatory authority" over certain DOE facilities.<sup>6</sup> Section 202(3) gave the NRC authority to license and regulate DOE's disposal of high-level waste resulting from activities licensed under the Act.<sup>7</sup> Section 202(4) gave the NRC authority over DOE facilities for long-term storage of high-level waste generated by DOE.<sup>8</sup> Thus, under the Energy Reorganization Act, the NRC has the power (and the obligation) to regulate DOE's proposed Yucca Mountain repository.<sup>9</sup>

Petitioners try to get around section 202 by noting that the specific language of paragraph (3) refers to DOE "facilities used primarily for the receipt *and storage* of high level radioactive wastes...." 42 U.S.C. 5842(3) (emphasis added). "Storage," say petitioners, is not the same as "disposal." Therefore, they conclude, section 202 does not give the NRC authority over a DOE

---

<sup>4</sup> See *id.* at 10.

<sup>5</sup> As a general matter, DOE is not a "person" subject to the NRC's licensing authority. See AEA, § 11(s), 42 U.S.C. § 2014(s).

<sup>6</sup> 42 U.S.C. § 5842. The Energy Reorganization Act refer to the Energy Research and Development Administration (ERDA), which later became part of DOE. We have attached the full text of section 202 to this reply.

<sup>7</sup> 42 U.S.C. § 5842(3).

<sup>8</sup> 42 U.S.C. § 5842(4).

<sup>9</sup> The Commission's notice of rulemaking for Part 63 cites Section 202, 42 U.S.C. § 5842, as authority for the rule. 66 Fed. Reg. at 55793.

disposal facility. This argument comes more than 20 years late. In 1981 the Commission promulgated a final rule, 10 C.F.R. Part 60, on disposal of high level wastes that set out requirements for a DOE license application.<sup>10</sup> In the statement of consideration accompanying Part 60 the Commission cited section 202 of the Energy Reorganization Act as authority for the rule and stated explicitly: “The Commission interprets ‘storage’ as used in the Energy Reorganization Act to include disposal.”<sup>11</sup>

When it enacted the NWPA in 1982, Congress was aware of the Commission’s then-recent issuance of Part 60.<sup>12</sup> If the Commission’s interpretation of its authority to issue Part 60 had been wrong, Congress would surely have made clear in the NWPA that the Commission lacked preexisting authority over DOE disposal facilities and needed new authority from the NWPA. Instead, the NWPA simply directed the Commission to consider a DOE application to construct a repository “in accordance with the laws applicable to such applications.”<sup>13</sup> And, in a provision directly applicable here, the NWPA directed the Commission to use its “authority under other provisions of law” to promulgate the technical requirements and criteria it will apply “under the Atomic Energy Act ... and the Energy Reorganization Act.”<sup>14</sup> In other words, far from giving the NRC new regulatory authority over a DOE repository, Congress in the NWPA assumed that the NRC already had such authority.

---

<sup>10</sup> See 46 Fed. Reg. 13971 (February 25, 1981).

<sup>11</sup> *Id.* at 13971 n.1. Petitioners’ response overlooks Part 60’s significance, perhaps because they inexplicably believe that Part 60 did not first issue until 1986, four years after enactment of the NWPA. See Pet. Response at 4.

<sup>12</sup> See, e.g., *Nuclear Waste Disposal : Joint Hearings on S. 637 and S. 1662 Before the Comm. on Energy and Nat. Res. And the Subcomm. On Environ. And Public Works, 97<sup>th</sup> Cong. 237* (1981).

<sup>13</sup> NWPA, § 114(d), 42 U.S.C. 10134(d).

<sup>14</sup> NWPA, § 121(b)(1)(A), 42 U.S.C. § 10141(b)(1)(A).

The NWPA's legislative history confirms this view. Addressing a DOE program for disposing of defense-related nuclear waste, the House Report on the NWPA makes clear Congress's agreement with the Commission that, for purposes of NRC authority under section 202, "storage" includes "disposal."

The Secretary is currently undertaking such a program. The Waste Isolation Pilot Plant [WIPP] project has been authorized for development of a facility for disposal of transuranic wastes, which may eventually be converted to a disposal facility for high level wastes. *Such a conversion would presumably subject the facility to requirements for licensing by the Nuclear Regulatory Commission of Section 202 of the Energy Reorganization Act.*<sup>15</sup>

Nothing in the NWPA's history, to our knowledge, suggests that Congress thought it was giving new authority to the NRC to regulate a DOE waste repository.

Petitioners point out that the NWPA distinguishes between "storage" and "disposal."<sup>16</sup> But the NWPA, unlike the Energy Reorganization Act, does not purport to define the NRC's regulatory authority vis-a-vis DOE. The NWPA's definitions obviously do not establish the terms' meaning for any other statute, in particular the earlier Energy Reorganization Act, which *did* give the NRC authority over a DOE repository. Because the NWPA sets out in separate subtitles detailed programs for "disposal" and for "interim storage," Congress had clear reason for distinguishing explicitly between the two activities in that statute.

In sum, petitioners' argument that section 202 does not give NRC authority to license and regulate a DOE nuclear waste *disposal* facility has long been recognized as wrong. Section 202 of the Energy Reorganization Act gave the NRC that authority. It has been in place since 1974. At the least, the NRC's longstanding view of section 202 -- evinced by the NRC's 1981

---

<sup>15</sup> H.R. Rep. No. 97-491, Part 1, 97<sup>th</sup> Cong., 2d Sess. 44 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3810 (emphasis supplied). Later, in section 12 of the WIPP Land Withdrawal Act, Congress forbade placement of high-level waste in WIPP. Pub. L. 102-579, 106 Stat. 4777 (1992).

<sup>16</sup> See Pet. Response at 12-13, *citing* 42 U.S.C. §§ 10101(9), 10101(25).

declaration (in the Part 60 rulemaking) that “storage” encompasses disposal -- is a “reasonable” interpretation and entitled to judicial deference.<sup>17</sup>

2. To justify NWPA jurisdiction in this Court, petitioners must show that the NRC issued Part 63 “under” the NWPA. But the NWPA directed the NRC to issue its licensing criteria rule “under other provisions of law.” Petitioners seem befuddled by this provision. They say “it is not entirely clear what the reference to ‘other provisions of law’ means,” and speculate that it “simply incorporates ordinary rulemaking practices and procedures.”<sup>18</sup> But this view attributes to Congress an unnecessary act, for at the time of the NWPA’s enactment the Administrative Procedure Act had already put in place a general federal rulemaking process.<sup>19</sup> A more straightforward reading of the NWPA’s “other provisions of law” clause is that it directs the NRC to use its existing rulemaking authority, rooted in the Atomic Energy Act and the Energy Reorganization Act. If so, the Hobbs Act’s “exclusive” judicial review scheme for NRC rules would come into play.<sup>20</sup> As we explained in our motion to dismiss, in *Natural Resources Defense Council, Inc. v. EPA*, the First Circuit read the NWPA’s “other provisions of law” language in exactly that way (albeit as applied to an EPA rule).<sup>21</sup>

Petitioners apparently take the view that our motion to dismiss focuses too tightly on the precise statutory authority for Part 63. What matters, they say, is not where the NRC’s

---

<sup>17</sup> See *FPL Energy Maine Hydro LLC v. FERC*, 287 F.3d 1151, 1156 (D.C. Cir. 2002). See generally *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

<sup>18</sup> Pet. Response at 9.

<sup>19</sup> See 5 U.S.C. § 553.

<sup>20</sup> See 28 U.S.C. § 2342; note 1, *supra*. The NWPA’s judicial review provision, section 119, is also “exclusive.” See 42 U.S.C. § 10139(a). The two “exclusive” statutes obviously cover separate, not overlapping, domains.

<sup>21</sup> See Motion to Dismiss, at 8, *discussing Nat. Res. Def. Council, inc. v. EPA*, 824 F.2d 1258 (1<sup>st</sup> Cir. 1987).

“technical authority” for a rule resides, but whether “the NWPA clearly contemplates or requires certain action by the NRC.”<sup>22</sup> Section 121 of the NWPA undeniably “contemplated and required” the NRC to issue a licensing criteria rule. But, as we have stressed, the NRC was to act “under” its preexisting authority. Because section 119 of the NWPA limits jurisdiction to agency actions “under” the NWPA, the source of the agency’s statutory authority to act becomes critical. In our view, it cannot sensibly be said that the NRC issued Part 63 “under” the NWPA, as petitioners would like, when the very same Act instructed the NRC to act “under” other provisions of law.<sup>23</sup>

3. Citing *General Electric Uranium Management Corp v. DOE* (“*GEUMCO*”), petitioners say that case law, in particular this Circuit’s, gives section 119 the “broad construction” they favor.<sup>24</sup> Our motion to dismiss has already addressed *GEUMCO*, acknowledging that the Court applied section 119, which authorizes judicial review of agency action “under this part” (Part A), to DOE action taken under a different part.<sup>25</sup> The petitioners view *GEUMCO* as “strong support” for their position that, contrary to the statutory language, section 119’s review

---

<sup>22</sup> See Pet. Response at 14.

<sup>23</sup> In addition, as our motion to dismiss noted (pp. 8-9), insofar as the NRC issued Part 63 “under” any statute other than the Atomic Energy Act (or the Energy Reorganization Act), that statute was the Energy Policy Act of 1992 (EnPA), not the NWPA. See Pub. L. 102-486, 106 Stat. 2776, § 801. It was EnPA, not the NWPA, that directed issuance of a Yucca Mountain-specific rule. *Id.* Petitioners don’t answer our EnPA point, except to imply that, when codified as a note in Title 42, EnPA merged into the NWPA. See Pet. Response, at 4, 5, 7, 8. Placing EnPA in Title 42 did not make EnPA, a stand-alone Act, part of the NWPA. See note 25, *infra*.

<sup>24</sup> See Pet. Response at 16, *discussing General Electric Uranium Management Corp v. DOE*, 764 F. 2d 896 (D.C. Cir. 1985), and other similar cases.

<sup>25</sup> See Motion to Dismiss, at 6. Here, we use the term “Part A,” as this Court did in *GEUMCO*. Our motion to dismiss, though, used the term “Subtitle A.” The term “Subtitle” appears in the public law, the term “Part” in the codified version in Title 42. But Title 42 has not been enacted into positive law. See *United States v. Ward*, 131 F.3d 335, 339-40 (3<sup>rd</sup> Cir. 1997). Thus our motion to dismiss used the public law’s “subtitle” terminology. See Pet. Response at 6 n.3.

provisions are not limited to actions taken under Part A.<sup>26</sup> This “support” from *GEUMCO*, if such it is, is far from “strong.” We have already noted that *GEUMCO* at most extended section 119 to actions under other parts of NWPA. The case did not suggest that section 119 applies to agency actions taken under an entirely different statute.

In fact, a close reading of *GEUMCO* reveals the Court’s rationale that for all intents and purposes section 302 really belonged in Part A. “Indeed, the evolution of the placement of section 302 in the Waste Act strongly suggests that its physical separation from the judicial review provision in section 119 is pure happenstance.”<sup>27</sup> The Court also relied on policy considerations favoring initial review of administrative actions in the court of appeals rather than the district court. That’s not an issue in the present case. Nothing in *GEUMCO* suggests that the Court would have extended section 119 to cover agency actions taken under the authority of the Atomic Energy Act, which in any case provides for judicial review in the court of appeals.

4. Petitioners say that “the NRC itself has represented ... that it has issued Part 63 pursuant to the directives contained in the NWPA.”<sup>28</sup> Part 63 does say that (in effect). And it’s true, in the sense that the NWPA directed the Commission to use the authority the NRC already possessed under the Atomic Energy Act (through the operation of the Energy Reorganization Act, section 202) to establish standards and criteria for licensing of repositories. Prior to the NWPA the Commission had greater discretion in the exercise of this authority. The NWPA and

---

<sup>26</sup> See Pet. Response at 16.n.24.

<sup>27</sup> 764 F.2d at 903.

<sup>28</sup> See Pet. Response at 7. In the same vein, petitioners suggest that the NRC’s inclusion of the NWPA in the “authority” preface of Part 63 “contradicts” our position on jurisdiction. See Pet. Response at 6. But Part 63’s “authority” preface simply lists every statute bearing remotely on the new rule, including all the statutes we have discussed in this litigation (the Atomic Energy Act, the Energy Reorganization Act, the Energy Policy Act, and the NWPA). This laundry list does not answer the legal question which statute actually gave the NRC power to issue a rule. See also Motion to Dismiss, at 9 n.40.

the subsequent Energy Policy Act had an obvious bearing on the timing of the Commission's Part 63 rulemaking and its conformity with standards promulgated by EPA. In this sense the Commission's action was "pursuant to" the NWPA and the Energy Policy Act and met the purposes of those Acts.

Not infrequently, the Commission applies its regulatory authority to further a goal set out in other legislation. For example, after the Three Mile Island accident, Congress enacted an Authorization Act directing the NRC to issue a rule on emergency planning.<sup>29</sup> The Atomic Energy Act had already given the NRC authority to require emergency plans as a condition for licensing. The Authorization Act simply directed the NRC to use that authority. But any ensuing NRC action would have been carried out "under" the Atomic Energy Act, just as Part 63 was issued "under" the Atomic Energy Act (and the Energy Reorganization Act), notwithstanding the NWPA's mandate to use that authority.

5. In a footnote, petitioners correctly point out that, for purposes of criminal enforcement, Part 63 disclaimed section 161b of the Atomic Energy Act<sup>30</sup> as a source of authority for some Part 63 provisions.<sup>31</sup> As indicated in our motion to dismiss, section 161b is the principal Atomic Energy Act provision granting the NRC authority to establish by rule health-based standards for the use and disposal of radioactive materials governed by the Act. But it is not the sole source of NRC authority to regulate a DOE repository. As recounted above, the Energy Reorganization Act gave the NRC "licensing and related regulatory authority" over DOE waste disposal facilities.

---

<sup>29</sup> See NRC Authorization Act of 1980, § 109(b), 94 Stat. 780 (1980).

<sup>30</sup> 42 U.S.C. § 2201(b).

<sup>31</sup> See Pet. Response at 14 n.11, *citing* 10 C.F.R. § 63.172(b).

Thus, Part 63's disclaimer doesn't establish the point petitioners would like to make -- that Part 63's partial exclusion of section 161b amounts to an NRC concession that the NWSA is the source of the NRC's authority to issue portions of Part 63. The NWSA grants no rulemaking powers. The Atomic Energy Act and the Energy Reorganization Act do. This spoils petitioners' footnote argument.

6. Lacking a legally sound response to the motion to dismiss, petitioners' first and last resort is simply to call the NRC's argument bad names-- "Byzantine," "hyper-technical," "crippled," "perverse," and finally "unnatural."<sup>32</sup> Even if these colorful exaggerations were true, a fair reply might be that jurisdiction is indeed a highly technical part of the law. A litigant who relies on intuition rather than a close reading of the relevant statutes risks becoming a victim of jurisdictional technicalities from which a court has no power of rescue.

A 1985 Hobbs Act case from this Court, *Western Union Telegraph v. FCC*,<sup>33</sup> illustrates the point nicely. There, AT&T filed its petition for review of an FCC order outside the 60-day window -- too early (before the order became technically final) rather than too late. Begging this Court for an exception, the petitioner alleged that the Court's Clerk had encouraged premature filing. This Court simply noted that however appealing this argument might be "we have no power to make the exception AT&T requests."<sup>34</sup> The Court observed in *Western Union* that AT&T could easily have protected itself by filing a supplemental petition. The same is true here. Invoking the Hobbs Act, petitioners did challenge the EPA's parallel Yucca Mountain rule

---

<sup>32</sup> See Pet. Response at 3, 10, 16, 19.

<sup>33</sup> 773 F. 2d 375 (D.C. Cir. 1985).

<sup>34</sup> *Id.* at 380.

within 60 days.<sup>35</sup> They had ample opportunity to challenge the NRC rule within 60 days as well.

In any case, for the reasons we have given, petitioners' lawsuit had to meet the 60-day jurisdictional requirement. Their suit came too late, and for that reason it must be dismissed. "The rules of jurisdiction, which occasionally may appear technical and counterintuitive, are to be ungrudgingly obeyed."<sup>36</sup>

### CONCLUSION

For the foregoing reasons, and for the reasons set out in our motion to dismiss, this Court should dismiss the petition for review for lack of jurisdiction.

Respectfully submitted,

---

JOHN BRYSON  
RONALD M. SPRITZER  
Attorneys, Appellate Section  
Environment & Natural Resources Div.  
U.S. Department of Justice  
P.O. Box 23795  
Washington, D.C. 20530

---

JOHN F. CORDES  
Solicitor  
Office of the General Counsel  
U.S. Nuclear Regulatory Commission

---

E. LEO SLAGGIE  
Deputy Solicitor  
Office of the General Counsel  
U.S. Nuclear Regulatory Commission

---

STEVEN F. CROCKETT  
Senior Attorney  
Office of the General Counsel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555  
301-415-1622

July 1, 2002  
Section 202 of the Energy Reorganization Act of 1974, 42 U.S.C. § 5842, provides:

---

<sup>35</sup> See Joint Brief of Petitioners State of Nevada, et al., *Nuclear Energy Institute v. United States*, Nos. 01-1258, 01-1268, 01-1295, 01-1425 & 01-1226 (consolidated) (D.C. Cir.) (filed May 3, 2002).

<sup>36</sup> *Beers v. North American Van Lines, Inc.*, 836 F.2d 910, 913 (5<sup>th</sup> Cir. 1988).

**CERTIFICATE OF SERVICE**

I hereby certify that on July 1, 2002, copies of the foregoing reply were served by mail, postage prepaid, upon the following counsel:

Frankie Sue Del Papa, Attorney General  
Marta A. Adams, Sr. Deputy Attorney General  
State of Nevada  
100 North Carson Street  
Carson City, Nevada 89701

Joseph R. Egan  
Egan & Associates  
7918 Jones Branch Drive, Suite 600  
McLean, Va. 22102

Charles J. Cooper  
Robert J. Cynkar  
Vincent J. Colatriano  
Cooper & Kirk, L.L.P.  
1500 K Street, N.W., Suite 200  
Washington, D.C. 20001

William H. Briggs, Jr.  
Ross, Dixon & Bell, L.L.P.  
2001 K Street, N.W.  
Washington, D.C. 20006-1040

Elizabeth A. Vibert, Deputy District Attorney  
Clark County, Nevada  
500 South Grand Central Parkway  
Las Vegas, NV 89106

Bradford R. Jerbic, City Attorney  
William P. Henry, Senior Litigation Counsel  
City of Las Vegas, Nevada  
400 Stewart Avenue  
Las Vegas, NV 89101

Michael A. Bauser  
Nuclear Energy Institute, Inc.  
1776 I Street, N.W. Suite 400  
Washington, D.C. 20006

---

John F. Cordes