

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

STATE OF NEVADA, CLARK
COUNTY, NEVADA, and CITY OF
LAS VEGAS, NEVADA

Petitioners,

v.

UNITED STATES NUCLEAR
REGULATORY COMMISSION

Respondent.

Case No. 02-1116

SUGGESTION FOR IN TANDEM CONSIDERATION OF CASES

Petitioners, the State of Nevada, Clark County, Nevada, and the City of Las Vegas, Nevada (collectively, "Petitioners") hereby respectfully submit this suggestion for in tandem consideration of the various cases, currently pending before this Court, that pertain to the federal government's Yucca Mountain project.

This Court currently has before it three sets of cases, in various stages of briefing, that seek review of federal government actions, decisions, and failures to act with respect to the proposed nuclear waste repository at Yucca Mountain, Nevada. For purposes of this motion, Petitioners will refer to these three sets of cases as the "EPA Case," the "Recommendations Case," and the "NRC Case," respectively.

(1) The EPA case is actually a series of consolidated cases, all of which seek review of final regulations issued by the Environmental Protection Agency ("EPA") that establish the final radiation standards for the Yucca Mountain repository. *State of Nevada v. United States*, No. 01-

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1425; *Natural Resources Defense Council, et al. v. Whitman*, No. 01-1426; and *Nuclear Energy Institute, Inc. v. EPA*, Nos. 01-1258, 01-1268, and 01-1295. In two of these consolidated cases (Nos. 01-1425 and 01-1426), the State of Nevada (“Nevada”) and the Natural Resources Defense Council and its fellow environmental organization petitioners (“NRDC”) challenge the EPA’s regulations as facially invalid and fundamentally inconsistent with federal laws governing public health and safety, including the Nuclear Waste Policy Act of 1982, as amended (“NWPA”), 42 U.S.C. § 10101, *et seq.*, the Energy Policy Act of 1992, Pub. Law 102-486, and the Safe Drinking Water Act, 42 U.S.C. § 300h. In the other consolidated case, the Nuclear Energy Institute (“NEI”) challenges EPA’s authority to establish separate groundwater standards. The EPA Case has been fully briefed and is scheduled for oral argument on February 20, 2003.

(2) The Recommendations Case is also a series of consolidated cases, by which the Petitioners seek review of (a) final regulations issued by the Department of Energy (“DOE”) that establish guidelines governing the suitability of Yucca Mountain as a potential site for a repository; (b) the Secretary of Energy’s decision, based upon DOE’s application of its guidelines, to recommend the Yucca Mountain site to the President; (c) the President’s decision, based upon the Secretary’s site recommendation, to designate Yucca Mountain for development as a repository; and (d) DOE’s final environmental impact statement framing its final site recommendation to the President on the Yucca Mountain project, which the

NWPA required DOE to prepare and consider pursuant to the requirements of the National Environmental Policy Act, 42 U.S.C. §§ 4321, *et seq.* (“NEPA”). The petitions in the Recommendations Case also challenge DOE’s failure to take actions required by the NWPA upon what Petitioners contend was DOE’s factual determination that the Yucca Mountain site was indeed *not* suitable for development as a repository. *Nevada v. DOE*, No. 01-1516 (consolidated with Nos. 02-1036, 02-1077, 02-1179, and 02-1196). The Petitioners in the Recommendations Case contend that DOE’s and the President’s various actions, decisions, and failures to act violate applicable federal law, including the NWPA and NEPA. The Court has recently issued a modified briefing schedule in the Recommendations Case, pursuant to which the case will be fully briefed by May 6, 2003. No oral argument date has yet been set in the Recommendations Case.

(3) Finally, in the NRC Case, Petitioners seek review of final regulations issued by the U.S. Nuclear Regulatory Commission (“NRC”) that would govern the licensing of a repository at Yucca Mountain. *Nevada v. NRC*, No. 02-1116. Petitioners in the NRC Case contend, among other things, that the NRC’s licensing regulations violate applicable provisions of the NWPA and the Atomic Energy Act. No briefing schedule has yet been set in the NRC Case.

The three sets of cases summarized above raise distinct and separate legal issues pertaining to, among other things, the federal government’s compliance with various

statutes and regulations. Because many of the legal issues raised in the cases are distinct, and because the cases involve three different sets of federal respondents, these cases are not fit candidates for formal consolidation.¹ Indeed, no party in any of the cases has suggested or requested that the cases be formally consolidated. Nevertheless, certain of the legal issues raised in these cases by necessity interrelate with each other, and arise from the same factual, statutory, and regulatory background.

To take one example, all three cases call for consistent resolution of the legal issue of whether Congress, through the NWPA, required “geologic” isolation of wastes in any repository developed at Yucca Mountain — *i.e.*, whether the NWPA requires that disposal of nuclear waste at Yucca Mountain be accomplished primarily through the geologic features of the Yucca Mountain site itself, rather than through so-called “engineered barriers.” They also raise the corresponding issue of whether the repository referenced in final agency decisions and DOE’s FEIS satisfies the requirement of primary geologic isolation. All three cases challenge attempts by the federal agency respondents (DOE, EPA, and NRC) to weaken the regulatory standards applicable to Yucca Mountain alone in the face of agency evidence that this repository would be unable to provide primary geologic isolation. The Recommendations Case challenges DOE’s abrogation of other duties relating to this inability, including DOE’s misleading and inconsistent definition of the “proposed action” in the FEIS and its failure to declare the Yucca Mountain site unsuitable for repository development under NWPA section 113(b)(3), 42 U.S.C. §10133(b)(3).

¹ The parties to these cases also differ in other respects. Although NEI has party status in several of the actions, this Court denied its request to intervene in petitioners’ actions challenging the environmental review of the Yucca Mountain project under NEPA and related provisions of the NWPA (Nos. 02-1179 and 02-1196). Petitioners NRDC et al. in the EPA Case are not parties to the other actions.

Finally, the EPA Case challenges EPA's adoption of a 10,000-year period of performance that cannot protect public health and safety as applied to Yucca Mountain, whose inability to provide primary geologic isolation would render the public vulnerable to massive increases in radiation exposure after the expiration of the regulatory period.

In a related vein, Petitioners believe that it is imperative that none of these three cases are considered and resolved in a vacuum. Rather, it makes sense, both from the standpoint of judicial economy and efficiency and in the interest of achieving the correct resolution of the issues raised in these cases, for one panel of this Court to learn the broader statutory, regulatory, and scientific context surrounding the entire Yucca Mountain project that is a common backdrop to all three cases and that will unavoidably shape the issues, and the analysis that must be pursued, in each.

For these reasons, while Petitioners continue to believe that formal consolidation of the EPA Case, the Recommendations Case, and the NRC Case would not be appropriate, Petitioners do believe that it may be appropriate for one panel of this Court to consider all three cases in tandem. Thus, Petitioners believe that it may make sense for the Court to schedule oral argument in such a way as to allow all three cases to be argued over the course of one or two days before the same panel. Such in tandem consideration would require only one panel to master the statutory and regulatory regime governing the Yucca Mountain project that is essential to all of these cases, and would help minimize the risk of decisions that are inconsistent in either their holdings or their analyses.

Such in tandem consideration of the three cases would not interfere with or delay the remaining briefing in these cases. As noted, the EPA Case is already fully briefed, and the Recommendations Case will not be fully briefed until May. Should the Court

agree that consideration of all three cases in tandem is appropriate, it could enter a briefing schedule in the NRC Case that would ensure that briefing in that case is completed shortly after briefing is completed in the Recommendations Case.²

While in tandem consideration of these cases would likely require that oral argument in the EPA Case, currently scheduled for February 20, 2003, be rescheduled, a short postponement of the argument date in that case would not cause prejudice to any party. Petitioners note, in this regard, that DOE has itself announced that it will not even file a license application for a Yucca Mountain repository until December 2004 at the earliest. Thus, even if argument in the EPA Case is postponed by a few months, this Court would still have more than sufficient time to consider and resolve all three cases with logically consistent decisions far in advance of the submission of a license application by DOE.

For these reasons, Petitioners respectfully suggest that the Court consider the EPA Case, the Recommendations Case, and the NRC Case in tandem.³

² The Court could, for example, enter a schedule in the NRC Case that would require Petitioners' opening brief to be filed in mid to late January, would require the NRC's brief to be filed early to mid March, and require Petitioner's reply brief to be filed in late April or early May.

³ Petitioners have been authorized by the NRDC and their fellow environmental organization petitioners in the EPA Case to represent that they concur with Petitioners' suggestion for in tandem consideration of these cases.

Respectfully submitted,

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DATED: October 9, 2002

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served
this 9th day of October, 2002 by facsimile and by first class mail, postage prepaid on:

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