

ORAL ARGUMENT SCHEDULED FOR MAY 5, 2003

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

**PETITIONERS' REPLY TO OPPOSITIONS TO PETITIONERS' 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 reply in support of their suggestion for in tandem consideration of the various cases, currently pending before this Court, that pertain to the federal government's Yucca Mountain project.¹

1. In their opposition to Petitioners' suggestion for in tandem consideration, the primary contention of both the Federal Respondents² and the Nuclear Energy Institute, Inc. ("NEI")

¹ As in their Suggestion, Petitioners will refer to the three sets of cases under consideration as the "EPA Case," the "Recommendations Case," and the "NRC Case," respectively. The various docket numbers for these cases, as well as a short description of each case, are provided in the Suggestion.

² The Respondents in the Recommendations Case and the NRC Case — the Department of Energy ("DOE"), the Secretary of Energy, the President, and the Nuclear Regulatory Commission ("NRC") — have submitted a joint opposition to Petitioners' suggestion. Federal Respondents' Opposition to Petitioners' Suggestion for In Tandem Consideration of Cases ("DOE/NRC Opp."). The Respondent in the EPA Case — the Environmental Protection Agency ("EPA") — has submitted a separate opposition that is, in substance, identical to the opposition submitted in

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is that in tandem consideration would result in a significant delay in this Court's resolution of the EPA Case and the NRC Case. *See, e.g.*, DOE/NRC Opp. at 5-6; Response of Intervenor Nuclear Energy Institute, Inc. to "Suggestion For In Tandem Consideration of Cases" ("NEI Opp.") at 3-4. In this regard, the Federal Respondents contend that "the sooner" the standards governing DOE's license application for a Yucca Mountain repository "are reviewed, the sooner there can be a decision on whether the application should be granted." DOE/NRC Opp. at 6. This contention, with all due respect, is utterly without merit.

As no party has disputed, DOE has made clear that it will not even *submit* any licensing application for Yucca Mountain until December 2004 *at the earliest*. The Nuclear Waste Policy Act ("NWPA") contemplates that the NRC licensing proceedings will last from between *three to four years*. 42 U.S.C. § 10134(d). Thus, under even the most optimistic scenario, a "decision on whether the application should be granted" will not be forthcoming until the end of 2007 at the earliest. It cannot seriously be contended that a short delay of at most a few months in order to accommodate Petitioners' suggestion for in tandem consideration would seriously disrupt this schedule. Even if the cases are considered in tandem, it is far more likely than not that all these cases would be resolved far in advance of DOE's currently contemplated license application date of December 2004, and *years* before the NRC licensing proceedings would be completed.

Of course, this assumes that NRC licensing proceedings with respect to Yucca Mountain will even be held. If Petitioners prevail with respect to certain of their challenges to the agency actions under consideration, the government's decision to select the Yucca Mountain site will be invalidated, thus foreclosing any need for such NRC licensing proceedings. Moreover, if the

the Recommendations Case and NRC Case. Petitioners will refer to the respondents in these cases collectively as the "Federal Respondents."

Federal Respondents are correct on the merits of the various substantive claims raised in these cases, the resolution of these cases will not affect the licensing schedule at all. Finally, even if the NRC or EPA rules are ultimately declared invalid, but the selection of Yucca Mountain is left undisturbed, there is no reason to suspect that the currently contemplated licensing schedule would hold even if the cases were *not* considered in tandem. Thus, neither the Federal Respondents nor NEI have established that in tandem consideration of the cases is likely to lead to any additional delay in the ultimate licensing of a Yucca Mountain repository.

Furthermore, any short delay in the resolution of these cases that would flow from in tandem consideration is a small price to pay for the significant benefits of in tandem consideration — such as the conservation of judicial resources and the assurance of consistent adjudication. Moreover, the Yucca Mountain project presents risks of unprecedented scope and duration, requiring for Nevada and the nation safety from nuclear waste that, if ultimately placed in a Yucca Mountain repository, will remain lethally radioactive for tens or hundreds of thousands of years. A delay of at most a few months that is designed to ensure that this Court can consistently, efficiently and correctly review the standards for, among other things, the licensing of such a critical facility as a repository at Yucca Mountain can hardly be characterized as anything other than prudent. Since any “delay” resulting from in tandem consideration is exceedingly unlikely to result in any delay of NRC licensing proceedings, and since the issuance of inconsistent or conflicting decisions from separate panels of the Court could itself lead to serious delays in the licensing of a repository, both the Federal Respondents’ and NEI’s claims of prejudice ring quite hollow indeed.³

³ It is also more than a little ironic for the Federal Respondents to complain about a delay of at most a few months in this Court’s consideration and resolution of these critically important cases. The NWPA required DOE to file its NRC license application within 90 days of a final

Notwithstanding the Federal Respondents' and NEI's hyperbole regarding delay, Petitioners are willing to make adjustments to the briefing schedule in the Recommendations Case in order to address those concerns. Under the current schedule in the Recommendations Case, Petitioners' reply brief is due on April 29, 2003, and final briefs are due on May 6, 2003. In a concurrent pleading in the Recommendations case, Petitioners have offered to modify the briefing schedule so that their reply brief is due one month earlier, on March 28, 2003, and the parties' final briefs are also due one month earlier, on April 4, 2003. This accommodation could allow the Court, if it so desired, to schedule argument in all three cases for about the same time that it has currently scheduled argument in the NRC Case — May 5, 2003. While this schedule would cause less than a three-month postponement in the argument of the EPA Case, it would substantially *accelerate* the schedule for the Recommendations Case and effectively eliminate the Federal Respondents' and NEI's concerns regarding the delay that could result from in tandem consideration.⁴

repository site selection. *See* 42 U.S.C. § 10134(b). That deadline expired last month. Thus, DOE has acknowledged that it will miss its statutory deadline by a minimum of 26 months. It comes with poor grace for the Federal Respondents to cite to concerns about "delay" — especially "delay" that would not amount to a violation of any statutory or other deadline — as a basis for objecting to a proposal designed to maximize the conservation of this Court's resources and minimize the risk of inconsistent decisions, when any "delay" which would result from adoption of that proposal would pale in comparison to the Government's own substantial delays in complying with its statutory deadlines. Apparently, only certain types of "delay" are causes for concern to the Federal Respondents.

⁴ The Federal Respondents note that Petitioners "imagine[] that [their] reply brief in the NRC Case would not be filed until late April or early May" 2003, even though the briefing schedule in the NRC Case requires Petitioners' reply brief to be filed on February 13, 2003. DOE/NRC Opp. at 5-6. As the Federal Respondents know, Petitioners filed their suggestion, with its accompanying suggestion regarding possible briefing dates in the NRC Case, before they became aware that the NRC Case briefing schedule had been set by the Court in an order released on the same day Petitioners' suggestion was filed. Petitioners do *not* seek to alter the briefing schedule set by the Court in the NRC Case.

2. Since there can be little doubt that the concerns professed by the Federal Respondents and NEI regarding delay have little or no merit, the question for the Court then becomes whether any benefits to the Court and the parties would accrue from in tandem consideration of these cases. In their Suggestion, Petitioners have outlined the very real benefits that they believe would result. Petitioners have demonstrated, for example, that only one panel of this Court would be required to master the intricate and interrelated statutory and regulatory regime governing the Yucca Mountain project that is essential to the resolution of all three cases. Moreover, Petitioners demonstrated that in tandem consideration of these cases would minimize the risk of inconsistent decisions in these cases.

The Federal Respondents and NEI have said very little to rebut Petitioners' discussion of these potential benefits. The Federal Respondents offer only the weak observation that "it is not obvious" that in tandem consideration of the cases would lead to efficiencies, since "it is not clear" that there is enough similarity between the cases to produce such efficiencies. DOE/NRC Opp. at 7. The Federal Respondents also observe that each of these cases raises some distinct issues regarding both jurisdictional matters and the merits of Petitioners' claims. *Id.* NEI essentially echoes these observations. NEI Opp. at 2, 3.

None of these observations, however, undermine the significant benefits that could accrue from in tandem consideration of the cases. Neither the Federal Respondents nor NEI can deny that there is a substantial degree of overlap between the cases. All of the cases involve challenges to aspects of the Yucca Mountain project that arise in whole or in part from a dispute over what choices Congress made in the NWPA concerning the safe, long-term isolation of highly toxic nuclear waste. The Recommendations Case, for example, challenges the standards governing the selection and suitability assessment for the Yucca Mountain site and the Secretary

of Energy's recommendation and the President's selection, based upon those standards, of that site. The NRC Case challenges the NRC's regulation governing the licensing of the Yucca Mountain site as a repository. And the EPA Case challenges the EPA regulation establishing the final radiation standards that any Yucca Mountain repository must meet in order to be licensed by the NRC. Petitioners contend that all these agency interpretations of, and actions under, the NWPA are similarly unfaithful to the fundamental congressional decisions codified in the statute.

Thus, while the Federal Respondents and NEI are certainly correct that each individual case raises its own distinct questions, all three cases also raise critically integrated issues regarding the proper interpretation of a core group of statutes, including the NWPA, the 1987 amendments to the NWPA, and the Energy Policy Act of 1992. Each case raises substantially identical legal questions regarding whether the NWPA requires that disposal of nuclear waste at Yucca Mountain be accomplished primarily through "geologic" isolation rather than through so-called "engineered barriers." Correspondingly, they require assessment of whether the repository referenced in the respective agency records satisfies the requirement of primary geologic isolation. The Federal Respondents do not deny that this issue is relevant to all three cases, but trivialize it as "only one" common issue. DOE/NRC Opp. at 7. On the contrary, this "only one" common issue is the critically important common thread binding the legal issues in all three cases. In fact, it is *the* primary legal issue in both the Recommendations Case and the NRC Case, and is central to two of Nevada's three legal issues in the EPA Case. Clearly, it makes sense to have one panel of the Court undertake the work needed, in adjudicating these issues, to master this intricate and interrelated statutory scheme.

Moreover, the Federal Respondents wrongly characterize the geologic disposal question

as “only a minor issue” in the EPA Case. DOE/NRC Opp. at 7. This issue was addressed at some length in the briefs in that case, particularly in Nevada and co-petitioner NRDC’s challenge to EPA’s decision to limit the period during which the repository must prevent the escape of dangerous levels of radiation to 10,000 years. Nevada/NRDC joint brief at 41-43, 47-50; Nevada/ NRDC reply brief at 22-25. Yet it is undisputed that the nuclear waste will still be highly toxic at that time and that the rate of dangerous radiation escaping from the repository will rise precipitously after that time period, if, as EPA has argued, the ability of Yucca Mountain to protect us from this radiation can be based “on engineered barriers” rather than primarily on site geology. EPA brief at 44. To the contrary, as Nevada and NRDC argued, such a standard *could only* be considered reasonable *if* it were premised on a statutory regime that mandated primary geologic isolation. In theory, the 10,000-year compliance standard could conceivably be seen as the longest realistic time period for the assurance of man-made engineered barriers in the repository system, with the geologic features of the site subsequently providing an appropriately safe backup. Indeed, this is the logic of Congress’ choice in the NWPA to rely primarily on geology (that is, rock) rather than man-made artifices as a means to isolate this waste over the long term. If Yucca Mountain does *not* come close to satisfying the statutory mandate for primary geologic isolation, then that site does not provide the kind of secure isolation contemplated by Congress, and EPA’s use of the 10,000-year standard cannot provide adequate assurances regarding health and safety. Site geology is equally central to Nevada and NRDC’s claim that EPA adopted a definition of “disposal” inconsistent with the one in the NWPA, 42 U.S.C. § 10101(9). Nevada/ NRDC joint brief at 50-51; Nevada/ NRDC reply at 25-26. In sum, the geologic isolation issue is a threshold question that has a profound impact on this Court’s resolution of Petitioners’ challenge to the EPA rule.

Given the substantial overlap between the three cases, as described above and in Petitioners' original suggestion, significant benefits would accrue to the Court, and to the parties, from the in tandem consideration of these cases. These benefits of in tandem consideration do not entail serious costs in the form of significant delay or any other type of significant prejudice to any party. Thus, the insistence of the Federal Respondents and NEI that different panels of this Court hear and resolve these cases on a piecemeal basis is quite puzzling, to say the least.⁵

3. The Federal Respondents also argue that Petitioners have made their suggestion for in tandem consideration too late, and that Petitioners should have complied with the Court's deadline for motions "that may affect the progress of the case through the Court." DOE/NRC Opp. at 4. It is not apparent that this deadline for procedural "motions" is germane to the type of suggestion that Petitioners have made, which does not request formal consolidation and pertains only to case management. Indeed, the motion deadline in the EPA Case, which responded to the first agency decision made, preceded several of the decisions (including the Secretary's February 14 recommendation of the Yucca Mountain site) with respect to which tandem consideration is now sought. All the motion deadlines also preceded the decision to consolidate Petitioners' NEPA action with the action challenging DOE's guidelines, at Respondents' request. Moreover,

⁵ NEI claims that the Court should not be concerned regarding the risk of inconsistent decisions, since "application of the doctrine of *stare decisis* will operate to preclude contradictory determinations." NEI Opp. at 4. Even assuming, for purposes of argument, that this is true as a legal matter, this point does not detract from Petitioners' demonstration of the efficiencies that could result from in tandem consideration. It would hardly foster efficiency or the conservation of resources for one panel of this Court that perhaps views the common legal questions raised in these cases differently from another panel of this Court to have to stop its work in its tracks, retool its analysis, and perhaps start work on a new opinion from scratch in order to accommodate a decision as to such common legal questions rendered by the other panel, merely because the other panel rendered its decision first. Such a scenario would also raise the prospect that the parties would need to submit supplemental briefs addressing the scope and effect of the earlier-rendered opinion. Not only would this scenario threaten to waste judicial resources, rather than conserve them, it would likely also lead to the very delay that NEI elsewhere professes to hope to avoid.

it was only relatively recently, as Petitioners worked their way through newly received and voluminous administrative records compiled in the Recommendations and NRC Cases, that Petitioners fully appreciated the interrelationship between key aspects of the statutory and regulatory regimes that are at issue in these cases. Even assuming *arguendo* that Petitioners should have come to this realization sooner, Federal Respondents can point to no actual prejudice that has resulted. Nor can the Federal Respondents articulate any reason why Petitioners, when they did come to a realization of the potential benefits that could accrue to the Court from in tandem consideration of these cases, should not have brought their views as to this issue to the Court's attention, so as to allow the Court to make the case management and resource allocation decision that it believed appropriate.

4. Finally, both the Federal Respondents and NEI make the point that, as the Federal Respondents put it, this Court "is the best judge of the allocation of its resources." DOE/NRC Opp. at 8. *See also* NEI Opp. at 3 (the Court is "best qualified to manage its own resources"). Petitioners could not agree more. The fact that this Court is the best judge regarding the allocation of its resources, however, does not at all mean or suggest that the parties to these cases should be disabled from making their views known to the Court regarding the interrelationship of these cases, and to make suggestions to the Court regarding how best to deal with the linkages and commonalities between the cases.⁶

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

⁶ Petitioners note, in this regard, that the fact that the Federal Respondents believe this Court is the "best judge" regarding the allocations of its resources did not prevent the Federal Respondents from making their own "alternative" suggestions regarding how the Court "might achieve some economies," including suggestions regarding which panel of this Court should decide the cases. DOE/NRC Opp. at 8.

Respectfully submitted,

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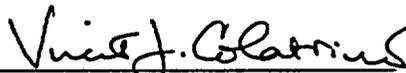
DATED: November 1, 2002

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served
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