

NOT YET CALENDARED FOR ORAL ARGUMENT

Case Nos. 02-1116 and 03-1058

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NEVADA, *et al.*,

Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION,

Respondent.

PETITION FOR REVIEW FROM FINAL DECISIONS AND ACTIONS
OF UNITED STATES NUCLEAR REGULATORY COMMISSION

PETITIONER STATE OF NEVADA'S SUPPLEMENTAL BRIEF

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**CERTIFICATE AS TO
PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Circuit Rule 28(a)(1), Petitioners respectfully certify as follows:

(A) Parties and Amici: As this action involves the direct review of agency regulations and other agency actions, there were no proceedings before the district court. The parties, intervenors, and known *amici* before this Court are as follows:

- Parties:
 - (1) State of Nevada, Petitioner in Nos. 02-1116 and 03-1058
 - (2) Clark County, Nevada, Petitioner in No. 02-1116
 - (3) City of Las Vegas, Nevada, Petitioner in No. 02-1116
 - (4) United States Nuclear Regulatory Commission (“NRC”), Respondent in Nos. 02-1116 and 03-1058
 - (5) United States of America, Respondent in No. 03-1058¹
- Intervenors: The Nuclear Energy Institute (“NEI”).

¹ The NRC has claimed that the United States of America is also an appropriate respondent in Case No. 02-1116, and has included the United States as a respondent in its filings in that case.

- Amici: None.

Because Petitioners are not corporations, associations, joint ventures, partnerships, syndicates, or other similar entities, Circuit Rule 26.1 does not require the filing of a disclosure statement.

(B) Rulings Under Review: Petitioners seek review of the final rules issued by NRC, titled "Disposal of High-Level Radioactive Wastes in a Proposed Geologic Repository at Yucca Mountain, Nevada, 10 C.F.R. Part 63," published at 66 F.R. 55,732-55,816 (Nov. 2, 2001). A copy of these rules may be found in the Statutory/Regulatory Appendix filed with Petitioners' Opening Brief. Petitioner Nevada also seeks review of the NRC's denial of Nevada's Petition for Rulemaking, docketed as PRM-63-1. NRC's denial of Nevada's Petition for Rulemaking was published at 68 F.R. 9,023-9,032 (Feb. 27, 2003).

(C) Related Cases: The matters under review were not previously before this Court or any other court. While Petitioners do not believe that there are any cases pending before the Court that constitute "related cases" within the meaning of the Court's rules, Petitioners note that pending before the Court are three groups of cases, involving dif-

ferent respondents, that, like this case, generally concern issues relating to the proposed nuclear waste repository at Yucca Mountain, Nevada:

- *Nuclear Energy Institute, Inc. v. Environmental Protection Agency*, No. 01-1258 (consolidated with Nos. 01-1268, 01-1295, 01-1425, and 01-1426) (the “EPA Case”);
- *State of Nevada, et al. v. United States Department of Energy*, No. 01-1516 (consolidated with Nos. 02-1036, 02-1077, 02-1179, and 02-1196) (the “Recommendations Case”);
- *State of Nevada, et al. v. United States*, No. 03-1009 (the “Constitutional Case”).

By orders dated November 7, 2002, and March 14, 2003, this Court directed that this case be heard in tandem with the EPA Case, the Recommendations Case, and the Constitutional case, and that the Clerk calendar all four groups of cases for oral argument on the same day or the same week, and before the same panel, in September 2003.

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GLOSSARY

AEA – Atomic Energy Act

DOE – United States Department of Energy

F.R. – Federal Register

NRC – United States Nuclear Regulatory Commission

NWPA – Nuclear Waste Policy Act of 1982. Citations to the NWPA in this brief are to the Public Law section rather than to the United States Code section. A copy of the NWPA, as amended, with cross-references to the Code sections (*e.g.*, NWPA §113 is codified at 42 U.S.C. §10133; NWPA §114 is codified at 42 U.S.C. §10134), is included in the statutory / regulatory appendix filed with Petitioners' Opening Brief.

JURISDICTION

This action challenges the February 21, 2003 final decision of the Nuclear Regulatory Commission (“NRC”) denying Nevada’s petition for rulemaking. Jurisdiction derives from Section 119(a)(1)(A) of the Nuclear Waste Policy Act (“NWPA”). This action was timely filed (March 4, 2003) under NWPA Section 119(c).

Alternatively, jurisdiction derives from the Hobbs Act, 28 U.S.C. § 2342(4), and this action was timely filed under 28 U.S.C. § 2344.

STATEMENT OF THE CASE

By order dated March 17, 2003, the Court consolidated Case No. 03-1058 with Case No. 02-1116, as both cases involve substantially similar challenges to the lawfulness of NRC’s “Part 63” regulations governing the licensing of the Department of Energy’s (“DOE”) proposed geologic repository at Yucca Mountain, Nevada (“Yucca”). In Case No. 03-1058, Petitioner State of Nevada challenges NRC’s refusal to amend its “Part 63” regulations to require DOE to demonstrate, as a prerequisite to NRC licensing, that the repository’s geologic setting forms the primary barrier for isolation of radioactive wastes.

Nevada raised this precise issue in a Petition for Rulemaking that it filed with the NRC on July 12, 2002 (“Petition”). Nevada’s Petition argued that the text and legislative history of the NWPA, the recommendations of an international peer

review, and previous positions of NRC and DOE, all compelled the conclusion that Yucca's geologic setting, as opposed to human-engineered barriers such as the waste package, must be the primary barrier for waste isolation. Accordingly, Nevada urged NRC to amend Part 63 to require that "[t]he natural features of the geologic setting shall constitute the primary barrier for assuring the long-term isolation of [radioactive waste] at the proposed geologic repository at Yucca." Petition at 44.

NRC denied Nevada's Petition on February 21, 2003. State of Nevada: Denial of a Petition for Rulemaking ("Denial"), 68 F.R. 9023. NRC concluded that it "finds no legal infirmity in the current Part 63 regulations and thus there is no reason to amend Part 63 to cure any supposed lack of conformity with NWPA or AEA." Denial at 11-12 (68 F.R. 9025).

In its Denial, NRC again abandons its previous regulatory approach to Yucca licensing, which was developed just after Congress enacted the NWPA, and which still applies to all other geologic repositories. NRC also reinvents the prior history of Part 63, contorts the pertinent sections of the NWPA, and ignores the NWPA's legislative history, which confirms that Congress intended geologic considerations to be the primary factor both in DOE's evaluation of Yucca's suitability and in NRC's licensing.

NRC tries to excuse its backsliding on the primary safety importance of the geologic setting by attributing its Denial on this point to its new regulatory philosophy of “risk-informed and performance-based regulation.” Denial at 15 (68 F.R. 9026). NRC cannot explain how it is that “risk-informing” must result in the de-emphasis of the most important safety risk factor in a geologic repository.

SUPPLEMENTAL STATEMENT OF FACTS

The pertinent statutory and regulatory background for this case is set forth in the Statement of Facts in Petitioners’ Opening Brief filed in Case No 02-1116.

Nevada filed its Petition for Rulemaking that gives rise to Case No. 03-1058 on July 12, 2002, after NRC had adopted Part 63 on November 2, 2001.

Nevada’s Petition cited the results of a peer review of DOE’s Yucca safety assessments that DOE had requested of the International Atomic Energy Agency and the Paris-based Nuclear Energy Agency. Petition at 34-38. The peer review results were released in March 2002 after Part 63 was revised, so NRC did not take them into account in that rulemaking.

The peer reviewers concluded that NRC’s and DOE’s common approach to the Yucca safety review “has resulted in a bias toward engineered barriers.” See Petition at 35 (citation omitted). Building on this, and on an extensive analysis of the text and history of the NWPA, Nevada urged NRC to restore the primacy of geologic isolation to Part 63.

Rather than simply state that Part 63 was too new to be reconsidered, NRC reconsidered its previous conclusion in Part 63 that geologic considerations need not be primary, devoted ten pages to a discussion of the merits of Nevada's arguments, and then rejected them. Denial at 11-21 (68 F.R. 9025-28).

ARGUMENT

As Petitioners' Opening Brief makes clear, in the NWPA, Congress unambiguously mandated a "system" for the "permanent deep geologic disposal" of nuclear waste. Congress required that the "geologic medium" form the primary barrier keeping waste from people and the environment over the millennia. Part 63 simply cannot be squared with these clear statutory commands. Thus for the same reasons, discussed at length in Petitioners' Opening Brief, that Part 63 is unlawful, NRC should have granted Nevada's Petition seeking amendments to Part 63 that would have brought that regulation into compliance with the geologic isolation provisions of the NWPA.

In addition, the Denial confirms the correctness of Nevada's position that NWPA Section 112(a) applies fully to Part 63. *See* Opening Brief at 44-46. Section 112(a) states that "geologic considerations" are to be the "primary criteria [in DOE's guidelines] for the selection of sites," including Yucca. NRC concedes that "[i]t may be readily acknowledged that it would make little sense for Congress to establish a system for selecting a repository where DOE guidelines for selection

of sites and NRC regulations for licensing a repository would contradict each other.” Denial at 19 (68 F.R. 9027). Nevada makes precisely the same point in its Opening Brief at 45-46.

NRC then tries to rationalize this apparent contradiction by arguing that when the license application is filed Yucca will already have passed the NWPA geological primacy test, so there is no need for NRC to address this test in licensing. Denial at 19 (68 F.R. 9027). But what if, for whatever reason, Yucca did *not* pass the test? NRC has no answer.

CONCLUSION

WHEREFORE, Nevada respectfully requests this Court to vacate NRC’s Denial and Part 63 as arbitrary, capricious, and violative of law, and to remand to NRC for further proceedings consistent with the Court’s instructions.

Respectfully submitted,

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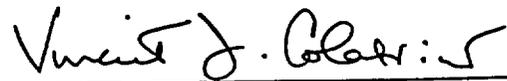
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CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation of set by this Court's Order dated March 17, 2003, which authorized Petitioner State of Nevada to file a supplemental brief not of not greater than 1,000 words. In reliance on the word count of the word-processing system used to prepare this brief, I hereby certify that the portions of this brief subject to the type-volume limitation contain 999 words.



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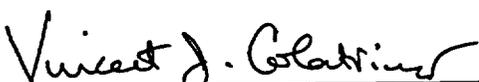
CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of
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