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December 15, 2003

Mark Langer, Clerk
U.S. Court Of Appeals for the
District Of Columbia Circuit
333 Constitution Ave., N.W.
Washington, D.C. 20001

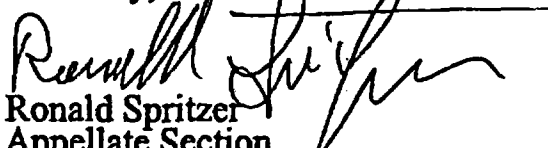
Re: Nuclear Energy Institute, et al. v. U.S. Environmental
Protection Agency, D.C. Cir. No. 01-1258 (Consolidated
with Nos. 01-1268, 01-1295, 01-1425, 01-1426, 01-1516,
02-1036, 02-1077, 02-1116, 02-1179, 02-1196, 03-1009,
and 03-1058)

Dear Mr. Langer:

Enclosed for filing with the Court are original and four copies of the
**Respondents' Opposition To Petitioners' Motion To Require Respondents To
Supplement The Record On Review** in the above captioned-case.

As indicated by the certificate of service, copies of the same have
been served on counsel.

Sincerely,


Ronald Spritzer
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Enclosures

TO BE ARGUED JANUARY 14, 2004

No. 01-1258

(Consolidated with Nos. 01-1268, 01-1295, 01-1425, 01-1426, 01-1516, 02-1036,
02-1077, 02-1116, 02-1179, 02-1196, 03-1009, 03-1058)

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

NUCLEAR ENERGY INSTITUTE, ET AL.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

**RESPONDENTS' OPPOSITION TO PETITIONERS' MOTION TO REQUIRE
RESPONDENTS TO SUPPLEMENT THE RECORD ON REVIEW**

Petitioners the State of Nevada, Clark County, Nevada, and Las Vegas, Nevada, filed their most recent Motion to Require Respondents To Supplement The Record On Review ("Motion to Supplement") on November 25, 2003. The Motion to Supplement requests the inclusion of 7 documents totaling 72 pages as a supplement to the "record on review." Motion to Supplement at 1. The Motion does not identify which agency record Petitioners claim should be supplemented, but the Motion pertains to the record for the Department of Energy's ("DOE's") Final Environmental Impact Statement ("FEIS") for the proposed Yucca Mountain repository.

documents, while presented as part of a motion to supplement the record, are at bottom nothing more than an attempt to supplement their briefs with arguments they could have included in those briefs but did not. Petitioners have not argued, and could not show, that they have any basis for attempting to supplement their briefs at this late date.

2. There is no need to supplement the record with documents that are already part of the administrative record. Petitioners' Motion to Supplement requests that the following documents be included in the administrative record:

No.	Document	Nev. Supp No.	FEIS Admin. Rec. Item No. EIS No. CD Designation
1	Letter dated October 6, 2003, from Quenell, DOE, to Fitzpatrick, Counsel for Nevada	Supp-904	Not in record
2	Criticality Potential Curve Draft Report (email dated July 30, 1998)	Supp-905 through Supp-917	Not in record
3	Letter dated November 14, 2003, from Arthur, DOE, to Fitzpatrick, Counsel for Nevada	Supp-918 through Supp-919	Not in record
4	Report of Senior Technical Review Panel Meeting of Feb. 9, 1998	Supp-920 through Supp-929	Not in record
5	Report of Senior Technical Review Panel Meeting of Feb. 10, 1998	Supp-930 through Supp-945	1.03317 EIS-AR-ID-NA-00026 EISARNA01
6	Report of Senior Technical Review Panel Meeting of Apr. 3, 1998	Supp-946 through Supp-966	1.03320 EIS-AR-ID-NA-00029 EISARNA01
7	Report of Senior Technical Review Panel Meeting of June 5, 1998	Supp-967 through Supp-975	1.03338 EIS-AR-ID-NA-00047 EISARNA01

As shown, Documents 5, 6, and 7 (Petitioners Supp-930 through Supp-975) are in the administrative record for the FEIS. Accordingly, Nevada's request to supplement the record with these documents is unnecessary.

3. Petitioners have failed to show that the remaining documents fall within any exception to the general rule against supplementation of the record. Petitioners have failed to provide a sufficient legal basis for adding documents 1-4 to the administrative record. The scope of the administrative record on review is defined by Rule 16 of the Federal Rules of Appellate Procedure:

(a) Composition of the Record. The order sought to be reviewed or enforced, the findings or report on which it is based, and the pleadings, evidence and proceedings before the agency shall constitute the record on review in proceedings to review or enforce the order of an agency.

Fed. R. App. P. 16(a). See also 28 U.S.C. 2112(b). The general rule, as articulated by the Supreme Court, is that extra-record materials should not be considered during judicial review of final agency action:

[W]e have consistently expressed the view that ordinarily review of administrative decisions is to be confined to "consideration . . . of the evidence on which it was based." United States v. Carlo Bianchi & Co., 373 U.S. 709, 714-715 (1963). "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." Camp v. Pitts, 411 U.S. 138, 142 (1973).

Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326, 331 (1976).

Thus, the administrative record is properly restricted to documents specifically relied upon or considered by the Agency as the basis for the administrative action in question, and a document

is properly included in the administrative record only if it was considered or relied on in support of that action.

“Although this Court has sanctioned supplementation of the record in certain circumstances . . . the practice decidedly is the exception not the rule.” San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287, 1324 (D.C. Cir. 1984) (quoting Motor & Equip. Mfrs. Ass’n v. EPA, 627 F.2d 1095, 1105 n.18 (D.C. Cir. 1979)). Among the limited exceptions this Court has noted are:

(1) when the agency action is not adequately explained in the record before the court; (2) when the agency failed to consider factors which are relevant to its final decision; [and] (3) when an agency considered evidence which it failed to include in the record.

Esch v. Yeutter, 876 F.2d 976, 991 (D.C. Cir. 1989). Neither these narrow exceptions, nor any others, apply to this case.

a. Documents 1, 3, and 4 should not be added to the Record. Documents 1 and 3 are transmittal letters in which DOE responded to Nevada’s August 14, 2003, FOIA request. The DOE letters are not substantive documents, and they were created long after the FEIS was issued in February 2001. Accordingly, they are not part of the administrative record for the FEIS. See Walter O. Boswell Memorial Hospital v. Heckler, 749 F.2d 788, 793-794 (D.C. Cir. 1984).

Document 4 is plainly a draft of document 5, which is in the record already. A comparison of the two documents shows that they describe the same meeting of the Senior Technical Review Panel and are nearly identical in text.² Since DOE included the final version

² Document 5 has a signature line and includes two appendices. Although the titles refer to different dates for the meeting, this discrepancy is evidently an error since the reports clearly describe the same meeting.

of the report in the record, there is no need to supplement the record with a draft, especially since there are no significant differences in the two documents.

b. The draft analysis in Document 2 does not concern a criticality issue properly raised by Nevada in this litigation. Petitioners claim that one of their “central contentions is that DOE’s FEIS failed to adequately consider the environmental impacts of various criticality scenarios.” Motion at 6.³ To be properly before the Court, however, Petitioners’ “various criticality scenarios” must have been raised in their opening brief, since this Court does not consider arguments raised for the first time in later briefs, much less in later motions to supplement the record. See Sierra Club v. EPA, 292 F.3d 895, 900 (D.C. Cir. 2002).

In fact, Petitioners’ opening brief raises only one criticality scenario: their theory, unsupported by any record evidence, that a missile fired by a terrorist at a transport cask of SNF could penetrate both shells of the cask and induce criticality. Petitioners’ Opening Brief in Case Nos. 01-1516, *et al*, at 97. Petitioners alleged that DOE’s analysis of the possibility of such an attack was arbitrary and capricious because DOE allegedly relied upon an outdated study to conclude that a missile could penetrate only the outer wall of a transport cask. Id. at 96-97. DOE showed that its analysis of this issue was based upon a report completed by Sandia Laboratories in 1999 that reviewed numerous studies and concluded that a missile identified as HEDD1 had the most potential to cause damage to the transport cask. DOE Brief in Case Nos. 01-1516, *et al*, at 97-98. The Sandia study confirmed that such a missile would penetrate only the outer wall of the transport cask. Id. at 98. DOE was therefore fully justified in basing the analysis in the

³ Criticality is defined in the FEIS as the condition in which nuclear fuel sustains a chain reaction. JA 1339.

FEIS upon that realistic scenario rather than Petitioners' speculation that a missile could penetrate both walls and induce criticality. Id. at 98-99.

Rather than addressing Petitioners' terrorist scenario, Document 2, like Documents 4-7, concerns an entirely different question: the criticality potential of the "loss of institutional control" scenario that DOE analyzed in the FEIS as part of its no-action alternative. As DOE explained in its brief in the FEIS/Guidelines/Recommendations case, the no-action alternative assumed that if Yucca Mountain was not developed as a repository, utilities and DOE would continue to manage SNF and high level radioactive waste ("HLW") on-site in dry storage facilities. Brief in Case Nos. 01-1516, *et al*, at 78-81. Because of the obvious uncertainties in predicting how such on-site storage facilities will be operated over the next 10,000 years, DOE included two "bounding" scenarios within its no-action alternative. The loss of institutional control scenario provided the lower-bound or worst-case scenario for the no-action alternative. That scenario assumed that utilities and DOE would abandon effective institutional control of their dry storage facilities after 100 years. Id. at 79. The best-case scenario that provided the upper-bound for the analysis assumed that utilities would continue to maintain effective institutional control of their dry storage facilities for the next 10,000 years. Id.

Document 2 (like documents 4-7) concerns the loss of institutional control scenario. The title of document 2 is "Criticality Events in Dry Storage." Supp. 906. It concerns the possibility of a criticality event in "[e]xisting storage systems" which "might occur if loss of institutional controls were to remove surveillance and maintenance controls." Id. If institutional control is maintained at the dry storage facilities, a criticality is not plausible because the casks would be monitored and maintained to prevent the introduction of water into the canister. However, if

institutional control were lost, eventual degradation (corrosion) of the dry storage canisters could lead to the entry of water from precipitation, at which point criticality could be possible if other conditions were met simultaneously. Id.⁴

Thus, the draft report did not address Petitioners' terrorism scenario, but another criticality issue that Petitioners have not raised in this litigation. None of the documents cited by Petitioners addresses the question whether a missile could reasonably be expected to penetrate both walls of a transport cask and induce criticality. Thus, like Petitioners' brief, they fail to provide the factual predicate for Petitioners' sole argument concerning criticality. Petitioners have therefore failed to show that the documents are relevant to the arguments properly before the Court, should the Court conclude it has jurisdiction to review the FEIS.

c. Document 2 does not support Petitioners' new criticality theories, even if they were properly before the Court. Petitioners would now apparently like to expand the scope of the litigation to include additional criticality scenarios that they claim might arise during transportation of SNF or disposal of SNF in a repository. See Motion to Supplement at 2, 4, 6. Petitioners' attempt to use the Motion to Supplement to expand the scope of the issues before

⁴ DOE's FEIS discusses the possibility of a criticality in on-site dry storage systems. JA 1586-87. "A criticality accident is not possible in high-level radioactive waste because most of the fissionable atoms were removed or the density of fissionable atoms was reduced by the addition of glass matrix." JA 1586. The FEIS states that the "designs of existing dry storage systems for spent nuclear fuel, in accordance with Nuclear Regulatory Commission regulations (10 CFR 72) preclude criticality events by various measures, including primarily the prevention of water entering the dry storage container. If water is excluded, a criticality cannot occur." JA 1587. If institutional controls are maintained at the dry storage facilities, a criticality is not plausible, since water would be excluded. However, with the loss of institutional controls the dry storage canisters can degrade (corrode) and allow entry of water and the possibility of a criticality event. Id.

the Court should be rejected. Moreover, Document 2 does not address criticality issues related to SNF transportation or the disposal of SNF at Yucca Mountain.

The event described in Document 2 is not relevant to the short transport times needed to move a cask of SNF from a utility storage site in a transport cask that complies with NRC transportation regulations at 10 CFR Part 71. Under the NRC regulations, a transportation package "must be so designed and constructed and its contents so limited that it would be subcritical if water were to leak into the containment system." 10 CFR 71.55. Document 2 does not provide any evidence that a transport cask that complies with the NRC regulations could achieve a criticality event if it were damaged in transit.

The use of Document 2 to attempt to predict the probability of criticality events occurring within a repository is also without basis. The document's analysis of the impact of loss of institutional control at on-site storage facilities assumed vertical dry storage casks located at existing locations. The casks were assumed to not contain neutron absorbers, which would limit criticality events if they were included. Supp-907 and -910. The FEIS addressed the different issue of criticality within the repository. JA 965-68. As the FEIS explains, "[o]ne of the required conditions for nuclear criticality is the presence of a moderator such as liquid water." JA 965. A waste package designed for disposal of SNF contains special features designed to prevent water from breaching the waste package, including the use of an extremely corrosion-resistant material for the waste package outer barrier and a titanium drip shield that diverts water away from the packages. JA 639-40. The FEIS concluded that "there is a very low probability that any liquid water would enter a specific package." JA 965. And, unlike the dry storage casks assumed in Document 2, each waste package "would contain a neutron

absorber that would have the important function of capturing neutrons and helping to prevent a criticality." JA 965. The FEIS explains that the probability of criticality occurring inside the waste package is extremely small, and that if criticality were to occur it would only have minor effects. JA 965-68. Neither Document 2 nor the other documents attached to the Motion to Supplement played a part in, or is relevant to, this analysis.

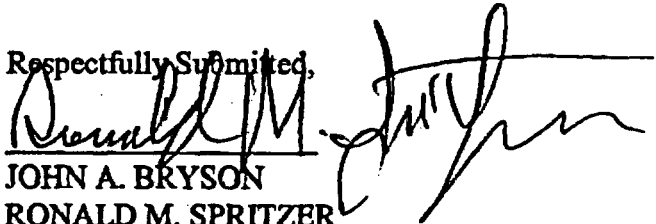
Thus, document 2 does not concern, and cannot be used to evaluate, the potential for criticality in a waste package located within the repository or within a cask during transport. Even if Petitioners had properly raised such issues, they would have to be evaluated on the basis of the certified administrative record, not a draft report that concerns a different matter.

Petitioners have thus failed to establish that Document 2, or any other document attached to their Motion to Supplement, should be added to the administrative record. See Camp v. Pitts, 411 U.S. 138, 142 (1973); James Madison Limited v. Ludwig, 82 F.3d 1085, 1095-1096 (D.C. Cir. 1996); Center for Auto Safety v. Federal Highway Administration, 956 F.2d 309, 314 (D.C. Cir. 1992); San Luis Obispo Mothers for Peace v. N.R.C., 751 F.2d at 1324-1325.

CONCLUSION

The Motion to Supplement should be denied.

Respectfully Submitted,


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CERTIFICATE OF SERVICE

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