TO BE ARGUED ON JANUARY 14, 2004

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NUCLEAR ENERGY INSTITUTE, Petitioner, v. ENVIRONMENTAL PROTECTION AGENCY, Respondent.	**Case No. 01-1258** Consolidated with 01-1268, 01-1295, 01-1425, 01-1426, 01-1516, 02-1036, 02-1077, 02-1116, 02-1179, 02-1196, 03-1009, 03-1058

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

As Respondents indicate, Petitioners' motion to supplement the administrative record pertaining to the Department of Energy's ("DOE") Final Environmental Impact Statement ("FEIS") for the Yucca Mountain nuclear waste repository boils down to consideration of one key document that Respondents failed to place in the record but which clearly belongs there. That document is the so-called *Criticality Potential Curve Draft Report* ("*Criticality Report*"). The remaining documents are (a) two cover letters offered simply to illustrate that the disputed documents were provided in October and November 2003 in response to Freedom of Information Act ("FOIA") requests; (b) one document that Respondents correctly contend is a draft of a later document now in the record; and (c) three documents provided in response to Petitioners' FOIA request that are already in the record but were not previously cited in Petitioners' briefs.[1]

[1] Petitioners acknowledge that they inadvertently failed to discover that these three documents appeared in the certified index to the Administrative Record, which index is alone some 1600 pages long.

Respondents raise three arguments. First, they argue that the motion to supplement is untimely. Second, they claim that Petitioners' request does not fit within any of the recognized exceptions to the general rule limiting the Court's review to that material claimed by the agency to constitute "the record." Third, Respondents contend that the key disputed document "does not concern a criticality issue properly raised by Nevada in this litigation." Respondents' Opposition to Petitioners' Motion to Require Respondents to Supplement the Record on Review ("Opposition") at 6. Respondents are wrong on all counts.

ARGUMENT

I. PETITIONERS' MOTION IS NOT UNTIMELY

Respondents do not contend that Petitioners waited too long after receiving the *Criticality Report* to file their Motion to Supplement. Rather, Respondents' argument is that Petitioners waited too long to make the FOIA request that led to the release of the Criticality Report in the first place. Respondents' position appears to be that (1) Petitioners should have anticipated before briefing began that Respondents would withhold highly relevant material from the voluminous administrative record; and that (2) Petitioners, before filing their opening brief, should have submitted wide-ranging FOIA requests that would have eventually led to the discovery of materials that Petitioners did not even know existed. Not surprisingly, Respondents cite no authority that would support such a bizarre proposition, which would reduce administrative agency litigation to an elaborate exercise of "gotcha"-style gamesmanship.

The fact of the matter is that Petitioners did not even know that a document even resembling the *Criticality Report* existed until *after* briefing in this case began, when vague references to a criticality study were included in DOE's Continued Storage Analysis Report, which was itself inappropriately excluded from the administrative record and released in January 2003 in re-

sponse to FOIA requests. Even then, it was not clear that such an unreleased study would contain information that was highly relevant to Petitioners' claims under the National Environmental Policy Act ("NEPA"), let alone that it would contain analyses that are directly at odds with DOE's assertion, in its Yucca Mountain FEIS and in its briefs filed in this Court, that the risk of nuclear criticality occurring in a shipping cask attacked by saboteurs or terrorists is insignificant or "speculative" and therefore need not have been evaluated by DOE as part of its legal obligation to take a "hard look" at impacts under NEPA. Upon realizing the potential relevance of the unreleased criticality study referenced in the CSAR, Petitioners made a FOIA request for the study. It was only upon receiving the *Criticality Report* and related documents in October and November 2003 that Petitioners discovered that DOE was aware that, in fact, criticality *is* a significant risk *anytime* water is allowed to enter a spent fuel container. DOE's own studies show that even an obsolete armor-piercing weapon will penetrate at least one wall of a shipping cask. Until the laws of physics are repealed, it takes only one such penetration to permit the ingress of water into the cask in a variety of scenarios easy to envision.

DOE withheld the *Criticality Report* from Petitioners and from the administrative record, and it was only through successive applications under the FOIA process that Petitioners even learned of its existence. For Respondents to now claim that the Court should foreclose consideration of that document because Petitioners only discovered the full extent of DOE's mischief in October and November 2003, and did not suspect such mischief, and file a protective FOIA request, before briefing began in this case, is absurd.

II. THE COURT MAY CONSIDER THE *CRITICALITY REPORT* UNDER RECOGNIZED EXCEPTIONS

As noted by Respondents, Opposition at 5, *Esch v. Yeutter* and other decisions acknowl-

edge that the Court may order supplementation of the record or otherwise consider a document "when the agency failed to consider factors which are relevant to its final decision," or "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). *See also* Petitioners' Motion to Require Respondents to Supplement the Record on Review at 5-6. Either factor would permit the Court to consider the *Criticality Report*.

In evaluating the post-9/11 risks of terrorism and sabotage in shipping tens of thousands of loaded spent fuel casks through the nation's cities to Yucca Mountain, DOE's final decision was not to evaluate the risks and consequences of nuclear criticality because they were deemed insignificant or speculative. Though DOE knew that terrorists or saboteurs could readily penetrate a shipping cask with even an obsolete armor-piercing weapon (hundreds of thousands of which are available in the world marketplace), DOE ignored its own criticality studies suggesting that criticality was not only possible but *likely* in the event of water entering a cask under certain conditions. Though DOE considered nuclear criticality risk to be significant with rainwater trickling into a degraded cask sitting on a concrete pad near a nuclear reactor, DOE ignored criticality risks in the far more dangerous situation of a cask penetrated (and its internals destroyed) by an armor-piercing weapon and then exposed to water. Under *Esch v. Yeutter*, criticality risk factors were clearly relevant to DOE's decision to proceed with the largest spent fuel shipping campaign in history; and the *Criticality Report* illustrates that DOE considered and was aware of criticality risks but failed to include its own best evidence of such risks in the record. Alternatively, supplementation of the record before the Court is appropriate to allow the Court to meaningfully evaluate Petitioners' contention that DOE failed to adequately consider and assess the environmental impacts of various criticality scenarios.

III. PETITIONERS PROPERLY RAISED THE CRITICALITY ISSUE IN THIS LITIGATION

Respondents claim that Petitioners' central criticality contention was not raised in Petitioners' opening brief, and thus that this Court "does not consider" such arguments raised at a later time. Opposition at 6 (citing *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002)).

Respondents are again wrong. Petitioners' opening brief alleged that "DOE did not consider the risk that a warhead exploding inside a spent fuel container could cause fissile nuclear material inside to create a nuclear chain reaction, or 'criticality,' whose consequences would catastrophically exceed the postulated consequences of the relatively tame [sabotage] event described in the FEIS." Petitioners' Opening Brief at 97 (No. 01-1516, *et al.*). Petitioners alleged that, although DOE considered criticality in connection with the mere storage of spent fuel in casks exposed to rainwater seepage, DOE "ignored the far more realistic risks of criticality occurring in a sabotage event" on a penetrated shipping cask exposed "to rain, fire, or firefighters' spray, inducing criticality." *Id.* Indeed, Petitioners described such an event as the ultimate, easy-to-achieve "dirty bomb." *Id.* at 98.

Knowing this, Respondents now attempt to obfuscate Petitioners' argument by claiming it dealt solely with a criticality scenario requiring double penetration of *both* sides of a transport cask. This straw man is nowhere to be found in Petitioners' pleadings. Petitioners' allegation, supported by DOE's own research, was simply that an armor-piercing weapon can penetrate a cask,[2] permitting the ingress of water. Petitioners do not disagree that " '[if] water is excluded, a

[2] Video footage of an actual 1999 U.S. Army test dramatically illustrates a TOW missile warhead fully perforating one of the nuclear industry's most robust shipping casks. *See* http://wwws.house.gov/search97cgi/s97_cgi?action=View&VdkVgwKey=http%3A%2F%2Fwww%2Ehouse%2Egov%2Fberkley%2Flegis%5Fni%5Fyucca%2Ehtml&DocOffset=2&DocsFound=3&QueryZip=TOW&SourceQueryZip=vdkvgwkey+%3Csubstring%3E+%22%2Fberkley%2

criticality cannot occur.' " *See* Opposition at 8 n.4 (citation omitted). But it takes only one perforation of a cask to permit the ingress of water. Respondents' attempt to obfuscate this contention into an issue of double penetration is unavailing. Likewise, the fact that NRC regulations require casks to be designed and constructed so they remain subcritical even if water were to leak into them is irrelevant here. Opposition at 9. The design geometry and structural internals of a cask and its contents are extremely unlikely to stay intact when exploded by an armor-piercing warhead. Indeed, Respondents do not dispute that the mere degradation of a cask passively sitting on a concrete pad in storage can create the internal structural conditions permitting criticality, notwithstanding these same NRC regulations.[3]

CONCLUSION

Petitioners' motion to supplement the record should be granted.

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[3] Finally, Petitioners recognize that they have not raised in *this* litigation the issue of criticality occurring within the repository at Yucca Mountain. *See* Opposition at 9-10. They did not do so because they initially accepted DOE's false representation that the risk of criticality occurring inside the repository was less than one in ten million per year.

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DATED: December 29, 2003

CERTIFICATE OF SERVICE

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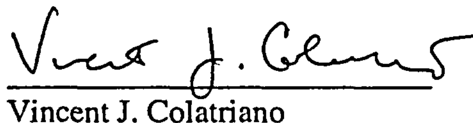

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