

January 15, 2004

Mark J. Langer, Clerk
U.S. Court of Appeals for the District of Columbia Circuit
Room 5423, U.S. Courthouse
333 Constitution Ave., N.W.
Washington, DC 20001

Re: *Nuclear Energy Institute v. EPA*, 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:

A panel of this Court (Edwards, Henderson & Tatel, JJ) heard oral argument yesterday (January 14, 2004) in the above-captioned consolidated cases. I argued the Nuclear Regulatory Commission (NRC) portion of the cases on behalf of the Commission.

At the end of oral argument, I was recalled to the podium to explain how the Department of Energy's (DOE) environmental impact statement (EIS) would come into play during repository licensing proceedings at the NRC. The Court's inquiry did not relate to our own case, but to the DOE cases.

I am concerned that my response may not have been entirely clear. The NRC's appellate brief in Nos. 02-1116 and 03-1058 (at pp. 44-45) correctly sets out the process for NRC handling of DOE's EIS. As our brief indicates, by statute the NRC is to adopt DOE's EIS "if practicable." See 42 U.S.C. §10134(f)(4). If the NRC adopts the EIS, "no further consideration shall be required." *Id.* Under NRC regulations, in deciding whether adoption of the DOE EIS is "practicable," the presiding officer at NRC administrative hearings considers whether "[s]ignificant and substantial new information or new considerations render [the] environmental impact statement inadequate." See 10 C.F.R. § 51.109(c).

This regulatory regime affects issues that can be raised and litigated at NRC *administrative* hearings, not issues that can be raised on *judicial* review. As Ronald Spritzer of the Department of Justice explained at oral argument, DOE's EIS will become subject to judicial review when it is used to support government action, such as DOE's upcoming transportation decision and the NRC's decision on adopting DOE's EIS.

I have enclosed an original and four copies of this letter. Please distribute copies to the panel of this Court considering this case.

Thank you for your attention to this matter.

Sincerely,

/RA/

Steven F. Crockett

cc: Service List