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Via E-mail @ kdc@nrc.gov
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Karen D. Cyr, Esq.
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Dear Ms. Cyr:

According to a recent article that appeared in the July 24, 2004, edition of *Inside NRC*, your office is being asked to provide guidance on whether the NRC Staff may docket a U.S. Department of Energy ("DOE") application for a construction authorization for a geologic repository at Yucca Mountain (the "LA") in light of the recent decision of the United States Court of Appeals for the District of Columbia Circuit (the "Yucca Decision") vacating both 40 C.F.R Part 197 and 10 C.F.R. Part 63 insofar as they limited the compliance assessment to the first ten thousand years. If this article is correct, the State of Nevada respectfully requests that your office take into account its views on this matter, as set forth below.

In brief, Nevada believes docketing of the LA is impossible until (1) the U.S. Environmental Protection Agency ("EPA") and NRC issue effective new rules that conform to the Court's decision and the National Academy of Sciences Report on *Technical Bases for Yucca Mountain Standards*; and (2) DOE submits a tendered application with a full evaluation of compliance with the new standards. Nevada believes this position is compelled by both legal and practical regulatory considerations.

First, as the Court of Appeals correctly observed (Yucca Decision at pg. 55), the Nuclear Waste Policy Act of 1982 as amended ("NWPA") "specifically directs NRC to adopt 'requirements and criteria' to review the specified [Yucca Mountain] application." Moreover, Section 121 provides specifically that these "requirements and criteria" for review of the LA cannot be developed in the licensing adjudication, but must instead be promulgated "by rule." Also, Section 121 provides clearly that any such NRC rule cannot be promulgated in the absence

of an effective EPA Yucca Mountain standard. *See* Yucca Decision at pg. 74. And 10 C.F.R. § 2.101(f)(3) states specifically that a tendered LA cannot be docketed absent a judgment that it is "complete."[1] The Court of Appeals' mandate will issue seven days after denial of reconsideration, an event that will occur well before the LA is tendered. So, when the LA is tendered, the ten thousand-year compliance period will be vacated, and revisions to the EPA and NRC regulations will be legally mandated. No LA could possibly be "complete" without an evaluation of compliance with the applicable revised NRC rule, preceded by the revised EPA rule, and obviously no evaluation of compliance is possible without certain knowledge of what these rules actually require.

Second, practical regulatory considerations preclude the docketing of an LA under current circumstances. Even if issuance of the Court of Appeals' mandate is delayed, a docketing decision based on the hyper-technical premise that the Court of Appeals' mandate has not yet issued would be like ignoring the "elephant in the room." The possibility (Nevada would say *certainty*) that 10 C.F.R. Part 63 would require substantial alteration would loom over the proceeding and, when the mandate issues and critical portions of Part 63 are legally obliterated, much of what has been accomplished up to that point would need to be redone. This would place compliance with the three- or four-year statutory deadline in jeopardy. Moreover, in a time of constrained federal and state budgets, dollars and human resources will have been wasted.

Nevada emphasizes in this regard that conformance with the Yucca Decision will require more than simply according regulatory compliance significance to peak dose calculations used thus far in the DOE NEPA review, even putting aside the critical fact that to date these peak dose calculations demonstrate the EPA dose standard is violated. For example, 10 C.F.R.§ 63.114 requires the performance assessment to take account of features, processes and events (so called "FEPs") and to provide the basis for their selection or exclusion. However, under 10 C.F.R. § 63.342, certain FEPs have been excluded based on whether they are "very unlikely" or "unlikely," with likelihood defined only with reference to the first ten thousand years after disposal. Clearly, once the ten thousand-year compliance period is eliminated, the likelihood of FEPS that may occur beyond ten thousand years must be taken into account, when doses are projected to *rise*. Similarly, the scope of alternative conceptual models required by 10 C.F.R. § 63.114 (c) would need to be expanded, as would the scope of the performance confirmation and quality assurance programs required by 10 C.F.R. §§ 63.131-144. As a practical matter, to determine LA completeness NRC Staff will, at a minimum, need to examine each of the 293 KTIs that relate in any way to the post-closure assessment and decide whether the formulation of the issues and any DOE responses are still sufficient.

[1] It might be suggested that a partial LA (*e.g.*, one that included only pre-closure information and analyses) could be docketed. However, NRC's rules do not allow this. *Compare* 10 C.F.R. § 2.101(f)(3) with 10 C.F.R. § 2.101 (a-1). Moreover, Section 114 (d) of the NWPA requires the NRC to issue a "final decision approving or disapproving the issuance of a construction authorization" within three or (with Congressional notification) four years "after the date of the submission of such application." Under 10 C.F.R. §§ 63.3 and 63.31, there is only a single such construction authorization premised upon the filing of a single LA. Docketing of a partial application would, under Section 114(d) of the NWPA, place the NRC in the absolutely untenable position of purporting to be conducting a proceeding for the possible issuance of a full construction authorization subject to the Congressional deadlines on the basis of an application that could not lead to any final decision other than denial for incompleteness.

Thus, while at first blush it might appear expedient to docket an LA with a performance assessment using some conservative assumptions of what a Yucca Mountain EPA standard complying with the Yucca Decision might be, full development of such an assumed standard and the completion of the necessary performance assessment would pose a daunting challenge. The time and resources needed for such an effort would be better devoted to the expeditious completion of the EPA and NRC rulemakings. Moreover, given the need for EPA to keep its rulemaking options open to avoid pre-judgment of the results of the public rulemaking proceeding, NRC might guess wrong on what the EPA rule might require, with the result that the licensing review and hearing would need to be commenced again; intense controversies would develop over admission of new contentions and reopening hearing records; compliance with the statutory decision deadline would be in jeopardy; and precious dollars and human resources would be wasted. In at least one prior case, the Commission rejected an option for the initiation of a complex proceeding where the result would have been the need for the parties to re-do much of what had been done before, citing both the Commission's commitment to expeditious decision-making and its concomitant commitment to treat all parties fairly. *Hydro Resources, Inc.*, CLI-01-04, 53 NRC 31 (2001). The same result should obtain here.

The State of Nevada would be pleased to discuss this matter further with you or your staff. As a practical matter, Nevada expects substantial delays anyway as DOE struggles to fulfill its regulatory responsibilities for the LSN (a decision on Nevada's request to strike DOE's initial certification of compliance is expected soon).

Sincerely,

Martin G. Malsch

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