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September 30, 2004

BY MESSENGER

Mark J. Langer, Clerk
U.S. Court of Appeals for the
District of Columbia Circuit
United States Courthouse
333 Constitution Avenue, N.W.
Room 5423
Washington, D.C. 20001

Re: Nuclear Energy Institute, Inc. v. United States Environmental Protection Agency, No. 01-1258

Dear Mr. Langer:

Please find enclosed for filing in this case an original and four copies of the Reply Memorandum of Petitioner Nuclear Energy Institute, Inc. in Support of Motion to Stay the Mandate Pending Timely Filing and Disposition of Petition for Writ of Certiorari. Please date stamp the additional copy of the document to acknowledge filing and return it to our messenger.

Thank you.

Sincerely,

Peter Buscemi

Enclosures
cc(w/encs.): All Counsel of Record

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1258

NUCLEAR ENERGY INSTITUTE, INC.,
PETITIONER,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT.

Consolidated with

01-1268, 01-1295, 01-1425, 01-1426, 01-1516
02-1036, 02-1077, 02-116, 02-1179, 02-1196
03-1009, 03-1058

ON PETITIONS FOR REVIEW OF FINAL RULES
OF THE ENVIRONMENTAL PROTECTION AGENCY

REPLY MEMORANDUM OF PETITIONER NUCLEAR ENERGY INSTITUTE, INC. IN SUPPORT OF MOTION TO STAY THE MANDATE PENDING TIMELY FILING AND DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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September 30, 2004

REPLY MEMORANDUM OF PETITIONER NUCLEAR ENERGY INSTITUTE, INC. IN SUPPORT OF MOTION TO STAY THE MANDATE PENDING TIMELY FILING AND DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

The opposition of the State of Nevada, the Natural Resources Defense Council, and several other groups, to the motion of Petitioner Nuclear Energy Institute, Inc. ("NEI") to stay the mandate is misguided in several respects. Most important, it misapprehends the fundamental purpose of the motion. A stay is needed to avoid the possibility that during the period of NEI's request for Supreme Court review, the decision of this Court will be used by Nevada or others to impede or otherwise delay the completion and submission by the Department of Energy (DOE) of its application for a license for the planned Yucca Mountain repository. Nevada and its supporters do not even allege that the requested stay would cause any harm to themselves or others. Nor do they deny that, in the absence of a stay, this Court's decision may pose an obstacle to continued progress on the pending DOE application. In these circumstances, the balance of potential harms favors a stay, and, as the motion and this memorandum show, the remaining requirements for a stay of the mandate are satisfied.

1. Nevada begins (Opp. 2) by questioning the order in which NEI presented its grounds supporting a stay of the mandate. NEI's motion, however, simply tracked the requirements of Fed. R. App. P. 41(d)(2)(A), which governs stays of the mandate pending the filing and disposition of a petition for certiorari. We are unaware of any authority that a motion to stay the mandate should not proceed in accordance with the governing federal rule. Nor has Nevada identified any such authority.

2. Nevada's characterization of the relevant substantive goal of the Energy Policy Act of 1992 (Opp. 3) (EnPA) is deeply flawed. The statute's "substantive goal" is "to facilitate construction of a permanent nuclear waste repository . . . ." *NEI v.*

Environmental Protection Agency, 373 F.3d 1251, 1258-60 (D.C. Cir. 2004). The "substantive goal" that Nevada identifies—"promulgation of a compliance period in which to measure the safety of the repository"—is but a means to that end. The statutory objective is the creation of the repository, and it is from that perspective that NEI's discussion of harm flows. As an avowed opponent of the Yucca Mountain repository, Nevada seeks to block achievement of the substantive goal set by EnPA and the Nuclear Waste Policy Act of 1982, 42 U.S.C. 10101 *et seq.* Nevada's arguments about the absence of harm should be considered in light of their source.

3. Nevada improperly characterizes (Opp. 3-4) the harm identified by NEI as "mere litigation expenses." That is not accurate. As this Court found, delay of the opening of the Yucca Mountain repository would inflict concrete harm on NEI's members, who have incurred and will continue to incur substantial sums for the storage of high-level radioactive waste and for the funding of the construction and operation of the repository, including increases that result from delay and the cost of the regulatory process that is intended to lead to the creation of the repository. *See NEI v. EPA, supra,* 373 F.3d at 1279-80. These costs are not litigation expenses. Any delay of DOE's progress in completing and submitting its application for the Yucca Mountain repository inevitably will redound to the detriment of NEI's member companies. That is why NEI has sought a stay, to avoid any possibility that this Court's ruling will be used as a barrier to further progress during the pendency of NEI's request for Supreme Court review.

4. Nevada also suggests (Opp. 4) that any harm that is suffered by NEI or its members is something that NEI "brought upon itself anyway." This is nonsense. NEI challenged the separate groundwater standard adopted by the Environmental Protection

Agency (EPA). If NEI's challenge had been successful, that standard would have been eliminated, and EPA, DOE, and the Nuclear Regulatory Commission (NRC) simply would have proceeded without it.[1] NEI's decision to challenge the groundwater rule did not cause this Court to overturn EPA's judgment regarding the appropriate compliance period adopted by EPA, and did not bring about the harm cited by NEI, namely, a potential delay in the repository if this Court's mandate is not stayed pending Supreme Court review. Any such delay would be unjustified, particularly in the event that the Supreme Court reverses this Court's ruling regarding the compliance period.

5. Nevada's assertion (Opp. 5-6) that DOE "cannot lawfully submit an application" for the Yucca Mountain repository until it has certified that certain documents have been made electronically available is premised on an incomplete reading of the NRC regulations. DOE may submit its application on its planned schedule.

Under Section 2.101(f)(8) of the NRC regulations, the NRC hearing on the application is initiated by publication of a notice in the Federal Register after the application is *docketed.* An application is not docketed when it is first submitted. Instead, NRC's Director of Nuclear Material Safety and Safeguards must first determine whether an application submitted by DOE is complete and acceptable for docketing. 10 CFR §2.101(f)(2)(2004). Until the application is found to be complete, it is considered to be only a "tendered document," and the Director may not docket it. 10 CFR §2.101(f)(5)(2004).

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[1] EPA's regulations provide that the separate groundwater standard is severable from the individual protection standard. 40 CFR §197.38 (2003). With respect to the NRC regulations, EnPA section 801(b)(1) requires that they simply be consistent with the EPA standard.

In addition to requiring a Director's finding that the application is complete, the regulations provide for another prerequisite to NRC's docketing of the application that relates to the process established by the NRC to obviate the need for discovery in the hearing. DOE is required to make publicly available in electronic form the information on which it intends to rely in the hearing and certain related material, and it must certify its compliance with the applicable procedures. 10 CFR § 2.1001 (definition of "documentary material"), § 2.1003(a) (2004). This certification is to be made no later than six months in advance of submitting its application. *Id.*

Nevada notes that, in anticipation of filing the Yucca Mountain application at the end of this year, DOE submitted its certification pursuant to Section 2.1003 in June 2004. Thereafter, an NRC Atomic Safety and Licensing Board ("Licensing Board") held that DOE did not meet the regulatory requirements and struck DOE's certification. Opp. 5. Based on the provisions of Section 2.1003(a) and the Licensing Board decision, Nevada argues that DOE cannot submit its application until six months after it cures the defect in its certification.

Nevada ignores the fact that the NRC regulations anticipate the possibility of such circumstances and specify the consequences if DOE fails to make a satisfactory initial certification before the time that DOE submits its license application:

> If the Department of Energy fails to make its initial certification at least six months prior to tendering the application, upon receipt of the *tendered* application, notwithstanding the provisions of § 2.101(f)(3), the Director of the NRC's Office of Nuclear Material Safety and Safeguards will not docket the application until at least six months have elapsed from the time of certification.

10 CFR §2.1012(a)(2004) (emphasis added).[2] Thus, contrary to Nevada's representation, the NRC regulations expressly contemplate that the DOE application can be submitted, even if DOE's certification regarding document availability is not yet complete.

If the Court stays its mandate as requested, DOE may submit its planned application without concern that the NRC will refuse to accept the application for review based on the position urged by the Malsch letter (copy attached to NEI's Motion for Stay of Mandate). As discussed in NEI's motion, NRC's completeness review and DOE's correction of any identified deficiencies both may take substantial time. Any action that delays NRC's completeness review would increase the risk of delay of NRC's docketing of the application, and ultimate delay of the Yucca Mountain repository. Although docketing cannot occur until six months after a new DOE certification, DOE may well cure the certification deficiencies found by the Licensing Board more than six months before the NRC finds the application to be suitable for docketing.[3]

6. Nevada next sets forth (Opp. 7) an overly restrictive view of the kinds of issues that may warrant the Supreme Court's attention. Selectively quoting from the Supreme Court's Rule 10, Nevada suggests that review will not be granted absent a conflict among the circuits or a conflict with a decision of the Supreme Court. This is not so. Rule 10 expressly provides that its list of the reasons for review that the Court will

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[2] The recent amendment of Section 2.1012(a) does not affect this aspect of the regulation. 69 Fed. Reg. 32836, 32849 (Jun. 14, 2004).

[3] The Licensing Board stated that it does not appear that it will take DOE a significant amount of time to make a recertification. *See* U.S. Department of Energy (High Level Waste Repository: Pre-Application Matters), LBP-04-20 (Aug. 31, 2004), slip op. at 53 n.61.

consider in the certiorari process is "neither controlling nor fully measuring the Court's discretion . . . ." Moreover, a review of the Court's decisions even in just the most recent Term reveals several cases in which review was granted even in the absence of the sort of conflict that Nevada claims is indispensable. *See, e.g., Ashcroft v. ACLU*, 124 S. Ct. 2783 (2004); *Cheney v. United States District Court*, 124 S. Ct. 2576 (2004); *Dep't of Transportation v. Public Citizen*, 124 S. Ct. 2204 (2004); *Tennessee Student Assistance Corp. v. Hood*, 124 S. Ct. 1905 (2004); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004). Here, where no other court of appeals will review EPA's regulations, and where expeditious construction of the Yucca Mountain repository is a matter of great national importance, the lack of a direct conflict does not impose an insurmountable obstacle to review.

7. Nevada also argues (Opp. 1-2, 7) that EPA will not seek further review of this Court's decision. The Solicitor General of the United States is charged with the responsibility of representing the government and its agencies and officers in the Supreme Court. *See* 28 U.S.C. § 518. The Solicitor General has not made any decision about whether to seek Supreme Court review of this Court's ruling. Response of the United States to the Motion of NEI to Stay the Mandate, dated Sept. 23, 2004. Moreover, even if the government elects not to file its own petition, it still will be expected, as a party before this Court, to advise the Supreme Court of its views regarding the petition to be filed by NEI, and the Solicitor General has not made any decision on that matter either. Accordingly, Nevada's assertion that the government already has decided not to support Supreme Court review is incorrect.

8. Ignoring the express provisions of Fed. R. App. P. 41(d)(2)(A), Nevada instead cites (Opp. 7) the Stern & Gressman Supreme Court treatise for the standard that allegedly governs this Court's decision on whether to stay its mandate pending the filing and disposition of a request for Supreme Court review. On this basis, Nevada contends that NEI must show a "reasonable possibility" that review will be granted and a "fair prospect" that this Court's decision will be reversed. The citation to *Supreme Court Practice* § 17.19 is inapposite, however. That section plainly deals with the approach employed by a single Justice considering a stay request *after* a federal court of appeals already has *denied* a motion to stay its mandate. That is not the situation here, and Fed. R. App. P. 41(d)(2)(A) does not adopt the approach described in the Supreme Court treatise. Even if it did, such concepts as a "reasonable possibility" of a grant of review and a "fair prospect" of a reversal must be measured in the context of the certiorari process as a whole. At a time when the Court grants review in approximately 75 cases a year out of more than 2000 paid petitions and several times that many *in forma pauperis* petitions, the statistical probabilities of a grant in any particular case are not high. That does not mean, however, that the standard for a stay of mandate can never be met. Here, the substantial questions to be presented, and the national importance of the underlying subject matter, plainly satisfy the governing standard.

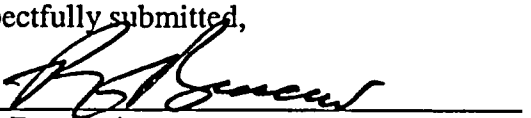
9. Finally, Nevada argues (Opp. 8 n.3) that NEI has a "new-found disagreement with EPA" that it has raised for the first time in its motion for a stay. NEI did not challenge the 10,000-year compliance period adopted by EPA. It does not have a disagreement, new or old, with EPA on this subject. Rather, NEI observed that the interpretation of the Energy Policy Act adopted by this Court, because it requires strict

adherence to the study prepared by the National Academy of Sciences, raises a serious issue under the non-delegation doctrine. That is not an argument for the unconstitutionality of EnPA. Instead, it is an argument in favor of the statutory interpretation adopted by EPA, under which final rulemaking authority was delegated to, and remained with, the agency, and the agency could exercise its administrative discretion to take policy considerations into account in addition to the scientific judgments of NAS. That is the very basis on which EPA defended its 10,000-year compliance period in this Court. *See* transcript of oral argument at 32-33. NEI's reference to the non-delegation doctrine, far from raising any new issue, simply provides further support for the interpretation of ambiguous statutory language that was adopted by the agency charged with the responsibility for implementing the statutory command.

CONCLUSION

NEI's motion for a stay of this Court's mandate should be granted.

Respectfully submitted,



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Dated: September 30, 2004

CERTIFICATE OF SERVICE

I hereby certify that I have this day served copies of Reply Memorandum of Petitioner Nuclear Energy Institute, Inc. In Support of Motion to Stay the Mandate Pending Timely Filing and Disposition of Petition For Writ of Certiorari, dated September 30, 2004, upon those listed in the attached service list by first class mail, postage prepaid.

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