Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Tel: 202.739.3000
Fax: 202.739.3001
www.morganlewis.com

Morgan Lewis
COUNSELORS AT LAW

1. Crockett
2. Lit Files

Peter Buscemi
(202) 739-5190
pbuscemi@morganlewis.com

September 8, 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 Motion of Petitioner Nuclear Energy Institute, Inc. 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

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

Of Counsel:
Robert W. Bishop
Ellen C. Ginsberg
Michael A. Bauser
Nuclear Energy Institute, Inc.
1776 Eye Street, N.W., Suite 400
Washington, D.C.
(202) 739-8000

Peter Buscemi
Alvin H. Gutterman
Morgan Lewis & Bockius, LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 739-3000

Counsel for Nuclear Energy Institute, Inc.

September 8, 2004

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

Petitioner Nuclear Energy Institute, Inc. ("NEI") respectfully moves, under Fed. R. App. P. 41(d)(2) and this Court's Rule 41(a)(2), for a stay of the mandate pending the timely filing and disposition of a petition for writ of certiorari to review the Court's judgment in this case. For the reasons set forth below, NEI submits that the standards for such a stay, established in Fed. R. App. P. 41(d)(2)(A), are satisfied here.

The petition for certiorari that NEI intends to file will present substantial questions regarding the proper interpretation of a critically important federal statute, the Energy Policy Act of 1992 ("EnPA"), Pub. L. No. 102-486, 106 Stat. 2776 (1992), codified in relevant part at 42 U.S.C. § 10141 note. These questions are of nationwide significance, because they directly affect the long-planned national program for the handling and storage of high-level radioactive waste. The propriety of the 10,000-year compliance period established by the Environmental Protection Agency ("EPA"), and the proper relationship between EPA's rulemaking and the congressionally mandated study performed by the National Academy of Sciences ("NAS"), present serious issues regarding the meaning of the phrase "based upon and consistent with" in Section 801(a)(1) of EnPA and the extent to which Congress lawfully may delegate authority to the NAS. Similarly, the propriety of EPA's separate groundwater standard, imposing release limits independent of any connection to protecting human health and safety, raises a substantial question about the meaning of the "Notwithstanding" provision at the beginning of Section 801(a)(1) and about EPA's authority under the statute to adopt standards not related to the "maximum annual effective dose equivalent" approach that the statute requires.

Not only are the legal issues substantial, but there is good cause for the brief stay sought by NEI. Under 28 U.S.C. § 2101(c) and Rule 41(d), NEI's certiorari petition must be filed by November 30, 2004, 90 days after this Court's denial of rehearing. During that time and during the Supreme Court's consideration of the petition, the congressional objectives reflected in EnPA will be best served if the regulatory status quo is maintained and EPA and subsequently the Nuclear Regulatory Commission ("NRC") are not required immediately to begin a new, and potentially unnecessary, round of formal rulemaking. Nearly twelve years have passed since the enactment of EnPA. Considerations of administrative efficiency and, more importantly, the expeditious achievement of Congress's substantive goal of establishing a national repository for spent nuclear fuel militate strongly in favor of a stay during the comparatively few months that will be needed for the filing and disposition of NEI's petition for review in the Supreme Court.

A. NEI's Petition for Certiorari Will Present Substantial Questions

1. The National Importance Of EnPA And EPA's Rulemaking Favors Supreme Court Review

This case involves a matter of great national importance: the creation of a national repository for spent nuclear fuel and high-level radioactive waste. The Secretary of Energy has advised the President that "there are compelling national interests that require development of a repository." These interests include our national security, non-proliferation objectives, energy security, homeland security, and environmental protection. *See* Recommendation by the Secretary of Energy Regarding the Suitability of the Yucca Mountain Site for a Repository Under the Nuclear Waste Policy Act of 1982, 67 Fed. Reg. 9048-68 (Feb. 17, 2002) ("Secretary's Recommendation").

Substantial national resources have been invested in the development of a repository. As the Court's July 9, 2004 opinion shows, the program has been developed and refined over the course of twelve Congresses, four Administrations, four major legislative enactments, and six major agency rulemakings. *NEI v. EPA*, 373 F.3d 1251, 1258-60 (D. C. Cir. 2004). Extensive scientific studies of the Yucca Mountain site over the course of more than 20 years make it the most thoroughly researched plot of land in the world. Secretary's Recommendation at 9051. The federal government already has expended approximately $8 billion on scientific and technical investigations and subsequent design work. *See* Dep't of Energy Office of Civilian Radioactive Management, "Monthly Summary of Program Financial and Budget Information FY 2003 Year-End Report," at 1-3, A-5.

Under the Nuclear Waste Policy Act of 1982, the Department of Energy ("DOE") entered into agreements with utilities to begin accepting their spent nuclear fuel no later than January 31, 1998. DOE has since estimated that the earliest that the Yucca Mountain repository can receive spent nuclear fuel is 2010. *See* Declaration of Eileen M. Supko (Dec. 11, 2001) ¶¶ 6, 13, attached to Petitioner's Reply Brief in No. 01-1258. While waiting for the opening of the Yucca Mountain repository, the owners of nuclear power plants continue to spend millions of dollars constructing and operating storage facilities. *See NEI v. EPA*, *supra*, 373 F.3d at 1278.

In 2002, the President recommended the selection of Yucca Mountain as the site for the nation's first repository, and Congress approved. 373 F.3d at 1261. Before construction can begin, however, DOE must apply to the NRC for a license. 10 CFR §63.31 (2004). DOE is now finalizing its license application for submission in December

2004. DOE FY 2005 Congressional Budget Request – Budget Highlights at 7-8, available at http://www.mbe.doe.gov/budget/05budget/content/highlite/highlite.pdf.

The issues to be raised by NEI's petition for certiorari, including the acceptability of EPA's 10,000-year compliance period, have a significant bearing on the cost and schedule of the repository. *See* Declaration of Steven P. Kraft (Dec. 14, 2001) at ¶¶ 5, 8-10, attached to Petitioner's Reply Brief in No. 01-1258.

If the Supreme Court is to weigh in at all on this critical national problem, it must do so now. No other court of appeals will review the challenged EPA regulations. There is no possibility that any conflict in the circuits will develop or that future litigation will clarify or sharpen the issues.

2. EnPA Does Not Preclude EPA's 10,000-Year Compliance Standard

We recognize, of course, that this Court already has decided this case, and we do not seek to reargue the matter in this motion for a stay of the mandate. NEI does submit, however, that the propriety of EPA's 10,000-year compliance standard raises significant issues that are worthy of Supreme Court review.

This Court has ruled that the "based upon and consistent with" language in Section 801(a)(1) of EnPA is ambiguous. *NEI v. EPA*, *supra*, 373 F.3d at 1269-70. Although the Court has acknowledged that, in view of this ambiguity, EPA's interpretation is entitled to full deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Court has concluded that there is no way in which EPA's regulation properly can be said to be "consistent with" the NAS study. 373 F.3d at 1270-73.

The words "consistent with," however, need not require the degree of conformity envisioned by this Court's opinion. An alternative reasonable interpretation of EnPA is

that Congress wanted the NAS to provide its scientific views on issues relating to the nuclear waste repository and that thereafter EPA, in conducting its rulemaking, was to accept the scientific views of the NAS and not to embrace any different scientific opinion. That does not imply, however, that EPA was obliged to implement the NAS's scientific views regardless of any other factors that EPA properly might consider in the rulemaking process. EPA, for example, might take into account considerations of practical feasibility, reliability, timeliness, and cost and might, on the basis of such considerations, conclude that, while scientists would prefer to focus on the time of peak human exposure (whenever that might occur), EPA's rule should use a 10,000-year compliance period. Such a regulatory determination does not entail any disagreement with the NAS study or the adoption of any inconsistent scientific views. Rather, it reflects the agency's proper exercise of its discretion, in the rulemaking process, to weigh policy as well as scientific factors.

There are several indications that this approach by the agency is just what Congress had in mind when it enacted EnPA. The Joint Explanatory Statement of the Conference Committee, for example, stressed that "[u]nder the provisions of section 801, the authority and responsibility to establish the standards, pursuant to a rulemaking, would remain with the [EPA] Administrator as is the case under existing law. The provisions of section 801 are not intended to limit the Administrator's discretion in the exercise of his authority related to public health and safety issues." H.R. Conf. Rep. No. 102-1018, 102d Cong., 2d Sess. ("Conf. Rep.") 391 (1992), reprinted in 1992 U.S.C.C.A.N. 2472, 2482. Similarly, Senator Johnston, Chairman of the Senate Committee on Energy and Natural Resources, explained that "[t]he National Academy of

Sciences, the most distinguished scientific group in the world, is to make the scientific determinations and EPA is to make the policy determinations after a study by the National Academy of Sciences." 138 Cong. Rec. 33955 (1992). The NAS saw its role the same way. After reviewing the proposed statutory language, Stephen A. Merrill, the executive director of NAS's National Research Council, drew the same distinction as Senator Johnston did. He said, in correspondence submitted before the passage of EnPA, "This is to advise that the Academy is prepared to conduct the study as described, although we would not assume a standard-setting role. That is properly the responsibility of Government officials." *Id.*

The NAS study itself recognized that it was addressing only scientific matters and that EPA's rulemaking, even as it accepted the NAS's scientific views, might adopt an approach driven by policy considerations as well as pure science. The study candidly acknowledged, for example, that the NAS has "identified several instances where science cannot provide all of the guidance necessary to resolve an issue." *Technical Bases for Yucca Mountain Standards*, National Research Council, 1995 ("NAS Study") at 3. The study stressed that "[t]his is particularly true in developing procedures for compliance assessment." *Id.* The study concluded, therefore, that setting the standard "requires addressing policy questions as well as scientific ones." *Id.* In that regard, the study cautioned that, although it had taken "a broad view of the scientific basis for the standard," it had not addressed "the social, political, and economic issues that might have more effect on the repository program than the health standard." *Id.*

Turning directly to the time horizon of EPA's compliance standard, the NAS study recognized that "there are significant uncertainties in the supporting calculations

and that the uncertainties increase as the time at which peak risk occurs increases." *Id.* at 56. Although the NAS found "no technical basis for limiting the period of concern to a period that is short compared to the time of peak risk" (*id.*; emphasis added), the study also acknowledged that "the selection of a time period of applicability . . . has policy aspects that we have not addressed." *Id.* To illustrate this point, the study observed that, even given the scientific views set forth in the study, "EPA might choose to establish consistent policies for managing risks from disposal of both long-lived hazardous nonradioactive materials and radioactive materials." *Id.* The NAS thus recognized that, without disagreeing with or rejecting any of the NAS's scientific views, EPA might adopt a 10,000-year standard like the standard used for hazardous nonradioactive materials. This is in fact precisely what EPA did. 40 Fed. Reg. 32,074, 32,098 (June 13, 2001).

At a minimum, the interpretation of "consistent with" outlined above is a plausible one, and it therefore is entitled to deference under *Chevron*. The more restrictive interpretation adopted by the Court has the effect of obligating EPA to adopt as regulatory policy the scientific views of the NAS. If EnPA is interpreted in this way, it would mean that Congress effectively delegated to the NAS, a private entity created under a charter granted by Congress, the authority to fix the substantive content of EPA's rules. Such a delegation to a private, non-Executive Branch entity would pose serious constitutional issues. *See, e.g., Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). Particularly where a reasonable alternative interpretation of "consistent with" is available, EnPA should not be construed to raise constitutional concerns. *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979). This is a further reason why the statutory interpretation issue presents a substantial question warranting Supreme Court review.

3. EnPA Does Not Authorize EPA's Separate Groundwater Rule

NEI also intends to ask the Supreme Court to review EPA's separate groundwater rule. Because this Court sustained that rule, however, issuance of the Court's mandate would not alter the pre-existing regulatory situation, and NEI would not be seeking a stay but for the Court's invalidation of EPA's 10,000-year compliance standard. On the other hand, because one of the requirements for a stay under Fed. R. App. P. 41(d)(2)(A) is that there be a "substantial question" for review on certiorari, we comment briefly on the significant statutory interpretation issue presented by the groundwater rule.

In NEI's view, two fundamental legislative judgments are reflected in Section 801(a)(1) of EnPA. First, Congress determined that, notwithstanding the many existing grants of regulatory authority to EPA to set "generally applicable" standards, EPA should establish standards for Yucca Mountain that are specifically directed to the proposed Yucca Mountain repository. Second, Congress directed EPA to focus exclusively on "public health and safety standards," an expression that Congress used to distinguish such standards from other kinds of regulation in which EPA customarily engages, such as the protection of natural resources (without regard to whether any particular instance of pollution has a demonstrable public health effect). That is why the Joint Explanatory Statement of the Conference Committee observed that the "health-based standards" mandated by Section 801 "would be the only such standards for protection of the public from releases of radioactive materials . . . at the Yucca Mountain site." Conf. Rep. at 390, reprinted in 1992 U.S.C.C.A.N. at 2481. Congress explicitly provided that the "public health and safety standards" that it envisioned would be standards prescribing the "maximum annual effective dose equivalent" to individual members of the public from releases to the accessible environment.

Under EnPA, EPA adopted a "maximum annual effective dose equivalent" standard that takes into account all sources of exposure, whether through air, water, food, or otherwise. EPA's rule, in other words, is an "all-pathway" rule that seeks to limit human exposure from any source. EPA did not stop there, however. Rather, EPA read EnPA's reference to "public health and safety standards" as a broad endorsement for EPA to adopt, in addition to the human exposure standard that fully considered exposure from groundwater and elsewhere, a separate groundwater rule that focused not on individual exposure limits but rather on restricting releases into groundwater so as to protect groundwater as a natural resource.

EPA took this step despite the "Notwithstanding" provision at the beginning of Section 801(a)(1), which makes clear that EPA was to direct its attention exclusively to Yucca Mountain and was to adopt only "public health and safety standards" of the sort described in Section 801(a)(1), *i.e.*, restrictions on the maximum predicted radiation dose exposure for human beings. EPA's groundwater rule thus effectively read the "Notwithstanding" provision out of the statute, and concluded that the simple statutory reference to "public health and safety standards" effectively authorized the agency to adopt whatever regulatory measures it might choose, despite the restrictions in EnPA. This is an implausible reading of the statutory language; if Congress had intended the reference to "public health and safety standards" to give EPA such broad authority, there would have been no reason to include the "Notwithstanding" provision in the first place.

EPA's election to adopt a separate groundwater rule is particularly suspect in view of the NAS's conclusions about the lack of scientific justification for such a rule. In its study, the NAS explicitly recommended against "release limits" of the kind that EPA

subsequently chose to adopt in its groundwater rule. NAS Study at 120-21. Instead, the study said, EPA should focus on "requirements necessary to limit risks to individuals," *i.e.*, individual dose restrictions such as those mandated by Section 801(a)(1) of EnPA. When EPA nevertheless proposed groundwater release limits in addition to its "maximum annual effective dose equivalent" rule, the NAS clearly stated that it found no "basis in science" for such a separate groundwater rule. The NAS predicted that EPA's groundwater rule would "greatly complicate the licensing process and have but a negligible impact on protection of the public." JA 0423. The NAS's negative reaction further supports the substantiality of the statutory interpretation question for which NEI intends to seek Supreme Court review.

B. There Is Good Cause For Staying the Mandate

Issuance of a stay will not harm any party, but, if a stay is not granted, invalidation of the EPA and the NRC regulations will impose increased burdens on both agencies and may constrain their activities in other ways. These consequences will adversely affect not only the agencies, but also NEI's members.

1. A Stay Will Not Harm Any Party

With or without a stay, there is no possibility that the NRC will issue a license for the repository before Supreme Court review is completed. Although DOE is finalizing a license application for the Yucca Mountain repository for submission in December, NRC's consideration of that application will take several years. *See* 10 CFR Part 2, App. D (2004) (providing 1125-day schedule for NRC proceeding on a repository application). NRC will not authorize any DOE construction activities until it has reviewed the application, conducted the necessary hearing, concluded the licensing proceeding, and issued a license for DOE to construct the facility. *See* 10 CFR §63.31 (2004). DOE

cannot receive any radioactive waste until NRC finds that construction of the repository operations area has been substantially completed and issues an additional license. *See* 10 CFR §63.41(a) (2004).

A stay will not adversely affect EPA or NRC. Although a stay would delay imposition of a requirement that both agencies proceed with further rulemaking in accordance with the Court's decision, it will not prevent them from doing so. The agencies will be free to determine their course of action in light of the Court's decision and other practical considerations, such as competing demands for their scarce resources and the efficient integration of their various other obligations.

A stay will not affect DOE's ability to conform its application to the Court's decision, nor will it prevent DOE from considering whether the Court's decision should affect the schedule for preparing and filing the application. There is not enough time before DOE's planned submission of its application in December for EPA to complete further rulemaking in light of this Court's decision and for NRC then to revise its regulations to be consistent with any EPA changes. That does not mean, however, that DOE cannot continue its current work on the application or that it will be unable to incorporate into the application at a later date any changes that it may deem advisable in light of any further regulatory proceedings before EPA or NRC.

Finally, a stay will not have any effect on physical activities that DOE may conduct in Nevada, nor will it limit in any way the opportunities for the State or any other party to influence the form and content of any rule changes that EPA or NRC may consider.

2. A Stay Would Avoid Harm To Federal Agencies And NEI Members

Without a stay, EPA will be required to initiate rulemaking promptly, and the NRC will be required to revise its regulations to be consistent with the revised EPA regulation. The effort required for EPA and NRC to reconsider their respective regulations may be considerable, since there is no precedent for regulations that address the uncertainties inherent in projecting anything, let alone the performance of a first-of-its-kind facility, over a period on the order of hundreds of thousands of years. If the Supreme Court reverses the Court's decision, these activities will have been unnecessary.

In large part, the cost of NRC rulemaking activities of this sort are born by NEI members through either their payments into the Nuclear Waste Fund or fees collected by the NRC from its licensees (*see Revision of Fee Schedules; Fee Recovery for FY 2004*, NRC, 69 Fed. Reg. 22664 (Apr. 26, 2004)).

Without a stay, there will be risk that the Yucca Mountain repository will be delayed without justification or that there will be further litigation. Counsel for the State of Nevada has argued to the NRC that once the Court has issued its mandate, NRC cannot legally accept DOE's application. *See* letter dated August 24, 2004 from M. Malsch of Egan, Fitzpatrick, Malsch & Cynkar, PLLC to K. Cyr, General Counsel of the NRC ("Malsch letter") (copy attached). Were the NRC to accept this argument, its review of DOE's application would be delayed. A stay would prevent this delay.

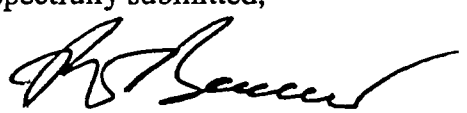
Even if NRC does proceed with its completeness review of the DOE application (*see* 10 CFR § 2.101.(f)(2)), there still would be a risk that NRC would not docket the application if a stay is not granted. This too likely would delay the Yucca Mountain repository. Even if NRC were to proceed with both its completeness review and its more detailed substantive review, NEI and its members still would be harmed in the absence of

a stay, because, as the Malsch letter makes clear, such a course by NRC would embroil the parties in further litigation – litigation that would be founded on this Court's invalidation of the NRC regulations.

C. Conclusion

NEI's petition for certiorari will present substantial questions regarding a matter of great national importance. A stay to preserve the status quo pending consideration of this petition will avoid significant harm to NEI and its members without imposing any harm on another party. Accordingly, the motion for a stay of mandate should be granted.

Respectfully submitted,



Dated: September 8, 2004

Peter Buscemi
Alvin H. Gutterman
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue N.W.
Washington, DC 20004
(202) 739.3000

Counsel for Nuclear Energy Institute, Inc.
Petitioner

Robert W. Bishop
Ellen C. Ginsberg
Michael A. Bauser
Nuclear Energy Institute, Inc.
1776 Eye Street, N.W., Suite 400
Washington, DC
(202) 739.8000

Of Counsel

EGAN, FITZPATRICK, MALSCH & CYNKAR, PLLC

Counselors at Law

7918 Jones Branch Drive • Suite 600
McLean, Virginia 22102
Tel: (703) 918-4942
Fax: (703) 918-4943

www.nuclearlawyer.com

1777 N.E. Loop 410 • Suite 600
San Antonio, Texas 78217
Tel: (210) 820-2667
Fax: (210) 820-2668

Joseph R. Egan
Martin G. Malsch
Robert J. Cynkar

Charles J. Fitzpatrick

August 24, 2004

Via E-mail @ kdc@nrc.gov
Facsimile @ 202-415-3086,
and First Class U.S. Mail
Karen D. Cyr, Esq.
General Counsel
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

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

MGM/ec

CERTIFICATE OF SERVICE

I hereby certify that I have this day served copies of Petitioner Nuclear Energy Institute, Inc.'s Motion to Stay the Mandate Pending the Filing of Petition For a Writ of Certiorari, dated September 8, 2004, upon those listed in the attached service list by first class mail, postage prepaid.

Peter Buscemi
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue N.W.
Washington, DC 20004

SERVICE LIST

Ronald M. Spritzer
John A. Bryson
U.S. Department of Justice
ENRD – Appellate Section
P.O. Box 23795
L'Enfant Plaza Station
Washington, DC 20026-3795

Lee Liberman Otis
Office of General Counsel, GC-1
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, DC 20585

Marc Johnston
Office of General Counsel
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, DC 20585

L. Dow Davis
Office of General Counsel, GC-21
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, DC 20585

James Bradford Ramsay
National Association of
Regulatory Commissioners
1101 Vermont Ave., Ste 200
Washington, DC 20005

William H. Briggs, Jr.
Ross, Dixon & Bell, L.L.P.
2001 K Street, N.W.
Washington, DC 20006-1040

Brian Sandoval, Attorney General
Marta A. Adams, Sr. Deputy Attorney General
State of Nevada
100 North Carson Street
Carson City, NV 89701

Elizabeth A. Vibert, Deputy District Attorney
Clark County, Nevada
500 South Grand Central Parkway
Las Vegas, NV 89106

Bradford R. Jerbic, City Attorney
William P. Henry, Senior Litigation Counsel
City of Las Vegas, Nevada
400 Stewart Avenue
Las Vegas, NV 89101

Antonio Rossmann
Special Deputy Attorney General
Roger B. Moore
Special Deputy Attorney General
Law Office of Antonio Rossmann
380 Hayes Street
San Francisco, CA 94102

Joseph R. Egan
Special Deputy Attorney General
Charles J. Fitzpatrick
Martin G. Malsch
Robert J. Cynkar
Howard K. Shapar
Egan, Fitzpatrick, Malsch & Cynkar, PLLC
7918 Jones Branch Drive, Suite 600
McLean, VA 22102

Charles J. Cooper
Vincent J. Colatriano
Cooper & Kirk, L.L.P.
1500 K Street, N.W., Suite 200
Washington, DC 20005

John F. Cordes, Jr. Solicitor
E. Leo Slaggie, Deputy Solicitor
Steven F. Crockett, Senior Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop OWFN 15D21
Washington, DC 220555-0001

Jean V. MacHarg
John C. Martin
Susan M. Mathiascheck
Patton Boggs LLP
2550 M Street, N.W.
Washington, DC 20037

G. Scott Williams
Michele L. Walter
Environmental Defense Section
United States Department of Justice
601 D Street, N.W.
Washington, DC 20026-3986

Geoff Fettus
Natural Resources Defense Council
1200 New York Avenue, N.W., Suite 400
Washington, DC 20005