

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

PETITION BY THE STATE OF NEVADA TO AMEND 10 C.F.R. § 51.109

I. INTRODUCTION AND SUMMARY

This Petition by the State of Nevada to Amend 10 C.F.R. § 50.109 (“Petition”) is designed to assure that the regulations of the U.S. Nuclear Regulatory Commission (“NRC” or “Commission”) are in conformance with the National Environmental Policy Act of 1969, as amended (“NEPA”), the Nuclear Waste Policy Act of 1982, as amended (“NWPA”), and the decision of the U.S. Court of Appeals for the D.C. Circuit in *Nuclear Energy Institute, Inc. v. Environmental Protection Agency*, 373 F. 3d 1251 (D.C. Cir. 2004) (“*NEP*”). As that regulation is now written, it is contrary to law.

II. GROUNDS FOR THE PETITION

A. STATUTORY AND REGULATORY BACKGROUND

Sections 114(a)(1)(D) and 114(f)(1) of the NWPA require DOE to prepare a final environmental impact statement (“FEIS”) in connection with its recommendation of the Yucca Mountain, Nevada site as a geologic repository for the disposal of reactor spent fuel and other high-level radioactive waste. DOE issued such an FEIS in February 2002 (DOE/EIS-0250). Section 114(f)(4) of the NWPA provides that this Yucca Mountain FEIS “shall, to the extent practicable, be adopted by the Commission in connection with the issuance by the Commission of a construction authorization and license for such repository,” and that “[t]o the extent such statement is adopted by the Commission, such adoption shall be deemed to also satisfy the responsibilities of the Commission under [NEPA] and no further consideration shall be required, except that nothing in this subsection shall affect any independent responsibilities of the

Commission to protect the public health and safety under the Atomic Energy Act of 1954 [citation omitted].”

The Commission’s regulation implementing section 114(f)(4) is 10 C.F.R. §51.109. Although the regulation in most respects tracks the language of the statute quoted above, three special provisions added by the Commission are not found in the statute. First, the regulation provides for special procedures for litigation of NEPA issues that are not in the NWPA and that contradict the procedures that apply to litigation of safety issues under the NWPA and the Atomic Energy Act. Second, the regulation provides for the NRC to adopt a DOE supplement to its original FEIS, if there is such a supplement. Section 114 (f) of the NWPA does not mention FEIS supplements. Third, the regulation provides special standards, not found in the NWPA, that specify in some detail precisely when the NRC will adopt the Yucca Mountain FEIS.

With regard to the special litigation procedures, 10 C.F.R. § 51.109(a)(2) conditions the admissibility of a contention that the NRC should not adopt the DOE FEIS (or supplemental FEIS) on satisfaction, to the extent possible, of the standards for reopening a closed record under 10 C.F.R. § 2.326. The principal difference between this contention standard, and the contention standard in 10 C.F.R. § 2.309(f) that applies to other issues, is that the former requires submission of admissible evidence, while the latter does not. This is because under 10 C.F.R. § 2.326, referenced in 10 C.F.R. § 51.109(a)(2), a motion to reopen must include admissible evidence. In contrast, the regulatory history of 10 C.F.R. § 2.309(f), which applies to all other issues, is clear that “the factual support necessary to show that a genuine dispute exists need not be in affidavit or formal evidentiary form and need not be of the quality necessary to withstand a summary disposition motion.” 54 Fed. Reg. 33168, 33171 (August 11, 1989).

The special adoption standards are in 10 C.F.R. § 51.109(c), which provides as follows:

The presiding officer will find that it is practicable to adopt any environmental impact statement prepared by the Secretary of Energy in connection with a geologic repository proposed to be constructed under Title I of the Nuclear Waste Policy Act of 1982, as amended, unless: (1) (i) The action proposed to be taken by the Commission differs from the action proposed in the license application submitted by the Secretary of Energy; and (ii) The difference may significantly affect the quality of the human environment; or (2) Significant and substantial new information or new considerations render such environmental impact statement inadequate.

The Commission adopted this regulation in 1989 (54 Fed. Reg. 27864, July 3, 1989).

The final notice of rulemaking indicates that the regulation was adopted over the objections of the Council on Environmental Quality. The CEQ comments are on NRC's Licensing Support Network at NRC 000024546 and support the comments of Nevada in NRC's 1988-1989 rulemaking to the effect that NEPA does *not* allow NRC to adopt the DOE FEIS without a full and independent review of that FEIS. The views of CEQ on what NEPA requires are entitled to "substantial deference." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 372 (1989); *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979).

Even as the Commission defended its interpretation of section 114(f)(4) of the NWPA, it conceded that "Congress did not speak to the precise question of the standard to be used in deciding whether adoption of DOE's environmental impact statement is practicable" and that "our construction is not the only one that might be proposed" (54 Fed. Reg. 27866, July 3, 1989). But the Commission's approach cannot be reconciled with the admonition in Section 102 of NEPA for agencies to follow the statutory procedures "to the fullest extent possible." Indeed, NEPA's procedural requirements must be enforced "unless there is a clear conflict of *statutory* authority." *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

Finally, the actual adoption standard in 10 C.F.R. § 51.109(c) cannot be reconciled with important portions of the NWPA's legislative history. *See, e.g.*, 128 Cong. Rec. S4302 (April 29, 1982) (statement on Senate floor by bill sponsor that the NRC licensing process would include "a detailed evaluation of the health and safety and environmental aspects of the proposed project."); 128 Cong. Rec. S15669 (December 20, 1982) (statement on Senate floor that the bill should "preserve the integrity and full scope of the NRC licensing review and environmental analysis under the National Environmental Policy Act.").

B. RECENT JUDICIAL DEVELOPMENTS

In the *NEI* case, Nevada challenged, among other things, the adequacy of DOE's FEIS supporting the recommendation of the Yucca site to the President. The Court held that any challenge to the FEIS, insofar as it *may* be adopted in support of a future NRC construction-authorization or licensing decision or used by DOE in support of a future transportation-alternative selection, is not yet ripe for review because, among other things, "the effect of the FEIS will not be felt in a concrete way by Nevada until it is used to support some other final decision of DOE or NRC" and "Nevada may raise its substantive claims against the FEIS if and when NRC and DOE makes such a final decision" 373 F.3d at 1313. The Court noted the representation of NRC counsel at oral argument that "Nevada will be permitted to raise its substantive challenges to the FEIS in any NRC proceeding to decide whether to adopt the FEIS" and agreed with NRC's acknowledgment that "it would not be 'practicable' to adopt the FEIS unless it meets the standards for an 'adequate statement' under the NEPA and the Council on Environmental Quality's NEPA regulations." *Id.* at 1313-1314. The Court further held that the NWPA "cannot reasonably be interpreted to permit NRC to premise a construction-authorization

or licensing decision upon an EIS that does not meet substantive requirements of the NEPA or the Council on Environmental Quality's NEPA regulations." *Id.* at 1314.

The Court addressed specifically the NRC adoption standards in 10 C.F.R. §51.109(c) and noted NRC counsel's representation at oral argument that "NRC will not construe the 'new information or new considerations' requirement to preclude Nevada from raising substantive objections against the FEIS in administrative proceedings" *Id.* After oral argument, NRC counsel sent a letter to the Court attempting to explain this regulation. Contrary to NRC counsel's representations at oral argument, the letter asserts that while 10 C.F.R. § 51.109(c) did not limit the NEPA issues that could be raised on judicial review, "it would limit what NEPA issues could be raised in the NRC licensing hearing." *Id.* The Court responded in its *NEI* opinion that the suggested distinction in the letter between what could be raised on judicial review and what could be raised in the NRC licensing hearing "makes no sense." *Id.* "Nevada's claims have not been adjudicated on the merits here and presumably will not have been passed upon by any court prior to the relevant NRC proceedings. The [Nevada] claims thus would certainly raise 'new considerations' with regard to any decision to adopt the FEIS. Moreover ... any substantive defects in the FEIS clearly would be relevant to the 'practicability' of adopting the FEIS." *Id.* The Court concluded that "Government counsel's unequivocal representations to the court during oral argument that Nevada will not be foreclosed from raising substantive claims against the FEIS in administrative proceedings comports with the terms of the regulation and reflects a reasonable and compelling interpretation." *Id.*

C. WHY THE REGULATION MUST BE AMENDED

Given all of the above, any Commission interpretation of 10 C.F.R. § 51.109 at odds with counsel's representation at oral argument would clearly be unlawful. However, the Commission

itself has not formally adopted its counsel's and the Court's interpretation, and its current regulation is directly at odds with that interpretation. Therefore, the Commission must correct the regulation.

In addition, the special litigation procedures in 10 C.F.R. § 51.109(c) are in violation of NEPA. Section 102(2)(C) of NEPA requires that an FEIS must be considered in the “*existing* agency review processes” [emphasis added], not some different review process applicably only to NEPA where interested persons must satisfy additional pleading requirements that would otherwise not apply. *See, e.g., Calvert Cliffs*; 40 C.F.R. § 1505.1. *See also Aberdeen & Rockfish R. Co. v. SCRAP*, 422 U.S. 289, 320 (1975).

III. REQUESTED RULE CHANGE

The simplest way for the Commission to incorporate the Court's requirements and also avoid unnecessary confusion and ambiguity is to add a new paragraph (h) to §51.109, to read as follows:

Nothing in this section shall be construed to limit the ability of any party or interested governmental participant to challenge in a licensing hearing any environmental impact statement (including any supplement thereto) prepared by the Secretary of Energy on the ground that such statement violates NEPA or the regulations of the Council on Environmental Quality, provided that the challenge is not barred by traditional principles of federal collateral estoppel. Collateral estoppel shall not bar the admission of a NEPA contention if the standards in subparagraph (c)(1) and (c)(2) of this section are met, provided that the change in the proposed action or new information or considerations became known after the litigation in question.

This language gives explicit effect to the representations of counsel adopted by the Court, while still giving appropriate effect to the standards of 10 C.F.R. § 51.109(c) within the appropriate context of traditional federal collateral estoppel principles.

The problems discussed above with respect to the special litigation procedures in 10 C.F.R. § 51.109 (a)(2) can be remedied only by deleting that subparagraph, with the result that the admission of NEPA contentions will be guided by the same principles in 10 C.F.R. § 2.309(f) that apply to other kinds of contentions.

IV. CONCLUSION

For the reasons stated herein, petitioner the State of Nevada respectfully requests the Commission to amend 10 C.F.R. § 51.109 by adding a new subsection (h) as described above, and by deleting subsection (a)(2) in its entirety.

Respectfully submitted,

Joseph R. Egan
Robert J. Cynkar
Charles J. Fitzpatrick
Martin G. Malsch
EGAN, FITZPATRICK, MALSCH
& CYNKAR, PLLC
8300 Boone Boulevard, Suite 340
Vienna, Virginia 22182
(703) 891-4050 Telephone
(703) 891-4055 Facsimile

Counsel for the State of Nevada

April 8, 2005

EGAN, FITZPATRICK, MALSCH & CYNKAR, PLLC

Counselors at Law

The American Center at Tysons Corner
8300 Boone Boulevard • Suite 340
Vienna, Virginia 22182
Tel: (703) 891-4050
Fax: (703) 891-4055

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

April 8, 2005

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

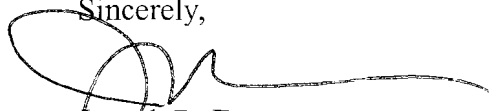
Attn: Rulemakings and Adjudications Staff

RE: PETITION BY THE STATE OF NEVADA TO AMEND 10 C.F.R. § 51.109

Dear Madam Secretary:

Enclosed for filing on behalf of the State of Nevada are an original and three copies of "Petition by the State of Nevada to Amend 10 C.F.R. § 51.109."

Sincerely,



Joseph R. Egan

cc: The Honorable Brian Sandoval
State of Nevada Attorney General

Robert R. Loux
Executive Director
Nevada Agency for Nuclear Projects

Nevada Congressional Delegation

Luis A. Reyes
Executive Director for Operations

Karen D. Cyr, Esq.
General Counsel

Jack Strosnider
Director
Office of Nuclear Material Safety and Safeguards

C. William Reamer, Esq.
Director
Division of Repository Safety

Donald P. Irwin, Esq.
Hunton & Williams

Michael Ryan, Chairman
Advisory Committee on Nuclear Waste