



Department of Energy

Office of Civilian Radioactive Waste Management
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Project No. WM-00011

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Michael F. Weber, Director
Office of Nuclear Material Safety and
Safeguards
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852

STATUS REPORT OF THE U.S. DEPARTMENT OF ENERGY (DOE) PURSUANT TO
10 C.F.R. § 51.67

Dear Mr. Weber:

Section 51.67(c) of the U.S. Nuclear Regulatory Commission's (NRC) regulations provides that, whenever DOE submits a final environmental impact statement or a final supplement to an environmental impact statement pursuant to that section, it shall also inform the NRC of the status of any civil action for judicial review instituted pursuant to Section 119 of the Nuclear Waste Policy Act of 1982 (NWPAct). Environmental impact statements covered by Section 51.67 are those "which the Department prepares in connection with any geological repository developed under Subsection A of Title I, or under Title IV, of the Nuclear Waste Policy Act of 1982, as amended."

On June 3, 2008, DOE submitted with its License Application the February 2002 *Final Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada* (DOE/EIS-0250) (2002 FEIS). DOE is submitting today the *Supplemental Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada* (DOE/EIS-0250-S1) (SEIS).

With respect to actions for judicial review initiated pursuant to Section 119 of the NWPAct, the State of Nevada and the City of Las Vegas initiated such an action challenging the 2002 FEIS. In a July 2004 decision, the United States Court of Appeals for the District of Columbia Circuit held that any challenge to the FEIS was not ripe for review because it had not been "adopted [by the NRC] in support of a future NRC construction-authorization or licensing decision or used by DOE in support of a future transportation-alternative selection." *Nuclear Energy Institute, Inc. v. EPA*, 373 F.3d 1251, 1312 (D.C. Cir. 2004).

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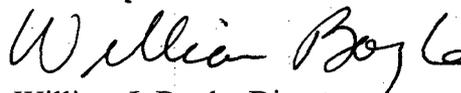
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Subsequent to the court's decision in *NEI*, the State of Nevada filed a petition for review with the United States Court of Appeals for the D.C. Circuit, pursuant to Section 119 of the NWPA, seeking review of DOE's April 8, 2004 Record of Decision (ROD) and the transportation-related portions of the 2002 FEIS on which it was based. The ROD announced DOE's selection, both nationally and in the State of Nevada, of the mostly rail scenario analyzed in the 2002 FEIS as the primary means of transporting spent nuclear fuel and high-level radioactive waste to the repository. The ROD also selected the Caliente rail corridor from several corridors considered in the 2002 FEIS as the corridor in which to study possible alignments for a rail line connecting the Yucca Mountain site to an existing rail line in Nevada. (69 *Fed.Reg.* 18557 (2004)). Nevada claimed that "in selecting a national transportation mode and Nevada rail corridor for the movement of waste to Yucca, DOE violated NEPA and NEPA implementing regulations" and acted in an arbitrary and capricious manner and contrary to law. Petitioner's Final Opening Brief at 2-4.

The United States Court of Appeals for the D.C. Circuit denied Nevada's petition and rejected the State's claims on their merits. The Court held that DOE had met its obligations under 40 C.F.R. § 1503.1(a)(2) with respect to consultation with other agencies; that DOE had appropriately "tiered" its proposed action analyses under 40 C.F.R. § 1508.28; and that DOE had taken the "requisite hard look" at the potential rail corridor environmental impact and that "DOE's analysis of the environmental impacts of rail corridor selection in its FEIS is adequate." *State of Nevada v. Department of Energy*, 457 F.3d 78, 89-93 (D.C. Cir. 2006). Finally, the Court held that "[w]e summarily deny any claims not specifically addressed in this opinion." *Id.* at 94 n.10.¹

Subsection (c)(2) of Section 51.67 states that a status report shall "[i]dentify any issues relating to the adequacy of the environmental impact statement that may remain subject to judicial review." Other than the issues that the United States Court of Appeals for the D.C. Circuit indicated in its 2004 and 2006 decisions were not ripe for review, there are no remaining issues that may be subject to judicial review relating to the 2002 FEIS. To date, there have been no petitions for review filed concerning the SEIS.

Sincerely,



William J. Boyle, Director
Regulatory Authority Office

¹ There were two issues whose merits the Court did not reach. The Court held that Nevada's challenge to what Nevada labeled as an "interim transportation plan" was not ripe for review because the interim transportation plan "may never materialize." *Id.* at 84. The Court also held that Nevada's claims regarding the jurisdiction of the Surface Transportation Board were likewise unripe because DOE had not made the decision to operate the railroad as a common carrier. *Id.* at 86-87.

cc:

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