

ORAL ARGUMENT NOT YET SCHEDULED

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

| | | |
|--------------------------------|---|-------------|
| STATE OF NEVADA |) | |
| |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| v. |) | No. 09-1133 |
| |) | |
| UNITED STATES NUCLEAR |) | |
| REGULATORY COMMISSION; and the |) | |
| UNITED STATES OF AMERICA |) | |
| |) | |
| Respondents. |) | |
| |) | |

**JOINT MOTION TO GOVERN FURTHER PROCEEDINGS,
INCLUDING REQUEST FOR IN TANDEM CONSIDERATION WITH
CASE NOS. 08-1327 AND 08-1345**

Respondents United States Nuclear Regulatory Commission and the United States of America (collectively, "NRC"), Petitioner State of Nevada ("Nevada"), and Movant for Intervention Nuclear Energy Institute ("NEI") respectfully move the Court for entry of an order that: (1) requires that this petition for review of an NRC regulation containing public health and safety standards for a potential radioactive material repository at Yucca Mountain, Nevada be considered in tandem with consolidated Case Nos. 08-1327 and 08-1345 (that is, at the same time, by the same panel, and based on separate briefing), a petition for review of a closely related Environmental Protection Agency ("EPA") regulation; and (2)

approves the briefing schedule and format set forth below.

In support of this motion, the parties jointly state:

1. This petition for review (Case No. 09-1133, hereinafter the “NRC Petition”) concerns a final action by NRC under Section 801 of the Energy Policy Act of 1992, Pub. L. 102-486, Title VIII, § 801, 106 Stat. 2921, and other federal statutes, containing technical requirements and criteria incorporating public health and safety standards for radioactive material stored or disposed of in the proposed repository at Yucca Mountain, Nevada. *See* “Implementation of a Dose Standard after 10,000 Years,” 74 Fed. Reg. 10811 (Mar. 13, 2009) (hereinafter the “2009 NRC Rule”). The 2009 NRC Rule responds to this Court’s partial vacatur and remand of NRC’s predecessor standards for Yucca Mountain, which Nevada and other petitioners challenged in an earlier action. *Nuclear Energy Institute v. EPA*, 373 F.3d 1251 (D.C. Cir. 2004) (vacating and remanding portions of 10 CFR Part 63, promulgated at 66 Fed. Reg. 55732 (November 2, 2001)).

2. Case Nos. 08-1327 and 08-1345 are other petitions for review filed by Nevada that challenge an EPA final rule on dose standards for the proposed Yucca Mountain radioactive material repository (hereinafter the “EPA Petition”). *See* “Public Health and Environmental Radiation Protection Standards for Yucca Mountain, Nevada; Final Rule,” 73 Fed. Reg. 61,256 (Oct. 15, 2008) (hereinafter the “2008 EPA Rule”). The 2009 NRC Rule incorporates and implements the 2008

EPA Rule. 74 Fed. Reg. 10811. Due to the different promulgation dates of the EPA and NRC Rules at issue, the NRC Petition was filed several months after the EPA Petition.

3. NEI has been granted leave to intervene in the EPA Petition (Order, Dec. 3, 2008), and its unopposed motion for leave to intervene in the NRC Petition (filed June 11, 2009) is pending.

4. In light of the substantive overlap between the EPA Petition and the NRC Petition, motions were filed in each case that requested time for the parties to confer and file motions to govern further proceedings regarding coordinated consideration of the two cases. *See* Petitioner Nevada's Unopposed Motion to Vacate and Modify Briefing Schedule (filed May 28, 2009 in Case No. 08-1327); Respondent NRC's Unopposed Motion to Postpone Proceedings (filed June 11, 2009 in Case No. 09-1133).

5. In a June 3, 2009, Order in the EPA Petition, the Court established August 31, 2009, as the deadline for parties to file motions to govern further proceedings and established a briefing scheduling pending any such motions. In a July 1, 2009, Order in the NRC Petition, the Court established a parallel deadline of August 31, 2009, for motions to govern further proceedings and established September 29, 2009, as the deadline for NRC to file the certified index to the administrative record and for dispositive motions.

6. The EPA Petition and the NRC Petition are closely related cases with a great degree of substantive overlap. The 2008 EPA Rule and the 2009 NRC Rule both concern standards applicable to the proposed Yucca Mountain radioactive material repository. Moreover, the 2009 NRC Rule specifically implements and incorporates the public health and safety standards of the 2008 EPA Rule. 74 Fed. Reg. at 10,813. Even though they share a common subject matter and, to some degree purpose, the two rules are nevertheless separate and distinct agency actions. The regulations were promulgated by different agencies, in different administrative proceedings, and subject to different processes and standards. Moreover, the respective petitions for review do not have a complete identity of issues and raise certain unique issues. As such, the parties do not believe that consolidation of the EPA and NRC Petitions would be appropriate. *See* D.C. Circuit Handbook of Practice and Internal Procedures at 23 (June 8, 2009). Nor would joint briefing of the two actions be suitable or efficient, particularly given the need for review and approval among and between different federal agencies and the Department of Justice.

7. Accordingly, the parties believe that an alternative means of coordinated review would be better suited to these cases and ask that the EPA Petition and NRC Petition be maintained as separate cases considered in tandem. Specifically, the parties ask that the petitions for review be considered by the same

panel subject to separate but coordinated briefing as set forth below. Such an approach would achieve certain efficiencies for the parties, avoid duplication in the briefing (thus lessening the burden on the Court) and eliminate the possibility of inconsistent judgments were the two cases to be considered by separate panels. Moreover, this is essentially the approach the Court adopted when it considered various standards from different agencies related to Yucca Mountain in *Nuclear Energy Institute v. EPA*, 373 F.3d 1251 (D.C. Cir. 2004).

8. The EPA Petition and NRC Petition each raise unusually complex issues, as they address, *inter alia*, radiation protection standards applicable for a period in excess of 10,000 years, several federal statutes (including the Energy Policy Act of 1992, the Atomic Energy Act, and the Nuclear Waste Policy Act), and matters with a long and substantial regulatory and procedural background dating back decades, including earlier standards promulgated in 2001. Furthermore, briefing these related petitions for review will require a significant amount of coordination, first by Petitioner Nevada and, then, by Respondents EPA and NRC in order to address the complexity of the issues raised and to accommodate the process for review and approval of EPA's and NRC's responsive merits briefs within EPA, NRC, and the Department of Justice. In light of this review and approval process, to facilitate coordination between the agencies, and to avoid potential duplication in EPA's and NRC's responsive

merits briefs, the deadlines for EPA's and NRC's briefs are staggered slightly as set forth below. Despite the complexity of the issues, the parties believe that the EPA Petition and NRC Petition can be briefed adequately in accordance with the standard brief lengths under the rules.

9. In light of the foregoing, the parties seek an order approving the following briefing schedule and format:

| | |
|--|---|
| Certified Index to the Record and Dispositive Motions in NRC Petition ¹ | September 29, 2009 |
| Petitioner Nevada's Brief in EPA Petition Petitioner Nevada's Brief in NRC Petition | No earlier than January 27, 2010 |
| Respondent EPA's Brief in EPA Petition | 120 days after Nevada's Brief |
| Inteviewer NEI's Brief in EPA Petition | 21 days after EPA's Brief |
| Respondent NRC's Brief in NRC Petition | 150 days after Nevada's Brief |
| Movant for Intervention NEI's Brief in NRC Petition (if granted) | 21 days after NRC's Brief |
| Petitioner Nevada's Reply Brief in EPA Petition Petitioner Nevada's Reply Brief in NRC Petition | 60 days after Intervenor NEI's Brief in NRC Petition ² |

¹ These procedural deadlines have already elapsed in the EPA Petition. EPA filed the certified index to the administrative record on February 19, 2009.

² If NEI is not allowed to intervene in the NRC Petition, Petitioner Nevada's Reply Brief would be due, instead, 60 days after NRC's Brief.

Deferred Appendix in EPA Petition
Deferred Appendix in NRC Petition

21 days after Nevada's Reply
Briefs

Final Briefs in EPA Petition
Final Briefs in NRC Petition

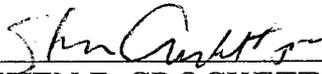
14 days after Deferred
Appendix

10. A similar joint motion requesting in tandem consideration and proposing the same format and schedule for briefing is being filed today in the EPA Petition.

WHEREFORE, the parties respectfully request that the Court issue an order providing that the EPA Petition and NRC Petition will be considered in tandem as described above and subject to the foregoing proposed format and schedule for briefing.

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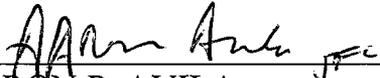
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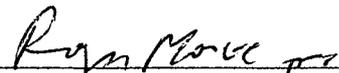
For Intervenor NEI:

Respectfully submitted,

JOHN C. CRUDEN
Acting Assistant Attorney General



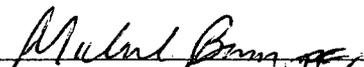
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing JOINT MOTION TO GOVERN FURTHER PROCEEDINGS, INCLUDING AS TO IN TANDEM CONSIDERATION WITH CASE NOS. 08-1327 AND 08-1345 to be served on the date below, by first class mail, on the following:

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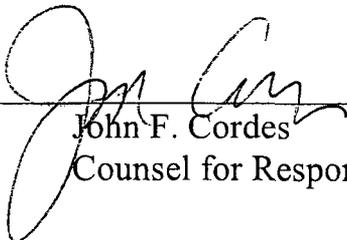
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Dated: August 31, 2009



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