

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

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| STATE OF NEVADA, |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| v. |) | Case No. 08- _____ |
| |) | |
| UNITED STATES ENVIRONMENTAL |) | |
| PROTECTION AGENCY; STEPHEN L. |) | |
| JOHNSON, ADMINISTRATOR; and |) | |
| UNITED STATES OF AMERICA, |) | |
| |) | |
| Respondents. |) | |
| |) | |

PETITION FOR REVIEW

1. Notice is hereby given this the 10th day of October, 2008, that petitioner State of Nevada petitions the United States Court of Appeals for the District of Columbia Circuit for review of the Final Rule of the respondents entitled “Public Health and Environmental Radiation Protection Standards for Yucca Mountain, Nevada,” executed by Stephen L. Johnson, Administrator of the United States Environmental Protection Agency (“EPA”), on September 30, 2008 (the “2008 Yucca Mountain Rule”).

2. As authority for promulgating the 2008 Yucca Mountain Rule, EPA references section 801 of the Energy Policy Act of 1992 (“EnPA,” Public Law No. 102-486, Title VIII, § 801), which in turn implicates the Atomic Energy Act of 1954 as amended (“AEA,” 42 U.S.C. §§ 2011-2296); the Nuclear Waste Policy Act (“NWPA,” 42 U.S.C. § 101, *et seq.*); and Reorganization Plan No. 3 of 1970 (5 U.S.C. appendix 1).
3. This petition is timely, pursuant to 40 C.F.R. §§ 23.9, 23.12.
4. The 2008 Yucca Mountain Rule purports to establish public health and safety standards governing the proposed high-level nuclear waste repository at Yucca Mountain, Nevada (the “Yucca Mountain Repository”). Petitioners have commenced this action because key provisions of the 2008 Yucca Mountain Rule fail to comply with applicable laws, including the AEA, the EnPA and the NWPA, to protect public health and safety in connection with the proposed Yucca Mountain Repository. The grounds on which relief is sought are identified with more particularity in the attached Preliminary Statement of Issues.
5. Pursuant to 28 U.S.C. §§ 1391, 2343, venue for this petition properly lies in this Court, both by statute and based upon the legal

residence and headquarters of all respondents, and the location of a substantial part of the events and omissions by respondents giving rise to the claim, within the District of Columbia.

6. Petitioner requests as relief that the Court: (a) declare that EPA's 2008 Yucca Mountain Rule is arbitrary and capricious, an abuse of discretion and otherwise inconsistent with applicable law; (b) hold unlawful and set aside the 2008 Yucca Mountain Rule; (c) stay application and enforcement of the Yucca Mountain Rule pending resolution of this petition; and (d) grant such other and further relief as may be appropriate.

ATTACHMENT A

Petitioner State of Nevada respectfully submits this non-binding preliminary statement of the issues to be raised in this action:

1. The 2008 Yucca Mountain Rule fails to comply with the duty underlying the Atomic Energy Act of 1954 as amended (“AEA,” 42 U.S.C. §§ 2011-2296); section 801 of the Energy Policy Act of 1992 (“EnPA,” Public Law No. 102-486, Title VIII, § 801) and the Nuclear Waste Policy Act (42 U.S.C. §§ 101, *et seq.*) to protect public health and safety in connection with the proposed Yucca Mountain radioactive storage and disposal facility.
2. The 2008 Yucca Mountain Rule is unauthorized under EnPA, which limits EPA’s authority to standard setting. The rule exceeds that authority because it prevents the NRC from considering whether specific events and processes at Yucca Mountain would lead to a violation of the EPA standard, based upon EPA’s own finding with respect to their probability and consequences. The rule therefore intrudes upon the NRC’s exclusive licensing authority and constitutes adjudication, not standard-setting.
3. The 2008 Yucca Mountain Rule assumes that no “event or process” could possibly create a significant risk to safety *after* 10,000 years if it

did not pose a significant risk before 10,000 years. But the rule also creates two exceptions from this rule without considering others. These determinations are irrational, arbitrary and capricious.

4. The 2008 Yucca Mountain Rule establishes an individual-protection annual dose standard of 100 millirem for Yucca Mountain alone in the period after 10,000 years when EPA projects peak dose to occur, rather than the first-tier 15-millirem standard applicable earlier. Peak dose could occur significantly earlier if engineered barriers fail earlier than EPA has projected. The rule's reliance on so-called "international standards" to justify its selection of a second-tier is irrational, arbitrary and capricious. While selectively incorporating certain aspects of international standards, the rule fails to adopt other key aspects needed to render its standard health-protective, including but not limited to the principle of apportionment.
5. The 2008 Yucca Mountain Rule's reliance on increased uncertainty in predicting repository performance after 10,000 years to justify a much less stringent dose standard for the post-10,000 year period is arbitrary and capricious because (a) it departs from prior EPA precedent without adequate explanation and necessarily assumes, without justification or explanation, that increased uncertainty can only cause

the dose to be overestimated; (b) it does not allow for the possibility that the NRC may conclude in the licensing adjudication that the uncertainty in predicting performance at Yucca Mountain for this post-10,000 year period will actually decrease; and (c) it effectively accounts for the same ostensible concern multiple times.

6. The 2008 Yucca Mountain Rule violates the Energy Policy Act of 1992 because it is contrary to the recommendations of the National Academy of Sciences.
7. The 2008 Yucca Mountain Rule fails to comply with EPA's obligations as specified in *Nuclear Energy Institute v. Environmental Protection Agency*, 373 F.3d 1251 (D.C. Cir. 2004).
8. The 2008 Yucca Mountain Rule is arbitrary, capricious, an abuse of discretion, and not in accordance with the law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(A)(2).

Respectfully submitted,

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