

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

STATE OF NEVADA,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. _____
	)	
UNITED STATES DEPARTMENT	)	
OF ENERGY, SPENCER ABRAHAM,	)	
SECRETARY,	)	
	)	
Respondents.	)	

**PETITION FOR REVIEW**

The State of Nevada, by and through its undersigned attorneys, and pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure, hereby petitions the Court for review of final agency action of the U.S. Department of Energy (hereinafter “DOE”), such action being contrary to the applicable provisions of federal law and exceeding the jurisdiction of DOE.

1. The challenged final agency action is DOE’s issuance of the combined final rules, “Office of Civilian Radioactive Waste Management; General Guidelines for the Recommendation of Sites for Nuclear Waste Repositories; Yucca Mountain Site Suitability Guidelines,” 10 CFR Parts 960 and 963 (collectively, the “Guidelines”). DOE’s Guidelines, which amend existing Part

960 and add a wholly new Part 963, purport to delineate the criteria and methodology to be applied by DOE for evaluating the suitability of high-level nuclear waste disposal sites generally, and of the proposed Yucca Mountain nuclear waste repository site in Nevada in particular. DOE began the challenged rulemaking by publishing a Notice of Proposed Rulemaking on December 16, 1996, 61 Fed. Reg. 66158. On November 30, 1999, DOE published a Supplemental Notice of Proposed Rulemaking that significantly revised the terms of DOE's site suitability criteria. 64 Fed. Reg. 67054. On November 14, 2001, DOE published its final rule, 10 CFR Parts 960 and 963, 66 Fed. Reg. 57297. By its express terms, the combined new rule became effective on December 14, 2001.

2. Nevada participated in the challenged rulemaking proceeding before the DOE. The proposed Yucca Mountain waste repository is located within the State of Nevada. Yucca Mountain is the only site designated for site characterization by DOE pursuant to the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. § 10101 *et seq.* (the "NWPA"). The NWPA confers upon Nevada certain rights of participation and review in the proposed site characterization activities and other conduct and decisions of DOE with respect to the Yucca Mountain project.

Nevada is a party aggrieved by the actions of DOE.

3. Section 119(a)(1) of the NWPA, 42 U.S.C. § 10139(a)(1), provides the United States Courts of Appeals with original and exclusive jurisdiction over this action.

4. Venue is proper in this Circuit pursuant to section 119(a)(2) of the NWPA, 42 U.S.C. § 10139(a)(2).

5. Since highly-radioactive wastes and spent nuclear fuel from nuclear reactors are lethally radioactive for hundreds of thousands of years, no form of man-made or engineered barrier or container, based on known technology, is capable of serving as a reliable and safe permanent repository for such wastes for such periods. As a result, the global scientific community, including scientists in the United States and at DOE, has overwhelmingly determined that deep geologic isolation is the preferred alternative for the permanent disposal of these wastes.

6. Congress embraced this consensus of scientific opinion in the explicit terms and legislative history of the Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10101 *et seq.* (the “NWPA”), which expressly mandated deep geologic isolation as the required form of containment for the nation’s high-level nuclear waste and affirmatively foreclosed consideration of any alternatives to geologic isolation in site selection, environmental assessments, and repository licensing.

7. All of the tasks, authorities, and responsibilities given to DOE under the NWPA flow from, and are qualified by, the express Congressional design that

permanent disposal of the nation’s high-level nuclear waste and spent fuel is to be accomplished primarily through deep geologic isolation. Congress has given DOE no power, authority, or discretion of any kind to rely on other forms of isolation or to fashion alternative guidelines for determining the suitability of a candidate site for a nuclear waste repository that would not depend primarily on deep geologic isolation for assuring safe, permanent disposal of such waste.

8. Reflecting this overarching statutory purpose, section 112(a) of the NWPA, 42 U.S.C. § 10132(a), requires that the statutorily mandated guidelines for the recommendation of “candidate sites” for repositories “shall specify detailed geologic considerations that shall be primary criteria for the selection of sites. . . .” (Emphasis added.) Moreover, “[s]uch guidelines shall specify factors that qualify or disqualify any site from development as a repository, including factors pertaining to the location of valuable natural resources, hydrology, geophysics, [and] seismic activity. . . .” Section 113 of the NWPA, 42 U.S.C. § 10133, requires DOE to carry out site characterization activities at the Yucca Mountain site and, “for such candidate site,” specify “criteria to be used to determine the suitability of such candidate site for the location of a repository, developed pursuant to section 112(a) [of the NWPA].” (Emphasis added.)

9. Original and longstanding interpretations of these NWPA requirements by DOE and the Nuclear Regulatory Commission (“NRC”), which must license the

repository pursuant to the NWPA, repeatedly confirm the understanding that the repository is required by Congress to be “primarily” a *geologic* repository, with engineered containers and barriers providing additional protection during earlier years of operation. In fact, reflecting its view of the ultimate fallibility of human technology, NRC concurred in DOE’s original site suitability guidelines, 10 CFR Part 960, only on condition that DOE add express requirements to the Guidelines affirming that engineered barriers, though highly desirable as a redundant form of protection, could never be used to compensate for inferior geology.

10. Congress did not alter the NWPA’s fundamental commitment to geologic isolation for the permanent disposal of high-level nuclear waste when revisiting and amending the NWPA in 1987, and again in 1992. The nuclear industry’s effort to have lawmakers remove or alter the NWPA’s geologic suitability requirements in sections 112 and 113 with proposed new legislation in 1999, H. R. 45, was unsuccessful.

11. Section 113(c)(3) of the NWPA further requires that, “[i]f the Secretary [of DOE] at any time determines the Yucca Mountain site to be unsuitable for development as a repository, the Secretary shall . . . terminate all site characterization activities at such site . . . notify the Congress, the Governor and legislature of Nevada of such termination; . . .and report to Congress not later than 6 months after such determination the Secretary’s recommendations for further

action to assure the safe, permanent disposal of spent nuclear fuel and high-level radioactive waste, including the need for new legislative authority.” (Emphasis added.)

12. In applying to Yucca Mountain DOE’s original site suitability guidelines, 10 CFR Part 960 (promulgated in 1984 pursuant to Section 112(a) of the NWSA), DOE determined after many years of analysis under those guidelines that the Yucca Mountain site is not “suitable” for the permanent geologic isolation of nuclear waste. This is because Yucca Mountain’s geologic characteristics proved to be such that they cannot serve “primarily” to isolate high-level radioactive wastes from the general environment for thousands of years, and cannot serve “primarily” to ensure that the Yucca Mountain geologic repository will meet applicable health and safety standards promulgated by the Environmental Protection Agency (“EPA”) pursuant to the authority given EPA by Section 801 of the Energy Policy Act of 1992, 42 U.S.C. § 10141. EPA promulgated those standards on June 13, 2001, in 40 CFR Part 197, 66 Fed. Reg. 32074, which by their express terms took effect on July 13, 2001.

13. Upon determining in fact that the Yucca Mountain site’s geologic characteristics were not “primarily” capable of assuring the repository could meet the new EPA rule or “primarily” capable of qualifying Yucca Mountain as a suitable permanent geologic repository, the Secretary of Energy failed to take the

actions required by section 113(c)(3) of the NWPA. Specifically, he failed to terminate all site characterization activities, failed to notify the Governor and legislature of Nevada, and failed to report to Congress.

14. Instead, realizing that the only way the Yucca Mountain candidate “site” could ever be configured to meet the EPA rule or secure an NRC license was to abandon the NWPA’s mandate for geologic isolation, DOE ignored the mandatory “site” suitability requirements of the NWPA and published for Yucca Mountain the “repository” Guidelines that are the subject of this petition.

15. In blatant disregard of the fundamental purpose and design of the NWPA, the Guidelines permit a determination by the Secretary of “repository” suitability wholly irrespective of the geologic characteristics of the Yucca Mountain site, and, indeed, would appear to authorize a passing “repository suitability” determination, with a superior waste package, at virtually any physical site in the United States.

16. DOE’s new Guidelines permit DOE, in attempting to meet EPA’s environmental protection standards, to rely “primarily” not on “geologic considerations,” as is required by the NWPA, but on engineered waste packages that DOE hopes would contain the wastes within the inferior geologic setting. Indeed, DOE’s own analyses reveal that the engineered waste packages account for nearly 100-percent of the isolation capability of the complete repository system

designed by DOE for Yucca Mountain, and that geologic considerations contribute little or essentially nothing to the repository system's isolation capability. The redundant, but non-primary, role envisioned by Congress for the man-made engineered waste packages has, under the Guidelines, been given total primacy in the face of known inferior geology at Yucca Mountain.

17. In fact, DOE's Guidelines fail to specify any physical or geologic factors that can "qualify or disqualify" the site from development as a suitable repository, as is explicitly required by the NWPA.

18. For the above and other reasons, DOE's new Guidelines are specious, violate the NWPA, and are otherwise contrary to law.

WHEREFORE, the State of Nevada respectfully requests that the Court:

(1) Declare that DOE's failure to act as described herein is inconsistent with applicable law;

(2) Declare that DOE's new Guidelines are inconsistent with applicable law;

(3) Direct DOE to reissue the Guidelines to make them consistent with the NWPA, other applicable laws, and this Court's findings;

(4) Direct DOE to apply the reissued Guidelines to the Yucca Mountain site and to adhere promptly to the directives of section 113(c)(3) of the NWPA if,

on the basis of those reissued Guidelines, the Yucca Mountain site is determined by DOE to be unsuitable;

(5) Stay the application and enforcement of the DOE Guidelines pending final determination of this petition; and

(6) Direct the Secretary to withhold issuance to the President under NWPA Section 114(a) of any site recommendation on Yucca Mountain pending final determination of this petition.

Respectfully submitted,

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DATED: December 17, 2001

Enclosure:  
10 CFR Parts 960 and 963

\* – Member, D.C. Circuit Bar

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was served this 17<sup>th</sup> day of December 2001 via messenger on:

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