Proposed Rules

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NUCLEAR REGULATORY COMMISSION

10 CFR Part 51

[Docket No. PRM–51–9]

State of Nevada; Denial of Petition for Rulemaking

AGENCY: Nuclear Regulatory Commission.

ACTION: Petition for rulemaking: denial.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC or Commission) is denying a petition for rulemaking submitted by the State of Nevada (PRM–51–9). The petition requests that NRC modify its regulation setting criteria for adoption of an environmental impact statement prepared by the Secretary of the Department of Energy in proceedings for issuance of a construction authorization and materials license with respect to a geologic repository. The petitioner asserts that the current regulation must be ''corrected'' because it is at odds with a recent court of appeals decision. Further, petitioner asserts that certain litigation procedures that will be used in the proceedings to consider the adoption question violate the National Environmental Policy Act of 1969, as amended (NEPA). NRC is denying the petition because the court found no reason for NRC to correct its adoption criteria and because the petition does not demonstrate that NRC's litigation procedures violate NEPA. Commissioner Gregory B. Jaczko's vote on this denial is included in Appendix I to this notice.

ADDRESSES: Publicly available documents related to this petition, including the petition for rulemaking, the comments received, and NRC's letter of denial to the petitioner may be viewed electronically on public computers in NRC's Public Document Room (PDR), 01F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland. The PDR reproduction contractor will copy documents for a fee.

Publicly available documents created or received at NRC after November 1, 1999, are also available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this site, the public can gain entry into the NRC's Agencywide Documents Access and Management System (ADAMS), which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the PDR reference staff at (800) 387–4209, (301) 415–4737 or by e-mail to *pdr@nrc.gov.*

FOR FURTHER INFORMATION CONTACT: Jerry Bonanno, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone (301) 415–1328 or Toll Free: 1–800–368–5642, e-mail: *jxb5@nrc.gov.*

SUPPLEMENTARY INFORMATION:

Introduction

On April 8, 2005, the State of Nevada (petitioner or the State) submitted a ''Petition by the State of Nevada to Amend 10 CFR 51.109'' (petition), which was docketed as a petition for rulemaking under 10 CFR 2.802 of the Commission's regulations (PRM–51–9). The petition was noticed on August 12, 2005 (70 FR 47148) with a public comment period that closed on October 26, 2005. Three comment letters were received. The petition requests amendments to the Commission's regulation at 10 CFR 51.109 governing NRC's adoption of the Department of Energy's (DOE) final environmental impact statement (FEIS), and any supplements thereto, which accompanied the Secretary of Energy's (the Secretary) recommendation to the President that the Yucca Mountain, Nevada (YM) site be approved for the development of a geologic repository. Petitioner believes that the current regulation is contrary to the NEPA, the Nuclear Waste Policy Act of 1982, as amended (NWPA), and the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Nuclear Energy Institute, Inc.* v. *Environmental Protection Agency,* 373 F.3d 1251 (D.C. Cir. 2004) (NEI).

Background

A. Statutory and Regulatory Background of § 51.109

Section 114(f)(4) of the NWPA provides that ''[a]ny [EIS] prepared in connection with a repository proposed to be constructed by the Secretary under this subtitle 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'' (emphasis added). The statute further provides 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 the [NEPA] and no further consideration shall be required, except that nothing in this subsection shall affect any independent responsibilities of the Commission to protect public health under the Atomic Energy Act of 1954 (42 U.S.C. 2011 *et seq.*).'' In 1988–89, NRC conducted a rulemaking to set out the standards and procedures that would be used in licensing proceedings for determining whether NRC's adoption of DOE's FEIS is practicable. *See,* 53 FR 16131; May 5, 1988 (proposed rule); 54 FR 27864; July 3, 1989 (final rule). In that rulemaking, NRC determined that the NWPA had altered NRC's ordinary NEPA responsibilities in such a manner as to narrow the scope of NRC's independent review of environmental issues that had been decided by DOE in its FEIS. As summarized by the Commission in the final rule,

> [T]he Commission continues to emphasize its view that its role under NWPA is oriented toward health and safety issues and that, in general, nonradiological environmental issues are intended to be resolved in advance of NRC licensing decisions through the actions of the Department of Energy, subject to Congressional and judicial review in accordance with NWPA and other applicable law. The Commission anticipates that many environmental questions would have been, or at least could have been, adjudicated in connection with an environmental impact statement prepared by DOE, and such questions should not be reopened in proceedings before NRC.

54 FR at 27865.

Accordingly, NRC's 1989 final rule established, in a new 10 CFR 51.109, ''Public hearings in proceedings for issuance of materials license with

respect to a geologic repository,'' procedures and criteria for implementing the statutory directive to adopt DOE's FEIS to the extent practicable. Under § 51.109(a)(1), the NRC staff must present its position on whether it is practicable to adopt, without further supplementation, DOE's FEIS upon publication of the notice of hearing in the **Federal Register**. Under § 51.109(a)(2), parties to a proceeding are given the opportunity to submit contentions asserting that it is not practicable to adopt:

(a)(2) Any other party to the proceeding who contends that it is not practicable to adopt the DOE [FEIS], as it may have been supplemented, shall file a contention to that effect within thirty (30) days after the publication of the notice of hearing in the **Federal Register**. Such contention must be accompanied by one or more affidavits which set forth factual and/or technical bases for the claim that, under the principles set forth in paragraphs (c) and (d) of this section, it is not practicable to adopt the DOE [FEIS], as it may have been supplemented. The presiding officer shall resolve disputes concerning adoption of the DOE [FEIS] by using, to the extent possible, the criteria and procedures that are followed in ruling on motions to reopen under § 2.236 of this chapter.

10 CFR 51.109(a)(2)(2007).[1] The criteria governing the practicability of adoption are set forth in § 51.109(c):

(c) 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.

10 CFR 51.109(c) (2007).

B. DOE's FEIS

The NWPA, *inter alia,* establishes a process for the characterization, siting, construction, and operation of a geologic repository at the YM site. As relevant here, when site characterization activities are completed, the Secretary of Energy may recommend site approval to the President and any such recommendation must be accompanied by a FEIS. See, section 114(a)(1) of the NWPA. Then, the President may recommend the site to the Congress and must include a copy of the documents comprising the basis of the Secretary's recommendation, including the FEIS. See, section 114(a)(2). The State is then given an opportunity to submit a notice of disapproval of the site designation which, however, may be overcome by a joint resolution of the Congress approving the recommended repository site. See, sections 115 and 116 of the NWPA. If the site designation is permitted to take effect under the provisions of section 115, the Secretary of Energy shall submit an application for a construction authorization to NRC. See, section 114(b) of the NWPA. In February 2002, the Secretary issued the *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* and recommended the YM site to the President. The President then recommended the YM site to the Congress. In April 2002, the State of Nevada submitted a notice of disapproval to the Congress. However, Congress approved the site designation by a Joint Resolution signed by the President on July 23, 2002. Public Law 107–200, 116 Stat. 735 (2002) (codified at 42 U.S.C. 10135 note (Supp. IV 2004)).

C. The NEI Decision

Thereafter, the State of Nevada sought court review of the Secretary's decision to recommend the YM site to the President, the President's decision to recommend the YM site to the Congress, and DOE's FEIS, which had been used to support both recommendations. In response, DOE argued that the Joint Resolution had rendered moot Nevada's challenges to the Secretary's and the President's recommendations, with the result that Nevada's claims that the FEIS was inadequate could not be considered as part of the challenges to these recommendations. Further, DOE argued that, insofar as the FEIS might be used to support future DOE and NRC decisions, the FEIS was unripe for review because there was no final agency action affecting the State at that time.

In the litigation resulting in the *NEI* decision, the State's challenges to the Secretary's and the President's recommendations and to the FEIS were combined with other issues raised by the State and with other lawsuits concerning the YM repository, including challenges to both the Environmental Protection Agency's final standards (66 FR 32,074; June 13, 2001) and NRC's final regulations for the proposed geologic repository at YM (66 FR 55,732; November 2, 2001). However, NRC's procedures and criteria for adoption of DOE's FEIS were not issues raised in any of the lawsuits and NRC's rationale for adoption of the § 51.109 procedures and criteria was neither briefed nor argued by NRC. NRC did describe in its brief its regulatory adoption process in the context of an issue raised by Nevada concerning NRC's regulation at 10 CFR 63.341, which required DOE to include the results of its projections of peak dose in its FEIS.[2] *See, Brief for the Federal Respondents, State of Nevada* v. *U.S. Nuclear Regulatory Commission,* Nos. 01–1116 and 03–1058, June 6, 2003, at 44–45. In resolving this issue, the court noted NRC's statement ''that it has imposed no categorical limitation on any challenge to DOE's peak dose calculations and that, under its regulations, parties to the proceeding may challenge the practicability of adopting aspects of DOE's EIS, including the peak dose calculations, based on substantial new information to the contrary.'' 375 F.3d 1251, at 1300 (internal quotations omitted).

In *NEI,* the court agreed with DOE that Congress' enactment of the Joint Resolution had rendered moot issues raised concerning the Secretary's and the President's recommendation of the YM site. *See* 373 F.3d at 1309. Thus, the court held that ''[i]nsofar as Nevada's instant challenge to the FEIS is intended to reverse the decision to select the Yucca site, the challenge is moot * * *'' 373 F.3d at 1312. However, the court noted the anticipated use of the FEIS in future decisionmaking related to YM, including its potential adoption by NRC in NRC's licensing proceeding, and considered whether the court should review the FEIS because it might be used to support future decisions. The court determined that the FEIS was not ripe for review under the two-part test used to determine ripeness: The fitness of the issue for judicial decision and the hardship to the parties of withholding court consideration. Under the first prong of the test, the court noted that it was unclear to what extent NRC would adopt the FEIS and whether the FEIS would require supplementation prior to any adoption. The court concluded that ''[o]ur review of the FEIS therefore would benefit from postponing consideration until the FEIS has been used to support a specific, concrete, and final decision.'' 373 F.3d at 1313. Under

[1] In 2004, § 51.109(a)(2) was revised to reference a new section number for motions to reopen as part of the Commission's revision of its rules of practice in adjudicatory proceedings. See 69 FR 2182, 2276 (January 14, 2004). The standards for reopening were not changed.

[2] In 2005, NRC proposed to eliminate § 63.341 as part of its proposed amendments to 10 CFR Part 63. See, 70 FR 53313 (September 8, 2005).

the second prong of the test, the court concluded that ''withholding consideration of Nevada's substantive claims at this time imposes no hardship on Nevada * * * [because] Nevada may raise its substantive claims against the FEIS if and when NRC or DOE makes * * * a final decision.'' Id. In reaching this conclusion as to hardship, the court stated that ''we rely on the assurances of counsel for both NRC and DOE 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 in any DOE proceeding to select a transportation alternative.'' *Id.*

The Petition

The petitioner agrees that § 51.109 ''in most respects tracks the language of [section 114(f)(4) of the NWPA]'' on which it is based. Petition at 2. However, the petitioner claims that this regulation also adds three special provisions not found in the statute: (1) Special procedures for litigation of NEPA issues; (2) allowance for adoption of DOE supplements to the FEIS; and (3) special standards that specify in some detail precisely when NRC will adopt the FEIS. The petitioner believes that the Commission must conduct a rulemaking to eliminate the ''special litigation procedures'' and to correct the ''special adoption standards.'' The petition makes no further reference to the second ''special provision'' and suggests no rule change with respect to this provision. There is no apparent reason why Congress would have intended to exclude supplements to the FEIS in its requirement for NRC to adopt DOE's FEIS to the extent practicable, so we do not regard this provision of the regulation as being within the petition for rulemaking.

To correct the criteria for assessing the practicability of adoption, petitioner requests that the Commission add a new paragraph (h) to § 51.109:

> 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 subparagraphs (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.

Petitioner further proposes that the Commission delete § 51.109(a)(2), with the result that the admission of NEPA contentions will be guided by the same principles in 10 CFR 2.309(f) that apply to other kinds of contentions.

Public Comments on the Petition

Three comment letters were received on the petition. The Board of Lincoln County Commissioners supports the petition for the reasons advanced in the petition, noting that it expects to participate in an NRC proceeding which will examine NRC's independent review of the FEIS. The National Association of Regulatory Utility Commissioners (NARUC) expressed the view that Nevada's substantive issues on the FEIS could be considered in NRC's licensing proceeding without any need to amend the regulations because, *inter alia,* ''the Court of Appeals provided the State the right to have consideration be given to outstanding concerns with the EIS prepared for the Yucca Mountain repository when * * * the NRC prepares its own EIS for the licensing decision.'' [3] DOE does not think that Nevada's requested rulemaking is warranted because ''[t]he regulation at issue comports with NRC's responsibilities under both NEPA and the NWPA, and nothing in the *NEI* case supports Nevada's claim that the regulation must be revised.''

Reasons for Denial

A. The Adoption Standards in § 51.109(c)

With regard to the ''special adoption standards'' in § 51.109(c), petitioner notes that both Nevada and the Council on Environmental Quality (CEQ) had objected to NRC's criteria for determining that it is practicable to adopt the FEIS. In comments submitted at the time of the 1988–89 rulemaking, Nevada and CEQ argued that NEPA does not allow NRC to adopt the FEIS without a full and independent review of the FEIS. Further, Nevada also disagreed, and continues to disagree, with NRC's position in that rulemaking that in the NWPA, Congress intended to alter NRC's ordinary NEPA obligations and lessened the need for NRC to conduct a fully independent review of the FEIS prior to adoption. In support of its position, the petitioner cites the statements of two Senators made during the congressional debates leading to the NWPA, statements considered by NRC in its rulemaking but rejected as ''less illuminating'' than the legislative history stemming from the House of Representatives' consideration of the issues. *See,* 53 FR 16137.

The State's main basis for requesting rulemaking stems from the NEI court's discussion of NRC's potential adoption of the FEIS. The petitioner notes the court's observations that Nevada may raise its substantive claims against the FEIS when it is used by NRC to support a future construction authorization or licensing decision, and that NRC counsel had assured the court that Nevada would be permitted to raise its substantive challenges to the FEIS in any NRC proceeding to decide whether to adopt the FEIS. The petitioner further notes the court's statement that NWPA's mandate that the FEIS be adopted by NRC ''to the extent practicable'' * * * ''cannot reasonably be interpreted to permit NRC to premise a construction-authorization or licensing decision upon an EIS that does not meet the substantive requirements of the NEPA or [CEQ's] NEPA regulations.'' 373 F.3d at 1314.

Finally, the petitioner notes the court's rejection of the position taken in a letter from NRC counsel to the court that § 51.109(c) only affected issues that could be raised and litigated in NRC administrative proceedings and not issues that could be raised on judicial review. *See,* Petition at 5; 373 F.3d 1314. Rather, the court stated, ''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 claims thus would certainly raise 'new considerations' with regard to any decision to adopt the FEIS.'' *Id.* The petitioner believes that ''any Commission interpretation of 10 CFR 51.109 at odds with counsel's representation at oral argument would clearly be unlawful'' and asserts that ''[NRC's] current regulation is directly at odds with [its counsel's and the court's] interpretation,'' so that the Commission must correct the regulation. Petition at 5–6.

Petitioner's assertion that § 51.109(c) must be ''corrected'' because it is ''directly at odds'' with the interpretation of this regulation by the *NEI* court directly contradicts what the court itself said on the subject of any need for the Commission to amend its regulations. The court stated:

> Government counsel's unequivocal representation 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.

[3] It is not clear whether NARUC recognizes that NRC may adopt DOE's EIS to the extent practicable, rather than prepare its own EIS.

Therefore, on the record at hand, there is no reason to assume that the regulation will bar consideration of Nevada's substantive claims in the relevant NRC administrative proceedings.

373 F.3d at 1314.

Far from suggesting that NRC's regulation needed to be amended to accommodate the court's interpretation of the regulation, the court expressed its satisfaction that there was no reason to assume that the present language of the regulation would bar consideration of Nevada's substantive claims. This conclusion follows the court's explicit consideration of the language of the § 51.109(c) criteria. The court focused on the second criterion; *i.e.*, that it might not be practicable for NRC to adopt the FEIS if ''significant and substantial new information or new considerations render such environmental impact statement inadequate.'' The court noted that ''Government counsel assured the court that NRC will not construe the 'new information or new considerations' requirement to preclude Nevada from raising substantive claims against the FEIS in administrative proceedings.'' *Id.* Further, the court observed that ''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 claims thus would certainly raise 'new considerations' with regard to any decision to adopt the FEIS.'' *Id.*[4] There is no need for the Commission to expend the resources needed for a rulemaking to ''correct'' a rule which the court gave no indication of needing correction. NRC will treat Nevada's substantive claims against the FEIS as ''new considerations'' within the framework of § 51.109(c).

Although the petitioner frames its request for correction of § 51.109(c) in terms of a supposed need to bring the regulation into line with the views of the court, the petitioner may actually be seeking to raise once again the issues the State and CEQ raised in comments made during the 1988–89 rulemaking. The petition raises no issues that were not raised and fully considered in that rulemaking. The Commission's rationale for the adoption criteria issued as part of that rulemaking was not before the court in NEI and the court, as explained above, found nothing amiss with the criteria. The court's decision presents no reasons for the Commission to reexamine the basis of that rulemaking.

B. The Litigation Procedures in § 51.109(a)(2)

With regard to the ''special litigation procedures,'' the petitioner notes that § 51.109(a)(2) conditions the admissibility of a contention which asserts that NRC should not adopt the FEIS on satisfaction, to the extent possible, of the standards for reopening a closed record under 10 CFR 2.326. The petitioner asserts that the principal difference between this standard and the contention standard in 10 CFR 2.309(f) that applies to other issues is that the former requires submission of admissible evidence, while the latter does not. The petitioner asserts that NRC's creation of ''special litigation procedures'' violates 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 applicabl[e] only to NEPA where interested persons must satisfy additional pleading requirements that would otherwise not apply.'' Petition at 6 (citing *Calvert Cliffs,* 449 F.2d 1109 (D.C. Cir. 1971); 40 CFR 1505.1; *Aberdeen & Rockfish R. Co.* v. *SCRAP,* 422 U.S. 289, 320 (1975)).

The relevant portion of section 102(2)(C) of the NEPA states that copies of the requisite ''detailed statement'' must ''accompany the proposal through the existing agency review processes.'' [5] This language does not require that an agency establish one uniform agency process for all NEPA reviews. Here, NRC has adopted a contention standard in § 51.109(a)(2) which takes account of the NWPA's effect on its NEPA responsibilities as explained in its 1988–89 rulemaking. In the relevant portion of the Calvert Cliffs decision, the question before the court was ''whether the [Atomic Energy] Commission is correct in thinking that its NEPA responsibilities may be carried out in toto outside the hearing process—whether it is enough that environmental data and evaluations merely accompany the application through the review process, but receive no consideration whatever from the hearing board.'' *Calvert Cliffs,* 449 F.2d at 1117 (internal quotation marks omitted). In the discussion that follows, the court focused on the meaning of the term ''accompany,'' not whether changes in agency procedures for considering NEPA issues would be inconsistent with the ''existing agency review process'' language. The court concluded that the word ''accompany'' meant that the detailed statement must be considered during the agency review process. In *Aberdeen,* the Court held that an oral hearing held before an agency made a recommendation or report on a proposal for Federal action was not an ''existing agency review process'' under section 102(2)(C) of the NEPA and thus, a FEIS was not required to be available during this hearing. *See*, 422 U.S. at 320–21. Thus, the Supreme Court's discussion in *Aberdeen* focuses on when the FEIS must be made available, not whether the term ''existing agency review process'' means that one contention standard must apply to all NEPA reviews in all cases before an agency. In short, the case law cited by the petitioner does not provide a reason for NRC to delete § 51.109(a)(2) from its regulations.

Conclusion

The *NEI* court found no need for NRC to amend its regulations for the purpose of allowing the State to have its substantive claims examined in NRC's licensing proceeding for a potential YM repository. Petitioner's claims that NRC's adoption criteria violate the NEPA or the NWPA were addressed in the 1988–89 rulemaking and petitioner offers no new arguments for the Commission's consideration. Nor does the petitioner provide adequate legal support for NRC to amend its litigation procedures. Given this, it would be an unwise expenditure of resources for the Commission to conduct a rulemaking on this matter.

For these reasons, the Commission denies PRM–51–9.

Dated at Rockville, Maryland, this 25th day of January 2008.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

Appendix I—Commissioner Jaczko's Comments on SECY–07–0159, Denial of a Petition for Rulemaking (PRM–51–9)—State of Nevada

I approve in part and disapprove in part the recommendation to proceed with option 2 which would deny the rulemaking petition while offering the assurance that the NRC will interpret the existing regulations to allow substantive claims to the Department of Energy's (DOE) Final Environmental Impact Statement (FEIS). Instead, I approve a combination of options 1 and 2. The original regulations governing the agency's review of the FEIS were based upon an assumption of how the site selection process for a potential repository would unfold. But because the judicial review of environmental

[4] At the same time, the court recognized that ''[t]he NWPA's mandate that the FEIS be adopted by NRC 'to the extent practicable' is intended to avoid duplication of the environmental review process.'' 373 F.3d 1251.

[5] The CEQ regulation at 40 CFR 1505.1 is based on the statutory language and requires that agency procedures require ''that relevant environmental documents * * * accompany the proposal through existing agency review processes so that agency officials use the statement in making decisions.''

issues did not happen as we envisioned, I believe we should grant the petition and fix the corresponding regulations to appropriately reflect that the entire FEIS will be open for litigation in any NRC administrative proceeding regarding a repository application. At the same time, I believe the notice of the proposed rule should explain that the agency will interpret the regulations in a manner consistent with this approach should the rulemaking not be completed in time for a hearing on a potential Yucca Mountain license application.

Based upon the history of this issue, I think granting the petition and amending our regulations is the right answer in this case. First, it is important to remember that the NRC could have originally interpreted the Nuclear Waste Policy Act (NWPA) to allow the NRC to handle the adoption of DOE's FEIS in the same manner it currently handles the adoption of any other federal agency EIS in the NEPA review process. The NWPA's direction to avoid duplicative environmental analysis does not necessarily equate to a direction to eliminate most, if not all, of the FEIS from the NRC's hearing process. I believe we should treat DOE's FEIS in the same manner as we treat any other FEIS submitted by a similarly situated regulated entity. In this case, that would mean defending the agency's independent review of the entire FEIS—not just limited portions of it—in the NRC's administrative proceedings. Commenters, including the Council on Environmental Quality, said as much in comments to this rulemaking and I find their logic persuasive. Had the agency opted for that interpretation in the proposed rulemaking, perhaps we would not find ourselves facing this petition today.

NRC's rationale for not doing so, however, while not ideal, made sense in the context of what the agency thought would happen with the FEIS. According to the rulemaking history, section 51.109 of NRC's regulations was based, at least in large part, upon the theory that the administrative litigation of NEPA issues at the NRC should be limited because many of these issues should have already had the opportunity to be litigated in another forum. Thus, legal doctrines which prevent issues and claims from being re-litigated, such as res judicata and collateral estoppel, would prevent the re-litigation of these issues in NRC hearings. This was premised upon NRC's expectation that an interested person would have had an opportunity to legally challenge DOE's FEIS after it was used to support the recommendations of Yucca Mountain as a site for a repository by the Secretary of Energy and the President.

With that expectation in mind, the regulations were then designed to ensure that the environmental issues in any NRC proceeding on the proposed repository would appropriately focus on issues that were new—that were not able to be raised at the earlier opportunity to challenge the FEIS. So the regulations adopted in section 51.109 focused not on the entire FEIS, as would be the normal NRC practice, but on the NRC's decision to adopt the FEIS. The regulations limited challenges to NRC's adoption decision to those issues that had changed from the original application, or that were issues raising ''significant and substantial new information'' since that earlier opportunity to challenge the FEIS. This makes sense if any of the other issues regarding the FEIS had already had the opportunity to be challenged. Given that presumption, it also explains why the regulations direct the Board to use the higher standards governing a motion to reopen when ruling upon the issues raised regarding adoption of the FEIS—because litigating the FEIS in NRC's administrative proceeding was seen as re-opening the record on an already litigated FEIS.

All that being said, as is often the case, actual events regarding judicial review of environmental issues transpired differently. Instead of the FEIS being used to support the recommendation of Yucca Mountain as a site for a repository, there was a Joint Resolution of Congress approving the Yucca Mountain site designation. This change of events, according to the Federal Court of Appeals decision in *Nuclear Energy Institute, Inc.* v. *Environmental Protection Agency,* 373 F.3d 1251 (D.C. Circuit 2004), rendered any such challenge to the FEIS' support for the Yucca Mountain site moot; and to the extent the NRC may rely upon the FEIS, rendered challenges unripe because the NRC had not reached a decision regarding adopting or relying upon the FEIS in a way that could have yet harmed the parties.

It was part of this discussion that led the NRC and DOE to assure the court that the parties would have an opportunity during NRC's administrative hearing to raise substantive challenges to the FEIS. And it is this assurance from NRC counsel that generated the petition for rulemaking. In essence, the petitioners do not understand how NRC's current regulations can be in accord with the assurance the court relied upon—that parties would have the opportunity at the NRC to substantively challenge the FEIS. Because current NRC regulations limit challenges to NRC's decision about adoption of the FEIS rather than the FEIS itself; and further limit those challenges to require they be based upon significant and substantial new information, it is easy to see how our stakeholders might be confused. Add to that the direction in the current regulations that the Boards are directed to review any challenge to the decision regarding adoption using the standards that govern re-opening a record—which is an intentionally higher bar for review—and there can be little question that the current regulations are confusing in light of the discussion in front of the court and the relied upon assurance that substantive issues regarding the FEIS could, in fact, be raised in NRC proceedings.

For all of these reasons, it appears to me that the best way to transparently resolve the real question presented—the question of what issues surrounding the FEIS can be challenged in a prospective hearing on an application for a construction authorization—is to grant this petition and ensure that the regulations transparently capture precisely how the environmental review will be conducted in NRC's administrative proceeding. The earlier rulemaking was based upon assumptions, but we can now answer the questions with the benefit of knowing now what we did not know then.

I recognize that the timing of the agency's decision on this petition is not ideal because an application for a repository may be submitted before this rulemaking would end. That is especially unfortunate in this particular situation where the petition was filed in 2005. Had we granted this petition at the close of the public comment period in October 2005, we likely would now be voting on the final rule instead of voting on this petition. I am hopeful that the staff's work to improve the rulemaking process will include ways to improve the timeliness of the petition process so we are not in this unfortunate position in the future.

But we are where we are, and with that in mind, I believe the notice that grants the petition for rulemaking should indicate that, if the rulemaking is not resolved prior to the receipt of an application for a repository, the agency intends to interpret the regulations in a manner consistent with the court's decision—as the staff has drafted in the notice accompanying option 2—with some additional clarification. The notice should also explain that section 51.109(c), which indicates that challenges to the NRC's adoption decision are to be based upon ''significant and substantial new information'', will be interpreted in a manner that recognizes, as the court did, that claims regarding DOE's FEIS have not been adjudicated on the merits and thus, would certainly raise ''new considerations'' with regard to any decision to adopt the FEIS. The notice should also make it clear that the current direction in section 51.109(a) that the presiding officer should, to the extent possible, use the criteria for ruling on a motion to reopen in resolving disputes regarding the adoption of the FEIS, is rendered moot. The notice should clearly state that it is not possible to rely upon criteria used for a motion to reopen given the relevant history of this matter where there was no opportunity to originally open these issues. Instead, the contention admissibility should be determined by reliance upon section 2.309(f), the agency's current contention standard.

I appreciate that because these regulations have not yet been interpreted and applied in any proceeding, the agency has more flexibility to interpret them now without recreating them in a new rulemaking—and thus the recommendation for option 2. But this is not a situation where the regulations intent could have been clearer; this is a situation where the interpretation of the regulations will essentially require the agency to exercise great latitude in applying them in a manner consistent with the discussion in court. Transparency should dictate that we, at least, try to correct this situation through the appropriate rulemaking channels regardless of the impacts of the timing of this decision. We should not let the prospect of a potential application complicate what is clearly the right answer. We can and should deal with the possible complications of an intervening application

by providing appropriate guidance should the rulemaking not resolve itself in time. But the two are not mutually exclusive and thus, I support a combination of options 1 and 2—granting the petition and clarifying in the notice the agency's regulatory interpretation of the existing regulations should they be required to be used prior to completion of the rulemaking.

Also, this paper should be reviewed for a release determination and, at a minimum, the voting record and SRM from this paper should be made publicly available five business days after the letter is sent to the petitioner, as is current practice for release of information regarding decisions on rulemaking petitions.

Gregory B. Jaczko.

[FR Doc. E8–1751 Filed 1–30–08; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket Nos. FAA–2007–0413 and FAA–2007–0414; Directorate Identifiers 2007–NM–341–AD and 2007–NM–340–AD]

RIN 2120–AA64

Airworthiness Directives; Bombardier Model CL–600–2B19 (Regional Jet Series 100 & 440), CL–600–2C10 (Regional Jet Series 700, 701 & 702), CL–600–2D15 (Regional Jet Series 705), and CL–600–2D24 (Regional Jet Series 900) Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM); correction.

SUMMARY: The FAA is correcting typographical errors in two NPRMs that were published in the **Federal Register** on January 4, 2008 (73 FR 833, and 73 FR 830). The errors resulted in incorrect docket numbers. One NPRM applies to all Bombardier Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes. The other NPRM applies to all Bombardier Model CL–600–2C10 (Regional Jet Series 700, 701 & 702), CL–600–2D15 (Regional Jet Series 705), and CL–600–2D24 (Regional Jet Series 900) airplanes. Both actions proposed to require revising the Airworthiness Limitations Section of the Instructions for Continued Airworthiness to incorporate new limitations for fuel tank systems.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (telephone 800–647–5527) is the Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Rocco Viselli, Aerospace Engineer, Airframe and Propulsion Branch, ANE–171, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7331; fax (516) 794–5531.

SUPPLEMENTARY INFORMATION: On December 26, 2007, the FAA issued a notice of proposed rulemaking (NPRM) for all Bombardier Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes. That NPRM, Directorate Identifier 2007–NM–341–AD, was published in the **Federal Register** on January 4, 2008 (73 FR 833).

On December 21, 2007, the FAA issued an NPRM for all Bombardier Model CL–600–2C10 (Regional Jet Series 700, 701 & 702), CL–600–2D15 (Regional Jet Series 705), and CL–600–2D24 (Regional Jet Series 900) airplanes. That NPRM, Directorate Identifier 2007–NM–340–AD, was published in the **Federal Register** on January 4, 2008 (73 FR 830).

Both actions proposed to require revising the Airworthiness Limitations Section of the Instructions for Continued Airworthiness to incorporate new limitations for fuel tank systems.

As published, those NPRMs specify incorrect docket numbers throughout the preamble and the regulatory text. The docket number associated with NPRM Directorate Identifier 2007–NM–341–AD was FAA–2008–0413, and the docket number associated with NPRM Directorate Identifier 2007–NM–340–AD was FAA–2008–0414. The docket numbers were assigned by the Federal Document Management System. We have been informed that incorrect docket numbers were assigned. The correct docket number for NPRM Directorate Identifier 2007–NM–341–AD is FAA–2007–0413. The correct docket number for NPRM Directorate Identifier 2007–NM–340–AD is FAA–2007–0414.

Any commenter who submitted comments to an original, incorrect docket number should check Docket No. FAA–2007–0413 or FAA–2007–0414 on *www.regulations.gov* to determine whether the comments have been received and filed in the appropriate docket. If not, or if it is not possible to determine whether comments have been posted to the correct docket, the comments should be resubmitted using the correct docket number.

No other part of the preamble or regulatory information has been changed; therefore, the NPRMs are not republished in the **Federal Register**.

The last date for submitting comments to the NPRMs remains February 4, 2008.

Correction

In the **Federal Register** of January 4, 2008, on page 833, in the second column, the headings section of NPRM Docket No. FAA–2008–0413, Directorate Identifier 2007–NM–341–AD, is corrected to read as follows:

''[Docket No. FAA–2007–0413; Directorate Identifier 2007–NM–341–AD]''

In the **Federal Register** of January 4, 2008, on page 833, in the third column, the **SUPPLEMENTARY INFORMATION** section of NPRM Docket No. FAA–2008–0413, Directorate Identifier 2007–NM–341–AD, is corrected to read as follows:

''* * * Include ''Docket No. FAA–2007–0413; Directorate Identifier 2007–NM–341–AD'' at the beginning of your comments. * * *''

In the **Federal Register** of January 4, 2008, on page 830, in the second column, the headings section of NPRM Docket No. FAA–2008–0414, Directorate Identifier 2007–NM–340–AD, is corrected to read as follows:

''[Docket No. FAA–2007–0414; Directorate Identifier 2007–NM–340–AD]''

In the **Federal Register** of January 4, 2008, on page 831, in the first column, the **SUPPLEMENTARY INFORMATION** section of NPRM Docket No. FAA–2008–0414, Directorate Identifier 2007–NM–340–AD, is corrected to read as follows:

''* * * Include ''Docket No. FAA–2007–0414; Directorate Identifier 2007–NM–340–AD'' at the beginning of your comments. * * *''

§ 39.13 [Corrected]

In the **Federal Register** of January 4, 2008, on page 835, in the first column, paragraph 2. of PART 39—AIRWORTHINESS DIRECTIVES of NPRM Docket No. FAA–2008–0413, Directorate Identifier 2007–NM–341–AD is corrected to read as follows:

* * * * *

Bombardier, Inc. (Formerly Canadair): Docket No. FAA–2007–0413; Directorate Identifier 2007–NM–341–AD.

* * * * *

In the **Federal Register** of January 4, 2008, on page 832, in the second