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Department of Energy Denies Nevada's Request To Stay Yucca Mountain Site Suitability Guidelines

Washington – The U.S. Department of Energy today released the following letter to Nevada Governor Kenny Guinn and State Attorney General Frankie Sue Del Papa denying the State of Nevada's request to stay the December 14, 2001 effective date of the Department's revised Yucca Mountain site suitability guidelines (10 CFR part 963) under the Nuclear Waste Policy Act (NWPA).

The text of the letter follows:

The Honorable Kenny C. Guinn, Governor
The Honorable Frankie Sue Del Papa, Attorney General
One Hundred One North Carson Street
Carson City, Nevada 89701

Dear Governor Guinn and Attorney General Del Papa:

The Secretary has asked me to respond to your December 10, 2001, letter in which you request a stay of the December 14, 2001, effective date of the Department's revised Yucca Mountain site suitability guidelines (10 CFR part 963) under the Nuclear Waste Policy Act (NWPA) pending the outcome of a lawsuit that you plan to file.

Your letter reiterates arguments that Nevada and others raised in comments on the proposed guidelines. The Department responded to these arguments in detail in the Supplementary Information portion of the notice of final rulemaking (66 Fed. Reg. 57298, November 14, 2001). I will not repeat the various points made there in detail. In brief, however, they are as follows.

- Nevada objects to the new suitability criteria in part because they are different from the old criteria and suggests that the only reason DOE could have for modifying them now is to address problems Yucca Mountain might have in meeting the prior criteria.

Response: DOE changed its Guidelines because both the science and the law relevant to this project have developed significantly since DOE first promulgated its Guidelines in 1984.

On the scientific front, pursuant to Congress's directive in the Energy Policy Act of 1992 (EPACT), in August 1995, the National Academy of Sciences (NAS) published a report entitled Technical Bases for Yucca Mountain Standards.

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In that report, the NAS concluded that it would be preferable to devise standards for regulation of a repository at Yucca Mountain that evaluated the performance of a repository taking into account all aspects of the repository, both engineered and natural, rather than evaluating different subsystems. This was because even if each subsystem performed well on its own, different subsystems could interfere with each other and cause defective performance of the repository as a whole.

Moreover, partly in response to the NAS study (as well as in response to Congress's directive in EPACT), the EPA and the NRC changed their rules for licensing repositories to focus on total system performance. See 40 CFR part 197 (new EPA rules); 10 CFR part 63 (new NRC rules). The Nuclear Waste Policy Act (NWPA) makes clear that there is a close link between the judgment that the Secretary must make about the suitability of a site for development as a repository and the potential licensability of a repository located at that site. Thus, once the EPA and the NRC changed their rules, it would have been improper for DOE to retain its old rules, which comported with the old NRC licensing requirements and approach but were out of step with NRC's current thinking.

- Nevada believes that the NRC concurred in DOE's old rules on the basis of certain provisos that the new rules do not satisfy.

Response: The NRC has concurred in DOE's new rules as well (66 Fed. Reg. 54303, October 26, 2001).

- Nevada objects to the fact that the new Guidelines allow DOE to consider both natural and engineered barriers in determining suitability, arguing that the NWPA intended the Secretary to focus on natural barriers exclusively in making his suitability determination.

Response: Section 121 of the NWPA directs the NRC to provide for the use of a multiple barrier system in the design of a repository. The NRC has implemented this directive by requiring DOE to show at licensing that the natural and engineered barriers will work in combination to enhance repository performance. Thus the operation of both sets of barriers is relevant under the regulatory framework for licensing. Given the link between suitability and licensing, it is entirely appropriate for DOE's suitability Guidelines to direct the Secretary's attention to both kinds of barriers in making a suitability determination.

For these reasons the Secretary does not believe a stay of the suitability regulations is warranted and has asked me to inform you that your request for a stay of the effective date of the site suitability Guidelines is denied.

Sincerely,

/s/

Lee Liberman Otis
General Counsel

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