

NOT YET CALENDARED FOR ORAL ARGUMENT

NOS. 01-1516, 02-1036, 02-1077, 02-1179 & 02-1196

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

STATE OF NEVADA, et al.,
Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY, et al.,
Respondents.

ON PETITIONS FOR REVIEW FROM DECISIONS OF UNITED STATES DEPARTMENT
OF ENERGY AND DECISION OF THE PRESIDENT OF THE UNITED STATES

BRIEF FOR THE RESPONDENTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and amici. All parties, intervenors, and amici appearing before this Court are listed in Petitioners' Opening Brief.

B. Rulings under review. All references to the matters at issue appear in Petitioners' Opening Brief.

C. Related Cases. The matters on review were not previously before this Court or any other court. The following cases may constitute related cases under Circuit Rule 28(a)(1)(C):

1. Nuclear Energy Institute, Inc. v. Environmental Protection Agency, No. 01-1258 (consolidated with Nos. 01-1268, 01-1295, 01-1425, and 01-1426).

2. State of Nevada v. United States Nuclear Regulatory Commission, No. 02-1116.

3. State of Nevada v. United States, No. 03-1009.

Respectfully submitted,

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GLOSSARY

APA	Administrative Procedures Act, 5 U.S.C. 551 <u>et. seq.</u>
Br.	Petitioners' Opening Brief
CEQ	Council on Environmental Quality
DOE	United States Department of Energy
EnPA	Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, 2921
EPA	United States Environmental Protection Agency
FEIS	Final Environmental Impact Statement
HEDD	high energy density device
HLW	high-level radioactive waste
NAS	National Academy of Sciences
NEPA	National Environmental Policy Act, 42 U.S.C. 4331 <u>et. seq.</u>
NRC	Nuclear Regulatory Commission
NWPA	Nuclear Waste Policy Act, as amended, 42 U.S.C. 10101 <u>et. seq.</u>
RCRA	Resource Conservation and Recovery Act, 42 U.S.C. 6901 <u>et seq.</u> ,
SA	Supplemental Appendix of Petitioners
SCP	Site Characterization Plan, Department of Energy, 1988

SRCSD	Site Recommendation Comment Summary Document, United States Department of Energy, DOE/RW-0548, February 2002
SNF	spent nuclear fuel
SR	Recommendation by the Secretary of Energy Regarding the Suitability of the Yucca Mountain Site for a Repository under the Nuclear Waste Policy Act of 1982, February 2002
TSPA	total system performance assessment
YMDA	Yucca Mountain Development Act, Pub. L. 107-200; 107th Cong., 2d Sess, 116 Stat. 735

Citations to the administrative records are in the following format:

Guidelines Record	GR-xx
Recommendations Record	RR-xx
FEIS Record	NR-xx

JURISDICTIONAL STATEMENT

The Petitioners invoke Section 119(a)(1) of the Nuclear Waste Policy Act (“NWPA”), 42 U.S.C. 10139(a)(1). For the reasons stated *infra*, pp. 19-42, the respondents submit the Court lacks jurisdiction to consider the petitions of review.

QUESTIONS PRESENTED

1. Whether the Court has jurisdiction over the petitions for review.
2. Whether the Department of Energy’s (“DOE’s”) guidelines for assessing the suitability of Yucca Mountain and the Secretary’s Recommendation of Yucca Mountain comply with the applicable substantive requirements of the NWPA.
3. Whether the Final Environmental Impact Statement (“FEIS”) prepared by DOE satisfies applicable requirements of the NWPA and the National Environmental Policy Act (“NEPA”).

STATUTES AND REGULATIONS

Pertinent statutes and regulations are in Petitioners’ Statutory/Regulatory Appendix and Respondents’ Addendum of Legislative Materials.

STATEMENT OF FACTS

I. Statutory and regulatory background

The disposal of the by-products of generating nuclear energy has been a significant public concern since 1954, when the Federal government decided to

allow private development of nuclear power plants. In 1982, Congress enacted the NWPA as a specific program for siting and operating geologic repositories for spent nuclear fuel (“SNF”) and high-level radioactive waste (“HLW”). Pub. L. 97-425, 96 Stat. 2202 (Jan. 7, 1983) (codified, as amended, at 42 U.S.C. 10101 et seq.).^{1/} The 1982 Act contemplated several stages for the evaluation of potential sites for repositories, including recommendation by DOE of candidate sites for site characterization, a multi-year period of site characterization of these sites, recommendation by DOE of a site for development as a repository, and a construction authorization pursuant to a license granted by the Nuclear Regulatory Commission (“NRC”). 96 Stat. 2208-17.

A. Section 112 of the 1982 Act: Recommendation of candidate sites.

Section 112(a) of the 1982 Act, 96 Stat. 2208, required that the Secretary of Energy publish general guidelines for use in recommending candidate sites for a nuclear waste repository site. DOE promulgated those guidelines in 1984. 49 FR 47752 (codified at 10 C.F.R. Part 960) ("the 1984 guidelines"). Consistent with DOE’s section 112 responsibilities, the 1984 guidelines were comparative in nature. The

^{1/} SNF is unprocessed fuel withdrawn from a nuclear reactor, and HLW generally is highly radioactive material either resulting from reprocessing of spent fuel or otherwise determined to require permanent isolation. 42 U.S.C. 10101(12), (23).

guidelines applicable to repository performance after closure identified several broad categories of technical considerations, such as “geohydrology,” “geochemistry,” “rock characteristics,” and “dissolution.” 49 FR 47760-47763. For each category, DOE established technical guidelines that specified qualifying and disqualifying conditions. *Id.* As DOE later noted, “[i]n effect, the technical guidelines and the associated qualifying and disqualifying conditions imposed specific ‘subsystem’ performance requirements; each subsystem requirement would be used to evaluate the merits of a site, independent of the other requirements.” 66 FR 57301. This approach was consistent with the licensing criteria established by NRC. 46 FR 13980.

After evaluation of several sites pursuant to the 1984 guidelines, DOE recommended to the President three sites, including Yucca Mountain, for intensive characterization of their ability to hold nuclear waste safely. 66 FR 57302. In 1987, however, Congress amended the statute, requiring DOE to limit site characterization to only Yucca Mountain. Pub. L. No. 100-203, § 5011, 101 Stat. 1330-1, 1330-228. The provisions of Section 113 and 114, governing site characterization and approval, were amended so as to apply only to Yucca Mountain, thereby eliminating comparative judgments of multiple sites.

B. Section 113: Site characterization. – Section 113(a) directed the Secretary

to carry out “appropriate site characterization activities at the Yucca Mountain site” and to prepare “a general plan for site characterization activities.” 42 U.S.C. 10133(a), (b)(1)(A). DOE developed its Site Characterization Plan (“SCP”) in coordination with NRC. 66 FR 57302. The SCP explained that the information obtained from site characterization would be used “to develop and optimize repository design and to evaluate the performance of the site and engineered barriers as an integrated system.” *Id.* at 57,303. Moreover, site characterization would obtain the information necessary to determine whether the site was suitable for a repository and could satisfy NRC’s licensing requirements. *Id.* at 57,302-03. NRC’s criteria, in turn, must be consistent with standards set by the Environmental Protection Agency (“EPA”) “for protection of the general environment from off-site releases from radioactive material in repositories.” 42 U.S.C. 10141(a), (b)(1)(C).

Section 113(b)(1)(A)(iv) also required DOE to include “criteria” to determine site suitability. 42 U.S.C. 10133(b)(1)(A)(iv). The SCP explained that the criteria would be those provisions of the 1984 guidelines that DOE had indicated it would apply in determining whether to recommend a site for development of a repository. 66 FR 57303.

C. Developments leading to DOE’s revised site suitability criteria. -- In 1992, Congress directed EPA in Section 801 of the Energy Policy Act (“EnPA”) to

set “public health and safety standards for protection of the public from releases from radioactive materials stored or disposed of in the repository at the Yucca Mountain site.” Pub. L. No. 102-486, 106 Stat. 2776, 2921. Congress instructed EPA to “contract with the National Academy of Sciences to conduct a study to provide * * * findings and recommendations on reasonable standards for protection of the public health and safety” and directed that EPA’s standards be “based upon and consistent with the findings and recommendations of the National Academy of Sciences,” *id.* at § 801(a)(1), (a)(2). Congress declared that EPA’s standards “shall be the only such standards applicable to the Yucca Mountain site” and directed NRC to modify its technical requirements and criteria to be consistent with the new EPA standards. *id.* at § 801(a)(1), (b).

The National Academy of Sciences (“NAS”) issued its report in 1995, concluding that a standard based on individual risk from releases from the repository would be adequately protective of the public health and safety (RR-5.0024-ES-7-8). 66 FR 57304. The report also advised that the technically appropriate way to determine if a repository could meet such a standard was to perform a total system performance assessment (“TSPA”) that would assess the potential future behavior of the entire repository system (RR-5.0024-ES-13, 68-70). 66 FR 57304. Such a system would use analytical modeling and computer systems to process data and

information about the site and the engineered elements and would describe how the system would behave over a range of conditions. 66 FR 57305. NAS noted that NRC should reconsider those portions of its licensing criteria that imposed performance requirements for individual elements of the system (RR-5.0024-ES-13, 125-126). 66 FR 57304. The performance of the entire system is critical for achieving compliance with a risk-based standard, and subsystem performance requirements could prevent the adoption of the optimal design for minimizing risk (RR-5.0024-125-126). 66 FR 57304.

In 1999, EPA proposed a new rule for standards governing the storage and disposal of nuclear waste at Yucca Mountain. 64 FR 46975. EPA's final rule, issued June 13, 2001, while adopting dose standards for protection of individuals rather than an individual risk standard, required, consistent with the NAS's recommendation, that DOE establish compliance with this standard by means of a TSPA. 66 FR 32074; 40 C.F.R. Part 197. NRC also proposed a new rule in 1999, containing licensing criteria for Yucca Mountain. 64 FR 8640. NRC's final rule, issued November 2, 2001, incorporated EPA's standards and required DOE to establish compliance with those standards by means of a TSPA. 66 FR 55733. See 10 C.F.R. 63.204, 63.311, 63.312, 63.321, 63.322, 63.331, 63.332. NRC's licensing requirements no longer required compliance with technical criteria having

subsystem performance requirements. 64 FR 8648-8649.

D. DOE's Part 963 Guidelines. The proposed new NRC and EPA regulations, as well as other scientific, technical, and legislative developments, prompted DOE proposed revisions to its 1984 guidelines. 64 FR 67,054. On November 14, 2001, DOE published final revisions that created a new 10 C.F.R. Part 963 ("Part 963 Guidelines") that was specific to Yucca Mountain and was to be used for determining the suitability of Yucca Mountain. 66 FR 57298. DOE limited the application of the 1984 guidelines to preliminary site screening for repositories located elsewhere than Yucca Mountain.

Under the Part 963 Guidelines, DOE could determine that Yucca Mountain is suitable if DOE found that it is likely to meet the radiation standards promulgated by EPA and adopted by NRC. 10 C.F.R. 963.11; 963.15. Consistent with EPA's and NRC's rules, DOE would make that determination by means of a TSPA. 10 C.F.R. 963.16.

E. The Recommendations of the Secretary and the President. Section 114(a)(1) of the NWPA required the Secretary to decide whether to recommend approval of Yucca Mountain as a repository site upon completion of site characterization and after conducting public hearings in the vicinity of the site. 42 U.S.C. 10134(a)(1). On January 10, 2002, the Secretary notified the Governor of

Nevada of his intent to make a favorable recommendation to the President. On February 14, 2002, the Secretary transmitted his Recommendation to the President.

As required by NWPA section 114(a)(1), the Secretary, “[t]ogether with [his] recommendation of a site,” made available to the President and the public a “comprehensive statement of the basis of such recommendation.” 42 U.S.C. 10134(a)(1). This statement included a Final Environmental Impact Statement (“FEIS”) prepared in accordance with subsection 114(f) of the NWPA and NEPA.

In his Recommendation, the Secretary explained that DOE’s scientific and technical investigations, conducted over 20 years, have examined “every aspect of the natural processes – past, present, and future – that could affect the ability of a repository beneath Yucca Mountain to isolate radionuclides emitted from nuclear materials emplaced there” (SR at 16). Scientists had also conducted “equally searching investigations into the processes that would allow them to understand the behavior of the engineered barriers – principally the waste ‘packages’ (more nearly akin to vaults) – that are expected to contribute to successful waste isolation.” Id. The Secretary applied the methods and criteria in the Part 963 Guidelines and concluded that a repository at Yucca Mountain will be able to protect the health and safety of the public when evaluated against EPA’s standards (SR at 26). The Secretary’s Recommendation included a detailed examination of the scientific and

technical issues pertinent to the Recommendation, an identification of the national interests that supported his Recommendation, and responses to objections. Id. at 12-45. The Secretary also submitted the FEIS required by Section 114(a)(1)(D).

On February 15, 2002, the President, acting pursuant to Section 114(a)(2), transmitted to Congress his Recommendation of the Yucca Mountain Site for the development of a nuclear waste repository. The President stated that (p. 1):

[p]roceeding with the repository program is necessary to protect public safety, health, and the Nation's security because successful completion of this project would isolate in a geologic repository at a remote location highly radioactive materials now scattered throughout the Nation. In addition, the geologic repository would support our national security through disposal of nuclear waste from our defense facilities.

F. Nevada's veto and the Yucca Mountain Development Act approving the Yucca Mountain site for a repository. On April 8, 2002, the State of Nevada submitted a notice of disapproval to Congress, as permitted by Sections 115(b) and 116(b)(2) of the NWPA. 42 U.S.C. 10135(b), 10136(b)(2). Under Section 115(c), Nevada's veto would have disapproved the selection of Yucca Mountain in the absence of Congress passing a joint resolution approving the site designation. 42 U.S.C. 10135(c). In the supporting statement of reasons, the Governor of Nevada presented the State's objections to DOE's Part 963 Guidelines and summarized the

various law suits Nevada had filed (or was then about to file) challenging the Guidelines, the recommendations, and the EPA and NRC regulations (RA at 10). The Governor urged Congress to wait until the lawsuits were resolved before acting (RA at 11).

Congress did not accept the Governor's suggestion. The House, after consideration by the House Committee on Energy and Commerce, including a hearing, passed the Joint Resolution by a vote of 306-117. 148 Cong. Rec. H2181-82 (daily ed. May 8, 2002); H. Rep. 107-425 (RA 38).

In the Senate, the Committee on Energy and Natural Resources held three days of public hearings, including testimony from the Secretary of Energy, NRC, the Chairman of the Nuclear Waste Technical Review Board, EPA's Assistant Administrator for Air and Radiation, and the Director of the Natural Resources and Environment Team of the General Accounting Office. S. Rep. 107-159 at 5 (RA 23). A panel of witnesses presented the State's case. The Committee considered each of Nevada's objections, contrasted Nevada's arguments with the positions taken by the Secretary and other experts, and in each instance agreed with DOE's position. *Id.* at 7-13.

The Committee concluded that the testimony before the Committee "and the voluminous technical documents supporting the recommendation meet the burden of

going forward imposed by the Act and are sufficient to justify allowing the Secretary to submit a license application for the repository to the [NRC] for its review.” Id. at 13. Nevada, the Committee noted, would have ample opportunity to present its concerns to NRC and would have “full recourse to the judicial review process to insure that the [NRC] exercises its proper role in protecting the public health and safety.” Id. at 13 (quoting Senator Henry M. Jackson on passage of the 1982 Act). The full Senate approved the Joint Resolution by a voice vote. 148 Cong. Rec. S6490 (daily ed. July 9, 2002).

The President signed the Joint Resolution on July 23, 2002, and accordingly it became law. Yucca Mountain Development Act (“YMDA”), Pub. L. 107-200; 107th Cong., 2d Sess, 116 Stat. 735.

SUMMARY OF ARGUMENT

1. Petitioners’ challenges to the Guidelines, Recommendations, and the FEIS suffer from numerous jurisdictional defects. Petitioners have failed to set forth facts sufficient to establish their standing to challenge the Recommendations and Guidelines under the NWPA. Even if Petitioners could surmount that hurdle, the Joint Resolution has mooted all of their challenges to the Guidelines and Recommendations, including any based on NEPA. Moreover, because the APA does not authorize their claims and the NWPA provides neither a cause of action

nor a waiver of sovereign immunity, the Court would lack jurisdiction to entertain the challenges to the Guidelines and Recommendations even had they not become moot. Finally, the FEIS is not properly before the Court at this time. Petitioners can only present a justiciable claim for review of the FEIS at such time as a federal agency takes final action affecting Petitioners and relies upon the FEIS for NEPA compliance.

2. DOE's site suitability criteria for Yucca Mountain are consistent with the requirements of the NWPA. An examination of the pertinent statutory provisions discloses no mandate to adopt suitability criteria that incorporate the Section 112(a) guidelines or place primary reliance on geologic barriers. On the contrary, Sections 113(c), 114(a)(2)(A), and 121(b)(1)(B) indicate an intent that the suitability determination of the Secretary was to be based on the likelihood that Yucca Mountain would meet NRC's licensing criteria, which in turn require the repository to utilize multiple barriers, both geologic and engineered, to qualify for a license. Further, in Section 113(b)(1)(A)(iv), Congress directed DOE to establish suitability criteria following Section 112(a)'s procedures but without further specifying the content of those criteria.

Second, the pertinent legislative history does not support an inference of congressional intent to apply the Section 112(a) guidelines or place primary reliance

on geology. There is no commentary on Section 113(g)(1)(A)(iv), the provision requiring site suitability criteria developed pursuant to Section 112(a), and consequently no legislative history contradicting DOE's limitation of this provision to the procedural steps for establishing criteria. Petitioners also point to statements in various reports about geologic barriers, but they will not bear the weight Petitioners would place on them. Contrary to their arguments, Congress did not divide over whether to place primary reliance on one type of barrier over the other. And the House committee that reported on the bill that became the NWPA recognized that a geologic repository will rely on both types of barriers.

Third, to the extent there is any ambiguity in the statutory language, the considered and reasonable interpretation of DOE is entitled to deference under the Chevron criteria, even though the Part 963 Guidelines are based on a new interpretation of the statute. DOE's interpretation is a reasonable reconciliation of the materially different responsibilities of DOE under section 112, on the one hand, and under Sections 113 and 114, on the other. Contrary to Petitioners' claims, DOE has not abandoned geology but has required the factoring of geologic considerations in the performance assessment. Indeed, DOE found that the geologic and engineered barriers will work together at Yucca Mountain to provide the required protection for the public.

Moreover, DOE reasonably relied on legislative, regulatory and technical developments to formulate appropriate and up-to-date criteria for evaluating Yucca Mountain. The legislative decision to limit site characterization to Yucca Mountain, coupled with the adoption by EPA and NRC of risk-based standards and licensing criteria pursuant to the EnPA and the report of the National Academy of Sciences, required DOE to conform its suitability criteria to these new requirements. Finally, by enacting the Joint Resolution, Congress not only approved the selection of Yucca Mountain but also ratified the Secretary's determination to base his Recommendation on an assessment of the total system performance.

3. DOE satisfied all applicable requirements in the preparation of the FEIS. Because the Secretary was only making a recommendation and was not approving the site, the Secretary's Recommendation did not trigger the decisionmaking requirements of CEQ's NEPA regulations. Moreover, Petitioners have failed to show any prejudice attributable to a failure to follow those procedures.

Consistent with CEQ guidance, DOE's no-action alternative assumed that, if Yucca Mountain were not developed as a repository, utilities and DOE would continue to manage SNF and HLW on-site. Continuation of the status quo should be selected as the no-action alternative unless the agency's decision not to act will result in predictable actions by others. Because it was not possible to predict

confidently the future actions of Congress, utilities, and the federal government, DOE correctly selected the status quo as the no-action alternative.

DOE also correctly described the proposed action as a geologic repository accepting waste from 77 sites around the country. Moreover, the FEIS appropriately used bounding analyses based on conservative assumptions to account for uncertainties such as unresolved questions about the design of the repository. DOE also thoroughly analyzed the transportation alternatives it is considering. Petitioners' claims that the FEIS improperly analyzed a possible aging facility as part of repository operations and the possibility, since rejected, of disposing of immobilized plutonium at Yucca Mountain do not raise legitimate NEPA issues but seek premature adjudication of questions concerning the scope of DOE's NWPA authority. Similarly, whether a permit under the Resources Conservation and Recovery Act would be required need not be resolved. In any event, DOE adequately explained its determination that such a permit is unnecessary. Finally, the FEIS took the requisite hard look at possible sabotage during transportation of waste to the repository.

ARGUMENT

STANDARD OF REVIEW

1. The Court's jurisdiction is decided de novo.

2. On the merits, this case involves in part a challenge to DOE's Guidelines, which represent the agency's construction of provisions of the NWPA, a statute that Congress has directed DOE to administer. DOE's interpretations are entitled to deference. United States v. Mead, 533 U.S. 218, 226-27 (2001); Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). See General Electric Uranium Management Corporation v. United States Department of Energy, 764 F.2d 896, 905 (D.C. Cir. 1985). The Supreme Court in Mead reaffirmed that deference is owed the agency in circumstances, like those here, where the agency rules are adopted pursuant to notice and comment rulemaking and specific statutory authority to promulgate rules having the force of law. Accordingly, this Court must defer to the Guidelines if they are a permissible interpretation of ambiguous provisions of the NWPA.^{2f}

Contrary to Petitioners' suggestion (Br. at 46), agencies' exercise of delegated authority merits deference regardless of whether it affects the federal fisc. E.g.,

^{2f} For any agency statutory interpretation to which Chevron deference does not apply, DOE would be entitled to deference under Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). Under that standard, the degree of deference will "vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." Mead, 533 U.S. 228, 234-235 (citing Skidmore, 323 U.S. at 139-140).

Independent Petroleum Assoc. of America v. Dewitt, 279 F.3d 1036, 1039-40 (D.C. Cir. 2002), cert. denied, 123 S.Ct. 869 (2003) (Interior regulations affecting contracts in which it has a financial interest); Myers-Garrison v. Johnson & Johnson, 210 F.3d 425, 430 (5th Cir. 2000) (IRS tax regulations); DIRECTV, Inc. v. FCC, 110 F.3d 816, 827 (D.C. Cir. 1997) (FCC decision to auction satellite broadcast rights). Petitioners also mistakenly assert a general Congressional intent in the NWPA to “wrest * * * policymaking away from the executive branch,” which they claim supports a denial of deference (Br. 47). The legislative history they rely upon does not support that conclusion, but rather shows, insofar as it is relevant, that Congress was dissatisfied with the government’s progress and took measures, including providing a legislated schedule, to expedite the process. What is relevant is that Section 113(b)(1)(A)(iv) expressly delegated to DOE the authority to promulgate criteria to govern the site suitability determination. Under Mead, that supports the application of Chevron deference.

3. “An agency’s interpretation of its own regulations is entitled to substantial deference,” and the court’s review is even more deferential in that context than under Chevron. Wyoming Outdoor Council v. United States Forest Service, 165 F.3d 43, 52 (D.C. Cir. 1999) (citation omitted).

4. The FEIS, if subject to review, is governed by the deferential “arbitrary

and capricious" standard of the Administrative Procedure Act ("APA"), 5 U.S.C. 706(2)(A). Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989); City of Olmsted Falls v. FAA, 292 F.3d 261, 269 (D.C. Cir. 2002). The scope of review under the arbitrary and capricious standard is narrow, and a court is not to substitute its judgment for the agency's. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983). Under NEPA, the court's role is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions. Olmsted Falls, 292 F.3d at 269. Moreover, the Court should give particular deference to the agency's evaluation of technical issues within its area of expertise. EDF v. EPA, 598 F.2d 62, 83 (D.C. Cir. 1978); Ethyl Corp. v. EPA, 541 F.2d 1, 38 (D.C. Cir.), cert. denied, 426 U.S. 941 (1976).

I

THE COURT LACKS JURISDICTION OVER THE PETITIONS FOR REVIEW

A. Petitioners have not established standing to challenge the Part 963 Guidelines and the Recommendations. Petitioners have the burden to establish all the elements of standing – injury in fact, traceability, and redressability – set forth in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). The mere fact that Petitioners disagree with the Guidelines and Recommendations is insufficient to establish standing since Nevada had the right to veto the President's Recommendation and

thereby require Congress to enact a new law to select Yucca Mountain as the site for a repository. When that right was exercised, any injury Petitioners might claim became traceable to the new law, not the Guidelines or Recommendations. See Simon v Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 41-42 (1976); City of Detroit v. Franklin, 4 F.3d 1367, 1373 (6th Cir. 1993) (discussing Young v. Klutznick, 652 F.2d 617 (6th Cir. 1981)).

In opposing Respondents' motions to dismiss, Petitioners contended that the alleged failure of the Secretary and the President to issue Guidelines and Recommendations consistent with the NWPA denied them procedural and informational rights under that statute, impairing their ability to participate effectively in the decision-making process concerning the development of a nuclear repository. See Opp. in No. 01-1516 at 12-19 and in No. 02-1077 at 14-15. Petitioners' standing must be evaluated based upon that theory. See Sierra Club v. EPA, 292 F.3d 895, 900 (D.C.Cir. 2002). Petitioners' claims of procedural and informational injury do not meet their burden to establish standing because the provisions of the NWPA that Petitioners claim require greater emphasis on site geology do not grant procedural or informational rights to Petitioners. Instead, they direct how the Secretary is to exercise his discretion in developing guidelines for recommending sites for characterization and conducting site characterization. As

was true of the agency actions at issue in Nevada v. Burford, 918 F.2d 854, 857 (9th Cir. 1990), the Recommendations and Guidelines did not “strip[] Nevada of its right to participate in the site characterization process or of its right to object to the selection of Yucca Mountain as a repository.”

Petitioners’ standing argument is based on speculative claims that had the Secretary given greater emphasis to site geology in characterizing Yucca Mountain, Nevada would have been more likely to persuade Congress to uphold the State’s veto. This argument fails because the theory of injury ““depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or predict.”” Lujan, 504 U.S. at 562 (quoting ASARCO, Inc. v. Kadish, 490 U.S. 605, 615 (1989)). Congress is fully capable of evaluating the Secretary’s and the President’s Recommendations with or without judicial review. Petitioners offer nothing more than the “remote possibility, unsubstantiated by allegations of fact, that . . . [their] situation might have been better had respondents acted otherwise, and might improve were the court to afford relief.” Northside Sanitary Landfill v. Thomas, 804 F.2d 371, 385 (7th Cir. 1986) (quoting Warth v. Seldin, 422 U.S. 490, 507 (1975)).

B. The YMDA moots Petitioners’ challenges to the Guidelines and the

Recommendations.

1. A federal court lacks jurisdiction “to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.” Church of Scientology of California v. United States, 506 U.S. 9, 12 (1992). A court must dismiss a lawsuit as moot where an intervening event makes it impossible to grant any effective relief. Church of Scientology of California, 506 U.S. at 12; Burlington Northern Railroad Co. v. Surface Transp. Bd., 75 F.3d 685, 688 (D.C. Cir. 1996); State of Nevada v. Watkins, 943 F.2d 1080, 1083-1084 (9th Cir. 1991). Here, enactment of the YMDA is just such an intervening event.

The YMDA has become law because it was enacted in accordance with the requirements of Article 1, Section 7, Clauses 2 & 3 of the Constitution. See Consumer Energy Council of America v. FERC, 673 F.2d 425, 456, 459 n.140 (D.C. Cir. 1982), *aff’d*, 463 U.S. 1216 (1983) (citing United States v. California, 332 U.S. 19, 28 (1947)); Watts v. United States, 161 F.2d 511, 513 (5th Cir.), *cert. denied*, 332 U.S. 769 (1947)). In the YMDA, Congress expressly approved Yucca Mountain as the site for a repository, brought the site selection process for a repository to a close, and enacted the President’s Recommendation into law. Accordingly, DOE is not only authorized but required to submit a license application

for a repository at Yucca Mountain to NRC. 42 U.S.C. 10134(b)

The courts are bound to give the YMDA full effect. See Robertson v. Seattle Audubon Society, 503 U.S. 429, 439 (1992) (a statutory directive binds both administrative officials and the courts); Mills v. Green, 159 U.S. 651, 655-656 (1895); Mobil Oil Corporation v. EPA, 35 F.3d 579, 583 (D.C. Cir. 1994); In re Mark Industries, 751 F.2d 1219, 1224 (Fed. Cir. 1984).

Here, Petitioners ask the Court to disregard Congress's approval of Yucca Mountain as a repository and send the issue back to DOE for further consideration (Br. 98-99). The intervening event of Congress's approval of the Yucca Mountain site precludes this or any other effective relief and moots all of Petitioners' claims seeking to invalidate the Recommendations or the Guidelines. The Court cannot grant Nevada the relief it seeks because Congress has approved the recommendation to locate a repository at Yucca Mountain, and that approval binds the courts as well as DOE.

Petitioners also seek declarations that the Part 963 Guidelines and Recommendations are unlawful and that DOE failed to take actions required under NWPA sections 113 and 114 (Br. 98). However, the legal status of the Yucca Mountain site has been determined not by the actions of the Secretary or the President, but by the independent action of Congress. Granting Petitioners the

declaratory relief they seek can have no effect because the YMDA independently approves the site as suitable and authorizes the license application. In effect, the NWPA reserved to subsequent legislation the final decision whether to authorize the Secretary to proceed, once Nevada issued its notice of disapproval. Congress has now taken that step. “Where intervening legislation has settled a controversy involving only injunctive or declaratory relief, the controversy has become moot.” Matter of Bunker Limited Partnership, 820 F.2d 308, 311 (9th Cir. 1987) (citing Diffenderfer v. Central Baptist Church of Miami, Florida, Inc., 404 U.S. 412, 413-415 (1972)).

2. Nevada characterizes the YMDA as analogous to a legislative veto, claiming it did no more than “cancel out” Nevada’s veto of the President’s Recommendation (Br. 40 n.15). However, in the Joint Resolution that became the YMDA Congress clearly and unequivocally “approved the site at Yucca Mountain, Nevada, for a repository.” Pub. L. 107-200 116 Stat. 735. A joint resolution is to be construed according to the general principles of statutory construction. Ann Arbor R. Co. v. United States, 281 U.S. 658, 666 (1930). Courts adhere to the axiom that Congress “says in a statute what it means and means in a statute what it says there.” Connecticut National Bank v. Germain, 503 U.S. 249, 254 (1992). See also Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000). The plain

language of the YMDA is sufficient to demonstrate Congress's intent to approve the Yucca Mountain site. Just as Congress both "cancels" a presidential veto and enacts a new law when it overrides a Presidential veto, so here Congress both overruled the State's disapproval and enacted a new law expressly approving Yucca Mountain for a nuclear repository.

It is usually not necessary to consider legislative history when Congressional intent is clear. United States v. Gonzales, 117 S. Ct. 1032, 1035 (1997). In any event, the legislative history of the YMDA confirms that Congress meant exactly what it said. Neither the Senate Report nor the House Report characterized the YMDA as a legislative veto or stated that its purpose was limited to canceling Nevada's veto. Instead, both reports repeatedly state that the purpose of the YMDA was to approve Yucca Mountain as a repository, and both confirm that Congress intended DOE to proceed to the next stage in the development of a repository, submission of a license application to NRC. See S. Rep. 107-159 (2002), H. Rep. 107-425 (2002) (RA 19, 38). The Senate Report, for example, stated that the purpose of the YMDA was "to approve the site at Yucca Mountain, Nevada for the development of a repository for the disposal of high-level radioactive waste and spent nuclear fuel pursuant to the Nuclear Waste Policy Act of 1982." S. Rep. 107-159, at 1. The House Report contains a virtually identical statement. H. Rep. 107-

425, at 2.

The Senate Committee on Energy and Natural Resources not only reviewed the Governor's objections, but also examined "the President and Secretary's site recommendation and supporting testimony and documents to determine if the Administration has made a case for allowing the program to go forward to the next step – applying to the Nuclear Regulatory Commission for authorization to construct the repository." S. Rep. 107-159, at 6 (emphasis added). The Committee determined that the information the Administration submitted was sufficient to "meet the burden of going forward imposed by the Act" and "to justify allowing the Secretary to submit a license application for the repository to the Nuclear Regulatory Commission for its review." Id. at 13. The Committee also concluded that none of the arguments presented against Yucca Mountain "outweighs the national interest in proceeding with this program." Id. at 14.

The House also understood that enacting the YMDA would not only override Nevada's veto but would permit DOE to proceed with the development of the Yucca Mountain site for a repository. H. Rep. 107-425 at 3. Among other things, the House Committee Report incorporated a Congressional Budget Office report which explained that "Congressional approval of the Yucca Mountain site is required before DOE can proceed with its plans to spend about \$10 billion over the next

several years to develop the Yucca Mountain site and begin receipt of waste in 2010.” Id. at 7.

Notably, neither supporters nor opponents of the YMDA argued that its effect would be to leave to the courts the question whether a repository would be sited at Yucca Mountain. Rather, all understood that Congress was deciding that question and that the result of enacting the YMDA would be that DOE would move forward to the next step, submitting a license application. Thus, enactment of the YMDA was not just an override of the State's notice of disapproval but an express approval of the Yucca Mountain site for a repository.

This view of what Congress did is consistent with the intent behind the procedure Congress established when it enacted the NWPA. Explaining the difference between the "two-house-override" procedures proposed in a key amendment in the Senate on December 20, 1982, and the "one-house-sustain" approach in the bill under consideration, Senator George Mitchell stated that the Amendment was intended to place the burden of proof on DOE and “guarantee that a State's objections is [sic] dealt with in a fair and comprehensive manner.” 128 Cong. Rec. S15652 (December 20, 1982). Rather than a "classic legislative veto," as the State would have it, the NWPA established a fair process for a comprehensive review by the Congress of the State's objections as a basis for a decision by the

entire Congress (with affirmation by the President) whether to approve the recommended site.

3. Nevada asserts that its claims are not moot because in enacting the YMDA Congress did not repeal the sections of the NWPA upon which its claims are based, nor did Congress adopt any provision barring judicial review of the Recommendations or the Guidelines (Br. 40). These arguments are irrelevant because, whether or not they are correct, the Court is not free to negate the YMDA. Nothing in the NWPA makes the legal effect of Congress's approval of the Yucca Mountain site for a repository dependent on the lawfulness of the Guidelines or the Recommendations. "[C]ourts cannot set aside legislation because it is inconsistent with prior legislation. * * * Congress may repeal, amend or ignore any statute it has enacted." Sierra Club v. Froehlke, 816 F.2d 205, 213 (5th Cir. 1987) (citing Manigault v. Springs, 199 U.S. 473, 487 (1905)). Accord Mt. Graham Red Squirrel v. Madigan, 954 F.2d 1441, 1461 (9th Cir. 1992) (Once Congress enacted the agency's opinion into law, the challenge to the opinion was moot; it was irrelevant "[w]hether Congress was acting under a misapprehension of fact or law.") (citing Moor v. Alameda County, 411 U.S. 693, 709 (1973)). Congress is free, so long as it stays within the limits of its authority under the Constitution, to legislate on any basis it chooses. See South Carolina v. Baker, 485 U.S. 505, 513 (1988) (courts are

not authorized “to second-guess the substantive basis for congressional legislation”).

In circumstances materially indistinguishable from the present case, the Ninth Circuit dismissed as moot a prior petition brought by Nevada to challenge an environmental assessment supporting the Secretary’s 1986 determination to characterize Yucca Mountain. Nevada v. Watkins, 943 F.2d at 1083. The court held that when Congress, in the 1987 amendments to the NWPA, chose Yucca Mountain as the sole site to be characterized, the court lost any power to adjudicate Nevada’s challenge to the environmental assessment and the Secretary’s prior decision or to enjoin the Secretary from proceeding. 943 F.2d at 1083-1084. Congress had made the decision, and the court was not free to “second-guess that legislative decision.” 943 F.2d at 1084 & n.4. Accord Mobil Oil Corp. v. EPA, 35 F.3d at 582-83 (citing Nevada v. Watkins with approval). Here, as in those cases, Congress has enacted legislation subsequent to the challenged agency conduct that precludes the court from granting effective relief. That is sufficient to make Petitioners’ claims moot.

C. The Court is without jurisdiction over Petitioners’ challenges to the Part 963 Guidelines and the Recommendations because those claims are not brought pursuant to the APA, and the NWPA does not create a cause of action or provide a

waiver of sovereign immunity.

1. The NWPA does not create a private right of action for review of the Guidelines or the Recommendations. Petitioners have conceded that their challenges to the Guidelines and Recommendations are not brought under the APA. Opp. to Motion to Dismiss in No. 02-1077 at 5; Order of July 6, 2002 in No. 01-1516 and consolidated cases.^{3/} Petitioners are therefore unable to maintain those claims unless they can show that the NWPA creates a right of action for review of the Recommendations and Guidelines. See Hill v. Norton, 275 F.3d 98, 103 (D.C. Cir. 2001). This they are unable to do.

Determining whether a statute creates an implied private right of action is a matter of statutory construction. Alexander v. Sandoval, 532 U.S. 275, 286 (2001). Absent congressional intent to create a private remedy, “courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the

^{3/} Petitioners have no choice but to seek review outside the APA. The APA does not authorize review of Presidential actions and the Secretary’s Recommendation is not reviewable under the APA because it was not the last step in the decision-making process under section 114(a) of the NWPA. Dalton v. Specter, 511 U.S. 462 (1994); Franklin v. Massachusetts, 505 U.S. 788 (1992); Public Citizen v. United States Trade Representative, 5 F.3d 549 (D.C. Cir. 1993); Armstrong v. Bush, 924 F.2d 282, 288-98 (D.C. Cir. 1991). The Guidelines are not reviewable under the APA because the NWPA expressly designates them as “preliminary decisionmaking activity.” 42 U.S.C. 10133(d).

statute.” Id. at 286-87. The search for congressional intent begins with the text and structure of the statute and often ends there. Id. at 288.

Petitioners rely upon NWSA section 119, 42 U.S.C. 10139. Pet. Opp. to Motion to Dismiss in No. 02-1077 at 5. Section 119 provides in relevant part that the courts of appeals shall have original and exclusive jurisdiction “over any civil action * * * for review of any final decision or action of the Secretary [or] the President.” 42 U.S.C. 10139(a)(1)(A). This provision addresses subject matter jurisdiction. See General Electric Uranium Management Corp. v. Dep’t of Energy, 764 F.2d 896, 900-904 (D.C. Cir. 1985). It shows only that Congress required all claims seeking review of final actions or decisions of the Secretary and President be filed in the courts of appeals.

In addressing a similar provision in Touche Ross & Co. v. Redington, 442 U.S. 560, 576-77 (1979), the Court held that an implied private cause of action to enforce duties created by section 17(a) of the Securities Exchange Act of 1934 could not be based upon section 27 of that Act, which grants federal courts jurisdiction of various suits under the Act and provides for venue and service of process. 442 U.S. at 577. Such a provision, the Court held, “creates no cause of action of its own force and effect; it imposes no liabilities.” Id. The Supreme Court’s reasoning applies with full force to section 119. “The source of plaintiffs’

rights must be found, if at all, in the substantive provisions of the * * * Act which they seek to enforce, not in the jurisdictional provision.” 442 U.S. at 577.

The substantive provisions Petitioners seek to enforce impose duties on DOE, but they do not create private rights.^{4/} The “‘question whether Congress . . . intended to create a private right of action [is] definitively answered in the negative’ where ‘a statute by its terms grants no private rights to any identifiable class.’” Gonzaga University v. DOE, 122 S. Ct. 2268, 2275 (2002) (quoting Redington, 442 U.S. at 576). Accord Sandoval, 532 U.S. at 289. Thus, “a cause of action is seldom implied” for “statutes framed as a ‘general prohibition or command to a federal agency.’” Rapid Transit Advocates, Inc. v. Southern Calif. Rapid Transit District, 752 F.2d 373, 376 (9th Cir. 1985) (citing Universities Research Ass’n, Inc. v. Coutu, 450 U.S. 754, 772 (1981)). See also Gonzaga, 122 S. Ct. at 2276-77 (quoting California v. Sierra Club, 451 U.S. 287, 294 (1981)).

As to the President, there is not even that much. The NWPA merely provides that, after receiving a recommendation from the Secretary, the President shall submit a recommendation to Congress if he “considers the Yucca Mountain site qualified for the application for a construction authorization.” 42 U.S.C. 10134(a)(2)(A). As in

^{4/} See Br. at 17-18, 49-52 (citing, e.g., 42 U.S.C. 10132(a), 10133(b)(1)(A)(iv)),

Dalton, 511 U.S. at 476, the President’s authority to act is not contingent on the Secretary’s fulfillment of all the duties imposed upon him by the NWPA. Such a broad grant of discretionary authority cannot support Petitioners’ theory that Congress impliedly created a cause of action against the President.

NWPA section 112(b)(1) confirms that the APA provides the cause of action for review under section 119(a), while the latter designates the court in which the action is to be decided. Among other things, sections 112(b)(1)(A) and (D) provide that the Secretary is to nominate five sites for site characterization and prepare an environmental assessment for each nominated site. 42 U.S.C. 10132(b)(1)(A) and (D). In order to permit judicial review of the assessments, Congress stated that “[t]he issuance of any environmental assessment under this paragraph shall be considered to be a final agency action subject to judicial review in accordance with the provisions of chapter 7 of title 5 and [section 119].” 42 U.S.C. 10132(b)(1)(E). Thus, Congress understood it was necessary for an action to qualify as final agency action under the APA in order for it to be reviewable under NWPA section 119.

Contrary to Petitioners’ theory, section 119(a)(1)(A) does not show that Congress must have intended to create a cause of action for review of the President’s final actions and decisions. See Opp. to Motion to Dismiss in No. 02-1077 at 6. The argument that it does revolves around the proposition that no other provision of

law creates a cause of action for review of the President's actions, since they are not reviewable under the APA. Franklin v. Massachusetts, 505 U.S. 788 (1992).

Therefore, according to Petitioners, the purpose of section 119(a)(1)(A) must have been to create a cause of action. The difficulty with this argument is that section 119 was part of the original NWPA, enacted on January 7, 1983. Pub. L. 97-425, Title I, § 119, 96 Stat. 2227 (Jan. 7, 1983). It thus predated Franklin by almost a decade. Until Franklin, the APA's application to the President was very much an open question. See Armstrong v. Bush, 924 F.2d 282, 288-89 (D.C. Cir. 1991), and materials cited therein. It was therefore perfectly reasonable for Congress to include final Presidential decisions in section 119 not in order to answer the question whether they were reviewable, but in order to make sure that if they were they would be reviewed in the courts of appeals. That interpretation of Congress's action is more plausible than the competing one: that without any significant discussion of the question, without specifying any of its elements, and without any consideration of the profound constitutional questions implicated,^{5/} Congress in section 119 created a new cause of action against the President.

2. Neither the Recommendations nor the Guidelines are reviewable under the

^{5/} See Franklin, 505 U.S. at 800-801.

NWPA. Even if an implied cause of action under section 119(a) could be inferred, Petitioners' challenges fall outside its scope because the Guidelines and Recommendations were not final actions or decisions of the Secretary or the President.

For an agency action to be “final,” it “must be one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’” Bennett v. Spear, 520 U.S. 154, 177 (1997). DOE adopted the Part 963 Guidelines under NWPA Section 113(d), 42 U.S.C. 10133(d), which provides that “[e]ach activity of the Secretary under this section that is in compliance with the provisions of subsection (c) of this section shall be considered a preliminary decisionmaking activity.” Thus, the Guidelines are not a final action or decision. See Nevada v. Watkins, 939 F.2d 710, 713 (9th Cir. 1991). Under Franklin, Dalton, and Public Citizen, *supra* note 3, the Secretary’s Recommendation to the President was also not a final decision because it could have no effect on the public absent further action by the President. The Secretary’s Recommendation was not the consummation of a decision-making process, and no legal consequences could flow from it unless the President adopted it.

A ruling that the Secretary’s Recommendation is not reviewable would not render section 119(a)(1)(A) a “nullity.” See Opp. to Motion to Dismiss in No. 02-

1077 at 6. The Secretary has issued decisions under the NWPA that were final and thus subject to review. E.g., Nevada v. DOE, 993 F.2d 1442 (9th Cir. 1993); Nevada v. Herrington, 827 F.2d 1394 (9th Cir. 1987). When the Secretary makes a final decision selecting a transportation alternative for Yucca Mountain, this will also be a final action subject to review in the courts of appeals under the APA and section 119(a). Section 119(a)(1)(A) can therefore be given meaningful effect without distorting established rules of finality.⁶⁷

The President's Recommendation was not a final decision or action because Nevada vetoed it. Unlike the apportionment statute at issue in Franklin and the Defense Base Closure and Realignment Act of 1990 at issue in Dalton, the NWPA does not automatically give effect to the President's adoption of the Secretary's Recommendation. Rather, it allowed the State of Nevada to interpose its disapproval of the President's action, after which new legislation was required to approve the President's Recommendation of the site. That, however, means that the President's

⁶⁷ In Nevada v. Watkins, 939 F.2d at 715 n.13, the court opined in dicta that DOE's guidelines would be reviewable "as part of any review of the Secretary's final recommendation." The Court was merely opining that if such a recommendation was subject to judicial review at some later date the guidelines could also be reviewed since they would have provided the framework for the Secretary's decision. In any event, the Supreme Court's subsequent decisions in Franklin v. Massachusetts and Dalton v. Specter made clear that determinations of the type made by the Secretary in his site Recommendation are not final actions.

Recommendation was not a final action or decision when it was issued, and it never became one because Nevada vetoed it.

The statutory scheme does not support the theory that Congress intended the Recommendations to be reviewable even if a state interposed its veto. A state's veto would mean that Congress would make the final decision whether Yucca Mountain should be selected as the site of a repository. 42 U.S.C. 10135(b) and (c). Judicial review in that circumstance would only serve to advise Congress in its deliberations. Cf. Flast v. Cohen, 392 U.S. 83, 96 (1968). Moreover, the accelerated schedule established by the NWPA for Congressional action in the face of a notice of disapproval (42 U.S.C. 10135(c)) is impossible to reconcile with the proposition that Congress contemplated concurrent judicial review of the Recommendations. See Dalton, 511 U.S. at 477 (Souter, J., concurring); Morris v. Gressette, 432 U.S. 491, 503-04 (1977).

3. Section 119(a) fails to provide the necessary waiver of sovereign immunity.

A waiver of sovereign immunity is a jurisdictional requirement, and it is a distinct issue from the question of subject matter jurisdiction. See First Virginia Bank v. Randolph, 110 F.3d 75, 77-78 (D.C. Cir. 1997). The party seeking review must demonstrate a statutory basis for both. Id. A waiver of sovereign immunity cannot be implied but must be explicitly stated and narrowly construed. E.g., Lane v. Pena,

518 U.S. 187 (1996); United States v. Nordic Village, Inc., 503 U.S. 30, 33-34 (1992); Department of Energy v. Ohio, 503 U.S. 607 (1992). The APA, 5 U.S.C. 702, provides a waiver of sovereign immunity for non-monetary claims challenging final actions of federal agencies, but Petitioners can point to no waiver of the President's immunity from suit.

Section 119(a)(1)(A) concerns only subject matter jurisdiction; it does not waive sovereign immunity. As the Supreme Court has held, “[t]he fact that Congress grants *jurisdiction* to hear a claim does not suffice to show Congress has abrogated all *defenses* to that claim. The issues are wholly distinct.” United States v. Nordic Village, Inc., 503 U.S. 30, 38 (1992) (quoting Blatchford v. Native Village of Noatak, 501 U.S. 775, 786 (1991)) (emphasis in original). Thus, for example, the grant of subject matter jurisdiction in 28 U.S.C. 1331 is not waiver of sovereign immunity. Swan v. Clinton, 100 F.3d 973, 981 (D.C. Cir. 1996); Whittle v. United States, 7 F.3d 1259,1262 (6th Cir. 1993); Coggeshall Development Corp. v. Diamond, 884 F.2d 1, 4 (1st Cir. 1989). See also Voluntary Purchasing Groups, Inc. v. Reilly, 889 F.2d 1380, 1385 (5th Cir. 1989) (grant of jurisdiction in 42 U.S.C. 9613(b) is not a waiver).

Section 119 does not describe who may bring actions within its jurisdictional grant, does not describe what remedies can be provided, and does not delineate the

nature and scope of such a cause of action. Suits against the United States and its agencies require an explicit waiver of sovereign immunity to answer these questions. "[W]here a cause of action is authorized against the federal government, the available remedies are not those that are 'appropriate,' but only those for which sovereign immunity has been expressly waived." Lane v. Pena, 518 U.S. 187, 197 (1996). Section 119 does not fulfill that function.

Petitioners rely on United States v. Mitchell, 463 U.S. 206 (1983), but that decision rested on the extensive legislative history of the establishment of the Court of Claims in the mid-19th century that clearly showed Congress' intent to provide a forum for awarding money damages in certain specified cases. 463 U.S. at 212-216. In contrast, Congress legislated here against the backdrop of decades of administrative litigation under the APA, which provides a waiver for actions challenging final agency actions and "seeking relief other than money damages." 5 U.S.C. 702.

Petitioners' challenges to the Secretary's and the President's Recommendations also do not fall within the officers' suit exception to sovereign immunity. This exception applies only if the action of the officer "is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void." Larson v. Domestic &

Foreign Commerce Corp., 337 U.S. 682, 702 (1949). Here, the actions challenged by Petitioners are plainly authorized, and their claim is merely that the Recommendations are inconsistent with statutory requirements.

D. The Court lacks jurisdiction over the Petitioners' challenge to the FEIS.

Apart from challenging the Recommendations and Guidelines under the NWPA and NEPA, Petitioners have sought review of the FEIS itself. See Petition in Case No. 02-1179. This claim is also not within the Court's jurisdiction.

Because NEPA does not provide a cause of action, a petitioner seeking to enforce EIS requirements must sue on some other statutory basis. Florida Audubon Society v. Bentsen, 94 F.3d 658, 665 (D.C. Cir. 1996). NWPA section 119(a)(1)(D) does not provide a cause of action for review of the FEIS. It grants the courts of appeals exclusive and original jurisdiction over any civil action "for review of any environmental impact statement prepared pursuant to [NEPA] with respect to any action under this part." 42 U.S.C. 10139(a)(1)(D). This provision, like the other provisions of section 119(a) previously discussed,⁷⁷ does not create a cause of action but rather specifies the court in which a claim for review under the APA must be filed. While the NWPA directed the Secretary to prepare an EIS to accompany his

⁷⁷ See pages 31-32, *supra*.

recommendation to the President, 42 U.S.C. 10134(a)(1)(D), that provision create no rights in Petitioners that would support a cause of action under the NWPA to obtain review of the FEIS. See Gonzaga University v. DOE, 122 S. Ct. at 2275. Had Congress intended to create a claim for review of the FEIS, it would have used language like that in NWPA section 112(b)(1)(E), 42 U.S.C. 10132(b)(1)(E).^{8/} The absence of an equivalent provision designating the FEIS as a final agency action is a strong indication that Congress did not intend to create an independent claim for review of the FEIS. See Beach v. Ocwen Federal Bank, 523 U.S. 410, 418 (1998) (quoting Bates v. United States, 522 U.S. 23, 29-30 (1997)). Therefore, the adequacy of the FEIS may be reviewed only in a challenge under the APA to a final agency action. See Public Citizen v. Office of United States Trade Representatives, 970 F.2d 916, 918-19 (D.C. Cir. 1992). The Petitioners have not identified and cannot identify any final agency action or decision based upon the FEIS that would authorize the Court to review the FEIS at this juncture.

Moreover, under the statutory scheme of the NWPA, a challenge to the FEIS is not presently justiciable because such a claim is not ripe for review. “Article III does not allow a litigant to pursue a cause of action to recover for an injury that is

^{8/} See page 32, *supra*.

not ‘certainly impending.’” Wyoming Outdoor Council v. United States Forest Service, 165 F.3d 43, 48 (D.C. Cir. 1999) (Quoting National Treasury Employees Union v. United States, 101 F.3d 1423, 1427 (D.C. Cir. 1996)). To establish an injury from an alleged NEPA violation, Petitioners must show that a federal agency has decided to undertake or authorize a project that affects their concrete interests without complying with NEPA’s procedural requirements. Lujan v. Defenders of Wildlife, 504 U.S. 555, 573 n.7 (1992). Here, Congress has made the decision to approve Yucca Mountain as the site of a repository, and DOE is therefore preparing a license application to NRC. Because actions of Congress are not subject to NEPA’s requirements, the designation of Yucca Mountain as the site of a repository cannot support Petitioners’ claim for review of the FEIS. DOE and NRC may rely on the FEIS in support of future agency decisions related to Yucca Mountain, but this is insufficient to establish any injury to Petitioners that is certainly impending. See Wyoming Outdoor Council, 165 F.3d at 50; National Wildlife Fed’n v. Goldschmidt, 677 F.2d 259, 263 (2nd Cir. 1982); Wilderness Society v. Morton, 479 F.2d 842, 889-90 (D.C. Cir. 1973) (en banc).

There is no hardship to Petitioners in postponing review of the FEIS until such time as Petitioners challenge a final agency decision that relies upon the FEIS. An EIS provides information on the potential environmental effects of a project, but it

does not determine substantive results such as whether a project proceeds or how it is designed. See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). Until NRC adopts the FEIS “to the extent practicable” to authorize the construction of a repository, 42 U.S.C. 10134(f)(4), or until DOE uses the FEIS to support a proposed action related to Yucca Mountain, review of the FEIS would be only an academic exercise. See Ohio Forestry Ass’n v. Sierra Club, 523 U.S. 726, 734-36 (1998).

II

DOE’S SITE SUITABILITY CRITERIA AND THE SECRETARY’S RECOMMENDATION ARE CONSISTENT WITH THE REQUIREMENTS OF THE NWPA

Petitioners do not challenge to the Secretary’s conclusion, endorsed by the President and Congress, that operation of a repository at Yucca Mountain would likely result in doses to the public far below the limits set by EPA (SR at 19, 25, Tables 1 & 2). Instead, Petitioners argue that the Part 963 Guidelines impermissibly fail to require that DOE base the suitability determination primarily on the geologic capacity of the site to isolate waste, a requirement Petitioners derive primarily from Section 112(a) of the NWPA. Congress, however, left to DOE the choice of what criteria to apply for its suitability determination. DOE’s decision to assess the likely performance of the repository on the basis of the entire system is a reasonable

construction of the statute, and accordingly should be affirmed by this Court.

A. The statute's plain language directed DOE to evaluate the suitability of Yucca Mountain with reference to its likely licensability. Contrary to Petitioners' arguments, when the relevant statutory language is considered, there is no directive to DOE to apply Section 112(a) in determining suitability or to place primary reliance on geologic barriers. Rather, as DOE noted, the language of the statute "require[s] DOE's suitability evaluation to revolve around the potential licensability of the site." 66 FR 57317.

First, Section 113(b)(1)(A)(iv) required DOE to establish "criteria to be used to determine the suitability of [Yucca Mountain] for the location of a repository * * *." 42 U.S.C. 10133(b)(1)(A)(iv). Section 113(c) limited DOE's site characterization activities at Yucca Mountain to those "necessary to provide the data required for evaluations of the suitability of such site for an application to be submitted to the [NRC] for a construction authorization for a repository" and to comply with NEPA. 42 U.S.C. 10133(c) (emphasis supplied). Further, Section 114(a)(2)(A) provided that the President, upon receipt of the Secretary's recommendation, must consider whether "the Yucca Mountain site qualified for application for a construction authorization for a repository * * *." 42 U.S.C. 10134(a)(2)(A). These provisions plainly indicate that the Secretary's suitability

determination was to be directly related to NRC's licensing criteria.

Second, in Section 121, Congress required NRC's criteria to be consistent with EPA's radiation standards, a pattern maintained by EnPA in 1992. See 42 U.S.C. 10141(b)(1)(C); Pub. L. 102-486, § 801(b). In addition, Congress mandated that the NRC criteria "shall provide for the use of a system of multiple barriers in the design of the repository * * *." 42 U.S.C. 10141(b)(1)(B). Thus, Congress expressly incorporated into the licensing criteria both the EPA standards and the requirement to design a repository using both geologic and engineered barriers. By contrast, Congress did not reference the Section 112(a) considerations in the licensing criteria. Congress' injunction to "use * * * a system of multiple barriers" stands in sharp contrast to Petitioners' insistence that geologic barriers should be the *sine qua non*.

Third, a comparison of Section 112 with Sections 113 and 114 demonstrates that Congress did not intend to require DOE to follow the same prescriptions under Sections 113 and 114 that were mandated for Section 112. The latter section is entitled "Recommendation of Candidate Sites for Site Characterization," itself an indication of the scope of its intended application. See Almendarez-Torres v. United States, 523 U.S. 224, 234 (1998); Trainmen v. Baltimore & Ohio R. Co., 331 U.S. 519, 528-529 (1947). As originally enacted, Section 112 established a process for

comparing several sites, preferably in different geologic media, for the selection of three sites for site characterization. 96 Stat. 2208-2210. Section 112(a) required DOE to “issue general guidelines for the recommendation of sites for repositories,” and gave the specific direction that “[t]he Secretary shall use guidelines established under this subsection in considering candidate sites for recommendation under subsection (b),” the subsection governing the selection of sites for characterization. See 42 U.S.C. 10132(a). The only other specific direction for their use appears in Subsections 112(b)(1)(D)(i)&(ii), which required each environmental assessment supporting a nomination for site characterization to evaluate the site for characterization under the Section 112(a) guidelines and to evaluate the site’s suitability as a repository under guidelines that could be applied without the results of site characterization. 42 U.S.C. 112(b)(1)(D)(i)&(ii).

In contrast, no provision of the NWPA has a direction to use any part of the Section 112(a) guidelines in the site suitability process under Sections 113 and 114. Indeed, the term “guidelines” does not appear in either Section 113 or Section 114. See 42 U.S.C. 10133, 10134. Rather, in Section 113(b)(1)(A)(iv), Congress directed DOE to establish “criteria” for making the site suitability determination. 42 U.S.C.

10133(b)(1)(A)(iv).^{9/}

Petitioners point to Section 113(b)(1)(A)(iv)'s directive that suitability criteria were to be "developed pursuant to section 112(a)." 42 U.S.C. 10133(b)(1)(A)(iv).

However, the very use of term "developed" suggests that Congress expected a separate set of Section 113 criteria different from the previously issued Section 112(a) guidelines. The better reading of this directive is that DOE was to use the special process set out in Section 112(a) in developing site suitability criteria.

Section 112(a)'s procedural requirements, which include consultation with specified Federal agencies and concurrence by NRC, are special mandates under the NWPA that would not otherwise apply.^{10/}

^{9/} Petitioners contend (Br. 54) that DOE has not interpreted the term "criteria" consistently because in explaining the Part 963 Guidelines, DOE "equated" the term "criteria" with the term "geologic considerations" in Section 112(a). DOE made this comparison only for the purpose of deciding whether "criteria" should be, as a general matter, "characterizing traits" or "benchmarks," as one commenter urged. 66 FR 57320. DOE chose "characterizing traits" in part because Section 112(a) uses the term "criteria" synonymously with "geologic considerations," and the latter term is more consonant with "characterizing traits" than "benchmarks." *Id.* (emphasis supplied).

^{10/} Petitioners also rely (Br. 51) on dicta in Nevada v. Watkins, 914 F.2d 1545, 1562 (9th Cir. 1990). Although the court did state that the Section 112(a) guidelines would to be used for the suitability determination, that issue was not presented and the court's observation was not part of its holding. The court actually held that the NWPA left to the unreviewable discretion of the Secretary to structure how and when to evaluate Yucca Mountain. 914 F.2d at 1563.

Petitioners also rely on Section 112(a)'s provision that "[s]uch guidelines shall specify detailed geologic considerations that shall be primary criteria for the selection of sites in various geologic media." 42 U.S.C. 10132(a). This provision, however, required the specification of geologic considerations for a particular purpose, *i.e.*, "the selection of sites in various geologic media." This plainly referred to the initial task of picking several sites in different geologic settings for further study, the process governed by Section 112. It does not reference Sections 113 or 114 nor speak to the task of determining the suitability of just one site, Yucca Mountain, which was DOE's job under the 1987 amended versions of the latter provisions. Section 112 must be construed in the context of the modified statute. Holloway v. United States, 526 U.S. 1, 7 (1999) ("[T]he meaning of statutory language, plain or not, depends on context," quoting Brown v. Gardner, 513 U.S. 115, 118 (1994), and King v. St. Vincent's Hospital, 502 U.S. 215, 221 (1991)).^{14/}

Petitioners also rely (Br. 50) on the term "repository," defined as "any system

^{14/} Petitioners also cite (Br. 52) the First Circuit's observation that Congress intended that geologic formations "would be the major component of the containment mechanism." NRDC v. EPA, 824 F.2d 1258, 1279 (1st Cir. 1987). The court there reviewed the contention that EPA's original radiation standards were in conflict with requirements of the Safe Drinking Water Act, 42 U.S.C. 300f *et seq.* 824 F.2d at 1277-1278. The court was not addressing the contention Petitioners present here, and the court did not construe any of the statutory provisions of the NWPA that Petitioners rely upon.

licensed by the [NRC] that is intended to be used for, or may be used for, the permanent deep geologic disposal of” nuclear waste. 42 U.S.C. 10101(18). This definition does not purport to prescribe particular criteria for a site suitability determination. In defining a repository in terms of “permanent” disposal, the definition simply reinforces the distinction drawn in the NWPA between disposal, defined as “the emplacement in a repository of high-level radioactive waste, spent nuclear fuel, or other highly radioactive material, with no foreseeable intent of recovery * * *,” and storage, defined as the “retention of high-level radioactive waste, spent nuclear fuel, or transuranic waste with the intent to recover such waste or fuel for subsequent use, processing, or disposal.” 42 U.S.C. 10101(9) & (25).^{12/} And in defining a repository as “a system * * * for * * * deep geologic disposal,” the definition simply indicates where a repository is to be located, *i.e.*, “deep” underground. What criteria should inform the determination whether such a “system” would be suitable for development is not addressed by this definition.

Petitioners’ reliance (Br. 18, 52 n.16)) on other definitions and provisions of the NWPA is equally unavailing. While the definitions of “candidate site” and “site

^{12/} The word “permanent” means “existing perpetually; everlasting, esp. without significant change.” Random House Dictionary of the English Language, 2d ed. 1442.

characterization” use the term “geologic,” nothing in them lends any support to Petitioners’ position. 42 U.S.C. 10101(4) & (21). Recommending an area for site characterization is a different process from determining that a candidate site is suitable as a repository. And “establish[ing] the geologic condition * * * of a candidate site” is but part of the analysis that is relevant to whether “a system of multiple barriers” can meet NRC’s licensing criteria.^{13/}

B. The legislative history does not support Petitioners’ interpretations.

Although Petitioners rely on legislative history for support (Br. 12-17, 53), they point only to various statements regarding geologic barriers, which upon examination are at best inconclusive. Significantly, they can present no history addressing the meaning of Section 113(b)(1)(A)(iv)’s requirement to establish site suitability criteria. That Section was added to H.R. 3809, the bill that became the NWPAA, by the Committee on Interior and Insular Affairs. See H.R. 3809, 97th Cong., 1st Sess.,

^{13/} In a footnote (Br. 52n.16), Petitioners cite several other statutory provisions, but Petitioners’ failure to state why they are pertinent means they are not properly presented to this Court for consideration. See Hutchins v. District of Columbia, 188 F.3d 531, 539-540 n.3 (D.C. Cir. 1999). In fact, none of these provisions addresses the criteria for the Yucca Mountain site suitability determination. Under 42 U.S.C. 10133(b)(A)(ii), the SCP had to describe investigations of the site’s isolation capabilities. Under 42 U.S.C. 10134(a)(1)(D) & (f)(6), the FEIS need not consider alternatives to geologic disposal. And 42 U.S.C. 10197(a)(6) and (b)(3), found in a separate title of the NWPAA, concern a possible research and development project.

pp. 11-13 (introduced June 4, 1981); H.R. 3908, 97th Cong., 2d Sess., pp. 85-86 (reported April 27, 1982); H.R. Rep. No. 97-491, Part 1, 97th Cong., 2d Sess., p. 6 (1982). The Report of that Committee contains no mention of this addition to the bill. The bill that passed the Senate, S. 1662, never had an analogous provision. See S. 1662, 97th Cong., 1st Sess. (introduced September 24, 1981); S. 1662, 97th Cong., 1st Sess. (reported November 30, 1981); S. 1662, 97th Cong., 2d Sess. (passed April 29, 1982). There is accordingly nothing in the legislative history that contradicts the Secretary's interpretation that Section 113(b)(1)(A)(iv) limited his discretion procedurally but not substantively.

1. With respect to Petitioners' more general contention that Congress required primary reliance on geologic barriers, none of the cited history will bear the weight Petitioners place on it. First, neither the 1957 report of the NAS nor DOE's 1980 generic Environmental Impact Statement on Management of Commercially Generated Radioactive Waste ("1980 EIS") is relevant since neither document purports to reflect the view of Congress on specific legislation. The NAS report predates the NWPA by more than 20 years (RR-1.0452). The 1980 EIS evaluated alternatives to the President's 1980 planning strategy for development of mined geologic repositories under existing statutory authority and did not address any further legislation (NR-2.00160, pp. iii-iv, 1.1-1.2). That EIS covered a proposal for

a “research and development program for waste management [that] will emphasize use of mine repositories in geologic formations” (*id.* at 1.6; emphasis supplied).

While DOE stated its general expectation that engineered barriers would be of greater significance in the short term and geologic barriers would be important over the long term, these statements were part of the description of the conceptual repository system whose environmental impacts were being assessed (*id.* at 1.2, 5.1-5.12). No inference about Congress’ intent can be drawn from a document that did not address a legislative proposal.

2. Petitioners also paint a misleading picture of a Congress struggling to choose between engineered barriers or geologic barriers as the primary defense (Br. 12-17, 52). They do this by focusing on H.R. 7418, which was considered, but never enacted, in the 96th Congress, the Congress prior to the one that passed the NWPA.

As introduced and reported by the House Science and Technology Committee, H.R. 7418 required DOE to develop specialized research and demonstration repositories in which research was limited to techniques for disposing of wastes from reprocessing of spent fuel. H.R. Rep. 96-1156, 96th Cong., 2d Sess., Part I, pp. 11-13 (1980). The bill was so limited not because that Committee mistakenly thought that all the waste would be from reprocessing but because the Committee was

promoting the revival of reprocessing by requiring DOE to demonstrate the practicality of disposing of the resulting waste. Id. at 12-15. Moreover, the Committee did not want any delay to locate geologically optimal sites; consequently it dictated that criteria for site selection for the demonstration repositories would be based on the primary use of engineered barriers to prevent releases. Id. at 17. DOE opposed the bill not because of its emphasis on engineered barriers but because H.R. 7418 would interfere with progress on DOE's own plan for development of a repository that would accept both waste from reprocessing and unprocessed spent fuel. Id. at 36-37.

The bill was next referred to the House Interior and Insular Affairs Committee, which agreed with DOE's position, jettisoned the research and demonstration project, and created a development program for a repository for both types of waste. H.R. Rep. 96-1156, Part 2. The bill then was referred to the House Interstate and Foreign Commerce Committee, which scrapped the repository development program created by the Interior Committee, reinstating a research and development program for both types of waste. H.R. Rep. No. 96-1156, Part 3, pp. 14, 29-30.

Accordingly, the Science and Technology Committee's emphasis on engineered barriers arose from the more narrow purpose of promoting reprocessing, and the actions of the other two committees were in reaction to that proposal. No inference

of a congressional mandate to rely primarily on geologic barriers can be drawn from this history.

3. More apt, but ultimately unpersuasive, is Petitioners' reliance on the report of the House Committee on Interior and Insular Affairs in the Congress that did enact the NWPA. H.R. 3809 contained the requirement that the Section 112(a) guidelines specify "geologic considerations that shall be primary criteria for selection of sites in various geologic media." H.R. Rep. No. 97-491, 97th Cong., 2d Sess., Part 1, p. 4 (1982). In the section-by-section analysis, the committee noted that "[t]he primary feature of the site specifically to be evaluated consists of a rock medium about 1,000 or more feet underground which will of itself provide one of the primary containments of the waste." Id. at 50 (emphasis added). Its report also spoke of "[c]ommitment to a waste disposal technology relying on primary geologic containment provided by a solid rock formation located deep underground, together with containment by engineered barriers * * *." Id. at 30.

These statements do indicate the committee expected that geology would play a central role in achieving the desired isolation. But the committee was not addressing itself to the Section 113 mandate that criteria be developed for the suitability determination; the content of those criteria, or the role of geology therein. Finally, of course, the committee could not have addressed the significance of the

1987 amendments, which focused site characterization on Yucca Mountain only, or the significance of the 1992 direction in EnPA to EPA and NRC to develop site-specific standards and criteria. Moreover, DOE's ultimate evaluation of Yucca Mountain, confirming that its natural barriers, including its geology, do contribute significantly to waste isolation, means the site in fact conforms with the committee's expectations (see SR at 22; RR-5.0019 at 3-90-99; RR 5.0016 at xxxiii-xliv).

C. If congressional intent is unclear, DOE's reasonable interpretation of the NWPA is entitled to deference. To the extent there is any ambiguity as to meaning of the statutory provisions, the considered and reasonable interpretation of DOE, the agency entrusted with the administration of these provisions, is entitled to deference on review. Mead, 533 U.S. at 228-231; Chevron, 467 U.S. at 843-844; General Electric Uranium Management Corporation, 764 F.2d at 905. When DOE promulgated the Part 963 Guidelines, it exercised its authority to make rules carrying the force of law. And in Section 113(b)(1)(A)(iv), Congress assigned DOE the responsibility to establish the criteria. The Part 963 Guidelines established minimum requirements for the Secretary to apply in evaluating the suitability of Yucca Mountain. They were issued pursuant to the notice and comment rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. 553, and in accordance with the additional procedural requirements of Section 112(a) of the NWPA. In such

circumstances, deference is owed the agency “when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which ‘Congress did not actually have an intent’ as to a particular result.” Mead, 533 U.S. at 229, quoting Chevron, 467 U.S. at 845.

1. DOE has not forfeited deference even though the Part 963 Guidelines are a significant change from the 1984 guidelines promulgated under Section 112. In adopting the Part 963 Guidelines, DOE acknowledged that, when it issued the Section 112(a) guidelines in 1984, it had then interpreted the NWPA in a way to make them applicable to both the site characterization selection and the recommendation of sites for development. 66 FR 57311. At that time, however, there was no tension between the Section 112(a) guidelines, which focused on subsystems, and the need to evaluate suitability in light of the NRC criteria, which at that time focused on similar subsystems. In 2001, however, DOE concluded that “a new approach is called for in light of the cumulative effect of the intervening legislative, regulatory, and technical developments that have occurred since 1984.” Id. In Rust v. Sullivan, the Supreme Court confirmed that “[t]his Court has rejected the argument that an agency's interpretation ‘is not entitled to deference because it represents a sharp break with prior interpretations’ of the statute in question.” 500 U.S. 173, 186-187 (1991), citing Chevron, 467 U.S. at 862. Where an agency

provides a reasoned explanation of the change in interpretation and the new interpretation is reasonable, Chevron deference is appropriate. Chevron, 467 U.S. at 863-864; U.S. Air Tour Ass'n v. FAA, 298 F.3d 997, 1006 (D.C. Cir. 2002).

2. DOE has reasonably concluded that Section 112's substantive prescriptions are limited to the stage of site selection covered by that section, namely, the comparison of different sites in different geologic media to select sites for site characterization. Contrary to Petitioners' contention (Br. 55, 56-57), DOE has not ignored Section 112(a) in the Part 963 Guidelines and has not abandoned consideration of the geologic characteristics of Yucca Mountain. DOE's Part 963 Guidelines simply required geology to be considered in a manner different from the one Petitioners prefer.^{14/} The Guidelines required DOE to evaluate both natural and engineered barriers in a TSPA. 10 C.F.R. 963.16(b). Based on that evaluation, DOE identified numerous features of the natural environment at Yucca Mountain that will play an important role in ensuring the isolation of wastes emplaced in a repository (SR at 22; RR-5.0019 at 3-90-99; RR 5.0016 at xxxiii-xliv). Indeed, to make a site

^{14/} DOE noted several connections between the two sets of rules. 64 FR 67080-67081. Moreover, the Part 963 Guidelines explicitly incorporate consideration of important geologic characteristics, including "geologic properties," "hydrologic properties," "geochemical properties," "unsaturated zone flow characteristics," and "near field environment characteristics." 10 C.F.R. 963.17; 66 FR 57330-57332.

suitability determination, DOE exhaustively studied and analyzed Yucca Mountain and found that the geology of the site will work together with the engineered barriers to meet EPA's standards (SR at 21-24; RR-5.0019 at 3-104-133).

Nor is it "absurd" (Br. 56) for Congress to have prescribed that geologic considerations be primary criteria for comparing sites for possible site characterization but to have allowed the determination whether a particular site is suitable for development as a repository to focus on whether it is likely to meet the radiation protection standards, a question as to which geology is relevant but not dispositive. The task presented at the earlier stage of candidate site selection is materially different from the recommendation of a site for development. At the earlier stage, several sites must be compared to determine a field of candidates; at the later stage, DOE must determine if a particular site is viable. DOE's construction of the statute does not imply Congress was indifferent to geology, but simply that geology is but one of the "multiple barriers" (42 U.S.C. 10141(b)(1)(B)) that must be taken into account.

3. DOE reasonably relied on significant legislative, regulatory and technical developments to conclude a change in its suitability criteria was appropriate. DOE did not characterize the legislative developments as a repeal of a prior legislative mandate. Rather, it saw them as fleshing out the statutory responsibility to make a

site suitability determination. See 66 FR 57312-57316. For example, EnPA clearly was highly relevant to that determination since it directed EPA and NRC to establish site-specific standards and criteria based upon recommendations from NAS. Consequently, DOE did not purport to, and has no need to, demonstrate an irreconcilable conflict between these developments and its original statutory mandate, and the authorities Petitioners cite concerning implied repeals are inapposite.

4. DOE presented a rational explanation of how those events necessitated a change in the framework for suitability criteria. Pursuant to EnPA, the 1995 NAS report recommended a standard based on individual risk and reliance on a total system performance assessment that would assess the potential future behavior of the entire repository system (RR-5.0024-ES-7-8, 13, 68-70). 66 FR 57304. NAS also noted that NRC should reconsider those portions of its licensing criteria that imposed performance requirements for individual elements of the system (RR-5.0024-125-126). 66 FR 57304.

EPA and NRC proposed in 1999 to implement EnPA. EPA's final rule, issued June 13, 2001, adopted dose standards for protection of individuals rather than an individual risk standard. However, because "risk is the underlying basis of [EPA's] standards" (66 FR 32,086), EPA required, consistent with the NAS's

recommendation, that DOE establish compliance with this standard by means of a TSPA. 66 FR 32074. Consistent with the NAS recommendations, the NRC proposed and adopted an approach for multiple barriers that does not specify numerical goals for the performance of individual barriers but requires DOE to evaluate the behavior of barriers in the context of performance assessment of the overall repository system. 64 FR 8649; 66 FR 55759. NRC's final criteria require that DOE demonstrate, through a TSPA, a reasonable expectation that the repository would comply with EPA's standards for the postclosure period. 66 FR 55740.

In its preamble to the Part 963 Guidelines, DOE explained that the regulatory changes that flowed from EnPA had a direct impact on its site suitability determination because of the dependency of that decision on the applicable licensing criteria. 66 FR 57313-57314. The NRC's elimination of its quantitative subsystem requirements had made many of DOE's corresponding guidelines inappropriate, if not inconsistent with NRC's rule. For example, DOE's geohydrology guideline had qualifying and disqualifying conditions, including the groundwater travel time condition, that had direct analogs in the NRC's original requirements in 10 C.F.R. 60.113. But the latter provision of NRC's rules no longer applies to Yucca Mountain, and the new Part 63 requirements have no analogous subsystem performance objective. 66 FR 57314. DOE reasonably concluded that it would be

“illogical” for DOE to make findings as to disqualifying and qualifying conditions “based on regulatory requirements that no longer would be applicable to the Yucca Mountain site and therefore could not support a determination regarding the site suitability.” Id.^{15/}

Petitioners argue (Br. 60) that DOE has abandoned a long-held distinction between “suitability” and “licensability.” DOE recognized, however, that the two concepts are different since NRC makes the licensing decision and DOE makes the suitability determination. 66 FR 57322. But DOE also recognized that Section 113(c) makes the suitability determination “a function of the DOE’s ability to demonstrate the site can meet applicable regulatory requirements.” 66 FR 57314. Petitioners concede (Br. 60), as they must, that there is a relationship. DOE, however, is entrusted with the administration of the statute and therefore the responsibility to define that relationship. For the agency’s view to be upheld, it need not be compelled by the statute. Rather, if it is a permissible and reasonable reading, it must be accepted on review.

Similarly, Petitioners’ view (Br. 61-62) that a system approach can be reconciled with a requirement that geology be the primary barrier misses the mark.

^{15/} DOE prepared a table showing that most of the old guidelines have no analog in NRC’s new Part 63. 66 FR 57315.

In the NWPA, Congress required NRC's licensing criteria to provide for multiple barriers, but did not prescribe the relative weight to be placed on them. It also directed NRC to conform its criteria to EPA's standards as based on the NAS recommendations. That Petitioners may be able to envision a regime in which geology would have emerged from these directives as the *sine qua non* does not detract from the fact that those agencies established different criteria for Yucca Mountain and that these criteria do not handle geology in the manner Petitioners advocate.

5. DOE also concluded that significant advances in analytical methods in the 15 years after promulgation of the 1984 guidelines supported its decision. DOE noted that there had been increased scientific and technological understanding of the geologic process at the site after nearly 20 years of investigation. 66 FR 57315. DOE also agreed with the NRC that there had been considerable advances in the technical methods for assessing the performance of a repository, including improved computer capability and analytic methods. 66 FR 57315-57316. In light of this significant progress, DOE concluded "a system performance approach provides the most meaningful method for evaluating whether or not the Yucca Mountain site is suitable for development as a repository." 66 FR 57316.

6. Finally, there is no foundation for accusations that the agency sought to

change the criteria after discovering Yucca Mountain would be disqualified under the Section 112 guidelines and that the agency “lobbied” EPA and NRC to change their rules. (Br. 57, 59-60).^{16/}

The central premise of Petitioners’ story is that DOE discovered as early as 1996 that Yucca Mountain would be disqualified under the Section 112 guidelines because groundwater travel time from the disturbed zone to the accessible environment would be less than 1,000 years (Br. 28-29, 33-36). DOE, however, has repeatedly stated that the agency made no such determination. 66 FR 57318-57319; 64 FR 67071-67072. And, in response to the same claim made in a comment on the draft EIS, the agency stated that “DOE estimates that the median groundwater travel times would be about 8,000 years, and average groundwater travel times would be longer” (FEIS at CR-24-25). DOE explained that the appropriate analysis requires reference to DOE’s regulatory definition of “ground water travel time,” which provides that:

[t]he travel time is the length of the flow path divided by the velocity, where velocity is the average groundwater flux passing through the cross-sectional area of the geologic medium through which flow occurs,

^{16/} To a large extent, Petitioners base their argument on documents that are not part of the record. We have shown in our oppositions to Petitioners’ pending motions to supplement that record, filed July 29, 2002, and November 22, 2002, that there is no justification for considering nonrecord materials.

* * * . If discrete segments of the flow path have different hydrologic properties, the total travel time will be the sum of the travel times for each discrete segment.

10 C.F.R. 960.2 (emphasis supplied). DOE explained that “[a]s a practical matter, this definition provides for the consideration of the rate at which most of the water moves through the natural system to the accessible environment” (FEIS at CR-24-25). DOE modeled groundwater flow as part its site characterization (id.).

These models indicate that small amounts of water potentially moving in “fast paths” from the repository to the accessible environment could do so in fewer than 1,000 years. However, the models and corroborating physical evidence indicate that most water would take substantially longer than 1,000 years to reach the accessible environment. Given this, DOE believes that the site would not have been disqualified under the groundwater travel condition at 10 C.F.R. 960.4-2-1.

When an agency makes such a determination in an area of its technical expertise, the agency’s conclusion is entitled to the greatest deference. Baltimore Gas & Electric Co. v. NRDC, 462 U.S. 82, 103 (1983); Ethyl Corp. v. EPA, 541 F.2d at 38.

In support of their argument, Petitioners cite to information and data presented in various reports that DOE had not incorporated into a definitive analysis of groundwater travel time (Br. 28-29).^{17/} Petitioners also rely (Br. 34-36) on several

^{17/} Petitioners also rely (Br. 29 n.7) on the Affidavit of John W. Bartlett (RR-7.0004). This affidavit simply presents Bartlett’s conclusory assertions without any evidence or analysis.

non-record documents that record part of the technical exchanges that DOE had with NRC and with the Nuclear Waste Technical Review Board, but again these exchanges did not present DOE's definitive analysis of the issue of groundwater travel time or any other issue. For example, the presentation at the January 25, 1999, meeting of the Review Board (SA-051, SA-012) was for the purpose of illustrating certain analytical techniques for the design process and was not a performance assessment (SA-012-76, 78, 86-87). Similarly, Petitioners rely (Br. 35-36) on DOE presentations of neutralization analyses, which are also analytical tools for the design process that deliberately exclude specified effects (RR-1.0291-E-11; SA-027). While such stylized calculations may provide insights to the total performance system assessment, they are not DOE's conclusions on performance of the total system, the expected contribution of natural barriers, or on groundwater travel time (SA-027-3).

Similarly, no weight can be given to Petitioners' suggestion that DOE improperly "lobbied" NRC and EPA to change their regulations. Once again, Petitioners improperly rely extensively on nonrecord documents, principally informal communications between the agencies (Br. 30-33). In any event, the evidence cited by Petitioners is not evidence of DOE lobbying NRC and EPA to change their regulations; rather, it is evidence that DOE was aware that regulatory changes would

be forthcoming in light of the NAS's recommendations, and that all three agencies would need to take responsive actions. Moreover, it was perfectly proper in that context for DOE to express views (substantially similar to those of the NAS) about what it believed the content of amended EPA standards and NRC licensing criteria should be. DOE, NRC, and EPA all have Congressionally-assigned roles to play in the process that may lead to a license for a repository at Yucca Mountain.

Interagency consultation among agencies with distinct but interrelated missions concerning rules that bear on those missions is a longstanding part of federal rulemaking, see, e.g., Executive Order 12866, 58 FR 51735; Executive Order 12291, 46 FR 13193; Executive Order 12044, 43 FR 12661. It has also long been recognized by this Court as a necessary and appropriate element of an effective and balanced regulatory process. Sierra Club v. Costle, 657 F.2d 298, 405-406 (D.C. Cir. 1981). At the same time, each agency is independent of the other, and exercises its own delegated authority. Each agency engaged in an open and documented public rulemaking process for adopting revisions to their respective regulations, and there is no indication that any agency failed to exercise its independent judgment in adopting new regulations.

Petitioners also gloss history in their discussion of how the program evolved in 1996-1997. Congressional concern about costs led DOE to revise its Program Plan

in 1996 to focus on site characterization activities necessary to assess the performance of a repository at Yucca Mountain. 66 FR 57305, 57313. This revised plan reflected the evolution of the site characterization program toward utilization of a total systems performance assessment, and led the agency to prepare in 1998, with the approval of Congress, a Viability Assessment including such a total assessment. 66 FR 57305, 57313. Because of this shift in focus, the agency also canceled a series of technical basis reports geared to the Section 112 guidelines (GR-32-19). Contrary to Petitioners' suggestion (Br. 30, 32, 65-66), this decision did not bring site characterization to an end. To the contrary, the investigation of the site was focused on the scientific and technical work needed to assess the performance of the repository and make a suitability determination (GR-32-14-15). Moreover, contrary to the impression Petitioners seek to leave (Br. 29-30, 32-33), this more focused approach to site characterization was responsive to Congress' direction. In the Conference Report for the 1997 Energy and Water Development Appropriations Act, DOE was directed to use its appropriations in accordance with the revised Program Plan. H.R. Rep. No. 104-782, 104th Cong., 2d Sess. 82 (1996).

D. Congress, in passing the YMDA has ratified DOE'S statutory interpretation. Not only is DOE's interpretation of its statutory mandate permissible, but Congress ratified it in enacting the YMDA. When Nevada vetoed the

President's Recommendation and submitted its statement of reasons to Congress, it made arguments much like those it has made in this case. Nevada argued to Congress, for example, that DOE had misinterpreted the NWPA by giving too much weight to engineered barriers and too little emphasis to site geology, and that DOE's Guidelines had been improperly rewritten to favor the selection of the Yucca Mountain site (RA 7-11). Congress rejected these arguments, concluding that "the Secretary's reliance on a combination of natural and engineered barriers is both permissible and appropriate." S. Rep. 107-159 at 8. The Committee "agree[d] with the Secretary that the concept of deep geologic disposal has always contemplated reliance on a combination of geologic and engineered barriers to ensure the safe containment of radionuclides in a repository. (See H. Rep. 97-491, part 1, at 30)." Id. The NWPA, the Senate Report stated, "not only allows but requires the Secretary to consider engineered barriers, including the form and packaging of the nuclear waste, in making his site recommendation to the President. (42 U.S.C. 10134(a)(1)(B).)" Id.

The present case thus comes to this Court with strong indicia that the agency did not misinterpret Congress's intent. "Here, the Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation." Red Lion Broadcasting v. FCC, 395 U.S. 367, 381-82 (1969).

See also United States v. Board of Commissioners of Sheffield, 435 U.S. 110, 134-35 (1978). The fact that Congress acted consistently with DOE's statutory interpretation in the face of Nevada's objections provides "at least some evidence of the reasonableness" of the agency's construction of the NWPA. See United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 137 (1985).

E. DOE has not failed to take any action required by the NWPA. Petitioners argue (Br. 63-65), DOE failed to carry out a statutory obligation to terminate site characterization at Yucca Mountain upon a determination that the site is unsuitable, as provided in Section 113(c)(3). 42 U.S.C. 10133(c)(3). However, the factual predicate for this contention is incorrect: the Secretary did not determine that the site is unsuitable. As Petitioners admit (Br. 65), the Secretary's 1998 letter expressly stated that groundwater travel time remained under study. There is no other record of a Secretarial determination that the site is unsuitable.^{18/}

Petitioners also incorrectly argue (Br. 65-66) that DOE failed to complete site characterization. There also is no factual basis for this allegation. Petitioners have

^{18/} To the extent Petitioners are alleging that the Secretary should have made a disqualification decision, such a claim is not reviewable. The Ninth Circuit correctly held that Nevada cannot bring such a claim because this provision vests the Secretary with unreviewable discretion to establish the timing for making a disqualification determination. See Nevada v. Watkins, 914 F.2d at 1563-1564.

misread the adoption of the Revised Program Plan in 1996, which canceled the method of site characterization that would have led to a series of technical basis reports with respect to each of the 1984 guidelines. Site characterization continued, however, in support of the revised program. Accordingly, no relief is available to Petitioners on this claim either.

III

DOE MET ALL APPLICABLE REQUIREMENTS FOR PREPARING THE FINAL ENVIRONMENTAL IMPACT STATEMENT

A. CEQ requirements for an agency's decisionmaking process are inapplicable to the Secretary's Recommendation. – Petitioners argue (Br. 71-74) that DOE was required to comply with CEQ regulations that require an agency to file an EIS with EPA, to delay for 30 days a decision on the proposed action, and to prepare a record of decision. See 40 C.F.R. 1505.2, 1506.9, 1506.10. These requirements, however, have no application because the decision on the proposed action rested with the President, whose actions are not governed by NEPA or CEQ regulations. Furthermore, Congress prescribed in the NWPA the precise process applicable to the Secretary's and the President's Recommendations, including the timing for release of the FEIS. It is unreasonable to presume Congress intended to engraft CEQ's different, and sometimes inconsistent, procedural requirements on this process.

1. NEPA by itself would not apply to the President's and the Secretary's actions. The actions of the President are not covered because the EIS requirements of NEPA apply only to "federal agencies." 42 U.S.C. 4332; 40 C.F.R. 1508.12 ("Federal agency * * * does not mean the Congress, the Judiciary, or the President * * *"). Moreover, because the Constitution protects the President's prerogative to require opinions and recommendations from cabinet officers, NEPA has been held not to apply to a recommendation to the President made by the Secretary of a cabinet agency. Alaska v. Carter, 462 F. Supp. 1155, 1159-1160 (D. Alaska 1978). See U.S. Const., Art II, Sec. 2; Public Citizen v. Kantor, 864 F. Supp. 208, 213 (D.D.C. 1994). In any event, because a recommendation by an agency to the President to take certain action is not "final agency action," a claim that the agency failed to prepare an EIS for a recommendation is not reviewable under the APA. Public Citizen v. United States Trade Representative, 5 F.3d 549 (D.C. Cir. 1993), applying Franklin v. Massachusetts, *supra*. Here, the Secretary could not have made the decision to approve development of a repository at Yucca Mountain by himself. That decision rested with the President or the Congress, depending on whether Nevada submitted a notice of disapproval, and neither of them is subject to NEPA's EIS requirements or CEQ's regulations.

In these circumstances, the CEQ's regulations governing agency

decisionmaking do not apply on their own terms. The requirement for a record of decision and the requirement to file the EIS with EPA and circulate it at least 30 days before making a decision all govern the process of making an agency “decision.” They apply to the conduct of the person with the decisionmaking authority, who must cause the filing of the EIS, wait the specified period, and prepare a formal record of his decision. These provisions cannot literally or logically be read to apply to the conduct of a subordinate making a recommendation to the decisionmaker. Here, the Secretary is the subordinate, making a recommendation to his superior, the President, who is vested with the decisionmaking authority to approve and recommend the site to Congress.

DOE had to prepare an EIS to accompany the Secretary’s Recommendation to the President only because NWPA Section 114 directed it to do so. However, while the NWPA required an EIS analyzing the environmental impacts of a repository at Yucca Mountain, it also spelled out in extraordinary detail the process that the Secretary was follow. Those steps included: (1) public hearings in the vicinity to inform the public and receive comments, (2) a 30-day advance notice (not an EIS) to Nevada of the Secretary’s intent to recommend the site to the President, (3) preparing a description of the repository and the waste packages, (4) preparing discussion of data collected during site characterization regarding the safety of the

site, (5) preparing a modified EIS, (6) collecting comments on the FEIS from CEQ, EPA, NRC, and the Interior Department, and (7) collecting and responding to the views and comments of Nevada on the proposed recommendation. 42 U.S.C.

10134(a)(1). Section 114 prescribes that all this material, including the EIS, shall be made available to the public when the Secretary submits his recommendation to the President. 42 U.S.C. 10134(a)(1). Thus, the statute requires release of the FEIS when the Secretary makes his recommendation but not before, and requires a 30-day advance notice, but not measured from the release of the EIS. Given the detailed attention given to the procedural steps, and the inconsistency of some with the CEQ decisionmaking structure, it is not reasonable to impute to Congress an intent to also impose the latter requirements on the Secretary's actions leading to the recommendation.

2. Nor does Section 114(f)(1) evidence such an intent. That section provides in part that “[a]ny recommendation made by the Secretary under this section shall be considered a major Federal action significantly affecting the quality of the human environment for purpose of [NEPA].” 42 U.S.C. 10134(f)(1). Read literally, this provision would designate the Secretary's recommendation, as opposed to the development of the repository, as the action whose environmental effects are to be evaluated. To avoid such an absurd result, it is only sensible to read this provision as

simply reinforcing the requirement for an environmental analysis of the proposed repository. See United States v. Granderson, 511 U.S. 39, 47 n.5, 55-56 (1994) (plain meaning interpretation of statute eschewed where it "leads to an absurd result."). What is not sensible is to read this provision as imposing the CEQ decisionmaking structure on the Secretary's actions when Sections 114(a)(1), (2)(A), and 3(A) expressly provide that it is the President, not the Secretary, who makes the decision to approve. 42 U.S.C. 10134(a)(1), (2)(A), 3(A). CEQ's filing, notice and record of decision requirements are focused on decisions concerning "major Federal actions[s]," not on proposals. At most, the Secretary's recommendation might be deemed a proposal for a major Federal action. Proposals, however, are not subject to the filing, notice and record of decision requirements. Rather under CEQ's regulations, a proposal to take major Federal action simply triggers the obligation to prepare an EIS. 42 U.S.C. 4332(2)(C).^{19/}

^{19/} Contrary to the view of Petitioners (Br. 68-69, 73), this case does not present the issue of whether there is a "clear conflict" between the NEPA obligation to prepare an EIS and DOE's other statutory duties. See Flint Ridge Development Co. v. Scenic Rivers Association of Oklahoma, 426 U.S. 776, 790-792 (1976) (limited time allowed by statute for agency to act irreconcilable with preparation of an EIS). See also Calvert Cliffs' Coordinating Committee, Inc. v. AEC, 449 F.2d 1109, 1115, 1117-1129 (D.C. Cir. 1971) (regulations of the AEC did not implement NEPA to the "fullest extent possible"). Here, the NWPA indisputably requires an EIS to accompany the Secretary's recommendation. The issue is whether Section 114, requiring an EIS and prescribing the process for submitting that

3. Even if the Secretary should have followed the CEQ process, Petitioners have failed to discharge their burden of showing any prejudicial error. See County of Del Norte v. United States, 732 F.2d 1462, 1466-1467 (9th Cir. 1984) (no relief for insubstantial nonprejudicial error in complying with CEQ filing and delay of decision requirements); Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017, 1022-1023 (9th Cir. 1980) (no relief for failure to comply strictly with NEPA requirement to obtain comment); Realty Income Trust v. Eckerd 564 F.2d 447, 456 (D.C. Cir. 1977) (no relief warranted for untimely filing of otherwise adequate EIS with congressional committee); 5 U.S.C. 706 (reviewing court to apply rule of prejudicial error).

Petitioners assert (Br. 71) prejudice to the ability of other agencies to make referrals to CEQ of proposed actions determined to be environmentally unsatisfactory. See 40 C.F.R. Part 1504. The specific agencies whose comments are required, CEQ, NRC, EPA, and the Interior Department, at no time expressed an intent to make a referral (NR-1.02838, NR-1.02833 at 1-2, NR-1.02858, NR-1.0246). Petitioners fail to identify any other agency that advised DOE in comments

recommendation, also requires the Secretary to follow CEQ's decisionmaking structure. This presents an issue of statutory construction, not the reconciliation of a conflict between a requirement of NEPA and the agency's other statutory responsibilities.

on the draft EIS of an intent to make such a referral, as required by 40 C.F.R. 1504.3(a)(2). In any event, Petitioners cannot show prejudice to themselves by speculating what other government agencies might have done.

Petitioners also allege (Br. 71) their ability to persuade the Secretary was hampered by not having the FEIS. Yet Petitioners present no specific instances of how their efforts were prejudiced. DOE provided myriad opportunities for the State and others to present their objections, including accepting comments on a preliminary Site Suitability Evaluation, a draft EIS, and a supplemental draft EIS (FEIS at CR-1-3; SRCSD at viii-ix). Moreover, it gave Nevada 30 days advance notice of the Secretary's intention to make a favorable recommendation. As the Ninth Circuit has held, CEQ's requirement for filing and delay of decision are not intended to provide an additional round of public comment and review. County of del Norte, 732 F.2d at 1466, citing California v. Block, 690 F.2d 753, 771 (9th Cir. 1982). Petitioners have not asserted that any changes appearing in the FEIS were so significant as to require supplementation of the EIS. See 40 C.F.R. 1502.9(c). This is an implicit concession that the draft EIS and supplemental draft EIS were sufficient for Petitioners to present their objections to the analysis and potential

recommendation.^{20/}

B. DOE included the appropriate no-action alternative in the FEIS. “In requiring consideration of a no-action alternative, the [CEQ] intended that agencies compare the potential impacts of the proposed major federal action to the known impacts of maintaining the status quo.” Custer County Action Assoc. v. Garvey, 256 F.3d 1024, 1040 (10th Cir. 2001) (citing Association of Public Agency Customers v. Bonneville Power Administration, 126 F.3d 1158, 1188 (9th Cir. 1997), and 46 FR 18,026, 18,027 (1981)). The only exception is if the choice of no-action by the agency would result in “predictable actions by others.” 46 FR at 18,027. Thus, “if denial of a permission to build a railroad to a facility *would lead* to construction of a road and increased truck traffic, the EIS should analyze this consequence of the ‘no action’ alternative.” Id. (emphasis added). The agency’s discussion of the no-action alternative need not be elaborate. See Headwaters, Inc. v. Bureau of Land Management, 914 F.2d 1174, 1181 (9th Cir. 1990).

^{20/} Petitioners also suggest (Br. 73) that the requirement in Section 114(a)(1)(F) for DOE to obtain the views and comments of Nevada required DOE to give Nevada the FEIS in advance of the recommendation. Congress, however, specified in separate subsection, 114(a)(1)(D), the entities whose comments on the FEIS were required, CEQ, EPA, NRC, and the Interior Department. 42 U.S.C. 10134(a)(1)(D). The omission of Nevada defeats the claim that a similar requirement was implicitly imposed in Section 114(a)(1)(F).

In the NWPA, Congress significantly limited DOE's duty to consider alternatives in the FEIS by providing that DOE is not required to consider "alternatives to geologic disposal." 42 U.S.C. 10134(a)(1)(D). Petitioners suggest this only suspends DOE's duty to consider "action" alternatives (Br. 75 & n.25). However, on its face the provision eliminates any obligation to consider any alternative to geologic disposal. Nevertheless, DOE opted to analyze a no-action alternative in the FEIS "to provide a basis for comparison to the impacts of the Proposed Action and because [the no-action scenarios] reflect a range of impacts that could occur" (FEIS S-36).

1. DOE's no-action alternative was reasonable and consistent with the CEQ Guidance and the NWPA. Congress intended that the Yucca Mountain repository be a permanent solution to the Nation's SNF and HLW disposal problem. In the event DOE terminated the Yucca Mountain project, the agency would prepare a report to Congress with its recommendations for further action to ensure the safe, permanent disposal of SNF and HLW, including the need for new legislative authority (FEIS at 2-64). See 42 U.S.C. 10133(c)(3)(F). Congress would then adopt whatever legislation it deemed appropriate. DOE acknowledged that a number of possibilities could be pursued if the Yucca Mountain repository project was terminated, including storage of SNF and HLW at one or more centralized locations, study and selection of

another location for a deep geologic repository, reconsideration of alternatives to geologic disposal, or development of new technologies (FEIS at 2-64, 7-1 to 7-6, 1-22). The environmental consequences of these possibilities were analyzed in documents referenced in the FEIS and included in the record (FEIS 7-1 to 7-6). However, as the FEIS recognized, it is uncertain what course Congress, DOE, and the commercial utilities will take if the Yucca Mountain project is terminated (FEIS 2-64, 7-1).

Accordingly, consistent with CEQ guidance, DOE's no-action alternative assumed that, if Yucca Mountain were not developed as a repository, utilities and DOE would continue to manage SNF and HLW on-site (FEIS 2-64). Because of the uncertainties in predicting how on-site storage facilities will be operated for the next 10,000 years, DOE included two different "bounding" scenarios within the no-action alternative.^{21/} Scenario one assumed that utilities and DOE would continue on-site storage with effective institutional control of SNF and HLW for the next 10,000 years, including regular maintenance and continuous monitoring (FEIS 7-20-22).^{22/} Scenario two also assumed that utilities and DOE would continue on-site storage, but

^{21/} As discussed *infra* at 86-87, the use of bounding scenarios is a reasonable and accepted method of addressing uncertainty in environmental analyses.

^{22/} Institutional control is defined at FEIS 1-22.

assumed that effective institutional control would continue for only the next 100 years (FEIS 7-33).

Petitioners assert that the premise of scenario two that institutional control would be lost after 100 years is not credible (Br. at 79). While DOE and commercial utilities intend to maintain control of nuclear storage facilities as long as necessary, the second scenario was included “to provide a basis for evaluating an upper limit of potential adverse human health impacts” (FEIS 7-33). The loss of institutional control after 100 years assumption was based on a review of generally applicable requirements “that discount altogether the consideration of institutional control after 100 years for purposes of conducting performance assessments” for disposal facilities (FEIS S-30; see also FEIS CR 9-6-7).^{23/} Furthermore, Petitioners’ argument on this point goes to only one of the two scenarios included in the no-action alternative. The assumptions of scenario one were highly favorable to the no-action alternative, and DOE fully analyzed the environmental effects of both scenarios for purposes of comparison with the proposed action (FEIS S-74-76 and Chapter 7).

^{23/} The generally applicable requirements included EPA’s “Radiation Protection Standards for Management and Disposal of Spent Nuclear Fuel, High-Level and Transuranic Radioactive Wastes,” 40 C.F.R. Part 191 (see §191.14(a)); NRC’s “Licensing Requirements for Land Disposal of Radioactive Waste,” 10 C.F.R. Part 61 (see §61.59(b)); and the National Research Council report on standards for the proposed Yucca Mountain Repository (NR-1.08340). Id.

DOE also took measures to avoid overstating the adverse impacts of the no-action alternative so as to avoid any arguable overestimation of the benefits of geologic disposal (see FEIS 7-9-10 (discussing institutional controls, corrosion rates, and radionuclide inventories for the no-action alternative)).

Petitioners assert (Br. at 80) that the inventory of SNF or HLW used in the no-action alternative differs from that used in the proposed action and that as a result the impacts of the proposed action are understated. This issue was not raised by Petitioners during the comment period. In any event, the FEIS clearly states that the no-action analysis is constructed with “identical spent nuclear fuel and high-level radioactive waste inventories” (FEIS 7-9). “The amount of spent nuclear fuel and high-level radioactive waste considered in this analysis [no-action] is the same as that in the Proposed Action- 70,000 MTHM” (FEIS 2-2).^{24/}

Petitioners extensively criticize DOE’s alleged assumption of “no construction for onsite storage” and “no spent fuel storage construction” (Br. at 76, 78-80). In fact, the no-action alternative does assume new spent fuel storage construction for onsite storage (FEIS 2-65-68). The FEIS noted that most SNF is currently stored in water-filled basins at reactor sites, but that dry storage is the preferred alternative for

^{24/} The NWPA limits the volume that may be disposed of at Yucca Mountain. to 70,000 MTHM. 42 U.S.C. 10134(d).

long-term SNF storage (FEIS at 2-66). “Accordingly, the EIS assumes that all commercial spent nuclear fuel would be in dry storage at independent spent fuel storage installations at existing locations” (*id.*; see also FEIS 7-16 -20, CRD 9-65). Thus, DOE’s no-action alternative assumes that utilities currently lacking on-site dry storage facilities would construct those facilities, the scenario Petitioners term “realistic, economical and predictable” (Br. at 80).

2. Petitioners’ alternatives fail to establish that DOE’s no-action alternative was arbitrary and capricious. The alternatives Petitioners argue for, other than the construction of new on-site storage facilities, were properly not included in the no-action alternative. The “PECO alternative” (Br. at 81), was not raised in comments on the Draft EIS or the Supplement. Moreover, as Petitioners describe it, the “PECO alternative” to geologic disposal requires actions by DOE, including taking title to a utility’s SNF on the reactor site and paying the utility’s costs of on-site storage (Br. at 81). Since the Eleventh Circuit ruled that DOE may not use utility trust fund money to pay for this alternative, Alabama Power Co. v. DOE, 307 F.3d 1300 (11th Cir. 2002), DOE would have to obtain new funding from Congress to implement the PECO alternative. Thus, this alternative is exactly the type of “action” alternative that Petitioners have acknowledged is not required by NWSA section 114(a)(1)(D) (Br. 75 & n.25).

Furthermore, the fact that DOE entered into an agreement with one utility, PECO, that was later overturned on judicial review is hardly sufficient to establish that this is a predictable alternative that Congress, DOE, and the nuclear power industry will adopt in the event of no-action on Yucca Mountain. Finally, Petitioners fail to acknowledge that the PECO alternative is simply another way to pay for continued on-site storage – the no-action alternative that was included in the FEIS. Petitioners fail to explain how it is of any consequence from the perspective of the environmental analysis whether the utilities or DOE pay for continued on-site storage.

That it was reasonable for DOE not to select the PECO alternative as the no-action alternative is confirmed by the Senate Committee on Energy and Natural Resources' rejection of this "alternative" when Nevada proposed it to Congress during consideration of the Joint Resolution. The PECO alternative, the Committee stated, "does not offer a permanent solution to the Nation's nuclear waste management problem. It would relinquish the progress that has been made over the past 20 years and return us to the policy of wishfully waiting, Macawber-like, for something to turn up." S. Rep. 107-159 at 11 (RA 29).

Petitioners imply that the transfer of SNF to centralized sites for interim storage in above-ground facilities is predictable in the event of no-action on Yucca

Mountain (Br. at 77-78). However, the documents they cite show only that this would be a potential option, among others, that may receive increased attention in the event of no-action (e.g., NR-1.08640, NR 1-03341). DOE recognized as much in the FEIS, but the agency could not predict that this or any other specific alternative would be adopted (FEIS 2-64, 7-1 to 7-6, 1-22). Therefore, DOE was not required to include centralized interim storage in the no-action alternative.

Petitioners rely upon a memo written by Stan Lichtman discussing a “Proposed Scenario Concept” based on centralized interim storage (Br. at 77-78). That different views were expressed during the deliberative process does not make DOE’s decision arbitrary and capricious. Furthermore, the memo is consistent with DOE’s reason for selecting the status quo as the no-action alternative in that it acknowledges the “inherent uncertainty regarding No Action” (NR 1-.03341). Mr. Lichtman believed that such uncertainty should have been addressed by “explicitly considering [in the no-action alternative] more possibilities than continued in situ storage” (id.). That is not what CEQ’s guidance provides. Uncertainty regarding future events means that the status quo should be selected as the no-action alternative, not that the agency should include a menu of speculative possibilities. DOE correctly applied CEQ’s guidance.

C. The FEIS correctly defines the proposed action. Petitioners argue (Br. 82-

84) that DOE's description of the proposed action in the FEIS as a "geologic repository" is incorrect based on the assertion that DOE unlawfully recommended approval of a repository that relied primarily on engineered, and not geologic, barriers. That claim fails, however, for the reasons set out at pp. 41-69, *supra*.

Second, there is no discrepancy between the description in the Recommendation of the number of sites storing SNF and HLW and the number of sites discussed in the FEIS (Br. 84). The distinction is that the Recommendation totaled the number of sites where such materials are "currently" stored by adding the 118 commercial nuclear power reactors (FEIS, Table A-3) to all the locations where DOE SNF and HLW is stored. The latter include the three "primary" sites, Hanford, Idaho National Engineering and Environmental Laboratory, and the Savannah River site (FEIS, A-21-22), plus other sites where smaller quantities of SNF and HLW are stored, such as Oak Ridge Reservation and university research reactors (FEIS 1-6-7, A-21-27). The FEIS transportation analysis refers to 77 sites because some places where SNF are stored are so close together they are treated as one site for the analysis. For example, the two reactors comprising Arkansas Unit One (FEIS Table A-3), each counted separately in the Recommendation, are treated as one site for the EIS analysis (FEIS Table A-7). Also, DOE anticipates consolidating all of its own material at 5 locations (FEIS 1-3, 1-6-7). Thus, there is no significant discrepancy

between the two descriptions of the location of spent fuel and waste.

D. DOE properly used bounding analyses to evaluate the impacts of a project whose design is necessarily evolving. – Petitioners argue (Br. 85-88) that the FEIS is inadequate because DOE has not made final decisions on a range of design issues for the repository and impermissibly compensated for this lack of information through the use of “bounding analyses.”

In the FEIS, DOE explained (FEIS 2-5):

DOE recognizes that plans for the repository would continue to evolve during the development of the final repository design and as a result of the U.S. Nuclear Regulatory Commission licensing review of the repository. While the design continues to evolve, it is based on decades of similar experience in mining operations and the management of spent nuclear fuel and other radioactive materials, as well as the ongoing site characterization and performance confirmation activities and results. In addition, decisions on how spent nuclear fuel and high-level radioactive waste would be shipped to the repository (for example, truck or rail) and how spent nuclear fuel would be packaged (uncanistered or in disposable or dual-purpose canisters) would be part of future transportation planning efforts. For these reasons, DOE developed implementing alternatives and analytical scenarios to bound the environmental impacts likely to result from the Proposed Action in the EIS * * *. The Department selected the implementing alternatives and scenarios to accommodate and maintain flexibility for potential future revisions to the design and operation of the repository. Because of uncertainties, DOE selected implementing alternatives and scenarios that incorporate conservative assumptions that tend to overstate the risks to address those uncertainties.

Petitioners do not contend there are errors in the bounding analyses or the

conclusions the agency reached on the basis of those analyses. Instead, they argue (Br. 87-88) such analyses are not permitted in NEPA analysis. To the contrary, use of bounding analyses is an appropriate analytical method to account for uncertainties and incomplete information and has been approved by the courts. See Hodges v. Abraham, 300 F.3d 432, 447 (4th Cir. 2002), cert. denied, 123 S.Ct. 871 (2003) (DOE took the requisite “hard look” when it concluded that risks for storage of plutonium were not significantly different than “or are bounded” by the impacts disclosed in prior EIS); South Carolina v. O’Leary, 953 F. Supp. 699, 708 (E.D. S.C. 1996) (DOE permissibly examined worst-case scenarios in a “bounding” analysis through which the “EIS by implication considers lesser risks when it looks at greater risks.”). ^{25/}

Nor is such an approach contrary to DOE guidance for preparing impacts analyses. As Petitioners note (Br. 87 & n.37), DOE has warned in informal guidance against reliance on prior bounding analyses of not-yet-proposed actions when later considering the environmental impacts of such activities (SA-002). But that is not

^{25/} This approach is fully consistent with CEQ regulations, which provide that where there is incomplete or unavailable information, the agency should disclose the lack of such information and present an analysis “based upon theoretical approaches or research methods generally accepted in the scientific community.” 40 C.F.R. 1502.22.

what DOE has done here. The agency addressed the uncertainties and lack of information attributable to the state of the design by analyzing effects over a range of conservative, reasonable assumptions of the design options for the repository. The guidance identified by Petitioners expressly approves of such an approach (*id.*).

To the extent Petitioners are suggesting that the FEIS should have been delayed until the design was finalized, the State has failed to show that DOE's contrary conclusion was unjustified. The agency determined, based on the level of information and analysis as well as analytic methods and approaches founded on conservative assumptions, that the environmental impacts could be adequately analyzed under NEPA (FEIS 2-5, S-34-35, CR-10-11). DOE's decision to proceed with that analysis implements CEQ's directives to undertake NEPA analyses as early as possible in the planning and decisionmaking process. 40 C.F.R. 1500.5(a); 1501.2, 1501.2(d)(3).

E. The FEIS thoroughly analyzed transportation impacts. DOE has not yet decided how SNF and HLW will be transported to Yucca Mountain. Accordingly, the FEIS analyzes the range of transportation impacts of the proposed action based upon the transportation alternatives DOE is considering. Petitioners erroneously claim this constitutes unlawful segmentation of the proposal's transportation impacts (Br. at 88-90).

“[W]hen several proposals for * * * actions that will have cumulative or synergistic environmental impact on a region are pending concurrently before an agency, their environmental consequences must be considered together.” Kleppe v. Sierra Club, 427 U.S. 390, 410 (1976). But NEPA “speaks solely in terms of proposed actions; it does not require an agency to consider the possible environmental impacts of less imminent actions when preparing the impact statement on proposed actions.” Id. at 410 n.20. Thus, NEPA does not require that an EIS analyze two projects that are “historically distinct, one of which is proposed and the other still in the process of study and design.” Environmental Defense Fund v. Marsh, 651 F.2d 983, 999 (5th Cir. 1981). Accord Society Hill Towers Owners’ Assoc. v. Rendell, 210 F.3d 168, 180-82 (3rd Cir. 2000); National Wildlife Fed’n v. FERC, 912 F.2d 1471, 1478 (D.C. Cir. 1990).

The CEQ regulations, like the case law, permit agencies to engage in phased decision-making. For example, the regulations provide for supplementation of EIS’s in specified circumstances, including when an agency makes substantial changes to a project. 40 C.F.R. 1502.9(c)(1)(i). The regulations encourage federal agencies to prepare EIS’s for federal projects at the feasibility (go/no-go) stage of analysis and to supplement the EIS at later stages as necessary. 40 C.F.R. 1502.5(a). And the regulations encourage “tiering,” in which agencies prepare a broad impact statement

to cover a broad agency program or policy, followed by more detailed local analyses in NEPA documents prepared for subsequent site-specific actions. 40 C.F.R.

1502.20. See Ohio Forestry, 523 U.S. at 729-30.

Neither the case law regarding segmentation nor the CEQ regulations required DOE to issue a record of decision concerning transportation before it published the FEIS – approximately ten years before shipments of SNF and HLW to Yucca Mountain are likely to even begin. Whether or not DOE could have deferred the analysis of transportation impacts to a later EIS is a question the Court need not decide, because in the FEIS DOE comprehensively analyzed the environmental impacts of the transportation alternatives under consideration. At the time the FEIS was prepared, DOE had identified “mostly rail” as its preferred mode of transportation but had not yet issued a record of decision to select a mode or route of transportation (FEIS S-2). DOE also had not identified a preference among the five potential rail corridors in Nevada for a branch line to Yucca Mountain, should that be part of the selected alternative (*id.*). Nevertheless, the FEIS evaluated the environmental effects of two national transportation scenarios, identified as “mostly legal-weight truck” and “mostly rail,” that DOE determined “cover the reasonably foreseeable range of transportation impacts to human health and the environment” (FEIS at S-21, 2-46-47). To evaluate the range of transportation impacts within

Nevada, the FEIS evaluated three transportation scenarios: legal-weight trucks, rail, and a combination of rail and heavy-haul trucks (id. at 2-48-51).

Of the 5,000 pages that make up the FEIS, more than 25% relate specifically to transportation, including the longest chapter, the longest Appendix, and 685 pages of comment responses. The FEIS evaluated, summarized, and compared the environmental impacts of the transportation alternatives at both the national level and in Nevada (FEIS 2-86-93 and Chapter 6). The methods used to evaluate transportation impacts were detailed in FEIS Appendix J. DOE's extensive analysis of the environmental impacts of the transportation alternatives shows that it has taken a hard look at the issue, and thus there has been no unlawful segmentation. See Communities, Inc. v. Busey, 956 F.2d 619, 625-26 (6th Cir. 1992).

Petitioners complain that the FEIS does not disclose the routes for shipments (Br. at 89-90). The Petitioners should not expect the FEIS to identify every route from 77 locations across the nation that would be followed many years from now when shipments to Yucca Mountain are likely to begin. Before then, state or tribal governments may designate alternate preferred highway shipping routes, FEIS J-30, and highways and rail lines could be built or modified. "Nonetheless, [the] analysis used current regulations governing highway shipments and historic rail industry practices to select existing highway and rail routes to estimate potential

environmental impacts of national transportation” (FEIS J-23).^{26/} DOE followed the same approach and provided the same information in evaluating transportation impacts within Nevada (FEIS 2-48-51, J-87-97). DOE also described five potential corridors for the rail branch line alternative and three intermodal transfer facility locations for the rail/heavy-haul truck alternative (FEIS 2-51-55).

Petitioners claim that the FEIS does not disclose the number of shipments (Br. at 89). However, the FEIS explained that, for the proposed action, there would be an estimated 52,786 truck and 300 rail shipments under the mostly truck scenario, or 1,079 truck and 9,646 rail shipments under the mostly rail scenario (FEIS Table J-1).

Thus, DOE has not “failed * * * to follow its own official guidance to EIS preparers on how to avoid illegal segmentation” (Br. 91).

F. Petitioners cannot pursue premature claims regarding the legality of the aging facility and disposal of immobilized plutonium in the guise of alleged NEPA violations. – The FEIS’s option to operate a lower temperature repository included as part of that option an aging facility where SNF will be stored until it has been cooled sufficiently (FEIS 2-12, 2-23-24). Petitioners assert (Br. 90-91) this facility is

^{26/} The FEIS includes maps showing the national rail and truck routes selected (FEIS J-24-25).

impermissible under the NWPA. Petitioners also argue (Br. 92-93) that DOE analyzed the disposal of immobilized plutonium in the repository, which they likewise assert is impermissible under the NWPA. Petitioners fail, however, to even assert a basis for a claim that there has been a NEPA violation, and they would be hard pressed to do so, since even if they are correct (which they are not), NEPA plainly permits agencies to consider reasonable options that are not within their current statutory authority. See 40 C.F.R. 1502.14(c). Petitioners, in effect, under the guise of NEPA, seek adjudication from the court of non-NEPA claims, i.e. the legality of an aging facility and the legality of disposal of immobilized plutonium.

These are issues which may at some time be ripe for adjudication but certainly not at this time and certainly not as part of a lawsuit claiming NEPA violations. For example, DOE has not made a decision on whether to pursue the aging facility option analyzed in the FEIS. Should it do so, the legality of this approach under the NWPA would be a question that would be within the primary jurisdiction of the NRC as part of the process of adjudicating a license application.^{27/}

^{27/} Furthermore, Petitioners present nothing but their conclusory allegation in response to DOE's view that such an aging facility is not prohibited.

DOE does not believe that the siting limitations for interim storage facilities in the Nuclear Waste Policy Act constrain the operational flexibility or ultimately the long-term performance of the repository.

Further, Petitioners would have this court opine on the legality of disposal of immobilized plutonium even though DOE has officially revised its earlier decision and does not intend to proceed with its earlier plans to immobilize this material. 67 FR 19432, 19434.^{28/}

G. DOE explained the basis of its conclusion that a RCRA permit is not required for the disposal at Yucca Mountain. According to Petitioners, DOE failed to address the issue of whether the project will require either a hazardous waste disposal permit under the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. 6901 et seq., “or, alternatively, a ‘de-listing’ of waste constituents” (Br. 95). This claim, like the two preceding ones, improperly invites the Court to address prematurely the extent to which certain legal requirements will apply to the Yucca Mountain repository many years from now. DOE satisfactorily addressed this issue to the degree it was required to under NEPA by explaining why it concluded a

Rather, the Department believes that the spent nuclear fuel aging facility option constitutes a potential operational element of the repository.

(FEIS-CR4-43).

^{28/} In any event, Petitioners did not present this objection in comments on the draft EIS or its supplement (FEIS CR 6-11-12; NR-1.08927; NR-1.06067), and have accordingly waived this claim. See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council Inc., 435 U.S. 519, 553-554 (1978); State of Ohio v. EPA, 997 F.2d 1520, 1528-1529 (D.C. Cir. 1993).

RCRA permit would not be required.

[U]nder current Civilian Radioactive Waste system requirements, DOE could not accept hazardous waste for disposal at Yucca Mountain. Before shipping to Yucca Mountain, DOE would treat materials that contained hazardous components to eliminate the hazardous waste characteristics. Before shipping materials containing hazardous components listed under Subpart D of Part 261 or applicable state requirements, DOE would process any necessary delisting petitions with the appropriate regulatory authorities. * * * DOE does not expect to need a Resource Conservation and Recovery Act permit for its activities at the proposed repository.

(FEIS 11-13-14; see also CR 7-695).^{29/}

^{29/} Although the Court need not address the many technical details of RCRA in order to decide the NEPA issue, we will briefly explain the basis of DOE's response. RCRA provides for the identification and listing of hazardous waste. See 42 U.S.C. 6921. A hazardous waste is subject to standards governing the generation, transport, treatment, storage, and disposal of such wastes. 42 U.S.C. 6922-24. Under RCRA, a solid waste can be a hazardous waste if (1) it is not excluded from regulation and (2) it either exhibits certain specific characteristics (ignitability, corrosivity, reactivity, or toxicity) or (3) it has been listed by EPA as a hazardous waste in 40 C.F.R. Part 261, Subpart D. 40 C.F.R. 261.3. When a characteristic waste is treated so that it no longer exhibits any characteristic of a hazardous waste, it is no longer a hazardous waste unless it has been listed. See 40 C.F.R. 261.3(d)(1). Listed hazardous wastes remain classified as hazardous unless they are delisted by EPA or an authorized state. See 40 C.F.R. 261.3(d)(2). Thus, the substance of DOE's response was that any characteristic hazardous waste would be treated and any listed hazardous waste would be delisted prior to shipment to the Yucca Mountain repository so that the repository would not require a RCRA hazardous waste permit. If DOE were to seek but Nevada did not adopt a delisting, federal legislation might be required for the delisting to take effect prior to disposal of the waste in Nevada. Contrary to Petitioners' claim (Br. at 95-96), if such

DOE thus adequately explained the basis of its conclusion that the project would not require a RCRA hazardous waste permit. This was sufficient to meet DOE's obligations under NEPA. See 40 C.F.R. 1508.27(b)(10). Moreover, consistent with the fundamental objective of NEPA, DOE adequately analyzed the environmental impacts from the hypothetical release of chemically toxic material from the engineered barriers and waste packaging. As a result DOE determined that there would not be releases of chemically toxic constituents in excess of applicable regulatory levels (FEIS S-7, S-32, I-28, I-52-62). Since DOE fulfilled its obligations under NEPA, the Court should decline Petitioners' invitation to engage in a speculative inquiry concerning the extent to which particular materials may constitute hazardous wastes under RCRA when and if they are disposed of at the repository many years from now.

H. The FEIS fully complied with NEPA requirements in considering the environmental impacts of sabotage or terrorist activities. Petitioners allege that DOE failed to address "realistic" sabotage scenarios involving spent fuel transport (Br. 96). The FEIS considers various severe accidents, including the crash of an aircraft into a transportation cask in transit loaded with spent nuclear fuel, as well as

legislation was enacted a new EIS would not be required because legislative actions are not covered by NEPA.

the consequences of a potential sabotage event (*i.e.*, the penetration of a spent fuel cask by a high energy density device). The FEIS concludes that the “consequences of both the maximum reasonably foreseeable accident and the aircraft crash * * * provide an approximation of the types of consequences which could occur from a sabotage event” (FEIS at 6-51).

Petitioners do not challenge this general finding. Instead, Petitioners challenge the analysis of the sabotage event considered in the FEIS on the ground that DOE used “a now-obsolete missile instead of a state-of-the-art ‘TOW’ missile” in estimating the impacts that could result were a spent fuel cask to be hit by a high energy density device (HEDD) (Br. 96).

The FEIS based the sabotage event analysis on a 1999 study by Sandia National Laboratories, which was prepared “to develop a source term for estimating the radiological consequences of potential sabotage events during transport of spent nuclear fuel in the early decades of the 21st century” (DIRS 104918 at 5).^{30/} The Sandia study was undertaken to update the results of previous studies conducted in the late 1970s and early 1980s to estimate source terms for an “optimally successful

^{30/} The Sandia study defines “source term” as “[t]he amount of radioactive material released to the environment as a result of an event” (DIRS 104918 at 5 n.1).

act of sabotage on spent fuel casks” then available for use in transporting spent nuclear fuel (DIRS 104918, Abstract). Petitioners mistakenly assert that “[t]he sole terrorist scenario analyzed by DOE [was] in a study conducted in the late 1970s.” (Br. 96). As even the most cursory examination makes clear, the Sandia study states that “[t]wo major studies,...were conducted in the late 1970s and early 1980s” and “[t]his report applies the results of those studies *and* additional analysis” (DIRS 104918 Abstract, at 10 (emphasis added)).

Sandia considered 15 devices before choosing two, HEDD1 and HEDD2, for detailed analyses (CR8-459). HEDD1 is the same device that was used in full-scale testing in the early 1980s, and HEDD2 is a newer device designed for “optimal armor penetration and capable of remote, rocket-propelled delivery” (DIRS 104918 at 6). The FEIS based its analysis of the environmental impacts of a sabotage event on the results for HEDD1 because it would be expected to cause the most damage (MOL.20020209.0097).

In contrast to Petitioners’ bald assertions, such as their claim that “an exploding TOW missile might shred the front and back hulls of a cask moving through a city” (Br. at 97-98), the Sandia study sets forth the technical reasons for its conclusion that, although both HEDD1 or HEDD2 could penetrate a single wall of a nuclear spent fuel cask, neither device would penetrate both cask walls (DIRS

104918 at 47). The purpose of the Sandia study was to report “results of optimally successful attacks with a type of device thought to produce significant damage” (DIRS 104918 at 5), and it concluded that penetration of a single cask wall could result in a release of radioactive material (CRD8-479). This type of penetration and its resulting release of radioactive material, however, differ from a criticality, which the FEIS defines as “the condition in which nuclear fuel sustains a chain reaction” (FEIS 14-10). Mere conjecture by Petitioners that a criticality could result from a missile attack is an insufficient basis for requiring further analysis under NEPA. Limerick Ecology Action v. NRC, 869 F.2d 719, 744 & n.31 (3rd Cir. 1989); Nat’l Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972).

Lastly, Petitioners’ assertion that the FEIS made no estimate of the costs that would be incurred in cleaning-up radioactive materials contamination is without merit (Br. at 97). Appendix J of the FEIS contains an analysis of the costs of cleanup and ecological restoration, and that information would be as applicable to contamination from a transportation accident as to contamination from an intentional act of sabotage (Appendix J at 72-74).

CONCLUSION

For the reasons set out above, the petitions for review should be denied.

Respectfully submitted.

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I certify that the foregoing brief is printed in 14 point proportional typeface (Times New Roman) and contains 22,996 words.

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