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The State of California opposes the appeal by the NRC Staff to the May 11, 2009, order of the Construction Authorization Boards admitting contention CAL-NEPA-5 in this proceeding. CAL-NEPA-5 alleges that the Department of Energy's (DOE) National Environmental Policy Act (NEPA) documents cannot be adopted by NRC because they are based on an incomplete and inaccurate project description, in that a doubling or tripling of Yucca Mountain's capacity is reasonably foreseeable due to DOE's request to Congress to authorize such a capacity increase.

The Staff has appealed the Boards' decision to admit a number of what the Boards designated as "legal" contentions, of which CAL-NEPA-5 is one. The Staff argues that the Boards erred by admitting these legal contentions, including CAL-NEPA-5, when the contentions are beyond the scope of this proceeding and are not supported by facts. Neither of these arguments is valid as to CAL-NEPA-5.

I. EXPANSION OF THE CAPACITY OF THE REPOSITORY IS REASONABLY FORESEEABLE AND MUST BE ANALYZED NOW IN ORDER FOR THE NEPA ANALYSIS TO BE MEANINGFUL.

A. Because of the Overwhelming Momentum That Will Urge Expansion of the Repository at Yucca Mountain, the Full Cumulative Effects of an Expanded Repository Should Be Examined Now.

The Staff argues that only the Repository capacity that is currently authorized under the Nuclear Waste Policy Act (NWPA) need be looked at in any DOE or NRC NEPA documents. Staff Appeal at 11-12. However, it is well established NEPA law that, to be meaningful, a full NEPA analysis must be done early enough in the agency approval process that bureaucratic momentum does not make the decision inevitable and make the consideration of alternatives hollow. *Arlington Coalition on Transportation, et al. v. Volpe*, 458 F.2d 1323 (4th Cir. 1972); *Colorado Wild v. U.S. Forest Service*, 523 F. Supp. 2d 1213, 1221 (D. Colo. 2007); *In the Matter of U.S. Dept. of Energy Project Mgm't Corp. Tennessee Valley Authority (Clinch River Breeder*

Reactor Plant), 15 N.R.C. 362, 372 nt. 22 (Bradford, concurring) (“As the economic commitment grows, the safety and environmental reviews are inevitably subject to increasing economic pressure. For all of the Commission's past protestations to the effect that the work is done at the risk of the applicant, this has rarely been completely true and is in any case unpersuasive when the applicant is government funded to so great an extent.”)

The NRC has often stated that this proceeding is *sui generis*, and this is one of the ways in which it truly is so. The Yucca Mountain licensing proceeding could be one of the most extreme examples of the potential for the phenomenon of “momentum” in the history of NEPA. It has been well over 20 years since the NWPA designated Yucca Mountain as the proposed site for the Repository, and longer than that since the search for a repository site began. If the Repository is built at Yucca Mountain, the momentum to keep it there, to avoid restarting another potentially decades-long search process, will inevitably weaken or compromise attempts to meaningfully consider alternative sites. If the Repository is approved and constructed, there will inevitably be enormous, overwhelming pressure to approve the relatively simple process of constructing additional emplacement tunnels in an already permitted site, rather than to begin again the lengthy and technically and politically contentious process of locating, characterizing, permitting, and building a second site. It is for this reason that the analysis of the environmental impacts of both the Repository at 70,000 MMT capacity *and* the Repository at the 130,000 MMT capacity -- which is only briefly and inadequately discussed in the cumulative impacts section of the Repository SEIS -- must occur now, before bureaucratic momentum becomes insuperable. *Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105, 1108 (9th Cir. 2000).

B. NEPA Requires Examination of Feasible Alternatives, Even If They Are Not Currently Within the Legal Power of the Applicant to Carry Out.

The only way a meaningful environmental examination of the expansion of Yucca Mountain can be done is if it is done now. The Council on Environmental Quality makes clear that a meaningful analysis of alternatives in the EIS should include options that are beyond the applicant's capabilities, and even options that conflict with current federal law, although the discussion can take current law into account. CEQ, "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations," Question 2, available at <http://ceq.hss.doe.gov/NEPA/regs/40/40p1.htm>. Here, DOE clearly believes that even though the federal law currently constrains the capacity of Yucca Mountain, Congress may change that law to put the ability to expand the Repository within DOE's capabilities in the future. DOE has recommended and is actively trying to bring about such a change in the law. Accordingly, it is reasonably foreseeable that the law may indeed change to allow expanded capacity at Yucca Mountain. As a reasonably foreseeable connected action, expansion of the Repository can and should be analyzed now.

II. CAL-NEPA-5 IS MATERIAL TO AND WITHIN THE SCOPE OF THIS PROCEEDING

The central ground on which the Staff appeals the admission of CAL-NEPA-5 is that it is purportedly outside the scope of this proceeding, because the licensing proceeding is limited to assessing the compliance by DOE with the NRC regulations in Part 63 as to a Repository limited to the 70,000 MMT capacity specified in the NWPA. Staff Appeal at 11-12. This is simply incorrect as a matter of law.

A. A Challenge to DOE’s NEPA Compliance, Including a Challenge to the Project Definition, Is Within the Scope of This Proceeding.

This licensing proceeding has already been held by the District of Columbia Court of Appeals to be the appropriate proceeding for any challenge to DOE’s NEPA documents. That court ruled in *Nuclear Energy Inst. v. U.S. Environmental Protection Agency*, 373 F.3d 1251, 1314 (D.C. Cir. 2004), as the Boards correctly point out, that any “substantive challenges to” DOE’s EISs could be raised “in any NRC proceeding to decide whether to adopt the [EIS]” for Yucca Mountain. (*NEI v. EPA*, 373 F.3d at 1313; Order at 29.) This is that proceeding, and will be California’s only opportunity to contest the deficiency alleged in CAL-NEPA-5. It is also the proceeding in which the Staff has recommended that the NRC adopt DOE’s NEPA compliance as NRC’s own NEPA compliance. This California’s only opportunity to raise and litigate the deficiencies California believes the documents have in front of the NRC in the context of licensing the facility.

A project description that is inadequate because it fails to include all aspects of the project is certainly a substantive deficiency. *See* Council on Environmental Quality NEPA regulations at 40 C.F.R. §1502.4 (“Agencies shall make sure the proposal which is the subject of an environmental impact statement is properly defined.”) CAL-NEPA-5 challenges the project description and is therefore a substantive challenge to DOE’s NEPA documents that can be raised in this proceeding.

B. The Practicability of NRC’s Adoption of DOE’s NEPA Documents as NRC’s Own NEPA Compliance Is Within the Scope of This Proceeding.

This proceeding is California’s opportunity to challenge NRC’s compliance with NEPA, through NRC’s possible adoption of DOE’s NEPA documents. The Staff has recommended that NRC adopt DOE’s NEPA documents, and NRC presumably will determine whether DOE’s

NEPA documents are adequate to serve as the NRC's own NEPA compliance. 10 C.F.R. §51.109(c), 10 C.F.R. §63.31(c) and section II, paragraph 1 of Notice of Hearing, 73 Fed. Reg. 63,031 (Oct. 22, 2008).

As part of its recommendation that NRC adopt DOE's NEPA documents as the NRC's own NEPA compliance, the Staff evaluated the cumulative analysis and declared that it meets the requirements of NEPA and the NRC's regulations. Staff Adoption Report at 3-4, 5-1. The cumulative impact analysis contains the analysis of a Repository with a capacity of 130,000 MMT, whose adequacy CAL-NEPA-5 challenges. The Staff explicitly stated its opinion that the treatment of cumulative impacts in DOE's NEPA documents "addresses the intent of Section 101 of NEPA," Staff Adoption Report at p. 3-4, and this cumulative impacts discussion is included in DOE's NEPA documentation that the Staff recommends for adoption by the NRC. Staff Adoption Report at p. 3-5 and 5-1 (stating that DOE's EISs comply with NRC NEPA requirements except as to certain aspects of the groundwater analysis).

In its Adoption Report, the Staff itself has explicitly vouched for the adequacy of DOE's cumulative impacts analysis, and has recommended inclusion of that cumulative analysis in NRC's NEPA compliance. The Staff should not now be allowed to say that the cumulative impacts analysis cannot be challenged in this proceeding, unless the Staff is willing and legally able to retract its recommendation. The NEPA documents that the Commission adopts must fully analyze and disclose the possible environmental consequences of the Commission's decision, including the cumulative impacts. California believes that DOE's NEPA documents do not do so adequately; its challenge is relevant and material to this proceeding.

As part of the proposed NRC NEPA compliance, the cumulative analysis must be within the range of what a party may challenge in the licensing proceeding. This proceeding is the

appropriate time and place to challenge the adoption of the DOE NEPA documents that the Staff has proposed.

Further, since NEPA is a process-oriented statute, the actual occurrence of that process is a materially different result for purposes of Part 63. NEPA carries out the Congressional mandate of ensuring that federal agencies make decisions with environmental impacts in mind through the “action-forcing” mechanism of the full analysis and full disclosure by such federal agencies of the environmental consequences of their proposed actions. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989). Compliance with this mandate through an adequate NEPA process and adequate NEPA documents constitutes a materially different result under NEPA.

III. CAL-NEPA-5 COMPLIES WITH NRC PLEADING REQUIREMENTS

The Staff also claims that the Boards admitted contentions that did not comply with the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1), but the Staff fails to point to any portion of the Boards’ order that shows that CAL-NEPA-5 was admitted on this basis. *See* Staff Appeal at 8. The Boards never made any finding or statement that CAL-NEPA-5 was being admitted despite a defect in pleading. That is merely an unsupported assumption by the Staff. Staff Appeal at 8 (“Although the basis for the admission of the legal contentions is not addressed with respect to each contention . . . it appears that the Board admitted these contentions notwithstanding the fact that not all of the admissibility standards were met.”) Moreover, the Staff Appeal itself does not even claim that California failed to support CAL-NEPA-5 with facts.

CAL-NEPA-5 plainly is supported by facts. CAL-NEPA-5 cites the presentation by DOE to the Congress of a document entitled “The Report to the President and the Congress by the Secretary of Energy on the Need for a Second Repository.” (DOE/RW-0595, 2008) An LSN

number was provided for that report: LSN CEC000000613. The contention cites to the content of that Report, in which DOE recommends to Congress that the current capacity limit for the Repository, contained in the Nuclear Waste Policy Act (NWPA), be removed (Report at 1, 8), and advises Congress of DOE's opinion that Yucca Mountain is physically capable of holding at least three times the amount of waste to which the NWPA currently limits it. (*Id.* at 8). The contention also cites to the portion of DOE's NEPA documents, found in the cumulative impacts analysis section (principally section 8 of the Repository SEIS), that discusses the possibility of an expanded Repository, and alleges that DOE's discussion of the potential environmental impacts of that expanded facility is inadequate. (California's Petition to Intervene, at 37-41.) Further, CAL-NEPA-5 is supported by an affidavit by Dr. Fred Dilger, presented in a form that the Boards found complied with NRC regulations. (California's Petition to Intervene, at Supporting Attachment 1.)

CONCLUSION

CAL-NEPA-5 is within the legal scope of this proceeding, alleges a substantive deficiency in DOE's NEPA compliance, complies with NRC pleading requirements, and was properly admitted by the Boards. That decision should be affirmed by the Commission.

Dated: May 31, 2009

Respectfully submitted,

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NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

In re:

U.S. DEPARTMENT OF ENERGY
(High-Level Waste Repository)

Docket No. 63-001

ASLBP Nos. 09-876-HLW-
CAB01
09-877-HLW-
CAB02
09-878-HLW-
CAB03

CERTIFICATE OF SERVICE

I hereby certify that the foregoing “California’s Opposition to NRC Staff Appeal of LBP-09-06,” dated May 31, 2009, has been served via the Nuclear Regulatory Commission’s Electronic Information Exchange (“EIE”) upon those on the Service List maintained by the EIE for the above-captioned proceeding, as listed below:

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Dated: May 31, 2009

Respectfully submitted,

[Signed electronically]
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