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January 2, 2008

Honorable Stephen L. Johnson, Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue N.W.
Washington, D.C. 20460

RE: Dec. 10 Fed. Reg. Notice on Yucca Mountain Rulemaking

Dear Mr. Administrator:

On December 10, the Environmental Protection Agency published a Federal Register notice (72 Fed. Reg. 69947) concerning the Agency's rulemaking on the public radiation dose standard for the proposed Department of Energy radioactive waste repository at Yucca Mountain. Although the notice appears to be a pro-forma announcement that EPA is still at work on a final version of 40 C.F.R. Part 197, it contains a number of statements that require comment and correction.

What stands out immediately is the extent to which the agency has unreasonably prolonged the Yucca Mountain rulemaking through its obstinate unwillingness to meet its public responsibilities. In the December 10 notice, EPA projects the date for a final rule as January 2008. If EPA meets this target, which is still of course uncertain, it will have taken an unconscionable three-and-a-half years to respond to a 2004 order of the D.C. Court of Appeals. The Court struck down a key portion of EPA's 2001 rule because the agency had blatantly ignored Congressional instructions in the 1992 Energy Policy Act. And, of course, the 2001 rule was itself a revision of a previous legally flawed version. Under the 1992 Act, EPA was supposed to have a valid rule in place by August 1996, so at best, the agency will have taken a total of 12 years and still has not produced a legally acceptable rule. But the story will not likely end even here, as the agency's recalcitrance is still evident.

The December 10 notice mischaracterizes the law's relationship between EPA's Yucca Mountain standard and the Nuclear Regulatory Commission's licensing regulations:

“The EnPA [the 1992 Act] also requires NRC to adopt our standards in its licensing regulations and use them as a basis to judge compliance of the repository's performance.”

Lest NRC again use this and similar EPA statements as a pretext for simply adopting the EPA standard as its own licensing rule, the NRC needs to be reminded that its responsibilities call for more than a lockstep march with EPA. NRC understands this in the case of power reactor regulation. There, for example, the overall dose standard set by EPA is just the starting point for an elaborate system of NRC rules on power reactor safety that tighten and expand upon the overarching EPA dose standard. NRC regulations specify detailed requirements for individual reactor safety systems and barriers.

In the case of Yucca Mountain, the 1992 Act requires only that NRC safety regulations be “consistent with” EPA's standard. In other words, in contrast to EPA's description above, NRC could promulgate more detailed and specific safety requirements as needed to meet its traditional standard of “reasonable assurance” that the public health and safety will be adequately protected – a standard the agency has interpreted historically as requiring a very high level of safety.

The December 10 notice displays EPA's aversion to that “reasonable assurance” standard. In earlier versions of its Yucca Mountain rule, EPA tried to promulgate a weaker standard than NRC's, one it called “reasonable expectation” of safety. But in oral argument before the Court of Appeals in 2004, NRC told the Court that when it came to licensing a repository, NRC would interpret “reasonable expectation” of safety to be *equivalent* to its traditional reasonable assurance of safety standard. Yet, in its December 10 Federal Register notice, EPA continues to cling to the notion that the “reasonable expectation” standard remains unchanged by the NRC's 2004 commitments to the Court of Appeals. In fact, EPA states explicitly that “the reasonable expectation approach to establishing the basis for the evaluations and compliance decisions is the same” as it was in its 2001 rule, and thus gives that erroneous rationale as a reason the final rule will purportedly have no cost impact on DOE.

The notion that EPA's final rule will impose no costs over that implied by the 2001 version is extraordinary in itself, especially considering that EPA makes so much of the “unprecedented” extension of the new rule's compliance period from 10,000 years to one million years, an extension the agency fought against because, in its view, such an extension would impose an unreasonable burden. That EPA now expects that this so-called unprecedented extension in compliance will have *no* cost impact whatsoever on DOE indicates clearly that EPA intends to accommodate DOE with a final standard so weak that DOE will have no trouble meeting it, no matter what, and that is in fact how EPA structured the proposed rule it published in 2005.

Indeed, recently discovered documents suggest a heavy and inappropriate level of cooperation between DOE and EPA to ensure that the rule would be one DOE could meet. *See* LSN Accession No. DN2002176932, where DOE's Alan Brownstein brags to DOE's Paul Golan that DOE and EPA had finally reached agreement on the EPA 2005 proposed rule "after several more intense rounds." And, in LSN Accession No. DN2002067717, DOE's Jeff Williams frets that "many will read [the 2005 EPA proposed rule] and come to the conclusion that the standard was written to ease the burden on licensing the repository." Recent Freedom of Information Act responses indicate an even higher degree of cooperation over the putative *final* rule.

A rule so contrived and so lax risks reversal again by the Court, something EPA seems to be very much aware of. From all reports, EPA put its Yucca Mountain rule into final form some months ago. Our suspicion is that EPA is sitting on the rule so that Nevada will not have time to file a successful court challenge before DOE files its license application with the NRC, which DOE plans to do prior to June 30, 2008. Underlying this scheme is the apparent expectation that once DOE gets its foot inside NRC's door, it will be harder to dislodge, even if the rule is later reversed.

To say the least, EPA is precluded by law and ethics from playing these sorts of games to accommodate the Yucca Mountain project. Such overly clever tactics will likely turn out to be shortsighted when it comes to the Court. Nevada will certainly challenge EPA's final rule if it is anything like the proposed version. And the new rule's reversal, when it comes, will then be even more painful to the Government.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert R. Loux", with a stylized flourish at the end.

Robert R. Loux