

## Guide to Yucca Mountain Lawsuits in the DC Circuit Court of Appeals

**July 9, 2004:** The Court ruled today on the lawsuits filed by the State of Nevada and others, including Public Citizen.

In sum, the court upheld Public Citizen's challenge to the EPA's radiation protection standard, and found the the rule - which says DOE must isolate the waste for 10,000 years - is insufficient and incompatible with the National Academy of Sciences' findings. While other challenges were rejected, this victory is huge and will force DOE to ensure the waste is isolated for the full 300,000 years or so that it is deadly. DOE's own analyses show that this standard cannot be met.

On January 14, the United States Court of Appeals for the DC Circuit heard oral arguments on a slate of lawsuits filed against the Yucca Mountain project. The six cases were consolidated and deemed "complex," allowing the three-judge panel more time to review them and lawyers more than the usual amount of time to argue them.

In all, the arguments lasted about three and a half hours; briefs for all cases were submitted before the court appearance. Links to the full text of the briefs are below.

The main arguments are as follows:

### ***1. The Constitutional Case Against the United States*** (STATE OF NEVADA et al. v. UNITED STATES OF AMERICA)

- Argues that under the U.S. Constitution, 49 states may not gang up on a single, politically isolated state to impose on it an unwanted burden without a compelling rational basis. With the abandonment of any geologic isolation criteria for the site, such a basis no longer exists at Yucca.
- Challenges the government's application of one set of site suitability rules for the Yucca site while applying a completely different (safer) set of rules for any other repository site in America.
- Invokes the principles of federalism in the Tenth Amendment and inherent in other constitutional provisions.

**Remedy:** Seeks to have the July 2002 Congressional Joint Resolution approving the Yucca site declared unconstitutional. This would forever put an end to the Yucca project.

### ***2. The Site Suitability Case Against the Energy Department*** (STATE OF NEVADA et al. v. US DEPARTMENT OF ENERGY)

- Argues that when the Energy Department suddenly changed its site suitability rules in 2001 and abandoned any geologic requirements for the Yucca site, it violated the Nuclear Waste Policy Act, which requires geologic isolation of waste.
- Argues that, for 17 years, DOE's siting rules were based on demonstrating geologic isolation, consistent with the Nuclear Waste Policy Act. But when the mountain couldn't even come close, DOE changed its siting rules. Three months later, ignoring the law, DOE declared the site suitable, and Yucca now relies almost totally on man-made waste packages to retain wastes.

**Remedy:** Seeks to have the Energy Department's siting rules set aside and remanded to the agency for redevelopment consistent with law. Since government scientists cannot demonstrate geologic isolation in Yucca's inferior setting, this would likely end the project or delay it by years while numerous new studies are performed. It would also make a construction license much harder or impossible to obtain.

### ***3. The Environmental Case Against the Energy Department*** (STATE OF NEVADA et al. v. US DEPARTMENT OF ENERGY)

- Argues that the Energy Department committed the most egregious procedural violations of the National Environmental Policy Act (NEPA) in the 31 years of that statute's existence, and that DOE failed to evaluate the impacts of the project in accordance with NEPA and the Nuclear Waste Policy Act.
- Argues DOE unlawfully hid its analysis from Nevada and Death Valley National Park and, for the first time in NEPA's history, took final agency action on a major federal project without first issuing a Record of Decision.
- Argues that DOE failed to consider that its project would blatantly violate Nevada's hazardous waste laws, would unlawfully site an above-ground interim waste storage facility in Nevada, and would expose tens of thousands of waste shipments to sabotage and terrorism dangers, including the danger of a nuclear "criticality."
- Argues that DOE wholly failed to define its project, including such basic aspects as whether it will operate in a "hot" or "cold" temperature mode, whether it will require centuries of ventilation, how much land it will use, and whether transport will be by rail or truck.

**Remedy:** Seeks to have the Energy Department's environmental impact statement for Yucca set aside and remanded to the agency for redevelopment consistent with law. Would cause substantial delays in the project while impacts are analyzed and resubmitted to the President and the Congress.

### ***4. The Case Against the President's and Secretary's Site Recommendations*** (STATE OF NEVADA et al. v. US DEPARTMENT OF ENERGY)

- Argues that, by accepting the Energy Department's legally deficient siting analysis and flawed environmental impact statement for Yucca, the Energy

Secretary's site recommendation and the President's (made a mere 24 hours later) were legally void.

- Also argues that the Energy Secretary failed to disqualify the site when it was found unsuitable under DOE's old rules, and that the Secretary then unlawfully recommended the site to the president without first completing Yucca's required site characterization.

**Remedy:** Seeks to have the Yucca site recommendations declared null and void. Would have the effect of returning the project to the Energy Department for redevelopment consistent with law, followed by recommencement of the Secretarial, Presidential, and Congressional review processes for the Yucca site.

**5. *The Case Against the EPA's Yucca Radiation Standards*** (STATE OF NEVADA, et al. v. US ENVIRONMENTAL PROTECTION AGENCY)

- Argues that, in developing the radiation release standards for the Yucca repository, the Environmental Protection Agency failed to follow the requirements of the Nuclear Waste Policy Act, the Energy Policy Act, and the Safe Drinking Water Act.
- Argues that EPA arbitrarily gerrymandered the Yucca site boundary to meet radiation release standards (that could not otherwise be met) by diluting wastes in Nevada's drinking water.
- Argues that the rule arbitrarily limits the regulatory compliance period to a time that precedes the time of the known peak hazard from the repository.

**Remedy:** Seeks to have the EPA's Yucca rules set aside and remanded to the agency for redevelopment consistent with law. Would cause the project to return to square one on regulatory compliance, resulting in years of delay, and might put an end to it if radiation release limits cannot be met at Yucca with a properly-drawn site boundary. The Nuclear Regulatory Commission's Yucca licensing rules, which depend on EPA's rules, would also have to be redone.

*\* Public Citizen is a plaintiff in this case along with Citizen Action Coalition of Indiana, Citizen Alert, Nevada Desert Experience, Nevada Nuclear Waste Task Force, Nuclear Information and Resource Service, and the Natural Resources Defense Council. Attorney Geoff Fettus of NRDC is representing the environmental groups in this case.*

**6. *The Case Against the Nuclear Regulatory Commission's Yucca Licensing Standards*** (STATE OF NEVADA et al. v. US NUCLEAR REGULATORY COMMISSION)

- Argues that NRC's repository licensing rules for Yucca violate the Nuclear Waste Policy Act and the Atomic Energy Act in six fundamental ways, including that:
  - they arbitrarily cut off all regulatory compliance prior to the time Nevadans will experience Yucca's peak radiation hazard;

- they set no minimum requirements for the geology or the geologic fitness of the Yucca site;
- they fail to require actual defense-in-depth through application of “multiple barriers” (both natural geologic barriers and man-made barriers);
- NRC has already conceded the remaining three issues alleged by Nevada:
  - That DOE should be required by NRC to demonstrate compliance with EPA’s Yucca radiation standards;
  - That NRC must apply a higher “reasonable assurance of safety” standard rather than the watered-down “reasonable expectation of safety” standard in the NRC rule;
  - That Nevada should be allowed to litigate in Yucca’s NRC’s license proceeding the issue of DOE’s failure to demonstrate repository safety after 10,000 years.

***Remedy:*** Seeks to have NRC’s Yucca licensing rules set aside and remanded to the agency for redevelopment consistent with law. Would cause years of delay in the project and might end it if designers are unable to demonstrate that Yucca can comply with radiation dose limits at the time of peak hazard. Would make licensing of the repository much more difficult.

(These lawsuit summaries were prepared by the State of Nevada.)