

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

Before Administrative Judges:

Thomas S. Moore
Paul S. Ryerson
Richard E. Wardwell

In the Matter of	)	Docket No.	63-001-HLW
	)		
U.S. DEPARTMENT OF ENERGY	)	ASLBP No.	09-892-HLW-CAB04
	)		
(High-Level Waste Repository)	)	May 17, 2010	

**COUNTY OF INYO’S RESPONSE TO THE DEPARTMENT
OF ENERGY’S MOTION TO WITHDRAW ITS LICENSE
APPLICATION**

I. INTRODUCTION

On March 3, 2010, the United States Department of Energy (DOE) filed a motion pursuant to 10 C.F.R. § 2.107 to withdraw its License Application for a construction authorization for the proposed Yucca Mountain high-level radioactive waste disposal facility. In its motion, DOE asked this Atomic Safety Licensing Board (Board) to dismiss its License Application with prejudice and to impose no additional terms of withdrawal. DOE explained among other things that the Secretary of Energy has determined that “Yucca Mountain is not a workable option for long-term disposition of these materials [spent nuclear fuel and high-level radioactive waste]” (DOE Motion at pg. 1). DOE also explained that “it does not intend ever to refile an application to construct a permanent geologic repository for spent nuclear fuel and high-level radioactive waste at Yucca Mountain” (DOE Motion at pg. 3, note 3).

In this proceeding, the County of Inyo (County) contends that the Nuclear Regulatory Commission (NRC) cannot issue a license to the DOE to construct the high level waste repository at Yucca Mountain because of deficiencies in the License Application and because the requirements of the National Environmental Policy Act (NEPA) and related NRC regulations have not been fulfilled. While the County takes no position on whether the Board should or should not grant DOE's motion to withdraw its License Application, the County requests that, should the Board grant DOE's motion with or without prejudice, the terms and conditions and identified below be imposed and that Board make express findings.

II. BACKGROUND

Ten contentions submitted by the County (Iny-Safety-001 to 003 and Iny-NEPA-001 to 007) have been admitted in this proceeding. Briefly, the contentions challenge whether the License Application, the "*Final Environmental Impact Statement for the Geologic Repository for the Disposal of Spent Nuclear Fuel and High Level Radioactive Waste at Yucca Mountain, Nye County, Nevada (DOE/EIS-0250F, February 2002)*" (Yucca Mountain Final EIS), and the "*Final Supplemental Environmental Impact Statement for the Geologic Repository for the Disposal of Spent Nuclear Fuel and High Level Radioactive Waste at Yucca Mountain, Nye County, Nevada (DOE/EIS-0250F-S1 July 2008)*" (Repository SEIS), adequately address the impacts of the proposed repository on groundwater resources, the potential for volcanic activity that may threaten the repository and the socioeconomic impacts of the repository in the County.

Pursuant to Section 114(f) the Nuclear Waste Policy Act, DOE prepared the NEPA documents described above. The U.S. Nuclear Regulatory Commission Staff (NRC Staff) conducted a review to determine whether it was practicable to adopt the NEPA documents in accordance with criteria stated in 10 C.F.R. § 51.109(c). On September 5, 2008, the NRC Staff

concluded that the environmental documents did not adequately characterize the potential impact of the proposed action on groundwater and from surface water discharges. Accordingly, the NRC Staff found that further supplementation of the documents was needed.

On October 24, 2008, DOE announced its intent to prepare a Supplement to the Yucca Mountain Final EIS and the Repository SEIS. However, by letter dated July 30, 2009, DOE informed the NRC Staff that “DOE has decided not to complete the Supplement, but rather has used the material prepared for the Supplement to develop the enclosed *Analysis of Postclosure Groundwater Impacts for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High Level Radioactive Waste at Yucca Mountain, Nye County, Nevada*.” During a pre-hearing conference on September 14, 2009, NRC Staff announced that, in view of DOE’s decision to not prepare a supplement addressing the groundwater impacts, the NRC Staff would prepare a supplemental analysis of postclosure groundwater impacts; however, the NRC Staff stated that the preparation of the supplemental analysis would not commence until after federal fiscal year 2010. The supplemental groundwater analysis has not been released by the NRC Staff.

On September 30, 2009, the Board issued CAB Case Management Order #2, which established a phased discovery plan and specified which contentions were subject to discovery and litigation in the first phase of this proceeding. On February 16, 2010, the Board granted (with exceptions) a motion by DOE to stay discovery pending its submittal of a motion to withdraw its license application. On March 3, 2010, DOE filed its motion to withdraw the License Application. With regard to the County’s contentions, no discovery has been conducted, no dispositive motions have been filed, no arguments on the merits of the contentions (except as to their admissibility) have been heard, and no rulings have been issued on the merits of the contentions.

III. STANDARD FOR DISMISSING A LICENSE APPLICATION

DOE's motion requests that its License Application be dismissed with prejudice and DOE further requests that no additional terms of withdrawal be imposed. If the Board grants DOE's motion with or without prejudice, the Board is under no legal obligation to accede to DOE's request to impose no additional terms on the dismissal of its License Application. It is clear that once a Notice of Hearing has been issued, the Board may grant an applicant's motion to withdraw its application for a license, may dismiss that application with prejudice, and may "regulate the terms and conditions of withdrawal." If terms and conditions are imposed, such terms must be rationally related to the state of the licensing proceeding, and any findings must be supported by the record." (10 C.F.R. § 2.107(a); *Philadelphia Electric Company (Fulton Generating Station, Units 1 and 2)*, ALAB-657, 14 N.R.C. 967, 974 (1981).)

IV. IF THE BOARD GRANTS DOE'S MOTION TO WITHDRAW, THE BOARD SHOULD IMPOSE CERTAIN TERMS AND CONDITIONS ON THE WITHDRAWAL OF THE LICENSE APPLICATION AND SHOULD MAKE EXPRESS FINDINGS

It has been held that a dismissal with prejudice of a license application may "amount to an adjudication on the merits of the admitted contentions." *In the Matter of Yankee Atomic Electric Company*, ASLBP No. 99-754-01-LA-R; LBP-99-27, 50 N.R.C. 45 (1999), citing *Duke Power Co. (Perkins Nuclear Station, Units 1, 2, 3)*, LBP-82-21, 16 NRC 1128, 1135 (1982). In this proceeding, if the Board were to grant DOE's application to withdraw the License Application with or without prejudice, the record would not support a conclusion that the contentions filed by the County have been "adjudicated on the merits;" nor would the record support a finding that the Yucca Mountain Final EIS or the Repository SEIS have been adjudged to be adequate, nor a finding that the supplemental groundwater EIS has been completed. Consequently, if the Board grants DOE's motion with or without prejudice, to avoid ambiguity

as to what issues were considered and decided in this proceeding, the County requests that the Board exercise its authority under 10 C.F.R. § 2.107(a) and make the following findings:

- (1) that none of the County's admitted contentions have been litigated or adjudicated in this proceeding,
- (2) that neither Yucca Mountain Final EIS, nor the Repository SEIS have been adjudged to be legally adequate, and
- (3) that the groundwater supplement to Yucca Mountain EIS and to the Repository SEIS has not been completed and has not been adjudicated to be legally adequate.

The County also requests that if the Board grants the DOE's motion with or without prejudice, that the Board include the following terms and conditions in its order:

- (1) that the withdrawal does not prejudice the County's ability to litigate its admitted contentions in any future licensing proceeding,
- (2) that DOE protect and preserve all Yucca Mountain technical information, records, documents, physical samples and scientific data for future scientific and policy purposes, and
- (3) that DOE's and the other parties' LSN information be preserved in a format that will permit the existing parties and future interested parties to search that information and retrieve the documents and information.

IV. CONCLUSION

The Board has the authority to prescribe the terms and conditions upon which any withdrawal of DOE's application to construct Yucca Mountain may be granted and to make findings supported by the record. If the Board grants DOE's motion to withdraw the License

Application with or without prejudice, the County requests that any such ruling include the terms, conditions and findings identified above.

Respectfully submitted,

/Signed electronically by/

Greg James

Counsel for the County of Inyo

710 Autumn Leaves Circle

Bishop, California

Telephone: 760-873-6838

Facsimile: 760-873-7095

Email: gregjames@earthlink.net

Dated at Bishop, California
this 17th day of May, 2010

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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CERTIFICATE OF SERVICE

I hereby certify that copies of the “**COUNTY OF INYO’S RESPONSE TO THE. DEPARTMENT OF ENERGY’S MOTION TO WITHDRAW ITS LICENSE APPLICATION**” in the above-captioned proceeding have been served on the following persons this 17th day of May, 2010, by Electronic Information Exchange.

CAB 04

Atomic Safety and Licensing Board Panel

Thomas S. Moore, Chair

E-mail: tsm2@nrc.gov

Paul S. Ryerson

E-mail: psr1@nrc.gov

Richard E. Wardwell

E-mail: rew@nrc.gov

Parties Served

Adams, Marta
Andersen, Robert M.
Bailey, Annie
Barlow, Gregory
Baughman, Mike
Bauser, Michael A.
Belete, Elene
Bell, Kevin W.
Berger, Michael
Berkey, Curtis
Beutel, Theodore
Bielecki, Jessica A.
Bollwerk III, G. Paul
Borella, Edward
Borski, Laurie
Brooks, Felicia M.
Carter, Lorraine
Cereghino, Stephen

E-mail Addresses

madams@ag.nv.gov
robert.andersen@akerman.com
baileys@lcturbonet.com
lcda@lcturbonet.com
bigboff@aol.com
mab@nei.org
ebelete@jsslaw.com
kwbell@energy.state.ca.us
mberger@bsglaw.net
curtis.berkey@abwwlaw.com
tbeutel@eurekanv.org
Jessica.Bielecki@nrc.gov
gpb@nrc.gov
edward_borella@ymp.gov
lborski@nuclearlawyer.com
fbrooks@ndnlaw.com
lcarter@captionreporters.com
stephen_cereghino@ymp.gov

Choate, Zoie
Colburn, Ross
Cooper, Cliff
Cottingham, Anne
Crosland, Martha S.
Csedrik, Lewis M.
Curran, Diane
Damele, Ronald
DiNunzio, Nicholas
Dobie, Julie
Dreher, Michael
Dudley, Sherry
Dunning, Michael L.
Durbin, Susan
Eredia, Sally
Faglioni, Kelly L.
Fitz, Andrew A.
Fitzpatrick, Charles J.
Francis, Karin
Fraser, Matthew
Frishman, Steve
Giitter, Rebecca
Gilman, Joseph
Ginsberg, Ellen C.
Golshan, K. G.
Gores, Jennifer A.
Gottshall, Thomas R.
Gutierrez, Jocelyn
Hanna, Robert S.
Harrington, Arthur J.
Hawkins, E. Roy
Hearing Docket
Heinzen, Steven A.
Hembacher, Brian
Horin, William
Houck, Darcie L.
Irwin, Donald P.
James, Greg
Johnson, Abigail
Kahn, Zachary
Klevorick, Phil
Kriner, Jeffrey
Kuyler, Raphael P.
LaPlante, Erica
Larimore, Patricia
Lawrence, John W.
Leigh, Rovicane
Lembke, Alisa
Lenehan, Daniel W.
Lewis, Linda
List, Robert F.

zchoate@co.nye.nv.us
rcolburn@ndnlaw.com
ccooper@morganlewis.com
awc@nei.org
Martha.Crosland@hq.doe.gov
lcsedrik@morganlewis.com
dcurran@harmoncurran.com
rdamele@eurekanv.org
Nicholas.DiNunzio@hq.doe.gov
jdobie@gklaw.com
michael.dreher@nrc.gov
sdudley@co.nye.nv.us
MichaelD@atg.wa.gov
susan.durbin@doj.ca.gov
seredia@ndnlaw.com
kfaglioni@hunton.com
AndyF@atg.wa.gov
cfitzpatrick@nuclearlawyer.com
kxf4@nrc.gov
mfraser@harmoncurran.com
steve.frishman@gmail.com
rll@nrc.gov
jsg1@nrc.gov
ecg@nei.org
kg.golshan@nrc.gov
jgores@armstrongteasdale.com
tgottshall@hsblawfirm.com
Jocelyn.Gutierrez@ymp.gov
rshanna@bsglaw.net
aharring@gklaw.com
erh@nrc.gov
hearingdocket@nrc.gov
sheinzen@gklaw.com
brian.hembacher@doj.ca.gov
whorin@winston.com
dhouck@ndnlaw.com
dirwin@hunton.com
gljames@earthlink.net
eurekanrc@gmail.com
zxk1@nrc.gov
klevorick@co.clark.nv.us
jeffrey.kriner@ymp.gov
rkuyler@morganlewis.com
eal1@nrc.gov
plarimore@talisman-intl.com
jlawrence@nuclearlawyer.com
rleigh@abbwlaw.com
alembke@inyocounty.us
dwl2@nrc.gov
linda.lewis@nrc.gov
rlist@armstrongteasdale.com

Loveland, Bryce
Lynch, Susan
Maerten, Daniel
Mahowald, Philip R.
Malsch, Martin G.
Martin, Circe
Mathias, Linda
McRae, Ben
Meharg, Stephanie
Mercado, Michele
Miras-Wilson, Rachel
Moldenhauer, Charles
Montesi, Susan
Moore, Thomas S.
Mueller, Edwin
Murphy, Malachy
Nezhad, Cyrus
Niegemann, Brian
OCAA Mail Center
Overton, H. Lee
Pak, Christina
Peebles, John M.
Peterson, William
Pitchford, Loreen, LSN Coordinator
Pitts, Jason
Poindexter, Thomas
Poland, Douglas M.
Polonsky, Alex
Putzu, Frank
Renfro, Hanna
Repka, David A.
Rhoan, Robert
Robbins, Alan
Roby, Debra
Rosenthal, Alan S.
Rotman, Matthew
Ryan, Tom
Ryerson, Paul S.
Schmutz, Thomas
Schwartz, Jaqueline
Sears, Richard
Shealy, S. Ross
Shebelskie, Michael R.
Silberg, Jay E.
Silverman, Donald
Silvia, Andrea L.
Simkins, Connie
Simon, Mike
Sisco, Carlos L.
Sommer, Josephine
Staton, Shannon

bloveland@jsslaw.com
slynch1761@gmail.com
Daniel.Maerten@caci.com
pmahowald@piic.org
mmalsch@nuclearlawyer.com
ogcmailcenter@nrc.gov
yuccainfo@mineralcountynv.org
Ben.McRae@hq.doe.gov
smeharg@hunton.com
michele.mercado@doj.ca.gov
rwilson@winston.com
cmoldenhauer@morganlewis.com
smontesi@nuclearlawyer.com
tsm2@nrc.gov
muellered@msn.com
mrmurphy@chamberscable.com
Cyrus.Nezhad@hq.doe.gov
bniegemann@ndnlaw.com
OCAAMAIL@nrc.gov
LeeO1@atg.wa.gov
Christina.Pak@hq.doe.gov
jpeebles@ndnlaw.com
paengineers@juno.com
lpitchford@comcast.net
jayson@idtservices.com
tpoindexter@morganlewis.com
dpoland@gklaw.com
apolonsky@morganlewis.com
frank.putzu@navy.mil
hrenfro@gklaw.com
drepka@winston.com
rrhoan@ndnlaw.com
arobbins@jsslaw.com
droby@jsslaw.com
rsnthl@nrc.gov ; axr@nrc.gov
matthew.rotman@nrc.gov
Tom.Ryan@nrc.gov
psr1@nrc.gov
tschmutz@morganlewis.com
jschwartz@gklaw.com
rwsears@wpcda.org
rshealy@hsblawfirm.com
mshebelskie@hunton.com
jay.silberg@pillsburylaw.com
dsilverman@morganlewis.com
alc1@nrc.gov
jcciac@co.lincoln.nv.us
wpnucast1@mwpower.net
csisco@winston.com
Josephine.Sommer@ymp.gov
sstaton@morganlewis.com

Sullivan, Timothy E.

timothy.sullivan@doj.ca.gov

Thompson, Jonathan C.

JonaT@atg.wa.gov

Tucker, Katheine

katie.tucker@nrc.gov

VanNiel, Jeffrey D.

nbrjdv@gmail.com

Vazquez, Tameka

purpose_driven@yahoo.com

Vibert, Elizabeth A.

VibertE@co.clark.nv.us

Walsh, Timothy J.

timothy.walsh@pillsburylaw.com

Wardwell, Richard E.

rew@nrc.gov

Webb, Maria

maria.webb@pillsburylaw.com

Whipple, Bret

bretwhipple@nomademail.com

Williams, Scott

swilliams@abbwlaw.com

Woodington, Kenneth P.

kwoodington@dml-law.com

Wright, Belinda A.

bwright@hunton.com

Young, Mitzi A.

may@nrc.gov

Zabarte, Ian

mrizabarte@gmail.com

Zaffuts, Paul

pzaffuts@morganlewis.com

Zobler, Marian L.

mlz@nrc.gov

Dated: May 17, 2010

/Signed (electronically) by/

Greg James

Attorney for the County of Inyo

710 Autumn Leaves Circle

Bishop, California 93514

Telephone: 760-873-6838

Email: gljames@earthlink.net