

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

Before Administrative Judges:

**Thomas S. Moore, Chairman
Alex S. Karlin
Alan S. Rosenthal**

In the Matter of	Docket No. PAPO-00
U.S. DEPARTMENT OF ENERGY	ASLBP No. 04-829-01 PAPO
(High Level Waste Repository: Pre-Application Matters)	July 15, 2005

**STATE OF NEVADA'S COMMENTS ON DEPARTMENT OF ENERGY'S
JOINT PROPOSED ORDER REGARDING RETENTION PROCEDURES**

In accordance with the Pre-License Application Presiding Officer (PAPO) Board's (May 23, 2005) Order, the State of Nevada (the State) submits the following comments with respect to the Department of Energy's (DOE) Submission of a Joint Proposed Order Regarding Retention Procedures.

BACKGROUND

Consistent with the PAPO Board's May 23, 2005 Order, and after meeting with potential parties to this proceeding on June 15, 2005, and conferring repeatedly with potential parties thereafter, DOE, on July 8, 2005, submitted a Joint Proposed Order Regarding Retention Procedures for Documentary Material. As recited in DOE's submission, DOE, the Nuclear Regulatory Commission (NRC) Staff, and the State agreed on all provisions of the proposed order with one exception. That exception concerned paragraph 8 of the proposed order. DOE

proposes inclusion of paragraph 8 while the NRC Staff and the State urge that paragraph 8 be omitted.

The paragraph 8 proposed by DOE and opposed by the NRC Staff and the State would provide: "This order does not address, and shall not be construed to address, whether or not a participant should have previously implemented procedures to preserve documents before entry of this order."

COMMENT

The State believes the inclusion of such a provision in the order is inappropriate because: (1) it is outside the scope of what the PAPO Board requested the parties to address in the Board's May 23 order and the Federal Register notice of May 27, 2005 (70 Fed. Reg. 30820); (2) it is unnecessary to enumerate matters "not addressed" in an order, since the order speaks for itself; and (3) the proposed provision inappropriately suggests that the proposed topic, i.e., **past** retention procedures (prior to the Board's addressing the subject) is an appropriate topic for consideration by the Board, which it is not.

1. The Board's May 23 Order explained that "the development and specification at **this time** of reasonable uniform Documentary Material retention procedures should enable all current participants and potential parties to avoid unnecessary burdens and expense." In consideration of that fact, the Board ordered the participants to meet and confer for the purpose of "developing a joint proposed minimum acceptable standard of Documentary Material retention for this proceeding." The Federal Register notice generated on behalf of the Board on May 27 contained identical statements. By definition, a standard prescribing retention of Documentary Material can only order the retention of documents currently in existence or documents which may come into existence in the future. To be sure, many participants in this

proceeding (including NRC, DOE, and the State) having existing retention policies which result in the continuing existence of many historical documents which would accordingly become subject to an LSN-related retention policy which may be adopted by the PAPO Board. Other entities and individuals who may wish to participate may or may not have retention policies, and if that is the case, it would be a vain act for the Board to attempt to retroactively adopt retention requirements with respect to documents which no longer exist. The agreed-upon terms of the proposed order submitted by DOE on July 8, 2005, amply ensure the protection and retention of documents now in existence and those which may be subsequently created by providing (in paragraph 7) for implementation of the terms of the order within 30 days of its publication and also **prohibiting** the destruction of relevant materials during that 30-day period.

2. There is obviously no need for an order to recite what "this order does not address," nor is DOE truly concerned that any such misconstruction is likely. Rather, DOE proposes paragraph 8 only as a thinly veiled attempt to support a DOE agenda of criticizing or attacking past retention policies of other potential participants in this proceeding. This agenda is confirmed by DOE's alternative proposal of a paragraph 8 during negotiations which would have recited that the order "does not address the consequences" of a party's earlier alleged document retention shortcomings. DOE inappropriately attempts to use this proposal as a vehicle to suggest that "consequences" will be imposed for imagined historical transgressions, but they are simply not yet addressed in this order. As such, the proposed language has no more place in this order than would a provision stating "this order does not address the consequences of DOE's failure to file its License Application with 90 days after its site recommendation, as required by law."

3. The suggestion that document retention requirements be retroactively placed upon parties or potential parties to an NRC proceeding has been considered and rejected by the NRC, both generally and in connection with this very proceeding. NRC's general rules for discovery do not specifically address document retention or destruction. This is clear from *Public Service Company of New Hampshire, et al. (Seabrook Station Units 1 and 2)*, ALAB-947,33 NRC 299 (1991) (Judges Bollwerk, Rosenthal, and Wiber). *Seabrook* involved a contested hearing on the results of an emergency planning exercise that had to be held and evaluated by NRC Staff and the Federal Emergency Management Agency (FEMA) before the Seabrook reactor operating licenses could be issued. Before the exercise was held, counsel for intervenors requested FEMA to preserve the NRC Staff and FEMA evaluators' notes, but despite this request, FEMA deliberately destroyed them.¹ The Atomic Safety and Licensing Board denied intervenor's request for sanctions and the Atomic Safety and Licensing Appeal Board affirmed this ruling on appeal, reasoning that "[i]ntervenors have provided no authority (and we are aware of none) establishing that, apart from any requirements that might emulate from this litigation, FEMA was under an obligation to preserve the documents in question." *Id.* at 315. Although it was obvious to all concerned that intervenors would contest the exercise results, under NRC's general discovery rules, discovery was available only after admission of contentions and no contentions were admitted on exercise results when the documents were destroyed. Under these circumstances, the Appeal Board held that no sanction should be imposed absent a finding of improper motive or bad faith, and it saw no reason to disturb the Atomic Safety and Licensing Board's decision. *Supra* at 315. *Seabrook* teaches that likely relevant documents that may be

¹ FEMA was not a formal party in the hearing but testified under NRC Staff aegis. However, because of FEMA's role in the evaluation (its findings constituted a rebuttable presumption), it was understood that FEMA was subject to discovery. See e.g. *Long Island Lighting Company (Shoreham Nuclear Power Station, Unit No. 1)*, ALAB-773, 19 NRC 1333 (1974).

destroyed in the ordinary course of business need not be retained prior to the opening of discovery, even if litigation is anticipated and party asks them to be retained.

If there were any NRC rules regarding document retention (or destruction) that apply to the Yucca Mountain proceeding, they would be located in the special provisions for discovery applicable to the Yucca Mountain proceeding in 10 C.F.R. Part 2, Subpart J (comprising 10 C.F.R. §§ 2.1000-2.1027); but there is nothing in Subpart J addressing any obligation of participants to preserve Documentary Material before the requirement to make it available under 10 C.F.R. § 2.1003. Under 10 C.F.R. § 2.1003, this obligation takes effect at various times, for various participants, beginning with DOE's certification under 10 C.F.R. § 2.1009(b).

The absence of a specific document retention requirement in Subpart J is noteworthy because of both the case law discussed above, which one must presume was known by the rule drafters, and the fact that one provision of Subpart J specifically contemplates that relevant documents might be destroyed yet says nothing about preservation. Specifically, 10 C.F.R. § 2.1019(i) requires a deponent to disclose relevant "documents in his possession" at the time of his or her deposition including "personal records" that are not Documentary Material and that are defined in part in 10 C.F.R. § 2.1000 as documents that "can be retained or discarded at the possessor's sole discretion." Furthermore, the history of Subpart J offers an example, *infra*, of a document retention requirement proposed but then dropped because of objections. Accordingly, the subject of document retention was considered in crafting the rule and the failure to include a document retention requirement was a considered decision.

Subpart J was first proposed formally in 1988. 53 Fed. Reg. 44411 (Nov. 3, 1988). There was no discussion of document retention or destruction in the notices of proposed or final rulemaking. However, as the notice of proposed rulemaking indicates, the Subpart had its

genesis in a negotiated rulemaking process that involved a series of meetings of an advisory group that included NRC Staff, Nevada, other states, DOE, and environmental and nuclear industry groups. The text of the 1988 proposed rule was the final negotiating text of the advisory group that had received the endorsement of all advisory members except the nuclear industry group. 53 Fed. Reg., at 44413. Therefore, the regulatory history of the rule includes the minutes of the nine advisory committee meetings that produced the final negotiating text.

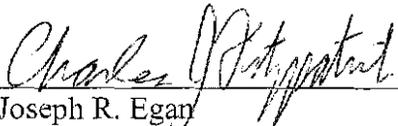
In one early meeting of the advisory group, held on October 15-16, 1987, the members were briefed on NRC discovery rules. See (ADAMS No.) ML033640511. The minutes do not indicate that any discussion of document retention requirements occurred. However, the subject came up on several later occasions. The minutes of the March 22-24, 1988 session, ML012050161, indicate that there was a discussion by the NRC Staff representative of how a draft document would not be an agency record for FOIA purposes if it was destroyed before the FOIA request and that, since the envisioned LSS could be analogized to an ongoing FOIA request, "each party needs to set up a records management system that will capture documents that people keep for good reason and to purge documents that are legitimately not intended to be entered into the LSS." However DOE objected, stating that while the LSS may be the equivalent of an ongoing FOIA, this does not mean that documents that are not agency records must be entered into the LSS and that the rule "should not be used to usurp DOE'S internal records management system." It seems to have been understood from the discussions at this point that document retention was governed by agency records management systems. *Id.* at 18-19.

The issue arose again at the next meeting on May 18, 1988. ML012050076. A provision in the draft rule that would have required participants to "retain all comments on draft documents circulated for concurrence within their organization" was removed after an industry group

objected that "this paragraph essentially constitutes a requirement for establishing a certain form of internal records management that is beyond the scope of the rulemaking. . . . Such organizations should not be required to establish a whole new and completely separate internal records management procedure for purposes of compliance with this rule." *Id.* at 6.

While the minutes of the advisory group are not decisive, they confirm that the drafters of Subpart J considered the matter, but knowingly refrained from imposing a rule that would supersede general agency document retention policies, or prescribe retention requirements for potential parties to this proceeding.

Respectfully submitted,



Joseph R. Egan

Charles J. Fitzpatrick

Martin G. Malsch

Robert J. Cynkar

EGAN, FITZPATRICK, MALSCH
& CYNKAR, PLLC

8300 Boone Boulevard, Suite 340

Vienna, Virginia 22182

(703) 891-4050 Telephone

(703) 891-4055 Facsimile

Attorneys for the State of Nevada

July 15, 2005

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

In the Matter of)	Docket No. PAPO-00
)	
U.S. DEPARTMENT OF ENERGY)	ASLBP No. 04-829-01 PAPO
)	
(High Level Waste Repository: Pre-Application Matters))	July 15, 2005

CERTIFICATE OF SERVICE

I certify that copies of the foregoing State of Nevada's Comments on Department of Energy's Joint Proposed Order Regarding Retention Procedures has been served upon the following persons by electronic mail:

**U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel**
Mail Stop – T-3 F23
Washington, DC 20555-0001
Thomas S. Moore, Chair
Administrative Judge
E-mail: PAPO@nrc.gov
Alex S. Karlin
Administrative Judge
E-mail: PAPO@nrc.gov
Alan S. Rosenthal
Administrative Judge
E-mail: PAPO@nrc.gov & rsnthl@comcast.net
G. Paul Bollwerk, III
Administrative Judge
E-mail: PAPO@nrc.gov
Anthony C. Eitrem, Esq.
Chief Counsel
E-mail: PAPO@nrc.gov
James M. Cutchin
E-mail: PAPO@nrc.gov
Bethany L. Engel
E-mail: PAPO@nrc.gov
Amy C. Roma, Esq.
E-mail: PAPO@nrc.gov
Jonathan Rund
E-mail: PAPO@nrc.gov
Susan Stevenson-Popp

E-mail: PAPO@nrc.gov
Christopher M. Wachter
E-mail: PAPO@nrc.gov
Daniel J. Graser
LSN Administrator
E-mail: djg2@nrc.gov
ASLBP HLW Adjudication
E-mail: ASLBP_HLW_Adjudication@nrc.gov

**U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission**
Mail Stop -O-16 C1
Washington, DC 20555-0001
Hearing Docket
E-mail: hearingdocket@nrc.gov
Andrew L. Bates
E-mail: alb@nrc.gov
Adria T. Byrdsong
E-mail: atbl@nrc.gov
Rebecca L. Glitter
E-mail: rll@nrc.gov
Emile L. Julian, Esq.
E-mail: els@nrc.gov
Evangeline S. Ngbea
E-mail: esn@nrc.gov

**U.S. Nuclear Regulatory Commission
Office of Congressional Affairs**

Mail Stop -O-17A3
Washington, DC 20555-0001
Thomas R. Combs
E-mail: trc@nrc.gov

**U.S. Nuclear Regulatory Commission
Office of the General Counsel**

Mail Stop -O-15-D21
Washington, DC 20555-0001
Karen D. Cyr, Esq.
General Counsel
E-mail: kdc@nrc.gov
Shelly D. Cole, Esq.
E-mail: sdcl@nrc.gov
David A. Cummings, Esq.
E-mail: dac3@nrc.gov
Gwendolyn D. Hawkins
E-mail: gxh2@nrc.gov
Janice E. Moore, Esq.
E-mail: jem@nrc.gov
Trip Rothschild, Esq.
E-mail: tbr@nrc.gov
Tyson R. Smith, Esq.
E-mail: trs1@nrc.gov
Harry E. Wedewer, Esq.
E-mail: hew@nrc.gov
Mitzi A. Young, Esq.
E-mail: may@nrc.gov
Marian L. Zoblner, Esq.
E-mail: mlz@nrc.gov
OGCMailCenter
E-mail: OGCMailCenter@nrc.gov

Hunton & Williams LLP

Counsel for the U.S. Department of Energy
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219
W. Jeffrey Edwards, Esq.
E-mail: jedwards@hunton.com
Kelly L. Fagliomi, Esq.
E-mail: kfagliomi@hunton.com
Melissa Grier
E-mail: mgrier@hunton.com

Donald P. Irwin, Esq.
E-mail: dirwin@hunton.com
Stephanie Meharg
E-mail: smeharg@hunton.com
Edward P. Noonan, Esq.
E-mail: enoonan@hunton.com
Audrey B. Rusteau
E-mail: arusteau@hunton.com
Michael R. Shebelskie, Esq.
E-mail: mshebelskie@hunton.com
Christopher A. Updike
E-mail: cupdike@hunton.com
Belinda A. Wright
E-mail: bwright@hunton.com

**U.S. Department of Energy
Office of General Counsel**

1000 Independence Avenue, S.W.
Washington, DC 20585
Martha S. Crosland
E-mail: Martha.Crosland@hq.doe.gov

**U.S. Department of Energy
Office of Civilian Radioactive Waste
Management**

Office of Repository Development
1551 Hillshire Drive
Las Vegas, NV 89134-6321
W. John Arthur III, Deputy Director
E-mail: john_arthur@notes.ymp.gov
Susan L. Rives
E-mail: susan_rives@ymp.gov
Kerry M. Grooms
E-mail: kerry_grooms@ymp.gov

**U.S. Department of Energy
Office of General Counsel**

1551 Hillshire Drive
Las Vegas, NV 89134-6321
George W. Hellstrom
E-mail: george.hellstrom@ymp.gov

**Yucca Mountain Project Licensing Group
DOE/BSC**

Jeffrey Kriner
E-mail: jeffrey_kriner@ymp.gov

Lander County Nuclear Waste Oversight Program

3185 South Humboldt St.
Battle Mountain, NV 89820
Loreen Pitchford
E-mail: gb4@charter.net
Deborah Teske
E-mail: dteske@Landercounty.com

Lander, Churchill and Mineral County

3888 Snow Valley Drive
Reno, NV 89506
Loreen Pitchford
E-mail: gb4@charter.net

Lincoln County Nuclear Oversight Program

100 Depot Avenue, Suite 15, P.O. Box 1068
Caliente, NV 89008-1068
Lea Rasura-Alfano, Coordinator
E-mail: jcciac@co.lincoln.nv.us

Nuclear Waste Technical Review Board

Victoria Reich
E-mail: reich@nwtrb.gov

Nevada Nuclear Waste Task Force

Alamo Plaza, 4550 W. Oakley Blvd.
Suite 111
Las Vegas, NV 89102
Judy Treichel, Executive Director
E-mail: judynwtf@aol.com

Churchill County

155 North Taylor Street, Suite 182
Fallon, NV 89406
Alan Kall
E-mail: comptroller@churchillcounty.org

Clark County Nuclear Waste Division

500 S. Grand Central Parkway
Las Vegas, NV 89155
Irene Navis
E-mail: iln@co.clark.nv.us
Engelbrecht von Tiesenhausen
E-mail: evt@co.clark.nv.us

Eureka County Yucca Mtn Info Office

P.O. Box 990
Eureka, NV 89316
Laurel Marshall, Program Coordinator
E-mail: ecmarshall@eurekanv.org

Intertech Services Corporation

(for Lincoln County)
P.O. Box 2008
Carson City, NV 89702-2008
Dr. Mike Baughman
E-mail: bigboff@aol.com

Mineral County Board of County Commissioners

P.O. Box 1600
Hawthorne, NV 89415
Linda Mathias, Administrator
Office of Nuclear Projects
E-mail: mineral@oem.hawthorne.nv.us

Nye County Department of Natural Resources & Federal Facilities

1210 E. Basin Road, Suite 6
Pahrump, NV 89048
Les Bradshaw
E-mail: clittle@co.nye.nv.us
David Swanson
E-mail: dswanson@nvecounty.net

Nye County Regulatory/Licensing Adv.

18150 Cottonwood Rd. #265
Sunriver, OR 97707
Malachy Murphy
E-mail: mrmurphy@cmc.net

White Pine County Nuclear Waste Project Office

959 Campton Street
Ely, NV 89301
Mike Simon, Director
E-mail: wpnucwst1@mwpower.net

**Inyo County (CA) Yucca Mountain
Nuclear Waste Repository Assessment
Office**

P.O. Drawer L
Independence, CA 93526
Andrew Remus, Project Coordinator
E-mail: aremus@gnet.com

Abby Johnson

617 Terrace Street
Carson City, NV 89702
E-mail: abbyj@gbis.com

National Congress of American Indians

1301 Connecticut Avenue, NW – 2nd floor
Washington, DC 20036
Robert I. Holden, Director
Nuclear Waste Program
E-mail: robert_holden@ncai.org

Public Citizen

215 Pennsylvania Avenue, SE
Washington, DC 20003
Michele Boyd, Legislative Representative
Critical Mass Energy and Environment
E-mail: mboyd@citizen.org

Ross, Dixon & Bell

2001 K Street N.W.
Washington, D.C. 20006-1040
William H. Briggs
E-mail: wbriggs@rdblaw.com

**U.S. Nuclear Regulatory Commission
Office of Nuclear Material Safety and
Safeguards**

Mail Stop -T-7 F3
Washington, D.C. 20555-0001
Jeffrey A. Ciocco
E-mail: jac3@nrc.gov

U.S. Nuclear Regulatory Commission

Office of Public Affairs
Mail Stop – O-2A13
Sue F. Gagner
E-mail: sfg@nrc.gov

Talisman International, LLC

1000 Potomac Street, NW
Suite 300
Washington, D.C. 20007
Patricia Larimore
E-mail: plarimore@talisman-intl.com

Nuclear Energy Institute

1776 I Street, NW, Suite 400
Washington, DC 20006-3708
Michael A. Bauser, Esq.
Associate General Counsel
E-mail: mab@nei.org
Robert W. Bishop, Esq.
E-mail: rwb@nei.org
Ellen C. Ginsberg, Esq.
E-mail: ecg@nei.org
Rod McCullum
E-mail: rxm@nei.org
Steven P. Kraft
E-mail: spk@nei.org

White Pine County

City of Caliente

Lincoln County

Jason Pitts
E-mail: idt@idtservices.com

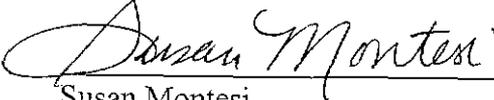
Environment Protection Agency

Ray Clark
E-mail: clark.ray@epa.gov

Nevada Agency for Nuclear Projects

Office of the Governor
1761 E. College Parkway, Suite 118
Carson City, NV 89706
Robert R. Loux
E-mail: bloux@nuc.state.nv.us
Steve S. Frishman
E-mail: ssteve@nuc.state.nv.us

State of Nevada
100 N. Carson Street
Carson City, NV 98710
Marta A. Adams
E-mail: maadams@ag.state.nv.us



Susan Montesi