

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**PRM-2-13**

**IN THE MATTER OF )  
LINCOLN COUNTY, NEVADA )  
 )  
PETITION FOR RULEMAKING TO )  
AMEND 10 C.F.R. 2.314(b) TO PERMIT )  
AFFECTED UNITS OF LOCAL )  
GOVERNMENT TO BE REPRESENTED )  
BY NON-ATTORNEYS IN THE YUCCA )  
MOUNTAIN LICENSING PROCEEDING )  
 )**

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OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

**I. Introduction**

**A. The Nuclear Waste Policy Act**

The Nuclear Waste Policy Act of 1982 (“NWPAct”), 42 U.S.C. §§ 10101 *et seq.*, established a national program for the management and permanent disposal of high-level nuclear waste and spent fuel. As originally enacted, the NWPAct specified that at least five potential sites would be considered by the Department of Energy (DOE) for the development of a nuclear waste repository; authorized the development of a waste transportation system; and required the DOE to submit a proposal to establish a monitored retrievable storage facility until a permanent nuclear waste repository could be constructed. 42 U.S.C. § 10132.

After DOE conducted preliminary studies of five sites, Congress amended the NWPAct and directed the DOE to study exclusively the suitability of Yucca Mountain, Nevada. *Id.* § 10133. On February 14, 2002, pursuant to section 114 of the Act, 42 U.S.C. § 10134, the DOE formally recommended to the President that he approve Yucca Mountain as the site for a national high-level nuclear waste repository. On February 15, 2002, the president approved DOE’s recommendation. On April 8, 2002, exercising its right under section 115 of the Act, 42 U.S.C. § 10135, the State of Nevada formally objected to the President’s recommendation. Thereafter, the U.S. House of Representatives and Senate each voted to approve the Yucca Mountain site over Nevada’s objection, pursuant to section 115 of the Act, which became known as the Yucca Mountain Development Act, was signed into law by the President on July 23, 2002 (Public law 107-200).

Pursuant to the NWPAct, the DOE is now charged with the responsibility to complete its studies of the suitability of Yucca Mountain and to submit an application for a license to construct the waste disposal facility to the Nuclear Regulatory Commission (“NRC” or “Commission”). The NRC has promulgated regulations to govern the conduct of that licensing proceeding, 10 C.F.R. Part 63, which supplement and are to be

read in conjunction with its procedural regulations that generally apply to adjudicatory proceedings the are litigated before the Commission, 10 C.F.R. Part 2.

If licensed by the NRC, the Yucca Mountain repository will ultimately house at least 7,000 metric tons of high-level radioactive waste and 63,000 metric tons of spent nuclear fuel, in perpetuity. The facility would receive nuclear waste from more than 100 sites across the country, which would be transported to Yucca Mountain through a combination of trucks and rail cars. Yucca Mountain is located in Nye County, Nevada, approximately 94 miles northwest of Las Vegas.

Congress made clear its belief that “[s]tate . . . participation” in the repository program would be “essential” to promote public confidence in the nuclear waste program. 42 U.S.C. § 10131(a)(6). Consequently, the Act provides for active participation by affected state and local governmental entities. The statute authorizes the Secretary of Energy (“Secretary”) to designate counties that are contiguous to Nye county as “affected unit[s] of local government (“AULGs”). 42 U.S.C. § 10101(31). To assist State and AULG participation, the NWPA requires to DOE to provide financial grant assistance to enable those entities to engage in various activities to monitor and evaluate the Yucca Mountain project and its impacts, and to inform its citizens of those issues. See generally 42 U.S.C. §§ 10136(c)(1)(A)-(B).

Congress also authorized the establishment of the Nuclear Waste Fund (“NWF”), to be funded by the generators and owners of nuclear waste, to fund the disposal program’s costs. Part of the NSF is to be used to facilitate AULG participation in the process. The NWF is also subject to the congressional appropriations process. See 42 U.S.C. § 10222(c) and (d). Each fiscal year, Congress appropriates money from the NWF, and the Secretary then administers the fund to promote the goals of the Act. The State of Nevada and designated AULGs may request financial assistance for site characterization activities. Each year the Secretary determines how much funding to make available to the State and AULGs. Those entities then negotiate among themselves to determine each government unit’s share of the total available funds.

### **B. Interests of Lincoln County**

Lincoln County, Nevada is located in the eastern portion of the State. According to the 2000 census, approximately 4,165 people, 1,540 families and 1,010 households reside in the County, which comprises approximately 10,637 square miles. Average annual per capita income is approximately \$17,000. About 11.5% of families and 16.5% of the population are below the poverty line. Cattle ranching, agriculture, government services and small-scale mining comprise the primary occupations. The town of Rachel, located in the western portion of Lincoln County, is approximately 65 miles northeast of Yucca Mountain. (By comparison, Yucca Mountain is located 94 miles northwest of Las

Vegas). Ninety-eight percent of the land in Lincoln County is administered by the federal government.

On April 8, 2004, DOE determined that, for purposes of its environmental reviews under the National Environmental Policy Act, its preferred method for transporting waste to Yucca Mountain from around the country would be to ship most of such waste by rail to the City of Caliente, Nevada, off-load the waste to dedicated rail cars in Caliente, and then ship the waste by dedicated rail line from Caliente to Yucca Mountain. The City of Caliente is located in Lincoln County. The DOE's preferred rail corridor for shipping the waste from Caliente to Yucca Mountain (the Caliente Rail Corridor) would be approximately 320 miles long., approximately 90 miles of which would be located in Lincoln County. On October 13, 2006, DOE announced that it is reconsidering its designation of the Caliente Rail Corridor as the preferred route and is studying other potential alternatives. However, as of the date of the filing of the instant petition, DOE has not altered its designation of the Caliente Rail Corridor as the preferred alternative; it is far from certain that that designation will ultimately change; and in any event, the Caliente Rail Corridor, which traverses a substantial portion of Lincoln County, will remain one of the primary alternatives under consideration.

As a backup to providing direct rail to Yucca Mountain, DOE is also currently evaluating construction and operation of a rail-to-truck inter-modal facility to be located in Caliente. Under this scenario, shipments of spent nuclear fuel and other high-level radioactive waste would be shipped via rail along the Union Pacific mainline to Caliente, where the shipments would be transferred to trucks and then shipped on existing federal and state highways west across Lincoln County toward the Yucca Mountain repository site.

In short, there is a strong possibility, if not likelihood, that Lincoln County will be the gateway for most shipments of high-level nuclear waste entering Nevada and destined for disposal at Yucca Mountain. In addition, as noted above, some of its communities live closer to Yucca Mountain than the residents of the City of Las Vegas.

Lincoln County is also situated downwind from the Nevada Test and Yucca Mountain repository site. As down-winders to the above-ground nuclear weapons tests, many Lincoln county residents have qualified for federal compensation for cancer resulting from exposure to weapons testing-related radionuclide deposition in the county. Accordingly, Lincoln County is very concerned about potential atmospheric exposure pathways associated with the Yucca Mountain repository.

Recognizing the potential for Lincoln County to be substantially and directly affected by Yucca Mountain, in July 1988, the Secretary of DOE designated Lincoln County an AULG, one of ten units of local government that have been so designated. In fact, Lincoln County is one of only three counties that the Secretary *voluntarily*

designated as an AULG, thus emphasizing that the Yucca Mountain project could have significant environmental and socio-economic impacts on the County and its residents.

## **II. The Existing NRC Rule Concerning Representation by Counsel**

10 C.F.R 2.314(b) provides in pertinent part that:

“[a] person may appear in an adjudication on his or her own behalf or by an attorney-at-law. *A partnership, corporation, or unincorporated association may be represented by a duly authorized member or officer, or by an attorney-at-law.* A party may be represented by an attorney-at-law if the attorney is in good standing and has been admitted to practice before any Court of the United States, the District of Columbia, or the highest court of any State, territory, or possession of the United States. (emphasis added)

Recently, the Pre-License Application Presiding Officer (PAPO) Board in the Yucca Mountain pre-license application proceedings had occasion to consider whether the italicized language allows municipal governments to be represented by persons other than an attorney -- that is, whether an “unincorporated association” includes county or local governments for purposes of this rule. The issue arose when White Pine County, Nevada sought permission to allow its non-attorney consultant to attend and participate in a site tour of Yucca Mountain as its representative. In response to this request, the PAPO Board ruled:

It is the current belief of a majority of the members of the PAPO Board that, in light of the provisions of section 2.314(b), a governmental entity such as White Pine County, Nevada, is not permitted to be represented in a [NRC] adjudicatory proceeding by other than an attorney-at law, and that the notice of appearance designating Dr. Baughman (for purposes of the forthcoming ASLBP tour of the Yucca Mountain facility) fails, inter alia, to meet this standard. Given the lack of formal briefing or unanimity on this question, the Board has further decided, however, to allow Dr. Baughman to participate in the December 7 tour solely as a matter of the Board’s discretion. This will leave the ultimate resolution of the representation issue to another day when it might prove of greater practical significance to the conduct of the proceeding. Given the assigned basis for extending this invitation to Dr. Baughman, it should be understood by all concerned that no precedent is being established by this action.

See Order dated December 2, 2005 in Docket No. PAPO--00, ASLBP No. 04-829-01-PAPO. More recently, at a pre-hearing conference on March 5, 2007, the PAPO Board reiterated its view that the regulation in question is unclear on this point.

The County's own research has not revealed any decisions, either by the Commission or by a judicial court, directly addressing this issue.<sup>1</sup> As the PAPO Board's pronouncements indicate, it is at best uncertain whether the Commission's current regulation would allow Affected Units of Local Government to be represented in the Yucca Mountain licensing proceedings by a non-attorney.

In the meantime, the DOE has publicly committed to filing its license application by no later than June 2008, and has reaffirmed that it will "meet or beat" that date. 38 Env't. Rptr. (BNA) 489 (Mar. 2, 2007). In addition, at a prehearing conference on March 5, 2007, the DOE informed the PAPO Board that sometime between October 1, 2007 and December 21, 2007, it will certify completion of its document filings on the Licensing Support Network ("LSN") that has been created to facilitate discovery in the Yucca Mountain proceeding. The DOE's LSN certification is significant because it will trigger a number of critical milestones and deadlines. Within 90 days DOE's certification, all parties must certify their own LSN postings. 10 C.F.R. § 2.1003(a). Further, the DOE's certification of its LSN postings set in motion the clock for DOE's filing of its license application; DOE must make available its LSN documents "no later than six months in advance of filing its license application." *Id.* Thus, if DOE were to certify its LSN filings as early as October 1, 2007, the licensing hearings could commence as early as April 1, 2007, just one year from now.

In short, the day is rapidly approaching when Lincoln County and other Affected Units of Local Government will need to know, with certainty, whether they may only be represented at the licensing proceedings by a licensed attorney, or whether they may be represented by non-attorneys if and when their limited resources so require. It is unclear when the PAPO Board might deem the issue ripe enough to rule on this issue in the specific context of the Yucca Mountain proceedings, much less whether any appeal from that ruling would be decided sufficiently in advance of the commencement of those proceedings to allow AULGs to plan effectively for the licensing hearings. Accordingly,

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<sup>1</sup> On a few limited occasions, the Commission has indicated a willingness to waive the requirement that intervenors be represented by an attorney on an ad hoc basis, but the authority to do this is at best unclear, has never been applied to municipal or county governments, and precedent provides little basis to assume that Affected Units of Local Government may be represented by non-attorneys in the Yucca Mountain licensing proceeding. See generally, U.S. NRC Staff Practice and Procedure Digest (2005) at 2.10.2, available at <http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr0386/sr0386digest13.pdf>.

Lincoln County is requesting that the Commission directly and authoritatively clarify this issue in the manner requested herein, to allow AULGs sufficient time to plan their participation in the Yucca Mountain licensing proceedings..

### **III. Requested Relief**

Lincoln County requests that 10 C.F.R 2.314(b) be amended to make explicit that Affected Units of Local Government may appear and participate in the Yucca Mountain licensing proceedings through designated non-attorneys. Specifically, Lincoln County proposes that the rule be amended to add the following language:

In any adjudicatory proceeding concerning an application for a license to construct a geological repository for high-level radioactive waste pursuant to the Nuclear Waste Policy Act, as amended, an affected unit of local government (as designated by the Secretary of Energy pursuant to 42 U.S.C. § 10136(c)) may be represented by any duly authorized representative and/or an attorney-at-law.

### **IV. Reasons for Requested Relief**

#### **A. Lincoln County (and other Rural AULGS) Have Limited Resources to Retain Counsel**

Once DOE files its license application, the Yucca Mountain licensing proceeding is expected to take years to complete. It will entail literally hundreds of days of hearings. A relative handful of private enterprises, let alone governmental entities, would have the financial resources to pay a qualified team of attorneys to prepare for, attend and participate on a daily basis in proceedings of such length and technical complexity. In the case of the Affected Units of Local Government, particularly rural counties with limited financial resources, this reality is exacerbated by the fact that the licensing hearings will be conducted in Nevada, but AULGs typically would have to go outside the State to retain counsel who are versed and experienced in NRC proceedings.<sup>2</sup> AULGs therefore may not only have to pay higher hourly rates relative to their local legal markets, but will also have to pay substantial travel costs to allow those attorneys to attend and participate in the hearings. Neither Lincoln County, nor other rural AULG, has the financial resources to pay counsel to attend the hearings on a daily basis.

By way of comparison, DOE itself has spent many years preparing its license application. To assist and represent it in this endeavor, it has retained special outside

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<sup>2</sup> As noted below, both the Department of Energy and the State of Nevada have determined it necessary to retain outside counsel located in and near Washington, D.C. to represent them effectively in the Yucca Mountain licensing proceedings. Lincoln, Eureka, and Lander Counties (all in Nevada) have likewise retained Washington, D.C. counsel to assist them in connection with those proceedings.

counsel -- first, the law firm of Winston & Strawn, and more recently (and currently) the law firm of Hunton & Williams -- to represent it in those activities and to conduct the licensing proceeding itself. According to press reports, the DOE's contract with Winston & Strawn was for \$16.5 million, and it may pay Hunton & Williams as much as \$45 million to finalize its license application and represent it in the NRC licensing proceedings. *See Las Vegas Review-Journal*, Feb. 5, 2002 (page 1A) and March 25, 2004 (page 4B), respectively. Thus, the State has had the benefit, and will have the benefit during the licensing proceedings, of the resources of these prominent national law firms. This has been possible only because of the millions of dollars that DOE has had the luxury of paying these outside counsel to date, and the additional millions that will be paid in the future to help finalize its license application and shepherd that application through the adjudicatory proceedings.

The State of Nevada, which opposes the proposed Yucca Mountain repository, also provides an instructive comparison. For years the State has been actively reviewing and commenting on many key DOE technical documents as they are prepared, and regulatory developments as they occur, pertaining to Yucca Mountain. The State has been able to fund legal challenges to many significant standard-setting and other actions taken by EPA, DOE and other federal agencies that pertain to the Yucca Mountain matter. [*See, e.g. State of Nevada v. Department of Energy*, 457 F.3d 78 (D.C. Cir. 2006); *State of Nevada v. U.S. Department of Energy, et al.*, No. 3:06 cv-00153-ECR-RAM (D.Nev.)(filed Mar. 22, 2006); *Nuclear Energy Institute, Inc., et al. v. EPA*, 373 F.3d 1271 (D.C. Cir. 2004). It has established and staffed a Nuclear Waste Project Office with sophisticated and experienced personnel, and can draw on an experienced and sophisticated group of environmental attorneys within the Office of the State Attorney General: Beyond all that, the State has been able to retain the services of one of the leading law firms in the country (located in Washington, D.C.) specializing in nuclear regulatory issues and NRC licensing proceedings.

The State has been able to vigorously protect its legal interests in this manner only because of the large amounts of money at its disposal, through standard and supplemental funding mechanisms, to pay for experienced counsel. Thus, as early as September 2001, the State Legislature appropriated \$4 million to fund its legal fight against Yucca Mountain. [www.lvrj.com/egi-bin/printable.egi?](http://www.lvrj.com/egi-bin/printable.egi?) (last visited 3/2/07); [www.state.nv.us/nucwate/npf/htm](http://www.state.nv.us/nucwate/npf/htm) (last visited 3/2/07). In addition, Clark County, Nevada, which also opposes Yucca Mountain, and a number of private contributors have contributed well over \$1 million to the State's fund. [www.state.nv.us/nucwaste/npf/contributors.htm](http://www.state.nv.us/nucwaste/npf/contributors.htm) (last visited 3/2/07). Undoubtedly, the State will be able to raise more funds for this legal fight in the future, both from its own coffers and the contributions of others. In addition, since October 1999, the State has received more than \$13 million in DOE grants through the Nuclear Waste Fund established by Congress as part of the Nuclear Waste Policy Act. *See* page 2, *supra*. Yet despite these substantial resources (which, as discussed below, dwarf what is available to Lincoln County and other rural AULGs), the State is reportedly uncertain that it will be

able to afford the level of participation by its counsel that would be necessary to fully protect its interests.

The situation of Lincoln County and other rural AULGs is dramatically different from that of DOE and the State. Although these counties and their citizens are as vitally interested in the Yucca Mountain project as the State of Nevada, and stand to be substantially affected by that project, the resources at their disposal to participate in the licensing proceedings pale in comparison to the resources of the State and DOE. Lincoln County's *total* operating budget from general revenues for the current fiscal year is only \$3 million. Its authority to levy sales and real property taxes is essentially tapped out. As noted above, ninety-eight percent of the land base in Lincoln County is managed by the federal government, leaving a very narrow opportunity for the county to expand its economic base. Lincoln County, and other rural counties, are simply not in a position to divert any meaningful portion of their revenues away from essential services in order to pay outside counsel to participate in the Yucca Mountain licensing proceeding at a frequency or level of effort that will fully protect their interests.

In order to participate in the NRC licensing proceedings concerning Yucca Mountain, Lincoln County and similarly situated rural counties are entirely dependent on DOE grants from the Nuclear Waste Fund -- but that money may only be used for participation in the licensing proceedings if Congress includes language in its annual appropriations bill or accompanying committee reports that expressly allows AULGs to use NWF funds for that purpose.<sup>3</sup> Lincoln County has received at total of only \$5.3 million since October 1999, and until FY 2006, none of those funds could be used to pay legal counsel in connection with the Yucca Mountain licensing or pre-licensing proceedings. *See* note 3. The amount of funding (if any) available to each AULG to pay for counsel is therefore unpredictable and will vary from year to year based on (1) how much, if anything, Congress appropriates for the Nuclear Waste Fund that year (2) whether Congress includes authorization in connection with its annual appropriation allowing AULGs to spend the money on the licensing proceedings and (3) the allocation formula that the AULGs negotiate among themselves each year to divide the congressional allocation among each of them. These amounts can vary widely.

It bears emphasis, in this regard, that the grants from the Nuclear Waste Fund constitute all of the available moneys that Lincoln County has at its disposal not only to retain counsel, but also to establish and operate its Nuclear Waste Oversight Office; conduct public information activities; and retain expert consultants including any

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<sup>3</sup> Section 116(c) of the NWPA, 42 U.S.C. § 10136(c), enumerates the purposes for which AULGs may use monies from the NWF. Participation in the licensing proceedings is not among them. Since FY 2006, the AULGs have succeeded in obtaining language in each of the past three annual appropriations that authorizes them to use NWF funds for participation in the Yucca Mountain licensing proceedings. There is no guarantee that, despite their best efforts, Congress will continue to include similar authorizations in future annual appropriations, in which case the AULGs would effectively have no funds available to pay for outside counsel to represent or assist them in those proceedings.

potential expert witnesses. When viewed against all these needs, funding to the AULGs from the Nuclear Waste Fund simply does not provide sufficient dollars to retain experienced counsel to prepare for and participate in the Yucca Mountain licensing proceedings every day that they will need to be represented at and participate in those proceedings. In short, the resources available for counsel's participation do not match the needs of the County to be present at and participate in the licensing proceedings. The same is true of other AULGs.

Moreover, it cannot simply be assumed that the interests of Lincoln County (or any other AULG) will be adequately protected by the participation of the State of Nevada. As the putative representative of all of the citizens of Nevada, the State does not and cannot attend to the specific interests and concerns of the residents of Lincoln County, or any other county. Lincoln County's interests can only be adequately protected if its own representative attends and participates in the hearings as needed. Ideally, that representative likely would be an attorney. But that is simply not possible every day. In fact, the office of the Lincoln County District Attorney currently consists of one attorney, the District Attorney himself. (The Office of the County District Attorney is responsible for civil as well as criminal matters). In a project of the magnitude and significance of Yucca Mountain, Lincoln County ought to be provided with sufficient federal funds to ensure the protection of its interest to the fullest extent. But where the federal government fails to make those resources available, it should not then penalize Lincoln County even further by forbidding the County's participation because the County cannot afford to have an attorney represent it every day.

**B. There is No Reasonable Justification to Allow Partnerships and Unincorporated Associations to be Represented by Non-Attorneys But to Deny the Same Right to Rural County Governments**

Presumably, partnerships, corporations and unincorporated associations are allowed to participate through non-attorneys because the Commission recognizes the importance of public participation and, therefore, the need to ensure that members of the public who have a direct stake in the Commission's actions are not denied a meaningful opportunity to participate in its proceedings because of a lack of financial resources.

The reality is, however, that Lincoln County and similarly situated AULGs will find it not only as difficult -- but in many cases, more difficult -- than any number of "unincorporated associations," "corporations" or "partnerships" to pay for legal counsel to represent it day-in and day-out in the very lengthy Yucca Mountain proceedings.

In short, fairness requires that Lincoln County and other AULGS be allowed to be represented by non-attorneys. There is no justifiable grounds on which to draw the line in favor of unincorporated associations, corporations and partnerships but not AULGs for purposes of the Yucca Mountain proceedings.

**C. Lincoln County Should Be Allowed to be Represented by a Duly Authorized Representative**

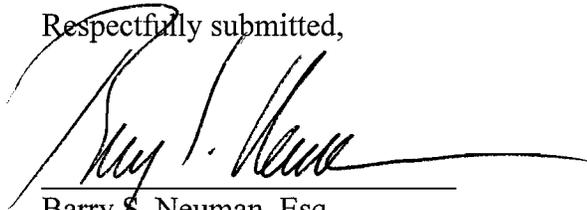
As presently written, section 2.314(b) requires an unincorporated association, partnership and corporation to be represented in a proceeding by a “duly authorized member or officer.” However, it would be untenable to require Lincoln County and other rural AULGs to be represented by a “member or officer” of the governmental unit. County commissioners, for example, do not make their living in those capacities, but serve voluntarily and are employed in other jobs. They could not possibly be expected to participate in the licensing proceedings. Even paid, full-time government officials and officers cannot reasonably be expected to vacate their daily public duties to the taxpayers in order to participate in NRC licensing proceedings.

Consequently, the regulation also needs to be amended to make clear that AULGs may be represented in the Yucca Mountain proceeding through consultants or other duly authorized representatives.

**V. Conclusion**

For all the foregoing reasons, the Commission should amend 10 C.F.R. 2.314(b) in the manner requested herein.

Respectfully submitted,



Barry S. Neuman, Esq.  
Carter Ledyard & Milburn LLP  
701- 8<sup>th</sup> St., N.W.  
Suite 410  
Washington, D.C. 20001

Attorneys for Petitioner, Lincoln County

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