

August 20, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRE-LICENSE APPLICATION PRESIDING OFFICER 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))	

**THE DEPARTMENT OF ENERGY'S
RESPONSE TO STATE OF NEVADA'S REPLY TO RESPONSES TO MOTION**

On August 10, 2007, the Board issued an Order allowing the U.S. Department of Energy (DOE) to respond to the "State of Nevada's Reply to the Responses to Nevada's Motion for a Declaratory Order." This is DOE's response to Nevada's reply.

Discussion

DOE's production obligation for its initial Licensing Support Network (LSN) certification is straightforward. When DOE makes its initial certification, it must make available on the LSN the documentary material DOE has generated or acquired as of a reasonable cutoff date in advance of the certification. No other standard applies.

The State of Nevada's latest attempt in its reply to recraft this obligation is no more availing than Nevada's original motion. In fact, it is not even certain what declaratory ruling Nevada now seeks from the Board. Nevada's reply advances no less than the following seven different formulations of the documents that must be available on the LSN at the time of DOE's initial certification:

- “the documentary safety basis of [DOE’s] license application”
- “documents essential to the application and the early drafting of contentions”
- “the basic substantive building blocks required of DOE’s application”
- documents “required for licensing”
- documents “truly necessary for licensing”
- “vitally important safety documents like [but apparently not limited to] Analysis Model Reports (AMRs) and the Total System Performance Assessment (TSPA)”
- documents “at the very core of DOE’s disposal safety analysis”

These formulations are not synonymous. Some focus on just the license application; others have a broader scope and look to the licensing proceeding. Some are concerned only with the “safety basis” of the application while others look more expansively to the application without qualification. Some are defined in terms of documents “required” for licensing while others seek a more limited set defined as documents that are “vitally important” or “at the very core of” DOE’s safety case. One formulation which goes even further afield would require DOE to speculate as to what information might be deemed “essential” from the perspective of other participants for the “early drafting of contentions.”

Moreover, it is not clear under any of these formulations whether Nevada contends that all of the subject documents necessarily must be available at the time of DOE’s initial certification. Nevada argues at times that this should be the case. Yet, Nevada simultaneously offers that “reasonable compliance” is sufficient and that DOE could certify as long as a “substantially complete set” of the required documents is available, which seemingly would permit certification before all such documents are completed.¹

¹ State of Nevada’s Reply to Responses to Nevada’s Motion for a Declaratory Order (August 9, 2007) at 2 n.2 & 3 (hereafter, Nevada Reply).

Nevada's reply also proposes a novel (and entirely extra-legal) precondition to DOE's certification. Citing no legal authority, Nevada contends that it is insufficient for DOE to make its documentary material available on the LSN. Nevada further contends that DOE's information also "has to be available in a form usable by other proceeding participants" before DOE can certify.² Left unstated is how compliance with that test would be measured.

None of the various declaratory rulings Nevada seeks is found in the Subpart J regulations. Each is vague and wholly subjective. If adopted, they would spawn countless disputes as participants could, and likely would, litigate such issues as what material is "essential" to their ability to draft contentions, which documents are "required" versus "truly necessary" versus "vitaly important," what is needed to make DOE's information "usable" by other participants, and so forth.

Indeed, Nevada has signaled that it might challenge DOE's certification even if DOE satisfied the various formulations from its reply. Nevada artfully emphasizes in its reply that the declaration it seeks is a standard for "*minimum compliance.*"³ This leaves open the very real prospect that upon DOE's certification, Nevada will claim yet more must be available.

In short, Nevada's reply does not, as Nevada contends, seek to avoid "regulatory uncertainty." It is a guarantee of ongoing disputes.

Had the Commission intended to condition DOE's LSN certification on any of the latest formulations Nevada advocates, it easily could have. The Commission could have required that DOE had to make available particular documents or analyses before it certified. The Commission, however, did not.

² Nevada Reply at 3.

³ Nevada Reply at 3.

Nevada has always understood the plain meaning of the Commission's regulations. Nevada evinced that understanding when it did not object to the Commission's statements during the LSN rulemaking that DOE did not have to complete its supporting documentary material before it certified.⁴ Nevada evinced that understanding again when it did not challenge DOE's prior certification on the ground that DOE had not completed its supporting documentary material.⁵ Nevada reiterated that understanding yet again just last year before Congress. In testimony filed with the Senate in May, 2006, the director of Nevada's Agency for Nuclear Projects stated that the information DOE has to make available on the LSN six months before submission of the license application is the documentary material "*in its possession*" at that time.⁶ There was no mention that DOE needed to complete by that time all "vitally important" documents, all "required" documents, all the "basic substantive building blocks" of the license application, or whatever other formulation Nevada argues.

Nor should the Board credit Nevada's assertion that "it would be impossible to begin drafting" contentions absent its requested relief.⁷ Nevada told this Board two years ago that it had already begun drafting contentions.⁸ Nevada said at the time that it expected to have several

⁴ The Department of Energy's Response to State of Nevada's Motion for Declaratory Ruling (August 3, 2007) at 14 (hereafter, DOE Brief).

⁵ DOE Brief at 16-19.

⁶ Statement of Robert Loux, Executive Director, Nevada Agency for Nuclear Projects before the Senate Committee on Energy and Natural Resources (May 16, 2006) at 2 (emphasis added) (Exhibit A hereto).

⁷ Nevada Reply at 3.

⁸ Tr. at 400 (statement of Charles Fitzpatrick).

hundred contentions.⁹ More recently, Nevada has declared that it expects to file “thousands” of contentions.¹⁰

Nevada has been drafting those contentions based on its review of the millions of documents DOE has already made available on the LSN. According to Nevada, it assembled a special team of lawyers and experts in 2001 to prepare for the Yucca Mountain licensing proceeding. Nevada’s team “has been performing a thorough evaluation of the scientific and legal integrity of the work done by DOE and its contractors at Yucca” since that time.¹¹

As part of their “review of the technical record for the project,” Nevada’s lawyers and experts “have been combing DOE’s electronic database,” *i.e.*, the documents DOE has made available on the LSN.¹² When DOE made available 2.1 million additional documents earlier this year, Nevada announced that its science consultants were dividing the documents among them so the documents could be “critiqued for information that could become part of the State’s case against the project” (thus belying Nevada’s further statement in footnote 2 of its reply that Nevada does not have the time or resources to review the documents DOE has already made available).¹³

Nevada’s ongoing review has included documentation regarding the TSPA. Nevada retained several years ago experts it characterizes as the world’s foremost authorities on analyses

⁹ Tr. at 402 (statement of Joseph Egan).

¹⁰ Statement of Robert Loux, Executive Director of Nevada Agency for Nuclear Projects, in S. Tetreault, “Documents Added to Yucca Database,” *Las Vegas Review Journal* (May 1, 2007) (Exhibit B hereto).

¹¹ Statement of Joseph Egan before the House Subcommittee on the Federal Workforce and Agency Organization (April 5, 2005) at 1 (Exhibit C hereto).

¹² *Id.* at 3.

¹³ Exhibit B at 1.

like the TSPA. Nevada says these experts have conducted a “detailed review” of the TSPA that accompanied DOE’s Site Recommendation for the Yucca Mountain repository, going so far as “purchas[ing] the GoldSim computer model”--the computer model on which the TSPA is based-- and “run[ning] various scenarios” from that version of the TSPA.¹⁴

These experts also have been paying “special attention” to DOE’s development of the TSPA since Site Recommendation.¹⁵ They have been “reviewing the record illustrating the development of the new TSPA” for the license application, including information from a technical exchange in October, 2006 at which DOE gave a detailed presentation of developments in the TSPA, entitled “TSPA Model Development and Implementation.”¹⁶ Thousands--if not tens of thousands--of pages of documentary material regarding developments on the TSPA are available on the LSN now, and Nevada is further supplementing its knowledge about the TSPA through such means as Freedom of Information Act requests.¹⁷ For Nevada to suggest in light of these facts that it cannot begin to draft contentions concerning the TSPA is irreconcilable with what Nevada has said it has been doing.

Furthermore, the NRC Staff has indicated that its docketing review of the license application could take up to six months.¹⁸ As a practical matter, therefore, Nevada and all other participants will likely have at least six months before the license application is docketed to

¹⁴ Letter from Robert Loux to Dale Klein (April 10, 2007) at 1 (Exhibit D hereto).

¹⁵ *Id.*

¹⁶ *Id.* at 2.

¹⁷ *E.g.*, Letter from Kenneth Powers to Charles Fitzpatrick (August 17, 2007) (Exhibit E hereto).

¹⁸ Summary of the U.S. Nuclear Regulatory Commission/U.S. Department of Energy Quarterly Management Meeting (March 27, 2007) at 1 (Exhibit F hereto).

review any of DOE's supporting documentary material that is not finished at the time of DOE's initial certification.

Conclusion

The Board should deny Nevada's motion. Even as recast, Nevada's motion does not seek to interpret the Subpart J regulations but to amend them. That is an inappropriate request for relief that the Board should reject.

Respectfully submitted,

U.S. DEPARTMENT OF ENERGY

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(High-Level Waste Repository:)
Pre-Application Matter))

THE DEPARTMENT OF ENERGY'S
RESPONSE TO STATE OF NEVADA'S REPLY TO RESPONSES TO MOTION
CERTIFICATE OF SERVICE

I certify that copies of the foregoing THE DEPARTMENT OF ENERGY'S RESPONSE TO STATE OF NEVADA'S REPLY TO RESPONSES TO MOTION in the above-captioned proceeding have been served on the following persons on August 20, 2007 by Electronic Information Exchange.

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EXHIBIT A

STATEMENT OF ROBERT R. LOUX
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NEVADA AGENCY FOR NUCLEAR PROJECTS
BEFORE THE UNITED STATES SENATE
COMMITTEE ON ENERGY AND NATURAL RESOURCES
MAY 16, 2006

Thank you for the opportunity to appear before you today. I am Robert Loux, Executive Director of the Nevada Agency for Nuclear Projects, which is a branch of the Office of the Governor of the State of Nevada. The Agency was established by the Nevada Legislature in 1985, to carry out the State's oversight duties under the Nuclear Waste Policy Act. I have served as the Agency director since it was established. Our Agency also serves as staff for the Nevada Commission on Nuclear Projects.

The current status of the Yucca Mountain high-level nuclear waste repository project can be described in a single word: unknown – not even uncertain, but unknown. You have heard from the Department of Energy's Office of Civilian Radioactive Waste Management that it cannot provide a schedule for submittal of a Yucca Mountain repository license application to the Nuclear Regulatory Commission (NRC) for its review. But, Department representatives have said that it will not take place in FY 07. You also have watched the progression of potential repository opening dates go from the statutory 1998 date to a more recent estimate of 2010, and now to maybe 2015 to 2020. Multiple episodes of "redirection" of the program, both from within the Department of Energy and from the Congress, define the past twenty years of the Yucca Mountain project history. The current status of the Yucca Mountain project, within the Office of Civilian Radioactive Waste Management, is a product of fundamental, persistent and unresolved problems, with both the site and the project execution, overlain by layers of redirection that wrongly assume the problems have been, or will be resolved.

Site Recommendation and Technical Basis for License Application

At the time of the Secretary of Energy's Site Recommendation for development of a Yucca Mountain repository on February 14, 2002, it was stated that a license application would be submitted to NRC in late 2004. This plan was announced despite the Nuclear Waste Policy Act requirement that a license application be submitted not later than 90 days after the site designation becomes effective by an act of Congress, which occurred in July 2002. In November 2004, it was announced that the license application would not be submitted during the following month, and it was not known when it would be submitted.

This failure to submit the license application in 2004 came as no surprise, since a regulatory prerequisite for license application submittal had not been met. The Nuclear Regulatory Commission Licensing Support Network Rule requires that DOE certify it has made all documentary material in its possession on the proposed Yucca Mountain high-level waste repository publicly available, in a prescribed manner, at least six months prior to submission of a license application. The intent of this is to expedite the discovery phase of the licensing hearing to meet the tight statutory schedule for a licensing decision by the NRC. On August 31, 2004, the NRC Atomic Safety and Licensing Board ruled that the DOE's June 30, 2004 certification was based on incomplete documentation, and the manner in which DOE made the material publicly available on its own internet web site failed to satisfy the regulations. Nevada's July 12, 2004 motion to strike the certification was granted. This all transpired two years after the Yucca Mountain site designation became effective. DOE has not tendered a new certification, and in its monthly status reports to the Atomic Safety and Licensing Board, as late as this month, stated that it does not have a schedule for resumption of the process.

At the time of the Site Recommendation, DOE announced its priorities for FY 03 were to:

- a) "continue vigorous scientific investigation of repository system behavior;
- b) develop a repository license application; and
- c) accelerate the transportation program."

This confirms that, contrary to statements by then Secretary Abraham and President Bush, the repository program managers were not prepared to move forward with the licensing process, since by law, site characterization, i.e. scientific work, is complete at the time of Site Recommendation with respect to the sufficiency of information for a license application. President Bush, in a February 15, 2002 letter to the President of the Senate and the Speaker of the House, said, "This recommendation...will permit commencement of the next rigorous stage of scientific review of the repository program through formal licensing proceedings before the Nuclear Regulatory Commission." (emphasis added).

Even the Nuclear Regulatory Commission understood that at the time of Site Recommendation, the information for a license application was insufficient because, in its statutorily required statement to the President of its view on whether the "at depth site characterization and waste form proposal seem to be sufficient for inclusion" in the license application, its response was a forecast, not a finding. The Commission indicated confidence that the information would be sufficient at the time of license application, but still pending with the Commission was the resolution of 293 Key Technical Issues that DOE had agreed with the NRC staff to have resolved prior to submission of a license application.

The Nuclear Waste Policy Act also required that a Final Environmental Impact Statement (FEIS) for a Yucca Mountain repository accompany the Site Recommendation by the Secretary to the President. The FEIS is the primary document that explains and

EXHIBIT B

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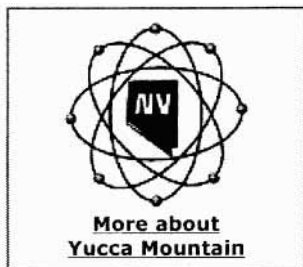
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Documents added to Yucca database

By STEVE TETREULT
STEPHENS WASHINGTON BUREAU



WASHINGTON -- The Energy Department announced Monday it has added 2.1 million documents to a Yucca Mountain electronic database that is available to the public.

Coupled with earlier postings, the database now contains 3.4 million DOE scientific and engineering documents, and other material government officials say will support their bid to establish a nuclear

waste repository in Nevada.

Yucca Mountain critics said the licensing support network also is likely to contain information hinting at repository flaws, and they plan to examine the documents closely.

Bob Loux, executive director of the Nevada Agency for Nuclear Projects, said the documents will be divided among 30 science consultants and critiqued for information that could become part of the state's case against the project, to be located about 100 miles northwest of Las Vegas.

Nevada plans to file "thousands" of contentions, or objections, during formal repository licensing hearings the Nuclear Regulatory Commission is expected to hold, Loux said.

The network Web site is www.lsnnet.gov. It also contains Yucca documents posted so far by the NRC, Nye County and the state

of Nevada.

The electronic library will be shared among the participants in repository license hearings. DOE spokesman Allen Benson said several hundred thousand more documents remain to be posted.

The public disclosure appeared to douse one fight between the Energy Department and Nevada, which had alleged that the DOE was hoarding documents and making it hard for the state to track the project.

Another disagreement may be brewing.

By law the licensing database must be officially certified six months before the DOE is allowed to file a repository license application with the NRC. DOE officials have said they plan to certify the database in December so the agency can file an application by the end of June.

But Loux said the state plans to protest that key documents such as analyses of key computer models, and the Total System Performance Assessment, a major science document, might not be made available until the spring.

"The modeling reports are foundation documents that may not be ready until sometime next year," Loux said. "We continue to think this will cause DOE a problem in trying to certify their records."

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EXHIBIT C

Statement of Joseph R. Egan

Before the House Subcommittee On the Federal Workforce and Agency Organization

"Yucca Mountain Project: Have Federal Employees Falsified Documents?"

April 5, 2005

Mr. Chairman and members of the subcommittee, thank you for the opportunity to address you today on this important national issue. My name is Joe Egan. I am a nuclear engineer and an attorney specializing in nuclear safety and environmental litigation. My Tysons Corner firm, Egan Fitzpatrick Malsch & Cynkar, PLLC, has handled a wide variety of nuclear cases over the past decade, including several involving the Department of Energy complex. I have been asked to address two specific issues related to your investigation of falsified documents at DOE's proposed Yucca Mountain nuclear waste repository. One is quality assurance, and the other involves DOE's ongoing efforts to suppress information about the misdeeds of its Yucca contractors and the geologic inadequacy of the Yucca site.

Introduction

On September 11, 2001, Nevada's Attorney General appointed me Special Deputy Attorney General to assist the Governor's Office and Nevada's Agency for Nuclear Projects in litigation and NRC licensing proceedings involving Yucca. I worked with those offices to assemble a small, world-class team of highly experienced nuclear and environmental attorneys and independent scientific experts to undertake this task. Our team has been performing a thorough evaluation of the scientific and legal integrity of the work done by DOE and its contractors at Yucca, and we have filed several lawsuits challenging that work.

One of those suits does not directly involve Nevada, though the State is closely following it. It is a class-action suit brought by private attorneys, including my ~~firm~~, on behalf of the workers at Yucca who drilled five miles of tunnels into the silica-laden rock there without mandatory respiratory protection. It relies on the testimony of experienced industrial hygienists that DOE's contractors falsified air quality and health and safety records at the project to save time and money on drilling, leading to gross and dangerous overexposures to toxic dust. So document falsification is not a new issue at Yucca.

Approximately a year into our review of the technical record for the project, I opined publicly that there would never be an ounce of nuclear waste buried at Yucca Mountain. I strongly maintain that view today. Indeed, in light of problems now emerging at a dizzying pace, epitomized by those your subcommittee is investigating, I believe it is quite possible, if not probable, that an application for a construction permit for the Yucca project will never even be docketed by the NRC, let alone granted. The project appears poised to sink on the character and fitness of DOE to be an NRC licensee,

and on the profoundly defective quality and inaccuracy of the records and scientific analyses supporting DOE's technical work. It is of vital importance to Nevadans and the nation as a whole that these records and analyses not be suppressed or hidden by DOE.

The Forced Disclosure of DOE's Emails

Last June, DOE purported to certify to NRC that all of its relevant documents concerning the Yucca project – some 2.1 million – had been made publicly available on an electronic database called the Licensing Support Network, or LSN. We challenged that certification before an NRC Licensing Board, arguing that DOE had improperly withheld at least six million documents, including roughly four million emails it had misleadingly called "archival" emails. DOE tried to create the impression in its certification that these emails were so old as to no longer be relevant to the project. On examination by the Licensing Board, however, it was learned that these emails were not archival at all, but extended through at least the year 2002 or 2003. The Licensing Board agreed with us that DOE had not shown good faith, and that emails often offer the most candid, unvarnished assessment of the facts.

On August 31 of last year, NRC's Licensing Board granted our request to strike DOE's document certification on three independent grounds. Among other things, the Board required DOE to produce all of its "archival" emails and perhaps millions of additional withheld records. It is only because of our motion to strike and the Board's inquiry that the emails that are the subject of this hearing came to light. The Board's order forced DOE's outside attorneys to have to review these emails for various privileges that might apply. I commend those attorneys, Hunton & Williams, for advising Secretary Bodman to disclose publicly that some of the emails evidenced falsified scientific data by the government's own scientists. It bears noting, however, that DOE really had no option but to disclose this information, since the emails were about to be forced into the public domain under compulsion of the Board's order.

It will be troubling, to say the least, if your investigation reveals that DOE's Yucca managers knew of the falsifications for years prior to this forced disclosure, and long prior to having declared the Yucca site "suitable" and recommending it to President Bush and the Congress. The discovery of document falsification by anyone at Yucca should immediately have been brought to project superiors and been fully investigated. Such conduct should immediately have raised issues of whether DOE's contractors may or should have been subject to debarment under federal contracting laws, whether they may or should have been liable for treble damages under the False Claims Act, whether bonuses should have been withheld, whether other civil or criminal statutes were implicated, and whether DOE itself, if indeed it tolerated such conduct, possesses the character and fitness to be an NRC licensee under NRC's regulations that will now, for the first time ever, be applicable to DOE.

Additional Troubling Emails

Since Secretary Bodman's disclosure, we have been combing DOE's electronic database for additional evidence of document falsification. We have already located additional emails that do evidence such falsification, as well as DOE's knowledge of gross deficiencies in the quality and accuracy of the records supporting DOE's scientific analyses of Yucca Mountain. Some of these emails, which appear to be only the tip of the iceberg, are attached as exhibits to my prepared statement. Additional emails are posted on Nevada's Nuclear Projects Office website at <http://www.canwin.org/LSN/>. When coupled with the emails DOE has recently released to your subcommittee, what the documents appear to show is a project so amiss, and so tremendously adrift from what NRC's quality assurance rules require, that it is almost impossible to imagine that DOE could any longer establish the basic prerequisites to even complete its license application, let alone survive four years of NRC litigation over it.

Consider what the few e-mails available to us before DOE's recent disclosures show. They show current project management (Bechtel/SAIC) directing its quality assurance personnel not to use the word "violated" in their audit reports ("noncompliant," a less disturbing term, was preferred) (Exhibit 1); project personnel adopting the position that NRC should be given "minimum information" (Exhibit 2); project personnel afraid to call whole programs deficient because fixing them would be too expensive (Exhibit 3); secret communications that question whether critical representations to the NRC about safety priorities are correct (Exhibit 4); efforts to "keep some people in blissful ignorance" about technical problems (Exhibit 5); an assumption that the proof "that will get us through the regulatory hoops" need not be "rigorous" (Exhibit 6); a program that carefully manipulates statistics to assure that the results are always "in the right place" (Exhibit 7); a program where scientific instruments are documented as properly calibrated before they are even received, much less calibrated (Exhibit 8); a project where discord and distrust are so rampant that senior officials are called "swindlers," "certifiable jerks," and worse, and the management of the principal contractor is called "craven and ignorant" (Exhibit 9). They evidence a project where dramatic and unexpected information ("Water Water Everywhere") apparently gives DOE "ulcers" but not enough discomfort to delay a scientific report to Congress so the new information can be included (Exhibit 10). To be sure, there are some good people that tried to do the right thing. For example, DOE quality assurance reviews in August of 2000 concluded that there was "evidence of major flaws in the approach taken towards implementation of an effective Quality Assurance Program," and "the wrong culture of the individuals involved" (Exhibit 11). As one documentation manager complained, "I don't know how to fight lies and misinformation, and no one seems to care about the truth, or even making sure the right people are doing the right stuff" (Exhibit 12). But who at DOE listens?

NRC's quality assurance rules are designed to ensure that all technical findings in a license application are supported by a proper and believable document pedigree. For example, it is not enough for DOE simply to claim that the infiltration rate of water through Yucca's rock is value X. DOE must also be able to show that the instruments used to measure the parameters necessary to calculate X were approved instruments that

EXHIBIT D



OFFICE OF THE GOVERNOR
AGENCY FOR NUCLEAR PROJECTS

1761 E. College Parkway, Suite 118

Carson City, Nevada 89706

Telephone: (775) 687-3744 • Fax: (775) 687-5277

Email: nwpo@nuc.state.nv.us

April 10, 2007

Honorable Dale Klein, Chairman
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

RE: *Inscrutability of DOE's TSPA for Yucca Mountain*

Dear Chairman Klein:

We understand that DOE may now be running or is about to run its Total System Performance Assessment ("TSPA") simulation program, the results of which will form the basis for DOE's license application for its proposed Yucca Mountain nuclear waste repository, which DOE plans to file with NRC by June 2008. Accordingly, Nevada has been paying special attention to the new TSPA. We have purchased the GoldSim computer model (for \$10,000) and have run various scenarios that arose in DOE's earlier Site Recommendation TSPA ("TSPA-SR").

After our detailed review, we thought it imperative to call your attention to a glaring and critical problem with DOE's TSPAs, including its newest one. In short, the TSPA *does not meet* the basic requirements of a calculation intended to form the basis for a government license. The model is so complicated and so large, and takes so many computers to run it, and it must be run so many times for the answer to converge, that it is **fundamentally** not capable of being checked by any third party, including the NRC Staff. We doubt there is even anyone in DOE who has a comprehensive command of the entire model.

We understand that NRC Staff has developed its own model (the "TPA"), less complicated than DOE's, in order to help Staff to understand the issues. But the Staff is not the applicant, and its model cannot be the primary ground for license approval. The application has to stand or fall on the validity of DOE's model and results. That model must be transparent and capable of being checked. NRC cannot license Yucca Mountain on results from a black box, and it should so inform DOE.

Nevada has been reviewing the record illustrating the development of the new TSPA. There are a variety of documents that attempt to decipher DOE's TSPA process. Perhaps the best is from a DOE/NRC Technical Exchange meeting on TSPA for Yucca Mountain held on October 24-25, 2006, where Mr. S. David Sevougian gave a presentation on DOE's "TSPA Model Development and Implementation." We and our experts have studied the slides from that presentation in detail, and they raise grave concerns that the hardware configuration adopted by DOE – involving hundreds of computers – is wholly inappropriate for a major safety-related license application that should be accessible for scrutiny by interested third parties reviewing the application, including NRC Staff, Nevada, other interested parties, the Nuclear Waste Technical Review Board, and NRC's Advisory Committee on Nuclear Waste.

Specifically, Slide 13 of the presentation (attached) shows the so-called "TSPA-wulf" configuration that is proposed by DOE for use in licensing. A footnote states that "TSPA-wulf" is a reference to the "Beowulf Project" developed at NASA's Goddard Space Center, after which this type of computer cluster configuration is named (*i.e.*, a "Beowulf Computer Cluster").

Nevada was most surprised to learn that the specific Beowulf Computer Cluster proposed by DOE for Yucca's licensing requires use of an immense cluster of computers and processors that no participant can reasonably expect to duplicate:

- A Windows 2000 File Server (Dell PowerEdge 6600);
- 30 Windows 2000 or 2003 Master Servers (Dell PowerEdge 4600s/2650s/2850s/2950s), described as job distribution servers and connected via a Terminal Services Client to unspecified PCs for off-site development;
- 752 Processors, comprising:
 - 240 Windows Server 2003 Processors (60 Dell PowerEdge 2950s);
 - 440 Windows 2000 Processors (220 Dell PowerEdge 2650s/2850s);
 - 36 Windows 2000 Processors (9 Dell PowerEdge 6450s);
 - 36 Windows NT 4.0 Processors (9 Dell PowerEdge 6350s).

In other words, simply running, or likely even inspecting, the structure of DOE's TSPA for Yucca requires the coordinated use of literally hundreds of computers and processors and software, some of which is already obsolete.

Worse, within this Byzantine hardware and software context, the GoldSim simulation software is then required to implement the enormously complicated TSPA, with the computations for individual portions of the simulation being distributed to the various processors noted above. GoldSim is an expensive proprietary software package that requires extensive training to operate. While Nevada has purchased this model and paid the annual fees, and has engaged experts devoted to understanding and running GoldSim, it is hard to imagine that we will be able to check DOE's work adequately, not

EXHIBIT E



Department of Energy
Washington, DC 20585

QA: N/A

AUG 17 2007

CERTIFIED MAIL 7000 1670 0005 4673 2327

Charles J. Fitzpatrick
Egan, Fitzpatrick & Malsch, PLLC
1777 N.E. Loop 410, Suite 600
San Antonio, TX 78217

Dear Mr. Fitzpatrick:

This is in response to your April 26, 2007, Freedom of Information Act (FOIA) request for various documents itemized below. Please refer to F2007-00276 in any future correspondence regarding this matter.

Our responses to the individual items of your FOIA request are itemized as follows:

1. The documents and CD-ROMs transmitted to Ms. Claudia **Newbury** in accordance with the correspondence attached to this request as Exhibit A (March 28, 2000) from Mr. Eric Zwahlen, including:
 - a. Simplified Total System Performance Assessment (**STSPA**) (on CD-ROM); and
 - b. All instructions on how to install, browse, and execute the model.

In response to this item of your request, enclosed is a CD-ROM identified as MOL.20010614.0182.

2. Any and all transmittal correspondence from any [U.S. Department of Energy] DOE employee or representative to any employee or representative of the Nuclear Waste Technical Review Board or any other third party or entity, providing such third party with any information pertaining, in whole or in part, to the **STSPA**.
 - a. Letter, S. Brocoum to W. D. Barnard, dated April 7, 2000, with Enclosure 1. Enclosure 2 is the same item identified in response to Item 1.a. above. We cannot **determine** what map was sent with this letter, therefore, this enclosure is not provided. Enclosure 4 is an Analysis



Model Report (AMR) that was provided to you in response to FOIA request F2006-00506 and is not provided at this time.
(MOL.20000605.0290; 68 pages)

- b. Letter, S. Brocoum to W. D. Barnard, dated January 24, 2002, with enclosure. The enclosure is the same as that identified in Item 1.a. above.
(MOL.20020501.0459; 2 pages)
3. The **STSPA** model referred to by presenter Abe **VanLuik** at slide #25 of his presentation on "Yucca Mountain project Total System Performance Assessment Approach" (cover page and slide #25 attached to this FOIA request as Exhibit B).
4. The TSPA-SR multimedia CD referenced to by presenter Abe VanLuik at slide #15 of the same presentation (slide #15 is attached as Exhibit C).

In response to these items of your request, enclosed is a CD-ROM identified as the *Total System Performance Assessment for the Site Recommendation – Summary – Yucca Mountain Project* (TSPA-SR).

5. In a February 2005 white paper on the GoldSim **website** (entitled "Radioactive and Hazardous Waste Management Applications Using GoldSim"), GoldSim states at page 1, "**at** the request of the U.S. Department of Energy, starting in 1990, we began to develop a new simulation tool to specifically address these problems. . . . The result of this development effort is a Windows-based graphical simulation tool called GoldSim." (The cover page of **GoldSim's** white paper and page 1 are attached to this FOIA request as Exhibit D.) Please provide a copy of **DOE's** relevant request for proposal for this work, if any, and its contract with GoldSim relating to **GoldSim's** development of this new simulation tool starting in 1990.

In response to this item of your request, enclosed is a copy of the following documents:

1. Contract DE-AC01-96RW00312, Subcontractor Task Assignment Authorization, Number 98-04D, dated June 1998 (1 page)
2. Contract DE-AC01-96RW00312, Subcontractor Task Assignment Authorization, Number 98-04D, dated August/September 1998 (1 page)
3. Contract DE-AC01-96RW00312, Subcontractor Task Assignment Authorization, Number 98-04D, dated November/December 1998 (1 page)
4. Task Assignment Modification YMP98-04D Additional Project, undated (3 pages)
5. Letter, B. Hamilton-Ray to C.F. Metzger, dated May 4, 1998 (4 pages)

Exemption 4 of the FOIA provides that U.S. government agencies need not make available records that have been determined to be business proprietary. We have determined that the labor categories and wage rates are business proprietary and, therefore, withheld from public disclosure under Exemption 4 of the FOIA. The balancing test to determine whether this information meets the criteria of business confidential information is "if disclosure of the information is likely to have either of the following effects: (1) to impair the government's ability to obtain necessary information in the future, or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." We have determined that releasing the labor rates to you would constitute an unfair competitive advantage over another individual or company wishing to submit an unsolicited proposal or compete for a similar contract with DOE. It has been determined that identification of these costs meet the two criteria, therefore, the labor category and wage rates contained in document number 5 listed are being withheld from disclosure.

Our contact at Golder Associates, Inc. has requested documents from their archived records center. Upon receipt of these documents, they will be reviewed and a determination will be made if any of them are responsive to your FOIA request. Therefore, additional documents will be provided to you if they are determined to be responsive to your FOIA request.

- 6. Information on GoldSim's website regarding the Yucca Mountain project (attached to this FOIA request as Exhibit E) states: "The Yucca Mountain project has designed a highly interactive GoldSim interface specifically for the public that provides an easy-to-understand summary of the entire project," after which statement is depicted a screen shot of the "simplified Total System Performance Assessment model." Please provide a copy of the DOE contract or contract amendment under which GoldSim prepared the simplified Total System Performance Assessment model.**

There are no documents responsive to your request for a copy of a request for proposal or contract between DOE and GoldSim. However, DOE issued to the Management and Technical Support Services (MTS) contractor a task order to develop a multi-media communication package to help explain to the general technical community how DOE expects the repository system to perform. The MTS then contracted with Golder to develop the requested communication package. Golder, in turn, developed the GoldSim software for the STSPA model. In response to this item of your request, enclosed are the following documents:

1. Letter, R. R. James to R. L. Toft, dated September 27, 2000, with enclosure.
(5 pages)

2. Letter, E. Zwahlen to S. Brocoum, dated April 30,2001, with enclosure.
(MOL.20010614.0181;7 pages)

7. **Any later version or updated version of the STSPA model or instructions on how to install, browse, or execute the model prepared by or on behalf of DOE at any time after March 28,2000, (the date of the transmittal to Ms. Newbury referred to in Request No. 1, above).**

There were two versions of the STSPA (phase I and phase II). The first phase was done under MTS task order (see our response to item 6 of your request). According to discussions with a Golder employee who worked on this matter, this phase was a work in progress demonstrated to the Nuclear Waste Technical Review Board in accordance with the Board's statutory oversight role, as referenced in the letter dated March 28, 2000, from Eric Zwahlen to Claudia Newbury. The second phase was a simplification of the TSPA-SR model, also developed under a MTS task assignment. This simplified model was ultimately incorporated into the TSPA CD-ROM provided in response to item 1 of your FOIA request.

8. **Any correspondence or other Documentary Material relating in any way to, or discussing, any DOE decision to discontinue, or terminate, the use of the STSPA or any decision not to update it.**

A search of the Office of Civilian Radioactive Waste Management's records was conducted and no responsive documents could be located. Therefore, there are no documents responsive to this item of your request.

I am the individual responsible for withholding the labor category and labor rates in item 5 of your FOIA request.

Our decision to withhold the labor category and labor rates in item 5 of your FOIA request may be appealed, in writing, within 30 days after your receipt of this letter, to the Director, Office of Hearings and Appeals, HG-1, U.S. Department of Energy, 1000 Independence Avenue, S.W., Washington, DC 20585. The written appeal must contain all other elements required by 10 C.F.R. § 1004.8. Judicial review will thereafter be available to you in the district where you reside, where you have your principal place of business. where DOE's records are situated, or in the District of Columbia.

In your April 26,2007, letter you stated your willingness to pay fees, in an amount not to exceed \$1000, for the search, duplication and review of this request. The fees assessed to process this FOIA request are itemized as follows:

AUG 17 2007

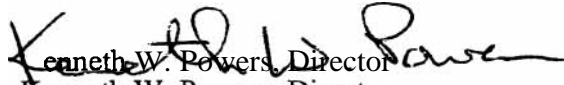
FOIA Officer GS 13/10 - \$46.98/hr

18 hours @ \$46.98=	\$845.64
Plus 16%	<u>135.30</u>
Subtotal	\$980.94
Duplication	
92 pages @ \$.05/page	<u>4.60</u>
Total	\$985.54

Upon receipt of the responsive documents and CD-ROMs, please send your check in the amount of **\$985.54**, made payable to the U.S. Department of Energy, to: U.S. Department of Energy, Attn: Diane Quenell, 1551 Hillshire Drive, Las Vegas, NV 89134-6321.

If you have questions regarding our response to your request, please contact Diane Quenell at (702) 794-5004 or at diane.quenell@ymp.gov for assistance. This completes our interim response to your FOIA request, pending the findings of Golder Associates, Inc., for additional responsive documents.

Sincerely,


Kenneth W. Powers, Director
Kenneth W. Powers, Director
Office of Project Management
and Procurement

Enclosures:
As stated

EXHIBIT F

**SUMMARY OF THE
U.S. NUCLEAR REGULATORY COMMISSION / U.S. DEPARTMENT OF ENERGY
QUARTERLY MANAGEMENT MEETING
ROCKVILLE, MARYLAND
March 27, 2007**

Introduction

The U.S. Nuclear Regulatory Commission (NRC) and U.S. Department of Energy (DOE) held a public Quarterly Management Meeting on March 27, 2007. The purpose of this meeting was to discuss the overall progress of the Yucca Mountain Project (YMP) on the proposed geologic repository site at Yucca Mountain, Nevada. The meeting was held at NRC Headquarters in Rockville, Maryland, with video conferencing to the Center for Nuclear Waste Regulatory Analyses (CNWRA) in San Antonio, Texas; NRC Region IV in Dallas, Texas; and the NRC's Atomic Safety and Licensing Board hearing facility in Las Vegas, Nevada. Teleconferencing was also made available to interested stakeholders. Other participants included the Nuclear Energy Institute, State of Nevada, Nye County, Clark County, Pine County, the Nuclear Waste Technical Review Board, and members of the public.

Opening Remarks

The NRC thanked everyone for attending and emphasized that the Quarterly Management Meeting gives the NRC a chance to reflect on the items that were completed in the last quarter, express any concerns publicly to DOE. The NRC provided the DOE and the public with some insight on the way the NRC will operate once the license application (LA) is tendered. For instance, meetings held after the LA is submitted will follow the same NRC public meeting procedures as any other applicant. The NRC stated that it expects a high quality LA from DOE, that is complete and accurate in all material respects.

Jack Strosnider's retirement was announced. Michael Weber and Eric Leeds were introduced as the new Director and Deputy Director of the NRC's Office of Nuclear Material Safety and Safeguards.

NRC Program Update

NRC's understanding of DOE's methods and approaches continues to grow. The NRC anticipates that it will make a docketing decision within approximately 6 months after receipt of the LA. The purpose of this initial review for docketing is to determine whether the LA contains sufficient information to begin a regulatory review in accordance with our regulations in 10 CFR Part 63 and other applicable requirements. This determination does not reflect the technical adequacy of the information, but a judgment that the NRC can begin the review to determine technical adequacy for a decision. Since Part 63 is a performance-based and risk-informed regulation, DOE has latitude in presenting its case for compliance with the NRC's Part 63 regulations. The review for docketing will have to consider how DOE intends to make its compliance demonstration.