

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

DOCKETED 05/02/08

SERVED 05/02/08

Before Administrative Judges:

Thomas S. Moore, Chairman
G. Paul Bollwerk, III
Paul S. Ryerson

In the Matter of

U.S. DEPARTMENT OF ENERGY

(High-Level Waste Repository:
Pre-Application Matters, Advisory PAPO
Board)

Docket No. PAPO-001

ASLBP No. 08-861-01-PAPO-BD01

May 2, 2008

MEMORANDUM

(Requesting Additional Input from
Potential Parties on Hearing Petition-Related Matters)

On April 4, 2008, the Advisory Pre-License Application Presiding Officer Board (Advisory PAPO Board) issued a Memorandum requesting written comments from potential parties* to the possible adjudication regarding an application by the Department of Energy (DOE) for authorization to construct a high-level waste repository at Yucca Mountain, Nevada. The Board posed a number of questions regarding, inter alia, the format for contentions. Timely responses were received from DOE; the NRC Staff; the State of Nevada (Nevada); the Nevada counties of Churchill, Esmeralda, Lander, and Mineral (jointly); the Nevada counties of Clark, Nye, Eureka, and Lincoln; and the Nuclear Energy Institute.

On April 16, 2008, the Board issued a Memorandum regarding the logistics of a conference to address these matters, which has been scheduled for Wednesday, May 14, 2008,

* "Potential party," as used in prior Advisory PAPO Board issuances and here, means DOE, the NRC Staff, the State of Nevada, and any person or entity that meets the definitions of "party," "potential party," or "interested governmental participant" under 10 C.F.R. § 2.1001.

beginning at 9:00 a.m. PDT in the Nuclear Regulatory Commission's Las Vegas Hearing Facility. That Memorandum advised that, after reviewing the potential parties' written responses to our April 4, 2008 Memorandum, the Advisory PAPO Board might pose additional questions for discussion at the conference. In addition to each potential party's being prepared to discuss its previous response and any other issues it believes have been raised by the written responses of others, the Board requests that the potential parties identified in brackets below be prepared in the first instance to address the following matters:

A. Submission of the DOE Application **[DOE]**

1. What is DOE's current, best, good faith estimate of the date on which DOE expects to file its license application?
2. In what form (e.g., three-ring notebooks) will DOE file paper copies of the application? (See 10 C.F.R. § 63.22)
3. What kind of optical storage media (OSM) will DOE use for filing the application, including any non-public portions of the application?
4. Will DOE include reference materials as part of the license application, provide citations to those materials, or some combination of attachments and citations?
5. Will DOE's OSM contain hyperlinks to such application reference materials and, if so, how will they function?
6. In addition to the paper and optical storage media copies filed in accordance with 10 C.F.R. § 63.22, does DOE intend to provide the NRC Staff with the application and/or reference material (or any portion thereof) in any other format?
7. If so, will DOE make the same materials available to other potential parties?
8. Does DOE intend to generate the application and/or reference material in another format for its own use?

9. If so, will DOE make available the same materials to other potential parties?

B. NRC Staff Receipt and Processing of the DOE Application

1. Does the NRC Staff intend to place the DOE license application in ADAMS?

[NRC Staff]

2. If so, how long after initial filing will the NRC Staff make the license application available in ADAMS? **[NRC Staff]**

3. What is the NRC Staff's current, best, good faith estimate of how long it will take the Staff to comply with the docketing requirements of 10 C.F.R. § 2.101(e)?

[NRC Staff]

4. What is the NRC Staff's current, best, good faith estimate of the time likely to lapse between formal docketing of the DOE license application, pursuant to 10 C.F.R. § 2.101(e)(6), and publication of a notice of hearing pursuant to 10 C.F.R. § 2.101(e)(8)? **[NRC Staff]**

5. In light of the reported current budgetary constraints and projected budgetary constraints through fiscal 2010, what is the NRC Staff's current, best, good faith estimate of the time required to complete a Safety Evaluation Report (SER) and final environmental documents concerning the DOE license application? **[NRC Staff]**

Staff]

6. If DOE supplements the license application as described in 10 C.F.R. § 2.101, what impact would this have on the filing of contentions? **[All]**

C. Licensing Board Staffing

1. Is there any reason not to allocate contentions to multiple licensing boards for adjudication? **[All]**

2. If contentions were so allocated, how would it be most efficient to do so?
 - a. For example, would it be possible to identify scientific phenomena or modeling techniques that are common to contentions addressing various portions of the license application? **[All]**
 - b. Should contentions be allocated on the basis of the legal requirement that allegedly has not been satisfied (e.g., all contentions asserting license application fails to satisfy 10 C.F.R. § 63.21(c)(21) assigned to one Board)? **[All]**
 3.
 - a. Relative to the DOE suggestion that issues should be allocated based on pre-closure, post-closure and NEPA/programmatic groupings, why did DOE structure the groupings in this manner (e.g., grouping NEPA/Programmatic and Quality Assurance issues)? **[DOE]**
 - b. Should contentions be allocated among licensing boards as DOE suggests, i.e., (1) Pre-Closure issues; (2) Post-Closure issues; and (3) NEPA/Programmatic (including Quality Assurance issues)? **[All]**
- D. Hearing Petitions, Answers, and Replies **[All]**
1. Should all contentions -- and not only contentions of omission -- clearly identify the legal requirement that allegedly has not been satisfied (e.g., license application fails to satisfy 10 C.F.R. § 63.21(c)(21))?
 2. Should answers to contentions track the format for contentions?
 3. Should answers to contentions be limited to addressing only those specific requirements of the regulations with which the proponent allegedly has not complied?

4. Should replies in support of contentions be limited to responding only to those issues that were raised in the answers?
 5. Given section 2.309(f)(1)(i)'s requirement that a contention must "[p]rovide a specific statement of the issue of law or fact to be raised or controverted," is it possible to proffer an admissible "contention" supporting the application (or a portion of the application)?
 6. If contentions in support of the application (or a portion of the application) are permitted, should those contentions be subject to the designation of DOE as the "lead" party that has principal responsibility for their presentation?
 7. If contentions in support of the application are not permitted, should a participant (other than the NRC Staff) wishing to support the application (or a portion of the application) be permitted to participate in the proceeding and, if so, how?
- E. Joint Contentions and Contention Adoption (10 C.F.R. § 2.309(f)(3)) **[All]**
1. Should the potential parties confer prior to filing contentions with the goal of submitting, where practicable, joint contentions rather than duplicative contentions and, if so, what procedural structure, if any, should be established to enable the consultation process?
 2. If a joint contention is proposed, what additional information should be included in the hearing petition(s) of one or more of the joint contention sponsors to designate/label/support that contention (e.g., statement indicating the contention is jointly sponsored, list of all the participants that are sponsoring the contention, designation of the specific participant who has authority to act with respect to the contention)?

3. Should there be a fixed time period in which to adopt the contentions of other parties?
 4. If there should be a fixed time for adopting contentions, what should such a time period be?
 5. If contention adoption is proposed, what information should be included in the pleading regarding adoption (e.g., adoptor statement declaring whether or not it has contacted the originator of the contention regarding the adoption and whether there is agreement on which participant will have authority to act regarding the contention)?
- F. Non-timely, New, or Amended Contentions **[All]**
1. Should any proffered contentions filed subsequent to the submission of the initial hearing petitions (e.g., non-timely, new, or amended contentions) be subject to the same kind of formatting requirements as initial contentions (see 10 C.F.R. § 2.309(c), (f)(2))?
- G. Additional Submission Format Matters **[All]**
1. Can the parties agree on three-letter designations for identifying themselves in their filings and any evidentiary exhibits?
 2. Can the parties consistently label supporting materials as “attachments,” so as to distinguish them from evidentiary exhibits for purposes of electronic filings?
- H. Standing/Interested Governmental Entity Status **[All]**
1. Should a petition that seeks to establish standing as of right for individuals or nongovernmental organizations contain specific, labeled sections addressing the required elements (e.g., injury in fact, zone of interests)?

2. What identifying/supporting information should be included in petitions and supporting affidavits relative to attempts to establish standing for individuals, organizations, and organizations seeking to establish representative standing?
3. If distance is relevant in establishing standing, should tools such as Google/Google Earth or MapQuest be used to provide an "as-the-crow-flies" estimate?
4. Should a petition that seeks discretionary standing for individuals or nongovernmental organizations contain specific, labeled sections addressing the elements that must be weighed (e.g., developing a sound record, interests in the proceeding, effect on interests, availability of other means, representation by existing parties, broaden issues or delay proceeding)?
5. What identifying/supporting information should a petition provide relative to an assertion that a federal, state or local governmental entity or Native American tribe has standing as of right?
6. What state and local governmental units and Native American tribes have been certified by DOE as an affected unit of local government/affected tribe with respect to the proposed repository and should they be considered to have standing?
7. Relative to obtaining interested governmental entity status, what identifying/supporting information should be provided in a hearing petition?
8. For each potential party and interested governmental entity, what information should be provided in a petition in connection with 10 C.F.R. § 2.1003 regarding availability of LSN material (e.g., date of filing of certification and status of any

challenges to that certification or a declaration that no LSN certification was submitted and explanation as to why no certification was needed)?

I. Advisory PAPO Authority **[AII]**

1. If the Commission does not give the Advisory PAPO Board authority to order a uniform format for contentions, answers and replies, will potential parties be prepared to act to comply voluntarily with reasonable standards for these documents, pending Commission adoption of any Board recommendations regarding those matters?

Because of the number of items to be discussed and the limited time to address them at the conference, we ask the participants to confer in advance of the conference, insofar as practicable, to identify areas of agreement and disagreement so that responses to our inquiries will be succinct and repetition avoided. We are confident that, when called upon to answer or to comment, all participants will cooperate in keeping their remarks very brief and to the point,

without the necessity of our having to establish and enforce rigid time limits.

The Advisory Pre-License Application
Presiding Officer Board

/RA/

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

/RA/

Paul S. Ryerson
ADMINISTRATIVE JUDGE

Rockville, Maryland

May 2, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
U.S. DEPARTMENT OF ENERGY) Docket No. PAPO-001
)
(Advisory Pre-License Application:)
Presiding Officer Board)
(Advisory PAPO Board))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MEMORANDUM (REQUESTING ADDITIONAL INPUT FROM POTENTIAL PARTIES ON HEARING PETITION-RELATED MATTERS), DATED MAY 2, 2008, have been served upon the following persons by Electronic Information Exchange.

U.S. Nuclear Regulatory Commission.
Atomic Safety and Licensing Board Panel
Mail Stop T-3F23
Washington, DC 20555-0001

Thomas S. Moore, Chair
Administrative Judge
E-mail: thomas.moore@nrc.gov

G. Paul Bollwerk, III
Administrative Judge
E-mail: gbp@nrc.gov

Alex S. Karlin,
Administrative Judge
E-mail: alex.karlin@nrc.gov

Paul S. Ryerson
Administrative Judge
E-mail: psr1@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop O-16C1
Washington, DC 20555-0001
Hearing Docket
E-mail: hearingdocket@nrc.gov

ASLB (cont'd.)

Anthony C. Eitreim, Esq.
Chief Counsel
E-mail: anthony.eitreim@nrc.gov

James M. Cutchin: james.cutchin@nrc.gov
Joseph Deucher: joseph.deucher@nrc.gov
Margaret Parish: margaret.parish@nrc.gov
Marcia Carpentier: marcia.carpentier@nrc.gov
Bradley S. Baxter: bradley.baxter@nrc.gov
Lauren Bregman: lauren.bregman@nrc.gov
Zachary Kahn: zachary.kahn@nrc.gov
Erica LaPlante: erica.laplante@nrc.gov
Johanna Thibault: johanna.thibault@nrc.gov
Emily Krause: emily.krause@nrc.gov

Daniel J. Graser: daniel.graser@nrc.gov
LSN Administrator
ASLB HLW Adjudication
E-mail: ASLBP_HLW_Adjudication@nrc.gov*

U.S. Nuclear Regulatory Commission
Office of Public Affairs
Mail Stop O-16D3
Washington, DC 20555-0001

David McIntyre:
E-mail: david.mcintyre@nrc.gov

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MEMORANDUM (REQUESTING ADDITIONAL INPUT FROM POTENTIAL PARTIES
ON HEARING PETITION-RELATED MATTERS), DATED MAY 2, 2008

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15D21
Washington, DC 20555-0001

Janice E. Moore, Esq.
janice.moore@nrc.gov
Mitzi A. Young, Esq.
mitzi.young@nrc.gov
Marian L. Zabler, Esq.
marian.zabler@nrc.gov
Andrea L. Silvia, Esq.
andrea.silvia@nrc.gov
Margaret J. Bupp, Esq.
margaret.bupp@nrc.gov
Daniel W. Lenehan, Esq.
daniel.lenehan@nrc.gov
Jessica Bielecki, Esq.
jessica.bielecki@nrc.gov
Daniel W. Lenehan, Esq.
daniel.lenehan@nrc.gov

OGC Mail Center : OGCMailCenter@nrc.gov

U.S. Department of Energy
1551 Hillshire Drive
Las Vegas, NV 89134-6321

Timothy C. Gunter
E-mail: timothy_gunter@ymp.gov
Susan L. Rives
E-mail: susan_rives@ymp.gov

U.S. Department of Energy
Office of General Counsel
1000 Independence Avenue S.W.
Washington, DC 20585

Martha S. Crosland, Esq.
E-mail: Martha.crosland@hq.doe.gov
Nicholas P. DiNunzio, Esq.
E-mail: nick.dinunzio@rw.doe.gov
Angela M. Kordyak, Esq.
E-mail: angela.kordyak@hq.doe.gov
Mary B. Neumayr, Esq.
E-mail: mary.neumayr@hq.doe.gov

U.S. Department of Energy
Office of General Counsel
1551 Hillshire Drive
Las Vegas, NV 89134-6321

George W. Hellstrom, Esq.
E-mail: george.hellstrom@ymp.gov

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Counsel for the U.S. Department of Energy
Morgan, Lewis, Bockius LLP
1111 Pennsylvania Ave., NW
Washington, DC 20004

Lewis Csedrik, Esq.
E-mail: lcshedrik@morganlewis.com
Jay Gutierrez, Esq.
E-mail: jgutierrez@morganlewis.com
Thomas Poindexter, Esq.
E-mail: tpoindexter@morganlewis.com
Alex S. Polonsky, Esq.
E-mail: apolonsky@morganlewis.com
Thomas A. Schmutz, Esq.
E-mail: tschmutz@morganlewis.com
Donald Silverman, Esq.
E-mail: dsilverman@morganlewis.com
Paul J. Zaffuts, Esq.
E-mail: pzaffuts@morganlewis.com
Thomas E. Reinert, Jr., Esq.
E-mail: treinert@morganlewis.com
Corrine A. Niosi, Esq.
E-mail: cniosi@morganlewis.com

Counsel for the U.S. Department of Energy
Hunton & Williams, LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219

W. Jeffrey Edwards, Esq.
E-mail: jedwards@hunton.com
Kelly L. Faglioni, Esq.
E-mail: kfaglioni@hunton.com
Melissa Grier
E-mail: mgrrier@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
Pat Slayton
E-mail: pslayton@hunton.com
Belinda A. Wright
E-mail: bwright@hunton.com

Counsel for the State of Nevada
Egan, Fitzpatrick & Malsch, PLLC
2001 K Street
Washington, DC 20006

Joseph R. Egan, Esq.
E-mail: eganpc@aol.com
Martin G. Malsch, Esq.
E-mail: mmalsch@nuclearlawyer.com
Susan Montesi
E-mail: smontesi@nuclearlawyer.com

Counsel for Lincoln County
Carter Ledyard & Milburn, LLP
1401 Eye Street, N.W.
Suite 300
Washington, DC 20005

Barry S. Neuman, Esq.
E-mail: neuman@clm.com

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ON HEARING PETITION-RELATED MATTERS), DATED MAY 2, 2008

Egan, Fitzpatrick & Malsch, PLLC
12500 San Pedro Avenue, Suite 555
San Antonio, TX 78216

Charles J. Fitzpatrick, Esq
E-mail: cfitzpatrick@nuclearlawyer.com
Laurie Borski, Paralegal
E-mail: lborski@nuclearlawyer.com

Clark County (NV) Nuclear Waste Division
500 S. Grand Central Parkway
Las Vegas, NV 98155

Engelbrecht von Tiesenhausen
E-mail: evt@co.clark.nv.us
Phil Klevorick
E-mail: klevorick@co.clark.nv.us

Counsel for the State of Nevada
Ross Dixon & Bell
2001 K. Street N.W., Suite 400
Washington, DC 20006

Merril Hirsh, Esq.
E-mail: mhirsh@rdblaw.com

Clark County, Nevada
Elizabeth A. Vibert, Deputy District Attorney
500 South Grand Central Parkway
Las Vegas, NV 89106
E-mail: VibertE@co.clark.nv.us

Counsel for Eureka County, Nevada
Harmon, Curran, Speilberg & Eisenberg, LLP
1726 M. Street N.W., Suite 600
Washington, DC 20036

Diane Curran, Esq.
E-mail: dcurran@harmoncurran.com

Nevada Nuclear Waste Task Force
P.O. Box 26177
Las Vegas, NV 89126

Judy Treichel, Executive Director
E-mail: judyntwf@aol.com

Churchill County, Eureka County, Lander
County, Mineral County, and Esmeralda
County

Robert F. List, Esq.
1975 Village Center Circle, Suite 140
Las Vegas, NV 89134-6237
E-mail: rlist@armstrongteasdale.com

Nuclear Energy Institute
1776 I Street, NW Suite 400
Washington, DC 20006-3708

Michael A. Bauser, Esq.
E-mail: mab@nei.org
Anne W. Cottingham, Esq.
E-mail: awc@nei.org
Ellen C. Ginsberg, Esq.
E-mail: ecg@nei.org

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ON HEARING PETITION-RELATED MATTERS), DATED MAY 2, 2008

City of Las Vegas
400 Stewart Avenue
Las Vegas, NV 89101

Margaret Plaster, Management Analyst
E-mail: mplaster@LasVegasNevada.gov
Liane Lee, Legislative Affairs Officer
E-mail: lilee@LasVegasNevada.GOV

Inyo County (CA) Yucca Mountain Nuclear
Waste
Repository Assessment Office
Inyo County
163 May St.
Bishop, CA 93514

Chris Howard, GIS/LAN Administrator
E-mail: choward@inywater.org

NWOP Consulting, Inc.
1705 Wildcat Lane
Ogden, UT 84403

Loreen Pitchford, LSN Coordinator
For Churchill, County, Eureka County, and
Lander County,
E-mail: lpitchford@comcast.net

Nuclear Information and Resource Service
(NIRS)
6930 Carroll Ave., Suite 400
Takoma Park, MD 20912

Kevin Kamps
E-mail: kevin@beyondnuclear.org

Nuclear Waste Project Office
1761 East College Parkway, Suite 118
Carson City, NV 89706

Robert Loux
E-mail: bloux@nuc.state.nv.us
Steve Frishman, Tech. Policy Coordinatory
E-mail: Steve.frishman@gmail.com

Timbisha Shoshone Tribe
Frederick and Peebles, LLP
1001 Second St.
Sacramento, CA 95814

Darcie L. Houck, Esq.
E-mail: dhouch@ndlaw.com
John M. Peebles, Esq.
E-mail: jpeebles@ndlaw.com
Joe Kennedy, Esq.
E-mail: chairperson@timbisha.org

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Nye County (NV) Regulatory/Licensing Adv.
18160 Cottonwood Rd. #265
Sunriver, OR 97707

Malachy Murphy, Esq.
E-mail: mrmurphy@chamberscable.com

Jeffrey D. VanNiel

E-mail: nbrjdv@gmail.com

Zoie Choate, Secretary

E-mail: zchoate@co.nye.nv.us

Sherry Dudley, Administrative Technical
Coordinator

E-mail: sdudley@co.nye.nv.us

White Pine County
City of Caliente
Lincoln County
P.O. Box 126
Caliente, NV 89008

Jason Pitts

E-mail: jayson@idtservices.com

Talisman International, LLC
1000 Potomac St., NW
Suite 300 Washington, DC 20007

Patricia Larimore, Senior Paralegal

E-mail: plarimore@talisman-intl.com

Yucca Mountain Project Licensing Group
DOE/BSC
Regulatory Programs
1180 North Town Center Dr.
Las Vegas, NV 89144

Jeffrey Kriner

E-mail: jeffrey.kriner@ymp.gov

California Department of Justice
Office of the Attorney General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550

Timothy E. Sullivan, Deputy Attorney General

Email: Timothy.Sullivan@doj.ca.gov

Michele Mercado, Analyst

Email: Michele.Mercado@doj.ca.gov

[Original signed by L. Lewis]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 2nd day of May 2008