

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

**Before Administrative Judges
Thomas S. Moore, Chairman
G. Paul Bollwerk, III
Paul S. Ryerson**

In the Matter of:)	Docket No. PAPO-001
)	
U.S. DEPARTMENT OF ENERGY)	ASLBP No. 08-861-01-PAPO-D01
High-Level Waste Repository:)	
)	
Pre-Application matters, Advisory PAPO)	May 9, 2008
Board))	

**ADDITIONAL COMMENTS OF LINCOLN COUNTY, NEVADA ON CASE
MANAGEMENT MATTERS**

Lincoln County, Nevada, submits these additional comments on case management matters in response to the April 29, 2008 Order of the Advisory Pre-License Application Presiding Officer Board (Advisory Board).

1. The Department of Energy (DOE) states that there is “strong consensus” in favor, among other things, of requiring “single issue” contentions and identification of purely legal contentions. *See* DOE’s Additional Comments on Case Management Matters filed May 6, 2008.

(a) If it were clear that the Advisory Board and all parties had the same understanding of what a “single issue” is for purposes of this requirement, then one could determine if a consensus exists concerning such a requirement. It is not at all clear, however, that the meaning of “single issue” is understood by the Advisory Board and all

of the parties to mean the same thing. This issue was raised in the initial round of comments by Lincoln County, Eureka County and the State of Nevada.

(b) Lincoln County, Eureka County and the State of Nevada likewise have raised concerns about the potential ramifications of requiring contentions to be labeled as “purely legal” as distinct from mixed questions of law and fact. Like the State of Nevada, Lincoln County does not oppose this requirement so long as a contention that is labeled “legal” will not be denied if it later turns out that the issue is a mixed question of law or fact. *See Nevada’s Responses to Advisory Pre-License Application Presiding officer Board’s April 4, 2008 Memorandum, dated April 28, 2008.*

2. While asserting that it is “not literally a case management issue,” the DOE argues that the issues related to its Supplemental Rail Corridor EIS and its Rail Alignment EIS “are outside the scope of the proceeding, because they are intended to support proposed actions to be taken by the Department that are outside the scope of the Commission’s jurisdiction, and that contentions based upon alleged inadequacies or omissions in those documents would not be admissible.” DOE’s May 6th submission. at 5. Lincoln County -- which stands to bear the brunt of the environmental impacts associated with the DOE’s preferred rail corridor -- strongly disagrees with DOE’s position in this regard. Suffice it to note here that, in its own Final Environmental Impact Statement issued in 2002, the DOE sensibly defined a single “Proposed Action” which includes both the construction and operation of a geological repository at Yucca Mountain *and* “transportation of spent nuclear fuel and high-level radioactive waste from commercial and DOE sites to the Yucca Mountain site.” Final Environmental

Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada (DOE/EIS-0250F) (“Repository FEIS”) at 2-1. Even though transportation is defined as an integral component of the project at issue, DOE’s position appears to be that the Commission has jurisdiction to consider transportation-related environmental issues only to the extent they may have been addressed in a general way in the Repository FEIS, but that as those impacts are more specifically identified and analyzed in the Rail Alignment EIS and Rail Corridor EIS, the Commission may not consider or address those more specific impacts in its licensing decision. Lincoln County believes that the DOE’s legal position is untenable, and will be prepared to brief and argue this issue whenever the Commission deems it appropriate to do so..

3. The DOE also suggests that each party should be required to include an affidavit demonstrating “whether the potential party could have raised or will have the opportunity to raise the information in the affidavit in a DOE administrative proceeding or a judicial proceeding.” DOE’s submission dated April 28, 2008 at 7. Lincoln County agrees with the NRC Staff that such a requirement would be inappropriate because there is no such requirement in 10 C.F.R. § 51.109. It would be inappropriate to require as a condition of admissibility that the proponent of a contention, in effect, provide a legal opinion as to whether particular issues can be raised in other *fora*. If DOE believes that a specific contention or category of contentions should be barred on the grounds that the issues can be raised in other legal proceedings (a proposition that is highly

questionable at best), such an argument is essentially in the nature of an affirmative defense, and the initial burden should remain on DOE to file a motion challenging the admissibility of those contentions on such grounds.

Dated: May 9, 2008

Respectfully submitted,

[signed electronically by]

Barry S. Neuman
CARTER LEDYARD & MILBURN LLP
701-8TH Street, NW
Suite 410
Washington, DC 20001
(202) 623-5705
Fax: (202) 898-1521
email: neuman@clm.com
Attorneys for Lincoln County, Nevada

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Pre-Application Matters, Advisory PAPO)	
Board))	
)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the Additional Comments of Lincoln County, Nevada on Case Management Matters in the above captioned proceeding have been served on the following persons this 9th day of May, 2008, by Electronic Information Exchange.

Thomas S. Moore, Chair
Administrative Judge
U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board
Mail Stop: T-3F23
Washington, DC 20555-0001
E-mail: tsm2@nrc.gov

G. Paul Bollwerk, III
Administrative Judge
U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board
Mail Stop: T-3F23
Washington, DC 20555-0001
E-mail: gpb@nrc.gov

Alan S. Rosenthal
Administrative Judge
U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board
Mail Stop: T-3F23
Washington, DC 20555-0001
E-mail: axr@nrc.gov
rsnthl@comcast.net

E. Roy Hawken
Administrative Judge
U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board
Mail Stop: T-3F23
Washington, DC 20555-0001
E-mail: erh@nrc.gov

Alex S. Karlin
Administrative Judge
U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board
Mail Stop: T-3F23
Washington, DC 20555-0001
E-mail: ask2@nrc.gov

Edward P. Noonan, Esq.
W. Jeffrey Edwards, Esq.
Kelly L. Faglioni, Esq.
Donald P. Irwin, Esq.
Michael R. Shebelskie, Esq.
Stephanie Meharg
Audrey b. Rusteau
Belinda A. Wright
Pat Slayton
Hunton & Williams LLP
951 East Byrd Street
Richmond, VA 23219
E-mail: enoonan@hunton.com
jedwards@hunton.com
kfaglioni@hunton.com
dirwin@hunton.com
mshebelskie@hunton.com
smeharg@hunton.com
arusteau@hunton.com
bwright@hunton.com
pslayton@hunton.com

Michael A. Bauser, Esq.
Associate General Counsel
Anne W. Cottingham, Esq.
Ellen C. Ginsberg, Esq.
Nuclear Energy Institute
1776 I Street, NW, Suite 400
Washington, DC 20006-3708
E-mail: mab@nei.org
awc@nei.org
ecg@nei.org

Office of the Secretary
ATTN: Docketing and Service
Mail Stop: o-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: HEARINGDOCKET@nrc.gov

Engelbrecht von Tiesenhausen
Clark County Nuclear Waste Division
500 S. Grand Central Parkway
Las Vegas, NV 89155
E-mail: evt@co.clark.nv.us
Timothy C. Gunter, Director
Susan L. Rives
U.S. Department of Energy
Office of Civilian Radioactive Waste
Management
Office of Repository Development
1551 Hillshire Drive
Las Vegas, NV 89134-6321
E-mail: timothy_gunter@ymp.gov
Susan_rives@ymp.gov

Jason Pitts
White Pine County
City of Caliente
Lincoln County
P.O. Box 126
Caliente, NV 89008
E-mail: idt@idtservices.com

Atomic Safety and Licensing Board panel
ASLB HLW Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, DC 20555-0001
E-mail:
ASLB_HLW_Adjudication@nrc.gov

Joseph R. Egan, Esq.
Marting G. Malsch, Esq.
Susan Montesi
Egan, Fitzpatrick, Malsch & Cynkar, PLLC
The American Center at Tysons Corner
2001 K Street, NW, Suite 400
Washington, DC 20006

Elizabeth A. Vibert, Esq.
Deputy District attorney
Clark County District Attorney Office
P.O. Box 553315
Las Vegas, NV 89155-2215
E-mail: VibertE@co.clark.nv.us

E-mail: eganpc@aol.com
mmalsch@nuclearlawyer.com
smontesi@nuclearlawyer.com

Charles J. Fitzpatrick, Esq.
Egan, Fitzpatrick & Malsch, PLLC
12500 San Pedro Avenue, Suite 555
San Antonio, TX 78216
E-mail: cfitzpatrick@nuclearlawyer.com

Jessica A. Bielecki
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001

Jeffrey Kriner
Yucca Mountain Project, Licensing Group,
DOE/BSC
Regulatory Programs
1180 North Town Center Drive
Las Vegas, NV 89144
E-mail: Jeffrey_kriner@ymp.gov

Margaret Parish
James M. Cutchin
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, DC 20555-0001
E-mail: map4@nrc.gov
Jmc3@nrc.gov

Judy Treichel, Executive Director
Nevada Nuclear Waste Task Force
P.O. Box 26177
Las Vegas, NV 89126
E-mail: judyntwf@aol.com

Martha S. Crosland, Esq.
Angela M. Kordyak, Esq.
U.S. Department of Energy
Office of the General Counsel
1000 Independence Avenue, S.W.
Washington, DC 20585
E-mail: Martha.crosland@hq.doe.gov
Angela.kordyak@hq.doe.gov

George W. Hellstrom, Esq.
U.S. Department of Energy
Office of the General Counsel
1551 Hillshire Drive
Las Vegas, NV 89134-6321
E-mail: george.hellstrom@ymp.gov

Anthony C. Eitreim, Esq.
Chief Counsel
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission

Loreen Pitchford, LSN Coordinator
for Lander, Churchill, Esmeralda and
Mineral County
1705 Wildcat Lane
Ogden, UT 84403
E-mail: lpitchford@comcast.net

Mail Stop: T-3 F23
Washington, DC 20555
E-mail: ace1@nrc.gov

Kevin Kamps
Nuclear Information and Resource Service
6930 Carroll Avenue, Suite 340
Takoma Park, MD 20910
E-mail: Kevin@nirs.org

Daniel J. Graser
Licensing and Support Network
Administrator
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, DC 20555-0001
E-mail: djg2@nrc.gov

Chris Howard, GIS/LAN Administrator
Inyo County (CA)
Yucca Mountain Nuclear Waste
Repository Assessment Office
163 May St.
Bishop, CA 93514
E-mail: choward@inyowater.org

Joe Kennedy, Chairman
E-mail: chairperson@timbisha.org

Patricia Larimore
Talisman International, LLC
1000 Potomac St., NW
Suite 300
Washington, DC 20007
E-mail: plarimore@talisman-intl.com

Robert Loux
Steve Frisman, Tech. Policy Coordinator
Nuclear Waste Project Office
1761 East College Parkway, Suite 118
Carson City, NV 89706
E-mail: bloux@nuc.state.nv.us
Steve.frisman@gmail.com

Diane Curran, Esq.
Eureka County
Harmon, Curran, Spielberg & Eisenberg,
LLP
1726 M Street N.W. Suite 600
Washington, DC 20036
E-mail: dcurran@harmoncurran.com

Margaret Plaster, Management Analyst
City of Las Vegas
400 Stewart Avenue
Las Vegas, NV 89101
E-mail: mplaster@lasvegasnevada.gov

John M. Peebles, Esq.
Darcie L. Houck, Esq.
Fredericks & Peebles, LLP
1001 Second St.
Sacramento, CA 95814
E-mail: jpeebles@ndnlaw.com
dhouck@ndnlaw.com

Barbara Durham
Tribal Historic Preservation Officer
E-mail: dvdurbarbara@netscape.com

Malachy R. Murphy, Esq.
18160 Cottonwood Rd. #265
Sunriver, OR 97707
E-mail: mrmurphy@chamberscable.com

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

Signed (electronically) by,

Barry S. Neuman
Counsel for Lincoln County
Carter Ledyard and Milburn LLP
701 8th Street N.W., Suite 410
Washington, DC 20001-3893
neuman@clm.com