

February 24, 2009

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

ASLB BOARD 09-876-HLW-CAB01 William S. Froelich, Chair Thomas S. Moore Richard E. Wardwell	ASLB BOARD 09-877-HLW-CAB02 Michael M. Gibson, Chair Lawrence G. McDade Nicholas G. Trikourous	ASLB BOARD 09-878-HLW-CAB03 Paul S. Ryerson, Chair Michael J. Farrar Mark O. Barnett
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In the Matter of)
) Docket No. 63-001
U.S. DEPARTMENT OF ENERGY)
)
(High-Level Waste Repository:)
Pre-Application Matters))
_____)

**EUREKA COUNTY’S REPLY TO OPPOSITIONS BY THE U.S. DEPARTMENT
OF ENERGY AND THE NRC STAFF TO ADMISSION OF CONTENTIONS
ON WHICH EUREKA COUNTY INTENDS TO PARTICIPATE**

Pursuant to 10 C.F.R. § 2.315(c) and the schedule established in the Atomic Safety and Licensing Board’s (“ASLB’s”) Order (Addressing Procedural Matters) (January 15, 2009), Eureka County hereby replies to arguments by the U.S. Department of Energy (“DOE”) and the U.S. Nuclear Regulatory Commission (“NRC”) Staff in opposition to the admission of contentions in which Eureka County has an interest in participating.

While Eureka County has not made a determination regarding the precise contentions on which it intends to participate and does not intend to do so until 45 days after the issuance of a decision regarding the admissibility of contentions (*see* Order by the NRC Secretary dated January 15, 2009), the County has generally identified three sets of issues on which it wishes to participate: environmental issues related to transportation, emergency planning issues, and

safety and environmental issues regarding the long-term integrity of the proposed Yucca Mountain repository. The County replies below to some of the general arguments raised by the DOE and the NRC Staff in response to contentions that raise Eureka County's concerns. If the DOE and the Staff were sustained with respect to these broad arguments, a significant portion of the issues on which Eureka wishes to participate would not be admitted to the proceeding.

I. ISSUES ON WHICH EUREKA COUNTY INTENDS TO PARTICIPATE

A. NEPA Issues Relating to Transportation of Spent Fuel

If the Yucca Mountain repository is licensed, high-level radioactive waste ("HLRW") will be shipped to the repository through Eureka County, along existing highway and/or rail routes. Eureka County also lies within the "Carlin" rail corridor, a secondary alternative for construction of a new rail spur to the Yucca Mountain repository. Therefore, Eureka County has significant concerns about the potential environmental impacts of HLRW shipments on the County.

The County's concerns about HLRW transportation aspects fall into three general categories. First, the County is concerned that shipments of HLRW to the Yucca Mountain repository will be vulnerable to acts of terrorism and sabotage. The County is concerned about the immediate health, environmental and economic impacts of a radioactive release from an attack on one or more transportation casks, as well as longer-term effects such as clean-up costs and long-term damage to the environmental and economic health of the County.

Second, while the DOE has chosen the Caliente Corridor rather than the Carlin Corridor as its preferred location for construction of a new rail spur, it is possible that DOE will reconsider that choice and elect the Carlin route. Thus, Eureka County has an interest in contentions that establish general principles regarding the level of detail in which the DOE's

Final Supplemental Environmental Impact Statement (“FSEIS”) for the Yucca Mountain repository describes alternatives for the mitigation of a rail spur’s environmental impacts on the environment, including businesses such as livestock grazing and mining.

Third, Eureka County is concerned about the DOE’s method for estimating the number of shipments that can be made by rail in the transportation, aging and disposal (“TAD”) canister system. DOE has assumed that a large percentage of shipments of high-level radioactive waste to the Yucca Mountain repository can be made by rail in the TAD system. However, a significant portion of the spent fuel is currently in canisters that are not consistent with the TAD system. There are also a significant number of reactors without rail access. Many of these sites will probably end up shipping HLRW by truck, rather than rail. These factors could result in many more highway shipments than DOE projects in the Final Supplemental EIS for the Yucca Mountain repository. Given the fact that highway shipments could be routed on I-80, this could significantly affect Eureka County.

B. Emergency Planning Issues

As a first responder in the event of a transportation accident, Eureka County has a strong interest in ensuring the adequacy of emergency response measures in the event of a transportation accident. In addition, a major event at the repository could potentially affect Eureka County because the County lies downwind of the repository.

C. Safety and Environmental Issues Concerning the Long-Term Integrity of the Yucca Mountain Repository

In order to protect the long-term health and economic interests of its residents, Eureka County seeks reasonable assurance from the NRC that the proposed repository can and will contain the highly radioactive material that is placed there, for the entire time period that it poses a hazard to the environment. Eureka County believes that the repository should be designed to

contain the waste using multiple barriers, relying primarily on the geology of the mountain. Over the years, it has become clear that the DOE must rely on engineered barriers, especially the drip shield, an unproven technology that DOE does not intend to install until generations into the future. Eureka shares the concerns raised by other parties regarding the unproven nature of the drip shields and the uncertainty about whether they will be installed and whether they will function properly if they are installed.

II. REPLY TO GENERAL ARGUMENTS BY DOE AND NRC STAFF

A. General Arguments Regarding NEPA Transportation Issues

The DOE makes several general arguments to the effect that any contentions raising transportation-related environmental issues are inadmissible. All are without merit. First, citing *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), the DOE argues that the NRC must take DOE's decisions regarding transportation facilities "as a given," because the NRC, does not have regulatory authority over transportation of high-level radioactive waste to Yucca Mountain. DOE Response at 1871. But *Department of Transportation* is inapposite here. In *Department of Transportation*, the Supreme Court held that the National Environmental Policy Act ("NEPA") did not require the U.S. Federal Motor Carrier Safety Administration ("FMCSA") to examine the increased environmental effects of cross-border operations of Mexican trucks, including increased air pollution, when it issued new safety regulations for the trucks. The Court found that the environmental impacts complained of by the petitioners were proximately caused by a presidential decision to lift a moratorium on the entry of Mexican trucks to the U.S., not by the FMCSA safety regulations. *Id.*, 541 U.S. at 767. In addition, the Court emphasized that the FMCSA, whose authority extended only to the regulation of motor carrier safety, had no ability to stop the ingress of Mexican trucks or to impose or enforce emissions

controls; thus, no valid purpose was served by preparing an EIS. *Id.*, 541 U.S. at 766. Here, in contrast, a decision by the NRC to license the Yucca Mountain repository would constitute the proximate cause of any transportation-related environmental impacts; and the NRC has the authority to stop or limit shipments of high-level radioactive waste to Yucca Mountain by denying or imposing conditions on a license to the DOE. Thus, *Department of Transportation* provides no authority for the DOE's argument.

Second, the DOE argues that any challenges to the analysis of environmental impacts arising from DOE's transportation decisions are subject only to the jurisdiction of the federal courts of appeals and are therefore outside the jurisdiction of the NRC. DOE Response at 1871. But this argument is inconsistent with the NRC's representations to the U.S. Court of Appeals in *Nuclear Energy Institute v. Environmental Protection Agency*, 373 F.3d 1251 (D.C. Cir. 2004) that Nevada, and presumably other parties, "will be permitted to raise [their] substantive challenges to the FEIS in any NRC proceeding to decide whether to adopt the FEIS . . ." *Id.* at 1313. Because the NRC must decide whether to adopt the Yucca Mountain EIS with respect to its discussion of transportation impacts, these impacts are a legitimate subject of contentions.

With respect to contentions that challenge the adequacy of the DOE's consideration of environmental impacts of terrorist attacks during transportation, DOE argues that the State of Nevada seeks a "worst-case" analysis, which is not required by NEPA. DOE Response at 1875. But it is quite clear that the State's contentions do *not* call for a worst-case analysis. Instead, they proffer evidence of "reasonably foreseeable" attack scenarios whose consequences would be significantly more severe than the consequences evaluated by the DOE. *See, e.g.*, Contention NEV-NEPA-01, Nevada Hearing Request at 1043-47. Consideration of low-probability but reasonably foreseeable impacts with potentially catastrophic consequences is required by NEPA

and the implementing regulations of the Council on Environmental Quality. *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1033-34 (9th Cir. 2006), cert. denied, 549 U.S. 1166 (2007) (citing 40 C.F.R. § 1502.22(b)).

The NRC Staff also makes broad arguments regarding the standard for admissibility of contentions which are not consistent with the standard approved by the U.S. Court of Appeals in *Nuclear Energy Institute*. As that standard was reiterated in a letter from the NRC to counsel for the State of Nevada, the NRC “would treat as cognizable in the Yucca Mountain proceeding an attack on the Yucca Mountain EIS based on significant and substantial considerations which, if true, would render the EIS inadequate.” Letter from Bradley W. Jones, Assistant General Counsel for Rulemaking and Fuel Cycle, to Martin G. Malsch, Counsel to the State of Nevada, re: Request by Nevada for Reconsideration and Clarification of Notice of Denial (March 20, 2008) (ADAMS Accession No. ML080810175). The Staff’s proposed test for an admissible contention goes far beyond the requirements articulated in Mr. Jones’ letter.

For instance, Nevada Contention NEV-NEPA-03 challenges the Final Supplemental EIS for Yucca Mountain for failing to provide clean-up cost estimates for a transportation-related accident; cites to the State’s own significant clean-up cost estimates; and asserts that the deficiency is significant because if clean-up costs were considered, the disclosure of radiological impacts could be materially different. Nevada Hearing Request at 1052-56. The Staff opposes the contention, arguing that the State’s assertion is “bare” and “not sufficient to show that the issue raised in the contention is significant” or “would make a material difference with respect to DOE’s NEPA analysis or the Staff’s adoption recommendation.” NRC Staff Answer to Intervention Petitions at 1342 (February 9, 2009) (“NRC Staff Answer”). Eureka County respectfully submits that an EIS which purports to analyze the environmental impacts of

transporting radioactive waste, and yet omits information on one of the most serious impacts that could occur – an accident involving waste transport – can in no way be considered adequate for adoption by the NRC. The failure of the EIS to include information regarding clean-up costs is, on its face, a substantial and significant consideration. Therefore the contention should be admitted.¹

B. General Arguments Regarding Emergency Planning Issues

DOE's and the NRC Staff's principal response with respect to emergency planning contentions is that NRC regulations do not require the DOE to submit an emergency plan with its Safety Analysis Report ("SAR"), but instead require only a "description" of the plan. DOE Response to Nevada Hearing Request at 130, NRC Staff Answer at 152 (citing 10 C.F.R. § 63.21(c)(21)). There is no question, however, that the DOE's emergency plan must be complete and deemed adequate by the NRC before it may issue a construction authorization for the Yucca Mountain repository. 10 C.F.R. § 63.31(a)(3)(v). Thus, at some point before issuance of a license, the DOE must submit a complete emergency plan for review by the NRC Staff and challenge by the public in a hearing request. *Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1443 (D.C. Cir. 1984), cert. denied, 469 U.S. 1132 (1985). Under the circumstances, Eureka County respectfully submits that it is appropriate to admit at least one general emergency planning contention and hold it in abeyance pending DOE's submission of an emergency plan.

¹ Contention NEV-NEPA-03 is just one example of transportation-related contention challenging the FSEIS's lack of information about potentially significant environmental impacts, for which the Staff's concept of an adequately described basis for a contention or an adequate discussion of the significance of the issues is excessively high. Other examples include NEV-NEPA-05 and NEV-NEPA-06.

IV. CONCLUSION

For the foregoing reasons, the ASLB should reject the above-discussed arguments made by the DOE and the NRC Staff against admission of the contentions in which Eureka County has an interest.

Respectfully submitted,

Eureka County

(Electronically signed by)

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