

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Commission

In the Matter of)	
)	
U.S. DEPARTMENT OF ENERGY)	Docket No. 63-001-HLW
)	
(High Level Waste Repository))	June 14, 2010

**STATE OF NEVADA PETITION FOR RELIEF
WITH RESPECT TO POSSIBLE ISSUANCE OF A
PARTIAL SAFETY EVALUATION REPORT FOR YUCCA MOUNTAIN**

I. INTRODUCTION.

The NRC Staff is actively engaged in efforts to complete two volumes of its Safety Evaluation Report (SER) on the Department of Energy's (DOE) application to construct a permanent geologic repository at Yucca Mountain. These two SER volumes are SER Volume 1, which will address Volume 1 of DOE's application, and SER Volume 3, which will address DOE's Total System Performance Assessment (TSPA) and analysis of post-closure (disposal) safety, the subject of multiple volumes of DOE's application. The focus of this Petition by the State of Nevada (Nevada) is on the Staff's efforts to complete SER Volume 3.¹

¹ The Staff advised the Atomic Safety and Licensing Board presiding over the June 4, 2010 case management conference in Las Vegas (CAB-04) that SER Volume 3 was not complete and would be issued on or before November 2010. The Staff also advised that SER Volume 1 was undergoing final review and concurrence and would be issued on or before August 2010 (*see* transcript at 327-329). This Petition focuses on SER Volume 3 because this Volume will address those issues that are unique to geologic disposal and most of Nevada's admitted contentions in the licensing proceeding focus on the TSPA and post-closure safety. Also, SER Volumes 2 and 5 will not be complete until 2011 or 2012, if ever. SER Volume 4 presents a special case and is discussed in the text of this Petition. Nevada does have a pending contention and rule challenges related to physical security and material control and accounting (MC&A). These two subjects will apparently be addressed in SER Volume 1, along with the other matters discussed in Volume 1 of DOE's application, presumably without prejudice to future Staff safety evaluations in SER Volume 3. However, the Commission has postponed its plans to revise and update its admittedly inadequate rules on physical security and MC&A at Yucca Mountain. *See* 72 Fed. Reg. 72,522, 72,524 (Dec. 29, 2007) (NRC notices proposed rulemaking because its current physical protection and MC&A rules for Yucca Mountain "are not adequate to protect the common defense and security or the public health and safety"). It

The Staff is proceeding to complete this SER volume notwithstanding (1) DOE's motion to withdraw its application, (2) DOE's statement (in its Motion to Withdraw at n.3) that, if withdrawal is allowed, it does not intend ever to refile the application, (3) DOE's nearly completed effort to terminate its Yucca Mountain licensing program, and (4) the Atomic Safety and Licensing Board's grant of an unopposed request to suspend all adjudicatory proceedings on the merits of DOE's application.

The Staff has apparently not yet decided whether it will issue its SER Volume 3 if DOE's application is finally withdrawn. However, Nevada is filing this Petition now and assuming, for argument purposes, that Staff will ultimately decide to do so, probably after informal consultation with the Commission. This Petition cannot be delayed until Staff makes up its mind because each day that passes will result in more staff resources being spent to the point that pure inertia could overcome all arguments that the completion and issuance of SER Volume 3 is a really bad idea.

Nevada does not object to an orderly close-out of the Staff's SER efforts if DOE's license application is finally withdrawn. This would include a systematic and careful account of which Requests for Additional Information (RAIs) remain closed or open. However, in the unique circumstances of this case, the Staff's issuance of SER Volume 3 would signal grave disrespect for the adjudicatory hearing process mandated by Congress and result in serious prejudice to Nevada. It also risks wasting taxpayer and ratepayer money on a project that will produce incomplete and potentially wrong and misleading results while benefiting no one, not even those considering future options for disposition of high-level waste and spent reactor fuel.

does not appear to Nevada how Staff could address these matters in an SER before the rulemakings are completed, given that the current rules are inadequate. *See also* contentions NEV-SAFETY-197 and NEV-SAFETY-198.

As explained below, the Commission should immediately direct its Staff to suspend all efforts to complete and issue Volume 3 of the SER pending a final Commission decision on DOE's motion to withdraw its application. If DOE's motion is finally granted, the Commission should direct its Staff to permanently cease all efforts to complete and issue all volumes of the SER. If DOE's motion is finally denied, the Staff's efforts to complete the SER should resume promptly upon notice by DOE that it will resume the defense and prosecution of its application.

If, however, the Commission does not suspend or terminate SER work as requested, this Petition presents a case for alternative relief that, while unsatisfactory, would partially mitigate the harm and damage that would be done.

Atomic Safety and Licensing Boards have no authority to direct Staff's actions in preparing its SER, and therefore, this Petition can only be filed with the Commission, and only the Commission is empowered to grant relief.

II. COMPLETING AND PUBLISHING SER VOLUME 3 WOULD DEMONSTRATE GREAT DISRESPECT FOR THE PUBLIC HEARING PROCESS MANDATED BY CONGRESS AND IGNORE SERIOUS SAFETY QUESTIONS

If DOE's application is finally withdrawn and the adjudicatory hearing process is terminated, but NRC Staff continues to prepare and eventually publish its SER Volume 3, as if the application were still pending, SER Volume 3 would stand forever as a stilted and incomplete document that accounted for some but not all of the relevant technical and legal analyses related to the TSPA and post-closure safety. Even worse, the Commission would stand accused of publishing safety conclusions that ignored the highly relevant scientific and other professional contributions of other governmental bodies and the public just because they were, at the Commission's insistence in its Rules of Practice, presented and substantiated in the public adjudicatory proceeding mandated by Congress.

The three presiding Construction Authorization Boards have admitted over 300 contentions (statements of issues to be raised) in this proceeding. On appeal, the Commission affirmed the Boards on the admission of all but a few contentions. One hundred sixty Nevada contentions challenging the technical adequacy of DOE's TSPA and post-closure safety analyses were admitted under the demanding pleading requirements of 10 C.F.R. § 2.309(f)(1). Therefore, the Commission is on record as holding that Nevada alone presented 160 legitimate post-closure safety issues, that every one of the 160 issues was supported by technical analyses and relevant facts sufficient to create a genuine issue, and that all of the 160 issues must be resolved before any construction authorization can be issued. Parties other than Nevada also propounded many genuine and material questions about the safety of disposal at Yucca Mountain. If the adjudicatory proceeding is terminated, it would be irresponsible for any part of the NRC to express any opinions on the TSPA and post-closure safety unless these very serious safety issues are addressed and resolved in a thorough and disciplined manner outside of the adjudicatory process.

In preparing its SER Volume 3, the Staff may well be mindful of the many admitted TSPA and post-closure contentions, and it may well be that Staff will address some of them in some detail. However, as required by 10 C.F.R. § 2.309(f)(1)(v), each admitted contention was accompanied by a statement of facts and expert opinions supporting it. Nevada and the other parties went to great effort and expense to hire highly qualified experts and to prepare especially detailed statements of expert opinion supporting their contentions. Appropriate respect for the considered and supported opinions of a Sovereign State, as well as respect for public participation processes in general, requires there to be a full and separate discussion of each

technical argument in paragraph 5 of each admitted contention on the TSPA and post-closure safety before any opinions and conclusions are published in an SER Volume 3.

III. NEVADA WILL BE SEVERELY PREJUDICED.

If the DOE application is finally withdrawn, but the Staff continued to review it as if it were pending and eventually reached positive safety conclusions in SER Volume 3, members of the public, the media, and the Congress might be led to believe that the Commission was of the firm opinion that Yucca Mountain would have been a safe option for the disposal of spent reactor fuel and high-level waste if only DOE had continued to prosecute its license application. While such a conclusion would not be well founded, because the SER would not have been tested in the adjudicatory hearing process as Congress intended, in reality this consideration may elude or be discounted by many, if not most, interested persons who are unfamiliar with the niceties of NRC licensing practice. As a result, Nevada and others who believe that a repository at Yucca Mountain would be unsafe would be placed unfairly on the defensive, and decision makers may reach decisions adversely affecting Nevada (for example decisions on FY2011 appropriations) based on information that is not only incomplete but also misleading and quite possibly wrong.

Similar problems would likewise arise if the SER Volume 3 supported a denial of the license application, in which case those parties supporting a repository at Yucca Mountain might be prejudiced for the same reasons, although very few admitted contentions support the licensing of Yucca Mountain.

IV. TAXPAYER AND RATEPAYER MONEY WILL BE WASTED.

As explained below, the issuance of this SER volume will waste taxpayer and ratepayer money on a project that will benefit no one, not even those considering future options for disposition of high-level waste and spent reactor fuel.

A. The SER Will Serve No Legitimate Agency Purpose.

If the application is withdrawn with prejudice, as DOE has requested, and Yucca Mountain is never licensed, the completion and issuance of SER Volume 3 will serve no legitimate agency purpose. Taxpayer and ratepayer resources will be wasted evaluating an application that no longer exists for a project that has been abandoned forever. An SER for an abandoned project is obviously not necessary for safety, and it would be contrary to NRC's regulatory mission to issue an SER for the sole purpose of assisting those who lobby for or against any federal nuclear project.

B. An SER Will Benefit No One, Not Even Those Considering Future Options For the Disposal of High-Level Waste And Spent Reactor Fuel.

The completion and issuance of SER Volume 3 will not even serve as a useful historical source for "lessons learned" that may be applied in considering future disposal options or in selecting and licensing a second repository site, should Congress decide on such a course.

1. First, most of Staff's conclusions will not apply to a different site in different geologic media and the regulation being applied, 10 C.F.R. Part 63, applies only to Yucca Mountain.

2. Second, many of Staff's conclusions will continue to be disputed in the media and elsewhere, and the issuance of SER Volume 3 will not settle anything. In particular, as explained further below, critical questions about the nature of the NRC's repository licensing framework, for example the role of defense-in-depth, will remain unsettled because they are sharply contested. In short, there will be no "lessons learned" because no lessons were completed.

Ten admitted Nevada post-closure contentions raise important questions regarding how the Commission's Yucca Mountain licensing regulations in 10 C.F.R. Part 63 should be

interpreted. Two of these contentions are especially noteworthy: NEV-SAFETY-161 and NEV-SAFETY-162. NEV-SAFETY-161 (now designated as Legal Issue VIII) questions whether Staff and DOE have improperly construed Part 63 so as to excuse DOE from evaluating the postulated absence of drip shields (an engineered barrier that is essential to waste isolation). Such an evaluation closely resembles the kind of evaluation performed routinely in nuclear reactor safety evaluations, and Nevada believes this evaluation is essential in order to determine whether DOE's proposed post-closure design of the repository properly reflects the Commission's defense-in-depth safety principle.

NEV-SAFETY-162 (now designated as Legal Issue X) questions whether, in promulgating Part 63, the Commission can possibly have contemplated that it would be sufficient for licensing for DOE merely to promise to install an essential post-closure safety feature, the drip shields, decades after the radiological hazards it is intended to address (all 70,000 metric tons of high-level waste) have already been introduced. No applicant for an NRC license for a large nuclear facility has ever advanced a similar proposal, and this presents an extremely important safety and interpretation question. If, for any reason, the drip shields cannot be installed decades from now (other admitted contentions offer many good reasons why this is likely to be the case) then, because there is no plan for waste retrieval, all 70,000 metric tons of high-level nuclear waste may be left forever buried in Yucca Mountain in an unsafe condition.

In many cases, Nevada's and the Staff's legal interpretations differ. In particular, NRC Staff and Nevada hold differing opinions on Legal Issues VIII and X described briefly above.

All ten of Nevada's legal issues have been fully briefed and argued before the Licensing Board (CAB-04). Without a resolution of these disputed legal issues by an authoritative NRC entity independent of NRC Staff, such as CAB-04 or the Commission, Volume 3 of the SER will

rely entirely on internal Staff regulatory interpretations that are contested and may be completely wrong, making SER Volume 3 a useless, misleading, and possibly false document.

V. ANY SER WOULD BE TENTATIVE, INCOMPLETE, AND POSSIBLY MISLEADING OR WRONG.

As explained below, because the Staff will never complete another SER volume that may affect conclusions about the sufficiency of the TSPA and post-closure safety, and DOE has not fulfilled its commitments to update and correct the application, SER Volume 3 will be tentative and woefully incomplete at best. At worst, important sections of SER volumes might be completely wrong because they relied on information and analyses in DOE's Safety Analysis Report (the most important part of the application) that were developed without compliance with proper quality assurance (QA) plans.

A. Quality Assurance Cannot Be Ignored.

In late 1998, after a public meeting between NRC Staff and DOE on QA, a knowledgeable nuclear industry attendee opined that DOE's QA implementation "is so bad that if DOE was a licensee, it would have been shut down 6 months ago and key people would be out looking for work" (*see* LSN# NEN000000304, an internal NEI email dated December 9, 1998). Numerous QA problems remained just six months before DOE tendered its license application in June 3, 2008 (*see* LSN# DEN001594484, a DOE Condition Report, dated January 31, 2008).

DOE worked feverishly to improve QA compliance as its self-imposed application filing deadline approached in 2008, but we may never know whether DOE's efforts were successful. There is no fixed schedule for the issuance of Staff's SER Volume 4, which was to address DOE's QA compliance, and it is not likely that SER Volume 4 will ever be issued if the application is finally withdrawn. Therefore, although the NRC Staff is apparently prepared to opine on the sufficiency of DOE's TSPA and post-closure safety analyses, it apparently is not

prepared to opine on whether the data relied upon in DOE's TSPA is fully traceable, or on whether DOE's TSPA and safety analyses are QA compliant in other important respects. This means that the Staff cannot eliminate the possibility that its conclusions in SER Volume 3 will be completely wrong because they relied on untraceable and otherwise unqualified data and analyses.

Nevada submits that it would be irresponsible to issue such an incomplete and potentially erroneous safety document.

B. DOE Commitments are Not Fulfilled and the Application is Incomplete.

The Staff has issued hundreds of RAIs, and DOE has responded with hundreds of answers relating to post-closure safety. Few of these RAI answers are included in the application Staff will be reviewing. DOE has also generated numerous Corrective Action Reports (CRs), and many of these are not accounted for in the application. These facts further undermine any NRC Staff safety conclusions.

1. For example, in response to both internal and external scientific criticisms of the experimental data it used to support its corrosion rates of Alloy-22, DOE performed additional analyses and promised that it would update and revise its application Safety Analysis Report to include "the final results of the re-cleaning and re-analysis of the weight-loss specimens" (*see* LSN# DEN001611785, a DOE letter to NRC Staff dated April 13, 2009, at Enclosure 3, p. 19). DOE also reanalyzed ratios between Titanium-7 and Titanium-21 corrosion rates and promised to make numerous corrections to the SER to reflect a new 1-1 ratio (*see* LSN# DEN001611049, a DOE letter to NRC Staff dated March 25, 2009, at Enclosure 1, p. 6, and Enclosure 2, p. 10). There will be no such updates, revisions, or corrections in the application Staff will be reviewing.

2. DOE also processed hundreds of CRs pursuant to its QA Program, some of which

affect post-closure safety analyses, and none of the more recent ones are factored into the application. For example, CR 13573 (LSN# DEN001621682) relates to a calculation affecting the design of the waste package. According to the CR (at pg. 1), "a significant amount of work is necessary, as not only is this calculation preliminary, but other calculations that are cited by it are also preliminary. In addition, an argument would have to be crafted that the 21-PWR design sufficiently represents that of the TAD based designs for internal pressures." The application the Staff will be reviewing does not include the final calculations or additional argument called for in CR 13573. CRs 12452 and 14167 apply to potentially incorrect information that DOE expected Staff would rely upon in its SER (*see* LSN# DEN001621068 at pgs. 7-8, minutes of a December 23, 2009 DOE Management Review Committee meeting). The additional work called for in these CRs will not be done before Staff completes its review.

3. 10 C.F.R. § 63.131(b) requires DOE to have a Performance Confirmation Program. There will be no Performance Confirmation Program if DOE finally withdraws the application. Thus, previously settled expectations that preliminary safety data in the application Safety Analysis Report would eventually be confirmed are now groundless. To take just one example, the Safety Analysis Report states at Section 4.2.2.2 that "it is anticipated that the existing [seismic] monitoring system will be maintained through repository closure." The system was being used to obtain seismic ground motion attenuation data at repository depth as input to the repository seismic design. The system will no longer exist if the application is finally withdrawn.

VI. CONCLUSION AND RELIEF REQUESTED.

A. An Immediate Suspension of the Staff's SER Work.

DOE's motion to withdraw its application for an authorization to construct the proposed

Yucca Mountain repository is pending before CAB-04. Nevada understands and appreciates that the Commission will not want to take any action regarding the Staff's SER that prejudices whether DOE's motion will be finally granted or denied. However, until there is a final Commission decision on DOE's motion, it will not be known whether completion of SER Volume 3 (and possibly Volume 4) will be a useful expenditure of time, resources, and taxpayer and ratepayer money, or an unnecessary and wasteful one that possibly prejudices Nevada and others and produces misleading and potentially wrong results. Therefore, the Commission should immediately direct its Staff to suspend its efforts to complete SER Volume 3 until there is a final Commission decision on DOE's motion.

A suspension will not cause any significant delay if DOE's motion to withdraw is finally denied and DOE resumes the prosecution and defense of its application before the NRC. DOE has already taken significant steps to dismantle its Yucca Mountain licensing program, and it could take six months to a year or more to restart the program. This would give the NRC Staff more than enough time to catch up and to issue its SER volumes on a timely basis. The deadlines for a final Commission decision on the merits of the application in Section 114(d) of the Nuclear Waste Policy Act will be impossible to meet, but this has been the case for some time and is no longer a relevant consideration. Well before DOE moved to withdraw its application, it became clear that Staff would be unable to complete its SER until early 2012 and that the statutory deadlines could not be met under any circumstances.

B. Permanent Cessation of SER Work.

If DOE's motion is finally granted, the Commission should direct its Staff to permanently cease all efforts to complete all volumes of the SER. If DOE's motion is finally denied, the Staff's efforts to complete the SER should resume promptly upon notice by DOE that it will

resume the defense and prosecution of its application.

C. Alternate Relief.

Nevada believes that this Petition presents a compelling case for a suspension of all work on SER Volume 3 and (if DOE's withdrawal motion is finally granted) permanent cessation of all work on this Volume, if not all SER volumes. If, however, work on the SER is not suspended or terminated, the Commission should at the very least:

1. Direct the presiding Atomic Safety and Licensing Board (CAB-04) to prepare a brief opinion on each of the ten pending legal issues raised by Nevada so that Staff's SER Volume 3 will apply the correct interpretation of the controlling Commission regulations in 10 C.F.R. Part 63. As noted, these issues have all been fully briefed and argued and were awaiting a CAB decision when DOE moved to withdraw. This brief opinion should be issued within a reasonable time after CAB-04 rules on the pending intervention petitions and motion to withdraw. Staff should be required to adhere to the CAB's rulings in preparing its SER Volume 3.²

2. Issue a declaratory order, contemporaneous with Staff's issuance of each SER volume, stating specifically that Staff's opinions and ultimate conclusions about the safety of disposal of high-level waste at Yucca Mountain do not necessarily reflect the opinions and conclusions of the Commission. This fact will be obvious to anyone familiar with NRC practice, but it will not be apparent to others who may seek to use the SER volumes to pursue their own agendas.

² If the Staff disagrees strongly with any CAB ruling, the disagreement could be brought to the Commission's attention, and the Commission could decide the issue itself after entertaining briefs from Staff, Nevada, and other interested parties.

Respectfully submitted,

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Atomic Safety and Licensing Board

In the Matter of)
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U.S. DEPARTMENT OF ENERGY) Docket No. 63-001-HLW
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing State of Nevada's Petition for Relief with Respect to Possible Issuance of a Partial Safety Evaluation Report for Yucca Mountain has been served upon the following persons by the Electronic Information Exchange:

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