

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE COMMISSION**

In the Matter of :	)	June 23, 2010
	)	
U.S. Department of Energy )	Docket No. 63-001 )	
	)	Docket No. 63-001-HLW
(High Level Waste Repository Construction )		
Authorization Application)	)	ASLBP No. 09-892-HLW-CAB04
	)	

**NYE COUNTY'S RESPONSE TO STATE OF NEVADA'S PETITION FOR  
RELIEF WITH RESPECT TO POSSIBLE ISSUANCE OF A PARTIAL SAFETY  
EVALUATION REPORT FOR YUCCA MOUNTAIN**

**I. INTRODUCTION**

Nye County, Nevada ("Nye County" or "County"), the host County for the proposed Yucca Mountain repository, and a party to the above-captioned licensing proceeding, requests that the Nuclear Regulatory Commission ("NRC") deny the Petition for Relief filed by the State of Nevada ("Nevada") on June 14, 2010. Nevada asks, among other things, that NRC direct the NRC Staff not to issue Safety Evaluation Report Volume 3 ("SER"). Notwithstanding Nevada's assertions, the relief requested is (1) contrary to Nuclear Waste Policy Act ("NWPA") and the nondiscretionary duties of the NRC Staff to expeditiously proceed with development and issuance of the SERs for the Yucca Mountain project; (2) premature, given that the Construction Authorization Board ("CAB04") and the NRC have not yet finally ruled on the Department of Energy's Motion to Withdraw the License Application;<sup>1</sup> and (3) needlessly wasteful of substantial expenditures of

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<sup>1</sup> On March 3, 2010, DOE filed a Motion to Withdraw its license application for a permanent geological repository at Yucca Mountain, and asked that the withdrawal be granted with prejudice and no other conditions. DOE Motion to Withdraw at 1. CAB04 presided over oral arguments on the Motion on June 3, 2010, and a decision is pending.

taxpayer money appropriated for the independent review of the safety issues in this proceeding, whether or not DOE continues to prosecute the license application.

## **II. ARGUMENT**

### **A. NRC and its Staff Have a Statutory Duty under the NWPA to Expediently Process DOE's License Application Until a Final Non-Appealable Decision on DOE's Motion to Withdraw is Rendered**

The NRC and its staff are required to develop and issue SERs, and to complete review of the pending Yucca Mountain license application, expeditiously and in accordance with the requirements of the NWPA. After the mandatory submittal of the license application by the Secretary of Energy in 2008, pursuant to section 114 (b) of the NWPA, NRC is required to consider DOE's application and reach a decision within three years of the date of submission, by section 114(d), unless a statutorily provided extension is granted. 42 U.S.C. § 10134(b) & (d). These provisions alone require NRC to deny the requested relief and to avoid delay in the issuance of an SER. Far from being a "grave disrespect for the adjudicatory hearing process mandated by Congress,"<sup>2</sup> the staff's expeditious continuation of the SER process is both required by and consistent with the NWPA requirement that the license application be reviewed and decided upon in a set timeframe. Indeed, any agency, including NRC that determines that it cannot comply with "any deadline in the project decision schedule" must file a report with Congress stating not only the reason why the deadline cannot be met, but also providing recommendations for steps to mitigate the delay. *See* 42 U.S.C. § 10134(e)(2).

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<sup>2</sup> Nevada Petition at 2.

The unmistakable conclusion from these requirements and the NWPA as a whole<sup>3</sup> is that NRC should not further delay the development and issuance of the SERs based upon the absurd assertion that release of an SER, independently prepared by the NRC Staff, will in any way harm Nevada or anyone else. Indeed, just the opposite is true: the public will be harmed if the SERs, paid for with Congressional appropriations funded by the Nation's taxpayers, are not released as expeditiously as possible. Thus, "wasting taxpayer money"<sup>4</sup> is in fact the very relief sought by Nevada.

The assertion that the SERs will "benefit no one" is equally untenable.<sup>5</sup> First, it is predicated on the assumption that not only will DOE's Motion to Dismiss be granted, but will be granted with prejudice. Even if the Motion is granted without prejudice, the vital SER analysis will be available for use in the event the Yucca Mountain application is re-filed in the future. Moreover, as recently as last year, the Secretary of Energy himself stated that the scientific and engineering information prepared during the licensing of Yucca Mountain was valuable to the Nation's efforts in understanding geological repositories for nuclear waste. Nevada's mere speculation about what will be contained in the SER, and its lack of value, ignores numerous uses for the information for other Yucca Mountain projects, even if the repository itself is precluded. Perhaps most importantly, it ignores the value that all scientific and engineering endeavors have in common, which is to shed light and understanding on processes and systems that had not been studied previously. Nevada can no more predict the

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<sup>3</sup> For example, the Secretary of Energy was directed to update Congress annually on the status of the application, and to prepare and update a schedule for project decision-making that "portrays the optimum way to attain operation of the repository." 42 U.S.C. § 10134(c), 10134(e)(1).

<sup>4</sup> Nevada Petition at 2, 5-8.

<sup>5</sup> *Id.* at 6

usefulness of that data and analysis than the Nation could have predicted the numerous scientific and engineering developments from the Apollo project.

B. Until the NRC, the Courts, and Congress Have Definitively Resolved the Question of Whether DOE May Unilaterally Withdraw Its License Application, It Is Premature For the Commission to Consider Halting NRC Staff Development of the Safety Analysis Reports

While the Yucca Mountain licensing proceeding has been stayed pending the resolution of DOE's Motion to Withdraw the Application With Prejudice, neither the CAB04, nor the Commission (not to mention the federal courts and Congress) has had an opportunity to address and resolve the key issue of whether the NWPA allows DOE to unilaterally abandon a Congressionally authorized project based upon DOE's naked "policy" assertions and no formal administrative record support other than the Motion to Withdraw itself. See Transcript of Oral Argument presided over by CAB04 on June 3, 2010 (questioning of counsel for DOE on documented basis for the Motion). Until a final, non-appealable decision is reached on that issue, NRC staff is required as a matter of law, their duties as federal officials, sound fiscal and science policy, and practical considerations, to evaluate the Yucca Mountain license as expeditiously as possible, which includes issuance of SERs.

In the event that NRC and ultimately the Courts rule in favor of those opposing DOE's Motion, the SERs will then be available to allow discovery and the licensing proceedings to promptly move forward. Moreover, there is no harm as alleged by Nevada, even if a final decision is rendered in favor of DOE's Motion. The SERs are funded by federal appropriation, and the taxpayers are entitled to the results of that effort. Unlike the contentions filed by Nevada and the other parties, which are unadjudicated allegations at this stage of the process, NRC staff's evaluations are intended to be neutral evaluations of the safety and environmental issues involved

in key aspects of the repository. While not final, they provide valuable technical insight into the safety issues raised that the public is entitled to obtain and use as it sees fit.

Nevada, as an intervenor in this proceeding, appears to place more weight and value on its own contentions than upon the SERs, which is perhaps understandable given Nevada's longstanding opposition to the project. However, Nevada's position on the SERs should in no way be construed as backed and supported by overall public policy. The Nation has waited decades for the Yucca Mountain licensing proceeding and is entitled to know the status of the safety evaluations and conclusions reached during the independent review of NRC staff funded by taxpayer dollars. Nye County, which also has admitted contentions, welcomes the opportunity to see the Staff's review of the safety issues that have been raised. Nye County does not oppose one of Nevada's "alternative relief suggestions" which asks that NRC contemporaneously issue with any Staff SER a statement that the Staff's conclusions "do not necessarily reflect the opinions and conclusions of the Commission." Nevada Petition at p. 12. That is simply a factual statement that all parties to the proceedings accept.

C. The "Severe Prejudice" and Harm That Nevada Alleges The State will Suffer is Not Recognized Under the NWPA or NRC Regulations and In fact Is Illusory

Besides being based upon speculation about the future, Nevada cites no procedural rule and offers no legal basis in the NWPA or NRC regulations for the relief requested, even if all of its factual speculation becomes reality. Nevada states that it will be severely prejudiced *if* SER Volume 3 reaches positive conclusions and *if* "members of the public, media, and 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..." Nevada Petition at

5 (emphasis added). Thus, Nevada's Petition is predicated upon a cascade of assumptions and speculations about future events. In fact, the alleged prejudice is illusory.

The law, NRC regulations, Congress, the Commission, and the parties all recognize that staff SERs are preliminary and certainly do not constitute final agency action. Assuming, however, for the sake of argument that Nevada's request for relief is legally cognizable, the "severe prejudice" to Nevada cannot occur as a logical matter unless (1) DOE is successful in obtaining dismissal of its application with prejudice; (2) SER Volume 3 is issued anyway; (3) the SER states that legitimate safety issues have been resolved; (4) the staff's conclusion's on safety are erroneous;<sup>6</sup> and (5) Congress and/or the public fail to understand the SER is not a final agency determination on the safety issues. In this regard, Nevada is in no worse of a position than the supporters of the Yucca project, who have for decades endeavored to explain that multiple layers of conservatism have been built into the modeling and safety systems of the Yucca Mountain, and that the project may be safely built and operated.

While opponents of the project have publicly alleged safety issues and raised numerous safety claims against the project, those issues have not been adjudicated or determined to be valid. From the perspective of supporters of the project, it has been equally difficult to educate the public

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<sup>6</sup> DOE maintains, as it must based upon the technical record amassed in support of the project over many years, that its Motion to Dismiss is **not based** upon the Secretary's judgment "that Yucca Mountain is unsafe or that there are flaws in the LA, but rather that it is not a workable option" from a policy perspective. See DOE Reply to the Responses to the Motion to Withdraw (May 27, 2010) at p. 31, n. 102. DOE investigated for the better part of two decades and invested "billions of dollars and millions of hours of research" on Yucca Mountain. DOE, *Recommendation by the Secretary of Energy Regarding the Suitability of the Yucca Mountain Site for a Repository Under the NWSA of 1982* (2002) ("Suitability Determination") at 1; 10 C.F.R. Part 963 (Yucca Mountain Site Suitability Guidelines). As a result of this investigation, DOE determined that the site was "far and away the most thoroughly researched site of its kind in the world." Id. In January 2002, the Secretary of Energy formally advised the President that a geological repository could be safely located at Yucca Mountain: "[T]he amount and quality of research the [DOE] has invested into [determining the safety and suitability of Yucca Mountain as the Site for a repository] – done by top flight people. . . – is nothing short of staggering. After careful evaluation, I am convinced that the product of over 20 years, millions of hours, and four billion dollars . . . provides a sound scientific basis for concluding that the site can perform safely during both the pre- and post-closure periods, and that it is indeed scientifically and technically suitable for development as a repository." Suitability Determination at 45. While Nevada may "sharply" disagree with this conclusion, it is supported by a massive technical record that DOE does not distance itself from in any way.

that safety contentions are not safety findings. As with every disputed matter or litigation, education of the public is the responsibility of all the parties, and the disputants have very different views of reality and truth.

### **CONCLUSION**

For all of the above-stated reasons, Nye County respectfully asks that the Commission deny the request for relief regarding SERs as having no basis in law or fact. The NWPA and sound policy demand that NRC staff proceed with development and issuance of the publicly-funded Yucca Mountain SERs as expeditiously as possible.

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*Signed electronically*

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June 23, 2010

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC AND SAFETY LICENSING BOARD

In the Matter of	)	Docket No.	63-001-HLW
	)		
U.S. DEPARTMENT OF ENERGY	)	ASLBP Nos.	09-892-HLW-CAB04
	)		
(High-Level Waste Repository)	)		
	)		

CERTIFICATE OF SERVICE

I hereby certify that copies of the Nye County Response To Nevada Petition, dated June 23, 2010, in the above-captioned proceeding have been served on the following persons by Electronic Information Exchange.

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