

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**Before the Commission**

In the Matter of	)	Docket No.	63-001-HLW
	)		
U.S. DEPARTMENT OF ENERGY	)	ASLBP No.	09-892-HLW-CAB04
	)		
(High-Level Waste Repository)	)	July 9, 2010	

**THE COUNTY OF INYO'S RESPONSE TO THE NUCLEAR  
ENERGY COMMISSION'S ORDER RE: THE ATOMIC  
SAFETY AND LICENSING BOARD'S DENIAL OF THE  
DEPARTMENT OF ENERGY'S MOTION TO WITHDRAW  
ITS LICENSE APPLICATION**

**I. INTRODUCTION**

In this proceeding, the County of Inyo (County) contends that the Nuclear Regulatory Commission (NRC or Commission) cannot issue a license to the Department of Energy (DOE) to construct the high level waste repository at Yucca Mountain because of deficiencies in the License Application and because the requirements of the National Environmental Policy Act (NEPA) and related Nuclear Regulatory Commission (NRC) regulations have not been fulfilled. On June 29, 2010, the Atomic Safety and Licensing Board (Board) issued Memorandum and Order LBP-10-11 (Board Order) which, among other things, denied the DOE motion to withdraw the License Application. The Board concluded that the Nuclear Waste Policy Act of 1982, as amended in 1987, does not permit the Secretary of Energy to withdraw the License Application.

In its response to DOE's motion to withdraw the License Application which was submitted to the Board, the County took no position on whether the Board should or should not grant the motion; however, the County requested that should be Board grant DOE's motion, with

or without prejudice, certain terms and conditions be imposed and that the Board make certain findings. In accordance with the April 23, 2010 order issued by the Commission, the Board's Order included an Appendix which identified proposed license conditions should the DOE's motion to withdraw be granted. However, except for a condition concerning the preservation of information on the Licensing Support Network (LSN), the conditions and findings requested in the County's response were not included in the Appendix.

The County, takes no position on whether the Commission should review and reverse or uphold the Board Order. However, the County urges the Commission, should it review and reverse the Board Order and grant DOE's motion to withdraw the License Application (with or without prejudice), to make the express findings, impose the conditions identified below, which includes the imposition of the conditions pertaining to the LSN described in the Appendix to the Board Order.

## **II. BACKGROUND**

Ten contentions (Iny-Safety-001 to 003 and Iny-NEPA-001 to 007) submitted by the County were admitted by the Board in this proceeding. Briefly, the County's contentions challenge whether the License Application, the Final Environmental Impact Statement for the Geologic Repository for the Disposal of Spent Nuclear Fuel and High Level Radioactive Waste at Yucca Mountain, Nye County, Nevada (DOE/EIS-0250F, February 2002)" (Yucca Mountain Final EIS), and the "Final Supplemental Environmental Impact Statement for the Geologic Repository for the Disposal of Spent Nuclear Fuel and High Level Radioactive Waste at Yucca Mountain, Nye County, Nevada (DOE/EIS-0250F-S1 July 2008)" (Repository SEIS), adequately address the impacts of the proposed repository on groundwater resources, the potential for

volcanic activity affecting the repository and the socioeconomic impacts of the repository in the County.

On October 24, 2008, DOE announced its intent to prepare a Supplement to the Yucca Mountain Final EIS and the Repository SEIS. By letter dated July 30, 2009, DOE informed the NRC Staff that “DOE has decided not to complete the Supplement, but rather has used the material prepared for the Supplement to develop the enclosed *Analysis of Postclosure Groundwater Impacts for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High Level Radioactive Waste at Yucca Mountain, Nye County, Nevada* (Analysis of Postclosure Groundwater Impacts).” During a pre-hearing conference on September 14, 2009, NRC Staff announced that it would prepare a supplemental analysis of postclosure groundwater impacts, but that the preparation of the supplemental analysis would not commence until after federal fiscal year 2010. The supplemental groundwater analysis has not been released by the NRC Staff.

On September 30, 2009, the Board issued CAB Case Management Order #2, which established a phased discovery plan and specified which contentions were subject to discovery and litigation in Phase I. In that Order the Board directed that “there shall be no discovery on or litigation of any other contentions that are not specifically identified as included in Phase I until a schedule is established for those contentions by this Board.” Two of the County’s ten admitted contentions were included in the Board’s Phase I list. On February 16, 2010, the Board granted (with exceptions) DOE’s motion to stay discovery, and on March 3, 2010, DOE filed its motion to withdraw the License Application. Under these circumstances, with regard to the County’s contentions, no discovery has been taken, no dispositive motion has been filed, no argument on the merits of any contention (except as to their admissibility) has been heard, and no rulings have been issued on the merits of such contentions.

### **III. IF THE COMMISSION GRANTS DOE’S MOTION TO WITHDRAW, THE COMMISSION SHOULD IMPOSE CONDITIONS ON THE WITHDRAWAL OF THE LICENSE APPLICATION AND SHOULD MAKE EXPRESS FINDINGS**

If the NRC were to grant DOE’s motion, the record in this proceeding would not support a conclusion that the contentions filed by the County have been “adjudicated on the merits;” nor would the record support a finding that the Yucca Mountain Final EIS or the Repository SEIS have been adjudged to be adequate the nor a finding that the supplemental groundwater EIS has been completed. Consequently, if the NRC grants DOE’s motion, with or without prejudice, to avoid ambiguity as to what issues were considered and decided in this proceeding, the County requests that the NRC make the following findings:

- (1) that none of the County’s admitted contentions have been litigated or adjudicated in this proceeding,
- (2) that neither Yucca Mountain Final EIS, nor the Repository SEIS have been adjudged to be legally adequate, and
- (3) that the groundwater supplement to Yucca Mountain EIS and to the Repository SEIS has not been completed and has not been adjudicated to be legally adequate.

The County also requests that if the NRC grants the DOE’s motion, with or without prejudice, that the NRC include the following condition in its order:

- (1) that the withdrawal does not prejudice the County’s ability to litigate its admitted contentions in any future licensing proceeding.

Finally, the County requests that if the NRC grants the DOE’s motion, with or without prejudice, that the NRC include the conditions concerning the LSN that are described in the Appendix to the Board Order.

#### IV. CONCLUSION

The Board and the NRC have the authority to prescribe the terms upon which any withdrawal of DOE's application to construct Yucca Mountain may be granted. If the Commission grants DOE's motion to withdraw the License Application, with or without prejudice, the County requests that any such ruling include the findings and the conditions identified above.

Respectfully submitted,

*/Signed electronically by/*

Greg James  
Counsel for the County of Inyo  
710 Autumn Leaves Circle  
Bishop, California  
Telephone: 760-873-6838  
Facsimile: 760-873-7095  
Email: gregjames@earthlink.net

Dated at Bishop, California  
this 9th day of July, 2010

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

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

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the “**THE COUNTY OF INYO’S RESPONSE TO THE NUCLEAR ENERGY COMMISSION’S ORDER RE: THE ATOMIC SAFETY AND LICENSING BOARD’S DENIAL OF THE DEPARTMENT OF ENERGY’S MOTION TO WITHDRAW ITS LICENSE APPLICATION**” in the above-captioned proceeding have been served on the following persons this 9th day of July, 2010, by Electronic Information Exchange.

**CAB 04**

**Atomic Safety and Licensing Board Panel**

**Thomas S. Moore, Chair**

E-mail: [tsm2@nrc.gov](mailto:tsm2@nrc.gov)

**Paul S. Ryerson**

E-mail: [psr1@nrc.gov](mailto:psr1@nrc.gov)

**Richard E. Wardwell**

E-mail: [rew@nrc.gov](mailto:rew@nrc.gov)

Parties Served

Adams, Marta  
Andersen, Robert M.  
Bailey, Annie  
Barlow, Gregory  
Baughman, Mike  
Bauser, Michael A.  
Belete, Elene  
Bell, Kevin W.  
Berger, Michael  
Berkey, Curtis  
Beutel, Theodore  
Bollwerk III, G. Paul  
Borella, Edward  
Borski, Laurie  
Bowden Berry, Elva  
Brooks, Felicia M.

E-mail Addresses

[madams@ag.nv.gov](mailto:madams@ag.nv.gov)  
[robert.andersen@akerman.com](mailto:robert.andersen@akerman.com)  
[baileys@lcturbonet.com](mailto:baileys@lcturbonet.com)  
[lcda@lcturbonet.com](mailto:lcda@lcturbonet.com)  
[bigboff@aol.com](mailto:bigboff@aol.com)  
[mab@nei.org](mailto:mab@nei.org)  
[ebelete@jsslaw.com](mailto:ebelete@jsslaw.com)  
[kwbell@energy.state.ca.us](mailto:kwbell@energy.state.ca.us)  
[mberger@bsglaw.net](mailto:mberger@bsglaw.net)  
[curtis.berkey@abwwlaw.com](mailto:curtis.berkey@abwwlaw.com)  
[tbeutel@eurekanv.org](mailto:tbeutel@eurekanv.org)  
[gpb@nrc.gov](mailto:gpb@nrc.gov)  
[edward\\_borella@ymp.gov](mailto:edward_borella@ymp.gov)  
[lborski@nuclearlawyer.com](mailto:lborski@nuclearlawyer.com)  
[Elva.BowdenBerry@nrc.gov](mailto:Elva.BowdenBerry@nrc.gov)  
[fbrooks@ndnlaw.com](mailto:fbrooks@ndnlaw.com)

Carter, Lorraine	<a href="mailto:lcarter@captionreporters.com">lcarter@captionreporters.com</a>
Cereghino, Stephen	<a href="mailto:stephen_cereghino@ymp.gov">stephen_cereghino@ymp.gov</a>
Choate, Zoie	<a href="mailto:zchoate@co.nye.nv.us">zchoate@co.nye.nv.us</a>
Colburn, Ross	<a href="mailto:rcolburn@ndnlaw.com">rcolburn@ndnlaw.com</a>
Cooper, Cliff	<a href="mailto:ccooper@morganlewis.com">ccooper@morganlewis.com</a>
Cottingham, Anne	<a href="mailto:awc@nei.org">awc@nei.org</a>
Crosland, Martha S.	<a href="mailto:Martha.Crosland@hq.doe.gov">Martha.Crosland@hq.doe.gov</a>
Csedrik, Lewis M.	<a href="mailto:lcsedrik@morganlewis.com">lcsedrik@morganlewis.com</a>
Curran, Diane	<a href="mailto:dcurran@harmoncurran.com">dcurran@harmoncurran.com</a>
Damele, Ronald	<a href="mailto:rdamele@eurekanv.org">rdamele@eurekanv.org</a>
DiNunzio, Nicholas	<a href="mailto:Nicholas.DiNunzio@hq.doe.gov">Nicholas.DiNunzio@hq.doe.gov</a>
Dobie, Julie	<a href="mailto:jdobie@gklaw.com">jdobie@gklaw.com</a>
Dudley, Sherry	<a href="mailto:sdudley@co.nye.nv.us">sdudley@co.nye.nv.us</a>
Dunning, Michael L.	<a href="mailto:MichaelD@atg.wa.gov">MichaelD@atg.wa.gov</a>
Durbin, Susan	<a href="mailto:susan.durbin@doj.ca.gov">susan.durbin@doj.ca.gov</a>
Eredia, Sally	<a href="mailto:seredia@ndnlaw.com">seredia@ndnlaw.com</a>
Faglioni, Kelly L.	<a href="mailto:kfaglioni@hunton.com">kfaglioni@hunton.com</a>
Fitz, Andrew A.	<a href="mailto:AndyF@atg.wa.gov">AndyF@atg.wa.gov</a>
Fitzpatrick, Charles J.	<a href="mailto:cfitzpatrick@nuclearlawyer.com">cfitzpatrick@nuclearlawyer.com</a>
Francis, Karin	<a href="mailto:kxf4@nrc.gov">kxf4@nrc.gov</a>
Fraser, Matthew	<a href="mailto:mfraser@harmoncurran.com">mfraser@harmoncurran.com</a>
Frishman, Steve	<a href="mailto:steve.frishman@gmail.com">steve.frishman@gmail.com</a>
Giitter, Rebecca	<a href="mailto:rll@nrc.gov">rll@nrc.gov</a>
Gilman, Joseph	<a href="mailto:jsg1@nrc.gov">jsg1@nrc.gov</a>
Ginsberg, Ellen C.	<a href="mailto:ecg@nei.org">ecg@nei.org</a>
Golshan, K. G.	<a href="mailto:kg.golshan@nrc.gov">kg.golshan@nrc.gov</a>
Gores, Jennifer A.	<a href="mailto:jgores@armstrongteasdale.com">jgores@armstrongteasdale.com</a>
Gottshall, Thomas R.	<a href="mailto:tgottshall@hsblawfirm.com">tgottshall@hsblawfirm.com</a>
Gutierrez, Jocelyn	<a href="mailto:Jocelyn.Gutierrez@ymp.gov">Jocelyn.Gutierrez@ymp.gov</a>
Hanna, Robert S.	<a href="mailto:rshanna@bsglaw.net">rshanna@bsglaw.net</a>
Harrington, Arthur J.	<a href="mailto:aharring@gklaw.com">aharring@gklaw.com</a>
Hawkins, E. Roy	<a href="mailto:erh@nrc.gov">erh@nrc.gov</a>
Hearing Docket	<a href="mailto:hearingdocket@nrc.gov">hearingdocket@nrc.gov</a>
Heinzen, Steven A.	<a href="mailto:sheinzen@gklaw.com">sheinzen@gklaw.com</a>
Hembacher, Brian	<a href="mailto:brian.hembacher@doj.ca.gov">brian.hembacher@doj.ca.gov</a>
Horin, William	<a href="mailto:whorin@winston.com">whorin@winston.com</a>
Houck, Darcie L.	<a href="mailto:dhouck@ndnlaw.com">dhouck@ndnlaw.com</a>
Irwin, Donald P.	<a href="mailto:dirwin@hunton.com">dirwin@hunton.com</a>
James, Greg	<a href="mailto:gljames@earthlink.net">gljames@earthlink.net</a>
Johnson, Abigail	<a href="mailto:eurekanrc@gmail.com">eurekanrc@gmail.com</a>
Kahn, Zachary	<a href="mailto:zxk1@nrc.gov">zxk1@nrc.gov</a>
Klevorick, Phil	<a href="mailto:klevorick@co.clark.nv.us">klevorick@co.clark.nv.us</a>
Kriner, Jeffrey	<a href="mailto:jeffrey_kriner@ymp.gov">jeffrey_kriner@ymp.gov</a>
Kuyler, Raphael P.	<a href="mailto:rkuyler@morganlewis.com">rkuyler@morganlewis.com</a>
LaPlante, Erica	<a href="mailto:eal1@nrc.gov">eal1@nrc.gov</a>
Larimore, Patricia	<a href="mailto:plarimore@talisman-intl.com">plarimore@talisman-intl.com</a>
Lawrence, John W.	<a href="mailto:jlawrence@nuclearlawyer.com">jlawrence@nuclearlawyer.com</a>
Leigh, Rovianna	<a href="mailto:rleigh@abbwlaw.com">rleigh@abbwlaw.com</a>
Lembke, Alisa	<a href="mailto:alembke@inyocounty.us">alembke@inyocounty.us</a>
Lenahan, Daniel W.	<a href="mailto:dw12@nrc.gov">dw12@nrc.gov</a>
Lewis, Linda	<a href="mailto:linda.lewis@nrc.gov">linda.lewis@nrc.gov</a>

List, Robert F.  
 Loveland, Bryce  
 Lynch, Susan  
 Maerten, Daniel  
 Mahowald, Philip R.  
 Malsch, Martin G.  
 Martin, Circe  
 Mathias, Linda  
 McRae, Ben  
 Meharg, Stephanie  
 Mercado, Michele  
 Miras-Wilson, Rachel  
 Moldenhauer, Charles  
 Montesi, Susan  
 Moore, Thomas S.  
 Mueller, Edwin  
 Murphy, Malachy  
 Nezhad, Cyrus  
 Niegemann, Brian  
 OCAA Mail Center  
 Overton, H. Lee  
 Pak, Christina  
 Peebles, John M.  
 Peterson, William  
 Pitchford, Loreen, LSN Coordinator  
 Pitts, Jason  
 Poindexter, Thomas  
 Poland, Douglas M.  
 Polonsky, Alex  
 Putzu, Frank  
 Renfro, Hanna  
 Repka, David A.  
 Rhoan, Robert  
 Robbins, Alan  
 Roby, Debra  
 Rosenthal, Alan S.  
 Rotman, Matthew  
 Ryan, Tom  
 Ryerson, Paul S.  
 Schmutz, Thomas  
 Schwartz, Jaqueline  
 Sears, Richard  
 Shealy, S. Ross  
 Shebelskie, Michael R.  
 Silberg, Jay E.  
 Silverman, Donald  
 Silvia, Andrea L.  
 Simkins, Connie  
 Simon, Mike  
 Sisco, Carlos L.  
 Sommer, Josephine

[rlist@armstrongteasdale.com](mailto:rlist@armstrongteasdale.com)  
[bloveland@jsslaw.com](mailto:bloveland@jsslaw.com)  
[slynch1761@gmail.com](mailto:slynch1761@gmail.com)  
[Daniel.Maerten@caci.com](mailto:Daniel.Maerten@caci.com)  
[pmahowald@piic.org](mailto:pmahowald@piic.org)  
[mmalsch@nuclearlawyer.com](mailto:mmalsch@nuclearlawyer.com)  
[ogcmailcenter@nrc.gov](mailto:ogcmailcenter@nrc.gov)  
[yuccainfo@mineralcountynv.org](mailto:yuccainfo@mineralcountynv.org)  
[Ben.McRae@hq.doe.gov](mailto:Ben.McRae@hq.doe.gov)  
[smeharg@hunton.com](mailto:smeharg@hunton.com)  
[michele.mercado@doj.ca.gov](mailto:michele.mercado@doj.ca.gov)  
[rwilson@winston.com](mailto:rwilson@winston.com)  
[cmoldenhauer@morganlewis.com](mailto:cmoldenhauer@morganlewis.com)  
[smontesi@nuclearlawyer.com](mailto:smontesi@nuclearlawyer.com)  
[tsm2@nrc.gov](mailto:tsm2@nrc.gov)  
[muellered@msn.com](mailto:muellered@msn.com)  
[mrmurphy@chamberscable.com](mailto:mrmurphy@chamberscable.com)  
[Cyrus.Nezhad@hq.doe.gov](mailto:Cyrus.Nezhad@hq.doe.gov)  
[bniegemann@ndnlaw.com](mailto:bniegemann@ndnlaw.com)  
[OCAAMAIL@nrc.gov](mailto:OCAAMAIL@nrc.gov)  
[LeeO1@atg.wa.gov](mailto:LeeO1@atg.wa.gov)  
[Christina.Pak@hq.doe.gov](mailto:Christina.Pak@hq.doe.gov)  
[jpeebles@ndnlaw.com](mailto:jpeebles@ndnlaw.com)  
[paengineers@juno.com](mailto:paengineers@juno.com)  
[lpitchford@comcast.net](mailto:lpitchford@comcast.net)  
[jayson@idtservices.com](mailto:jayson@idtservices.com)  
[tpoindexter@morganlewis.com](mailto:tpoindexter@morganlewis.com)  
[dpoland@gklaw.com](mailto:dpoland@gklaw.com)  
[apolonsky@morganlewis.com](mailto:apolonsky@morganlewis.com)  
[frank.putzu@navy.mil](mailto:frank.putzu@navy.mil)  
[hrenfro@gklaw.com](mailto:hrenfro@gklaw.com)  
[drepka@winston.com](mailto:drepka@winston.com)  
[rrhoan@ndnlaw.com](mailto:rrhoan@ndnlaw.com)  
[arobbins@jsslaw.com](mailto:arobbins@jsslaw.com)  
[droby@jsslaw.com](mailto:droby@jsslaw.com)  
[rsnthl@nrc.gov](mailto:rsnthl@nrc.gov) ; [axr@nrc.gov](mailto:axr@nrc.gov)  
[matthew.rotman@nrc.gov](mailto:matthew.rotman@nrc.gov)  
[Tom.Ryan@nrc.gov](mailto:Tom.Ryan@nrc.gov)  
[psrl@nrc.gov](mailto:psrl@nrc.gov)  
[tschmutz@morganlewis.com](mailto:tschmutz@morganlewis.com)  
[jschwartz@gklaw.com](mailto:jschwartz@gklaw.com)  
[rwsears@wpcda.org](mailto:rwsears@wpcda.org)  
[rshealy@hsblawfirm.com](mailto:rshealy@hsblawfirm.com)  
[mshebelskie@hunton.com](mailto:mshebelskie@hunton.com)  
[jay.silberg@pillsburylaw.com](mailto:jay.silberg@pillsburylaw.com)  
[dsilverman@morganlewis.com](mailto:dsilverman@morganlewis.com)  
[alc1@nrc.gov](mailto:alc1@nrc.gov)  
[jcciac@co.lincoln.nv.us](mailto:jcciac@co.lincoln.nv.us)  
[wpnucast1@mwpower.net](mailto:wpnucast1@mwpower.net)  
[csisco@winston.com](mailto:csisco@winston.com)  
[Josephine.Sommer@ymp.gov](mailto:Josephine.Sommer@ymp.gov)



Staton, Shannon  
Sullivan, Timothy E.

[sstaton@morganlewis.com](mailto:sstaton@morganlewis.com)  
[timothy.sullivan@doj.ca.gov](mailto:timothy.sullivan@doj.ca.gov)

Thompson, Jonathan C.  
Tucker, Katheine  
VanNiel, Jeffrey D.  
Vazquez, Tameka  
Vibert, Elizabeth A.  
Walsh, Timothy J.  
Wardwell, Richard E.  
Webb, Maria  
Whipple, Bret  
Williams, Scott  
Woodington, Kenneth P.  
Wright, Belinda A.  
Young, Mitzi A.  
Zabarte, Ian  
Zaffuts, Paul  
Zobler, Marian L.

[JonaT@atg.wa.gov](mailto:JonaT@atg.wa.gov)  
[katie.tucker@nrc.gov](mailto:katie.tucker@nrc.gov)  
[nbrjdv@gmail.com](mailto:nbrjdv@gmail.com)  
[purpose\\_driven@yahoo.com](mailto:purpose_driven@yahoo.com)  
[VibertE@co.clark.nv.us](mailto:VibertE@co.clark.nv.us)  
[timothy.walsh@pillsburylaw.com](mailto:timothy.walsh@pillsburylaw.com)  
[rew@nrc.gov](mailto:rew@nrc.gov)  
[maria.webb@pillsburylaw.com](mailto:maria.webb@pillsburylaw.com)  
[bretwhipple@nomademail.com](mailto:bretwhipple@nomademail.com)  
[swilliams@abbwlaw.com](mailto:swilliams@abbwlaw.com)  
[kwoodington@dml-law.com](mailto:kwoodington@dml-law.com)  
[bwright@hunton.com](mailto:bwright@hunton.com)  
[may@nrc.gov](mailto:may@nrc.gov)  
[mrizabarte@gmail.com](mailto:mrizabarte@gmail.com)  
[pzaffuts@morganlewis.com](mailto:pzaffuts@morganlewis.com)  
[mlz@nrc.gov](mailto:mlz@nrc.gov)

Dated: July 9, 2010

**/Signed (electronically) by/**

Greg James  
Attorney for the County of Inyo  
710 Autumn Leaves Circle  
Bishop, California 93514  
Telephone: 760-873-6838  
Email: [gljames@earthlink.net](mailto:gljames@earthlink.net)