

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE NUCLEAR REGULATORY COMMISSION

In re:

**U.S. DEPARTMENT OF ENERGY
(High-Level Waste Repository)**

Docket No. 63-001-HLW

ASLBP No. 09-892-HLW-CAB04

July 9, 2010

**STATE OF CALIFORNIA'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 THE LICENSE APPLICATION**

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I. INTRODUCTION

The Nuclear Regulatory Commission ("NRC") cannot issue a license to the U.S. Department of Energy ("DOE") to construct the high level waste repository at Yucca Mountain until such time as the requirements of the National Environmental Policy Act ("NEPA") and related NRC regulations have been fulfilled. California contends that the NEPA documents prepared by DOE as part of its license application are deficient, and that NRC cannot practicably adopt them. For this reason, California supported DOE's motion to withdraw the Application.¹ In its Response to DOE's motion to withdraw, California requested that the Board grant DOE's motion to withdraw the Application with certain conditions and findings regarding California's admitted environmental contentions in this proceeding.

On June 29, 2010, the Atomic Safety and Licensing Board (Board) issued Memorandum and Order LBP-10-11 which, among other things, denied DOE's motion to withdraw the Application. The Board concluded that the Nuclear Waste Policy Act (NWPA) of 1982, as amended in 1987, does not permit the Secretary of Energy to withdraw the Application that the NWPA ordered the Secretary to file. Specifically, the Board concluded that the NWPA does not give the Secretary the discretion to substitute his policy judgment for the one made by Congress in the NWPA that mandates progress toward a merits-based decision by the NRC on the construction permit.² The Board's order included in its appendix the proposed license conditions should the NRC overturn the decision of the Board denying DOE's motion to withdraw. However, the conditions requested in California's Response were not included.³

¹ The State of California's Response to U.S. Department of Energy's Motion to Withdraw, May 17, 2010

² Board Memorandum and Order, LBP10-11, June 29, 2010,

³ The State of California's Response to U.S. Department of Energy's Motion to Withdraw, May 17, 2010

California requests that the NRC, should it overturn the Board's order and grant DOE's motion to withdraw the Application, grant it only with conditions, and accompanied by findings, that reflect the complete absence of litigation of any of California's admitted environmental contentions in this proceeding. California has had 22 contentions admitted into this proceeding, all challenging the adequacy of DOE's environmental review documents and urging the impracticability of the NRC's adoption of DOE's environmental documents as they now stand.⁴ These admitted contentions have not been litigated nor adjudicated in any way, and an order by the NRC overturning the Board's order and granting DOE's motion to withdraw the license application must not prejudice California's ability to litigate such contentions in any future licensing proceeding, regarding the proposed repository at Yucca Mountain or any other proposed facility for the storage and/or disposal of spent nuclear fuel and high-level nuclear waste.

California, therefore, urges the NRC, should it overturn the Board's order, to make an explicit finding that none of California's admitted contentions regarding DOE's or NRC's compliance with NEPA (42 U.S.C. § 4321 et seq.) has been litigated or decided in this proceeding, including contentions challenging the methodology for identifying or characterizing potential environmental impacts, contentions regarding reasonably foreseeable environmental impacts from the transport of spent nuclear fuel or high-level radioactive waste in California, and contentions regarding potential groundwater contamination or the transport of radionuclides in groundwater into California.

⁴ Board Memorandum and Order, May 11, 2009; CLI-09-14, June 30, 2009.

II. IF IT OVERTURNS THE BOARD'S DENIAL OF DOE'S MOTION TO WITHDRAW, THE NRC SHOULD MAKE AN EXPLICIT STATEMENT THAT CALIFORNIA'S NEPA CONTENTIONS HAVE NOT BEEN LITIGATED NOR RESOLVED IN THIS PROCEEDING

California's primary concern at such time that the license is withdrawn remains the potential for prejudice to California's ability to litigate its environmental contentions in any future licensing proceeding, regarding the proposed Yucca Mountain or any other proposed facility for the storage and/or disposal of high-level waste and spent fuel.

There have been situations in which a dismissal with prejudice of a license application could have been construed to "amount to an adjudication on the merits of the admitted contentions." *In the Matter of Yankee Atomic Electric Company*, ASLBP No. 99-754-01-LA-R; LBP-99-27, 50 N.R.C. 45 (1999), citing *Duke Power Co. (Perkins Nuclear Station, Units 1, 2, 3)*, LBP-82-21, 16 NRC 1128, 1135 (1982). California believes that in this proceeding, the record would not support any conclusion that dismissal with prejudice could or would adjudicate the environmental contentions filed by California as to potential groundwater contamination, nor as to the potential environmental impacts from the transport of spent nuclear fuel or high-level radioactive waste within and through California to Yucca Mountain or any future facility. It is within the discretion of the NRC under 10 C.F.R. § 2.107(a) to impose an explicit condition or make an explicit finding that California's contentions have not been adjudicated, and, out of an abundance of caution, California requests such an explicit condition or finding.

A. California's Environmental Contentions Were Admitted.

California, acting pursuant to the regulations, the Hearing Notice, and *Nuclear Energy Institute, Inc. v. Environmental Protection Agency*, 373 F.3d 1251, 1314 (D.C. Cir. 2004), filed contentions challenging the adequacy of several aspects of DOE's various environmental impact statements relating to the Yucca Mountain Repository. The Board and the full Commission

admitted Contentions CAL-NEPA-001 through -005, -007, -008, -010 through -015, and -017 through -025, relating to the transport of radioactive material in and through California by truck, barge and rail and to the potential radioactive contamination of groundwater in California by radionuclides released from the Yucca Mountain Repository.

California's contentions challenge whether, pursuant to 10 C.F.R. § 51.109(c), DOE's environmental documents are adequate statements under NEPA and are therefore practicable for adoption by NRC. California contends that DOE's license application and environmental documents suffer from two major types of deficiencies. First, DOE has not adequately analyzed the impacts of transporting radioactive waste in and through California that would occur if the NRC authorized DOE to construct the Yucca Mountain Repository. Second, California contends that DOE's environmental documents failed to properly analyze the risk to California's groundwater resources from the repository.

B. No Admitted Environmental Contentions Were Litigated in This Proceeding.

The Board admitted eleven parties as interveners in this proceeding,⁵ and ruled on the admissibility of their contentions, admitting 299 contentions. The full Commission later reversed or partially reversed that ruling as to four contentions.⁶ Twenty-two of California's contentions were admitted, all dealing with DOE's and NRC's NEPA compliance.

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.⁷ In that order the Board directed that "there shall be no discovery on or

⁵ LPB-09-06, May 11, 2009.

⁶ CLI-09-14, June 30, 2009.

⁷ CAB Order (Case Management Order #2) (September 30, 2009), unpublished. The list of Phase I contentions is attached to Case Management Order 2 as an Appendix.

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.”⁸ None of California’s 22 admitted contentions was included in the Board’s Phase I list, and no schedule covering California’s contentions was ever established, and thus none of California’s contentions has been subject to any discovery or litigation.

Other parties prepared to commence discovery pursuant to the Board’s Case Management Order #2. However, on February 16, 2010, the Board granted (with exceptions) DOE’s motion to stay discovery,⁹ and on March 3, 2010, DOE filed its motion to withdraw the pending application for a license for a nuclear waste repository at Yucca Mountain. No discovery has been taken, no dispositive motion has been filed, no argument on the merits of any contention (as opposed to their admissibility) has been made before the Boards, and no ruling from the Boards has been handed down on the merits of any contention.

Thus, at no time has any admitted environmental contention been litigated, ruled upon, or finally decided in this proceeding. Since no adjudication of any admitted environmental contention has occurred, California’s rights to challenge all DOE environmental documents that purport to analyze and disclose the potential impacts on California’s groundwater from a repository at Yucca Mountain, or the impacts of the transport of spent nuclear fuel or high-level radioactive waste in or through California, remain intact. California is concerned, however, that if there is litigation at some point in the future regarding this repository or the environmental documents DOE relied upon in this proceeding, there may be ambiguity as to which issues were actually considered and decided in this proceeding. California, therefore, requests that if the

⁸ *Id.* at p. 3.

⁹ CAB Order (Granting Stay of Proceedings) (February 16, 2010), unpublished.

NRC overturns the Board's denial of DOE's motion to withdraw its license application, the NRC should explicitly recognize and memorialize the fact that the adequacy under NEPA of DOE's environmental documents has not been adjudicated. California's right to challenge non-compliance with NEPA is reserved for any future proceeding as to any license for a repository or other facility. Such a finding falls well within the Board's broad authority to attach conditions to a dismissal either with or without prejudice. 10 C.F.R. § 2.107(a). ("Withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe.")

III. CONCLUSION

All parties have learned in this proceeding that the future cannot be predicted. The applicable NRC regulations provide both the Board and the NRC with the authority to prescribe the terms upon which any withdrawal of DOE's application to construct a repository at Yucca Mountain may be granted. California asks that any such ruling contain an explicit statement or finding that none of California's contentions regarding the adequacy of DOE's environmental documents has been litigated, and that California's right to fully contest the merits of DOE's environmental documents in any proceeding seeking a license to construct or operate a repository at Yucca Mountain or any other facility for the storage and/or disposal of spent nuclear fuel and high-level radioactive waste are not prejudiced by the termination of this proceeding.

Dated: July 9, 2010

Respectfully submitted,

[Signed electronically]
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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	Docket No. 63-001
)	
U.S. DEPARTMENT OF ENERGY)	ASLBP No. 09-892-HLW-CAB-04
)	
(High-Level Waste Repository))	
_____)	

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document entitled, "THE CALIFORNIA ENERGY COMMISSION'S CERTIFICATION OF LSN SUPPLEMENTATION" has been served via the Nuclear Regulatory Commission's Electronic Information Exchange (EIE) upon those on the Service List maintained by the EIE for the above-captioned proceeding.

CAB 04

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