

August 24, 2009

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
U.S. DEPARTMENT OF ENERGY	)	Docket No. 63-001-HLW
	)	
(High-Level Waste Repository)	)	ASLBP Nos. 09-876-HLW-CAB01
	)	09-877-HLW-CAB02
	)	09-878-HLW-CAB03
	)	09-892-HLW-CAB04

NRC STAFF ANSWER TO JOINT MOTION FOR AN  
EXTENSION OF TIME TO FILE NEW OR AMENDED CONTENTIONS

INTRODUCTION

On August 14, 2009, Inyo County, California; the States of Nevada and California; Nye County, Nevada; the Joint Timbisha Shoshone Tribal Group; and the Native Community Action Council (collectively, Movants) filed a joint motion (Motion) seeking an extension of the time in which to file any new or amended contentions based on the Department of Energy's (DOE), "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," dated July, 2009 (Analysis). Movants seek an extension until 60 days after the NRC Staff advises the parties how it will proceed with the Analysis. Motion, at 1, 4.

Pursuant to 10 C.F.R. § 2.323, the NRC staff (Staff) files this answer opposing the Motion.

BACKGROUND

By letter dated September 8, 2008, the Staff advised DOE that DOE's 2002

Environmental Impact Statement (EIS)<sup>1</sup> and DOE's 2008 Repository Supplemental EIS<sup>2</sup> did not adequately address all of the impacts of the proposed action on groundwater or from surface discharges. Letter from Michael F. Weber, NRC to Mr. Edward F. Sproat, III, DOE (Sept. 8, 2008) (September 8 Letter) (ML082490751), at 2. The Staff's Adoption Determination Report was attached.<sup>3</sup> The letter also requested that DOE advise the Staff of DOE's proposed plan to prepare supplements to these documents. September 8 Letter at 2.

By letter dated October 3, 2008, DOE announced that it would supplement the 2002 FEIS and 2008 Repository SEIS by the fall of 2009. Letter from William J. Boyle, DOE to Director, Division of High-Level Waste Repository Safety, NRC (Oct. 3, 2008) (ML082810087). However, by letter dated July 30, 2009, DOE informed the Staff that it would not supplement these EISs and submitted its Analysis, which DOE stated had been developed using material prepared for the supplements. Letter from William J. Boyle, DOE to Director, Division of High-Level Waste Repository Safety, NRC (July 30, 2009) (ML092150301). DOE subsequently provided the Board and counsel of record for each party with a copy of the Analysis. Letter from Donald J. Silverman to Thomas S. Moore, Paul R. Ryerson and Richard E. Wardwell (Aug. 5, 2009) (ML092180942).

On August 14, 2009, Movants filed the instant motion.

---

<sup>1</sup> "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" (February 2002) (2002 EIS).

<sup>2</sup> "Final Supplemental Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada" (June 2008) (2008 Repository SEIS).

<sup>3</sup> "U.S. Nuclear Regulatory Commission Staff's Adoption Determination Report for the U.S. Department of Energy's Environmental Impact Statements for the Proposed Geologic Repository at Yucca Mountain," dated September 5, 2008 (ML082420342).

DISCUSSION

Pursuant to "CAB Case Management Order #1," dated January 29, 2009 (Case Management Order) a motion to file new or amended contentions based on new information must be filed within 30 days of the date that new information becomes available. Case Management Order, Sections B.1 and B.2, at 3. Although the Board has the authority to extend this period, *see Houston Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7, 13 (1980), it may only do so upon a showing of good cause. 10 C.F.R. § 2.307(a). Commission policy provides that extensions should be granted only in "unavoidable and extreme circumstances." *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 21 (1998) (published as Policy on Conduct of Adjudicatory Proceedings, Policy Statement, 63 Fed. Reg. 41,872 (Aug. 5, 1998)).

In the instant motion, the Movants request an extension of time for filing new or amended contentions based upon DOE's Analysis until 60 days after the Staff announces how it will proceed with the Analysis. Motion at 4. The only arguments Movants make to support their request for an extension are the unexplained and unsupported assertions that absent an extension, "some of the parties *may* be compelled to prepare new or amended contentions that are based upon DOE's" transmittal letters and the Analysis and that "*if* NRC were to determine that a draft and a final supplement will be prepared, some of the parties *might* be compelled to prepare yet another set of amended contentions. . . ." *Id.* at 4 (emphasis supplied). Movants also claim, without offering any support, that without an extension, Movants would be subjected to significant and unnecessary expenditures of time and money. *Id.* at 4.

Movants have not shown any basis upon which the Board could find good cause, much less the existence of "unavoidable and extreme circumstances." *Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC at 21. Movants' grounds appear speculative and fail to demonstrate good cause for an extension of time. Movants neither claim that they will

actually file contentions based on the Analysis, nor state that they will actually have to file additional contentions if additional EIS documentation is prepared. Rather, Movants argue that some parties may be required to file two sets of new or amended contentions (e.g., one set on the Analysis and one set on any additional EIS documentation). Motion at 4. Such speculation as to what “some” unidentified parties “may” or “might” do does not rise to the level of a showing of good cause for an extension of time in which to file contentions based on a document that is already available to the parties.

Moreover, the remedy Movants seek is contrary to usual NRC practice. In NRC practice, contentions are filed at the outset of the proceeding, concurrently with the request for a hearing, and environmental contentions are based on information submitted by an applicant.<sup>4</sup> 10 C.F.R. § 2.309(f) (“A request for hearing. . . must set forth with particularity the contentions sought to be raised”). Contentions contribute to the orderly progression of the proceeding by identifying issues in dispute and offering the potential for an early resolution of disputed issues. After initial contentions are admitted, intervenors “have an ‘ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable the [intervenor] to uncover any information that could serve as the foundation for a” new or amended contention. *McGuire*, CLI-02-28, 56 NRC at 386 , quoting Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989); *see also Shaw Areva MOX Services, LLC* (Mixed Oxide Fuel

---

<sup>4</sup> 10 C.F.R. § 2.309(f)(2) provides that contentions “must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee.” If an applicant files an environmental report which the Staff may or may not use in preparing its EIS, intervenors must file contentions on the environmental report, as well as any new information provided in responses to requests for additional information and the Staff’s draft and final EIS. *Id.*; *see also Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 382 (2002).

Fabrication Facility), CLI-09-02, 69 NRC \_\_\_, *slip op.* at 12, fn 47 (Feb. 4, 2009). Movants do not suggest any reason to alter this established practice, and, in fact, appear to ignore the possibility that information materially different from that in the Analysis could be presented in the Staff's environmental evaluation. See Motion at 4. If little or no new information is presented in the Staff's environmental analysis, then the burden associated with revising a contention previously filed would be slight. Moreover, with regard to DOE's Analysis, any contentions filed now may inform Staff's evaluation of environmental impacts and could render those concerns moot. Thus, the Movants have not demonstrated why an extension of time to file contentions based on the Analysis should be granted.

Finally, Movants fail to offer a reasoned basis for extending 30-day deadline for filing new or amended contentions in this proceeding, see Case Management Order at 3, to "60 days after NRC Staff formally announces or otherwise advises the parties how it will proceed with respect to DOE's Analysis of Postclosure Groundwater Impacts." Motion at 4. Even assuming new and materially different information became available at that time, the Case Management Order specifies that a motion to file new or amended contentions must be filed within 30 days of the date that new information becomes available. Case Management Order, Sections B.1 and B.2, at 3. Movants offer no adequate rationale as to why 60 days would be needed to prepare contentions based on the Analysis, which is limited in scope to discrete groundwater issues and available prior to the Staff's announcement.<sup>5</sup>

As discussed above, the Movants have not demonstrated the good cause required for an extension of time in which to file new or amended contentions on DOE's Analysis.

---

<sup>5</sup> Consequently, in the event the Board should decide to grant the Motion, the Staff urges that any extension be limited to no more than 30 days from the date it announces how it will proceed with respect to the Analysis, consistent with the provisions of the Case Management Order.

CONCLUSION

For the foregoing reasons, the Motion should be denied, and if not denied, any extension should be limited to 30 days.

Respectfully submitted,

**/Signed (electronically) by/**

Margaret J. Bupp  
Counsel for NRC Staff  
U.S. Nuclear Regulatory Commission  
Office of the General Counsel  
Mail Stop O-15 D21  
Washington, DC 20555-0001  
(301) 415-3722  
mjb5@nrc.gov

Dated at Rockville, Maryland  
this 24<sup>th</sup> day of August, 2009

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC AND SAFETY LICENSING BOARDS

In the Matter of	)	
	)	Docket No. 63-001-HLW
U.S. DEPARTMENT OF ENERGY	)	
	)	ASLBP Nos. 09-876-HLW-CAB01
(High-Level Waste Repository)	)	09-877-HLW-CAB02
	)	09-878-HLW-CAB03
	)	09-892-HLW-CAB04

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF ANSWER TO JOINT MOTION FOR AN EXTENSION OF TIME TO FILE NEW OR AMENDED CONTENTIONS" in the above-captioned proceeding have been served on the following persons this 24<sup>th</sup> of August, 2009, by Electronic Information Exchange.

CAB 01

William J. Froehlich, Chairman  
Thomas S. Moore  
Richard E. Wardwell  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
E-mail: [wjf1@nrc.gov](mailto:wjf1@nrc.gov)  
[tsm2@nrc.gov](mailto:tsm2@nrc.gov)  
[rew@nrc.gov](mailto:rew@nrc.gov)

CAB 02

Michael M. Gibson, Chairman  
Alan S. Rosenthal  
Nicholas G. Trikouros  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
E-mail: [mmg3@nrc.gov](mailto:mmg3@nrc.gov)  
[axr@nrc.gov](mailto:axr@nrc.gov)  
[nqt@nrc.gov](mailto:nqt@nrc.gov)

CAB 03

Paul S. Ryerson, Chairman  
Michael C. Farrar  
Mark O. Barnett  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
E-mail: [psr1@nrc.gov](mailto:psr1@nrc.gov)  
[mcf@nrc.gov](mailto:mcf@nrc.gov)  
[mob1@nrc.gov](mailto:mob1@nrc.gov)  
[mark.barnett@nrc.gov](mailto:mark.barnett@nrc.gov)

CAB 04

Thomas S. Moore, Chairman  
Paul S. Ryerson  
Richard E. Wardwell  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
E-mail: [tsm2@nrc.gov](mailto:tsm2@nrc.gov)  
[psr1@nrc.gov](mailto:psr1@nrc.gov)  
[rew@nrc.gov](mailto:rew@nrc.gov)

Office of the Secretary  
ATTN: Docketing and Service  
Mail Stop: O-16C1  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555  
E-mail: [HEARINGDOCKET@nrc.gov](mailto:HEARINGDOCKET@nrc.gov)

Office of Commission Appellate  
Adjudication  
[ocaamail@nrc.gov](mailto:ocaamail@nrc.gov)

Charles J. Fitzpatrick, Esq.  
John W. Lawrence, Esq.  
Egan, Fitzpatrick, Malsch & Lawrence PLLC  
12500 San Pedro Avenue, Suite 555  
San Antonio, TX 78216  
E-mail: [cfitzpatrick@nuclearlawyer.com](mailto:cfitzpatrick@nuclearlawyer.com)  
[jlawrence@nuclearlawyer.com](mailto:jlawrence@nuclearlawyer.com)

Martin G. Malsch, Esq.  
Egan, Fitzpatrick & Malsch, PLLC  
1750 K Street, N.W. Suite 350  
Washington, D.C. 20006  
E-mail: [mmalsch@nuclearlawyer.com](mailto:mmalsch@nuclearlawyer.com)

Brian W. Hembacher, Esq.  
Deputy Attorney General  
California Attorney General's Office  
300 South Spring Street  
Los Angeles, CA 90013  
E-mail: [brian.hembacher@doj.ca.gov](mailto:brian.hembacher@doj.ca.gov)

Timothy E. Sullivan, Esq.  
Deputy Attorney General  
California Department of Justice  
1515 Clay Street., 20<sup>th</sup> Flr.  
P.O. Box 70550  
Oakland, CA 94612-0550  
E-mail: [timothy.sullivan@doj.ca.gov](mailto:timothy.sullivan@doj.ca.gov)

Kevin W. Bell, Esq.  
Senior Staff Counsel  
California Energy Commission  
1516 9<sup>th</sup> Street  
Sacramento, CA 95814  
E-mail: [kwbell@energy.state.ca.us](mailto:kwbell@energy.state.ca.us)

Bryce C. Loveland  
Jennings Strouss & Salmon, PLC  
8330 W. Sahara Avenue, Suite 290  
Las Vegas, NV 89117-8949  
Email: [bloveland@jsslaw.com](mailto:bloveland@jsslaw.com)

Alan I. Robbins, Esq.  
Debra D. Roby, Esq.  
Jennings Strouss & Salmon, PLC  
1700 Pennsylvania Ave, NW Suite 500  
Washington, D.C. 20005  
E-mail: [arobbins@jsslaw.com](mailto:arobbins@jsslaw.com)  
[droby@jsslaw.com](mailto:droby@jsslaw.com)

Donald J. Silverman, Esq.  
Thomas A. Schmutz, Esq.  
Thomas C. Poindexter, Esq.  
Paul J. Zaffuts, Esq.  
Alex S. Polonsky, Esq.  
Lewis Csedrik, Esq.  
Morgan, Lewis & Bockius LLP  
1111 Pennsylvania Avenue, N.W.  
Washington, DC 20004  
E-mail: [dsilverman@morganlewis.com](mailto:dsilverman@morganlewis.com)  
[tschmutz@morganlewis.com](mailto:tschmutz@morganlewis.com)  
[tpoindexter@morganlewis.com](mailto:tpoindexter@morganlewis.com)  
[pzaffuts@morganlewis.com](mailto:pzaffuts@morganlewis.com)  
[apolonsky@morganlewis.com](mailto:apolonsky@morganlewis.com)  
[lcsedrik@morganlewis.com](mailto:lcsedrik@morganlewis.com)

Malachy R. Murphy, Esq.  
18160 Cottonwood Rd. #265  
Sunriver, OR 97707  
E-mail: [mrmurphy@chamberscable.com](mailto:mrmurphy@chamberscable.com)

Robert M. Andersen  
Akerman Senterfitt  
801 Pennsylvania Avenue N.W., Suite 600  
Washington, DC 20004 USA  
E-mail: [robert.andersen@akerman.com](mailto:robert.andersen@akerman.com)

Martha S. Crosland, Esq.  
Angela M. Kordyak, Esq.  
Nicholas P. DiNunzio  
James Bennett McRae, Esq.  
U.S. Department of Energy  
Office of the General Counsel  
1000 Independence Avenue, S.W.  
Washington, DC 20585  
E-mail: [martha.crosland@hq.doe.gov](mailto:martha.crosland@hq.doe.gov)  
[angela.kordyak@hq.doe.gov](mailto:angela.kordyak@hq.doe.gov)  
[nick.dinunzio@rw.doe.gov](mailto:nick.dinunzio@rw.doe.gov)  
[ben.mcrae@hq.doe.gov](mailto:ben.mcrae@hq.doe.gov)

George W. Hellstrom  
U.S. Department of Energy  
Office of General Counsel  
1551 Hillshire Drive  
Las Vegas, NV 89134-6321  
E-Mail: [george.hellstrom@ymp.gov](mailto:george.hellstrom@ymp.gov)

Jeffrey D. VanNiel, Esq.  
530 Farrington Court  
Las Vegas, NV 89123  
E-mail: [nbrjdv@gmail.com](mailto:nbrjdv@gmail.com)

Susan L. Durbin, Esq.  
Deputy Attorney General  
1300 I Street  
P.O. Box 944255  
Sacramento, CA 94244-2550  
E-mail: [susan.durbin@doj.ca.gov](mailto:susan.durbin@doj.ca.gov)

Frank A. Putzu  
Naval Sea Systems Command Nuclear  
Propulsion Program  
1333 Isaac Hull Avenue, S.E.  
Washington Navy Yard, Building 197  
Washington, DC 20376  
E-mail: [frank.putzu@navy.mil](mailto:frank.putzu@navy.mil)

John M. Peebles  
Darcie L. Houck  
Fredericks Peebles & Morgan LLP  
1001 Second Street  
Sacramento, CA 95814  
E-mail: [jpeebles@ndnlaw.com](mailto:jpeebles@ndnlaw.com)

Ellen C. Ginsberg  
Michael A. Bauser  
Anne W. Cottingham  
Nuclear Energy Institute, Inc.  
1776 I Street, N.W., Suite 400  
Washington, D.C. 20006  
E-mail: [ecg@nei.org](mailto:ecg@nei.org)  
[mab@nei.org](mailto:mab@nei.org)  
[awc@nei.org](mailto:awc@nei.org)

David A. Repka  
William A. Horin  
Rachel Miras-Wilson  
Winston & Strawn LLP  
1700 K Street N.W.  
Washington, D.C. 20006  
E-mail: [drepka@winston.com](mailto:drepka@winston.com)  
[whorin@winston.com](mailto:whorin@winston.com)  
[rwilson@winston.com](mailto:rwilson@winston.com)

Jay E. Silberg  
Timothy J.V. Walsh  
Pillsbury Winthrop Shaw Pittman LLP  
2300 N Street, N.W.  
Washington, D.C. 20037-1122  
E-mail: [jay.silberg@pillsburylaw.com](mailto:jay.silberg@pillsburylaw.com)  
[timothy.walsh@pillsburylaw.com](mailto:timothy.walsh@pillsburylaw.com)

Gregory L. James  
710 Autumn Leaves Circle  
Bishop, California 93514  
Email: [qljames@earthlink.net](mailto:qljames@earthlink.net)

Arthur J. Harrington  
Godfrey & Kahn, S.C.  
780 N. Water Street  
Milwaukee, WI 53202  
E-mail: [aharring@gklaw.com](mailto:aharring@gklaw.com)

Steven A. Heinzen  
Douglas M. Poland  
Hannah L. Renfro  
Godfrey & Kahn, S.C.  
One East Main Street, Suite 500  
P.O. Box 2719  
Madison, WI 53701-2719  
E-mail: [sheinzen@gklaw.com](mailto:sheinzen@gklaw.com)  
[dpoland@gklaw.com](mailto:dpoland@gklaw.com)  
[hrenfro@gklaw.com](mailto:hrenfro@gklaw.com)

Robert F. List, Esq.  
Jennifer A. Gores, Esq.  
Armstrong Teasdale LLP  
1975 Village Center Circle, Suite 140  
Las Vegas, NV 89134-6237  
E-mail: [rlist@armstrongteasdale.com](mailto:rlist@armstrongteasdale.com)  
[jgores@armstrongteasdale.com](mailto:jgores@armstrongteasdale.com)

Diane Curran  
Harmon, Curran, Spielberg, & Eisenberg,  
L.L.P.  
1726 M Street N.W., Suite 600  
Washington, D.C. 20036  
E-mail: [dcurran@harmoncurran.com](mailto:dcurran@harmoncurran.com)

Ian Zabarte, Board Member  
Native Community Action Council  
P.O. Box 140  
Baker, NV 89311  
E-mail: [mrizabarte@gmail.com](mailto:mrizabarte@gmail.com)

Richard Sears  
District Attorney No. 5489  
White Pine County District Attorney's Office  
801 Clark Street, Suite 3  
Ely, NV 89301  
E-mail: [rwsears@wpcda.org](mailto:rwsears@wpcda.org)

Donald P. Irwin  
Michael R. Shebelskie  
Kelly L. Faglioni  
Hunton & Williams LLP  
Riverfront Plaza, East Tower  
951 East Byrd Street  
Richmond, VA 23219-4074  
E-mail: [dirwin@hunton.com](mailto:dirwin@hunton.com)  
[mshebelskie@hunton.com](mailto:mshebelskie@hunton.com)  
[kfaglioni@hunton.com](mailto:kfaglioni@hunton.com)

Curtis G. Berkey  
Scott W. Williams  
Rovianne A. Leigh  
Alexander, Berkey, Williams, & Weathers  
LLP  
2030 Addison Street, Suite 410  
Berkley, CA 94704  
E-mail: [cberkey@abwwlaw.com](mailto:cberkey@abwwlaw.com)  
[swilliams@abwwlaw.com](mailto:swilliams@abwwlaw.com)  
[rleigh@abwwlaw.com](mailto:rleigh@abwwlaw.com)

Bret O. Whipple  
1100 South Tenth Street  
Las Vegas, Nevada 89104  
E-mail: [bretwhipple@nomademail.com](mailto:bretwhipple@nomademail.com)

Gregory Barlow  
P.O. Box 60  
Pioche, Nevada 89043  
E-mail: [lcd@lcturbonet.com](mailto:lcd@lcturbonet.com)

Connie Simkins  
P.O. Box 1068  
Caliente, Nevada 89008  
E-mail: [jcciac@co.lincoln.nv.us](mailto:jcciac@co.lincoln.nv.us)

Dr. Mike Baughman  
Intertech Services Corporation  
P.O. Box 2008  
Carson City, Nevada 89702  
E-mail: [bigoff@aol.com](mailto:bigoff@aol.com)

Michael Berger  
Robert S. Hanna  
Attorney for the County of Inyo  
233 East Carrillo Street Suite B  
Santa Barbara, California 93101  
E-mail: [mberger@bsqlaw.net](mailto:mberger@bsqlaw.net)  
[rshanna@bsqlaw.net](mailto:rshanna@bsqlaw.net)

**/Signed (electronically) by/**

Margaret J. Bupp  
Counsel for the NRC Staff  
U.S. Nuclear Regulatory Commission  
Office of the General Counsel  
Mail Stop O-15D21  
Washington, DC 20555-0001  
(301) 415-3722  
[mjb5@nrc.gov](mailto:mjb5@nrc.gov)