

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

Before Administrative Judges:

**Thomas S. Moore, Chairman
Paul S. Ryerson
Richard E. Wardwell**

_____)	May 13, 2011
In the Matter of :)	
U.S. Department of Energy (Docket No. 63-001))	
(High Level Waste Repository Construction)	Docket No. 63-001-HLW
Authorization Application))	ASLBP No. 09-892-HLW-CAB04
_____)	

**NYE COUNTY, NEVADA'S ANSWER TO DEPARTMENT OF ENERGY MOTION FOR
PROTECTIVE ORDER**

I. INTRODUCTION

Nye County, Nevada ("Nye County" or "County"), a party to this proceedings and the host County for the proposed Yucca Mountain repository, opposes the Department of Energy's ("DOE") Motion for Protective Order and request that the Atomic Safety and Licensing Board ("CAB04") quash Nevada's recent Notices of Depositions.¹ Nye County intends to participate as a party in the scheduled depositions in accordance with Case Management Order No. 2 and the Joint Submission of the Parties.² Because DOE's Motion is based on a gross distortion of the relevant facts and erroneous conclusions of law, the Motion should be denied and the parties ordered to proceed with discovery.

¹ DOE filed its Motion on May 5, 2011, in response to the State of Nevada's Notice *Duces Tecum* of the Intention to Take the Oral Deposition of Kevin Coppersmith, April 25, 2011 and State of Nevada's Notice *Duces Tecum* of the Intention to Take the Oral Deposition of Michael Gross, April 25, 2011.. Nye County informed counsel for DOE of its opposition to the Motion and that it would respond more fully once it was filed, during the required party consultation on May 4, 2011.

² CAB Case Management Order #2 issued on September 30, 2009, adopting the September 23, 2003 proposed order with limited exception, at page 2. The adopted proposed order provided for participation by the parties in depositions upon notice. Parties September 23 Proposed Case Management Order at page 10.

BACKGROUND AND SUMMARY OF ARGUMENT

In denying DOE's attempt to unilaterally withdraw its license application without providing a safety justification for the withdrawal, CAB04 recognized NRC's duty to complete consideration of the Yucca Mountain license application on the merits, pursuant to the Nuclear Waste Policy Act ("NWPA"), 42 U.S.C. § 10134(d). The Board's decision has not been overturned by the NRC, even though the matter has been pending before the Commission for many months after a full briefing by the parties, and after final votes have been cast by the individual NRC Commissioners.

Since filing its Motion for Withdrawal, DOE has rapidly dismantled the Yucca Mountain program, acting as if CAB04 had decided the withdrawal motion in its favor. DOE's instant Motion for Protective Order, at bottom, is little more than another delaying tactic, and an effort to undermine the Order issued by CAB04 on February 25, 2010, denying DOE's request for a stay or temporary suspension in the Yucca Mountain repository licensing proceeding until May 20, 2011.³ DOE's instant Motion is yet another thinly disguised attempt to revisit the same grounds that DOE cited in moving to withdraw the Yucca Mountain license application. In its March 3, 2010 Motion to Withdraw, the DOE argued against "expenditure of funds on a licensing proceeding for a project that is being terminated."⁴ DOE then began its unilateral "termination" of the program without obtaining Congressional approval and in the teeth of this Board's decision that the withdrawal was contrary to the requirements of the NWPA.

Until Congress amends the NWPA, NRC fulfills its obligation to issue a final decision on the appeal of the CAB04 June 29, 2010 decision, and/or a federal court rules otherwise, discovery should proceed unabated. As CAB04 correctly noted in its Order of February 25, 2011, DOE in essence

³ Construction Authorization Board, Memorandum and Order (Denying Motion to Renew Temporary Suspension of the Proceeding), February 25, 2011 ("February 25 Order"). U.S. Department Of Energy's Motion To Renew Temporary Suspension Of The Proceeding, January 21, 2011

⁴ Id. at 2.

seeks "the Board's unqualified approval of the parties continued 'collective inaction.'"⁵ Contrary to the implications of DOE's filings, appropriated funds are available for completion of discovery. Monies used for such purposes serve the national interest and are not wasteful.

ARGUMENT

I. DOE SHOULD NOT BE PERMITTED TO USE ITS DISMANTLING OF THE YUCCA MOUNTAIN PROGRAM, ITS REPROGRAMMING OF YUCCA FUNDS, AND DELAY TACTICS TO BOOTSTRAP A JUSTIFICATION FOR HALTING DISCOVERY

It is well-settled that unnecessary delay of a licensing proceeding is "a 'drastic' action that is unwarranted absent 'immediate threats to public health and safety.'"⁶ Furthermore, the Commission "generally [has] declined to hold proceedings in abeyance pending the outcome of other Commission actions or adjudications."⁷

Delays and political machination by DOE and certain Commissioners of the NRC are the root causes for the dilemma that the other parties to this proceeding face. Under well-settled principles of federal law, DOE should not be permitted to support its Motion for Protective Order by means of its own improper actions designed to subvert the licensing proceeding before a final decision on its Motion to Withdraw the license is rendered. Rather than wait for a final decision by the NRC, DOE, in an uncommon display of rapid administrative action, immediately began dismantling the Yucca Mountain program, dispersing experienced technical staff, and disposing of property and support systems without fully assessing the risks of such precipitous action, addressing the requirements of the NWPAA, or even complying with federal rules governing the disposition of property. *See generally* United States Government Accountability Office,

⁵ Memorandum and Order (Denying Motion to Renew Temporary Suspension of the Proceeding) at 2 (February 25, 2011).

⁶ *In re AmerGen Energy Co., LLC*, 68 N.R.C. 461, 484 (N.R.C. Oct. 6, 2008) (quoting *Vermont Yankee Nuclear Power Corp. & AmerGen Vermont, LLC* (Vermont Yankee Nuclear Power Station) 52 NRC 151, 173-74 (2000)).

⁷ *Entergy Nuclear Vt. Yankee, L.L.C.*, 2010 NRC LEXIS 27 (N.R.C. July 8, 2010).

Commercial Nuclear Waste, Effects of a Termination of the Yucca Mountain Repository Program and Lessons Learned Report, GAO-11-229 (April 2011)[hereinafter GAO Report].

Funds are still available to complete this phase of discovery. The Administration requested, and Congress approved, funding for the 2010 fiscal year that continued the Yucca Mountain license application process. DOE, *FY 2010 Congressional Budget Request, Vol. 5*, 504 (FY-2010 budget request "is dedicated solely to supporting ... the NRC LA process."), 505, 520, 540; P.L. 111-85, 123 Stat. 2864, 2868. In addition, FY-2011 Continuing Resolutions ("CR") prior to the final FY-2011 CR passed in April (the only one cited by DOE) continued to fund DOE's Yucca Mountain activities. As Nye County stated in its successful opposition to DOE's previous request for a stay: "The NWPA is law and Congress has already appropriated sufficient funds for DOE to complete this phase of discovery and for NRC to continue its adjudication of the license application through the end of FY-2011, regardless of future Congressional actions that could impact additional funding for the rest of the fiscal year."⁸

While DOE continued to dismantle the program, it took only the minimal steps mandated by the CAB04 in the licensing proceeding for over a year, while initiating no discovery whatsoever. Its rapid dismantling of the Yucca Mountain program required the improper "abandonment" of millions of dollars worth of property paid for by taxpayers without fully accounting for the property or following procedures that would have minimized fiscal losses. This action drew criticism from the GAO. All total, DOE has placed fifteen billion dollars of taxpayer money at risk by prematurely abandoning Yucca Mountain without so much as awaiting a final decision by the NRC or the results of its own Blue Ribbon Panel Recommendations on the future of nuclear waste management. *See generally* GAO Report. In

⁸ NYE COUNTY ANSWER TO U.S. DEPARTMENT OF ENERGY'S MOTION TO RENEW TEMPORARY SUSPENSION OF THE PROCEEDING at p. 7 and n.22. (March 11, 2011).

what can only be described as breathtaking hubris, DOE now comes before CAB04 and complains that discovery would "needlessly waste resources" and would cause "undue burden and expense". DOE Motion for Protective Order at 2. The authorities DOE cites for this proposition are not procedural decisions on motion to quash, but rather decisions on the merits of projects abandoned by other agencies under wholly different circumstances. For example, the decision in *County of Vernon v. United States*, 933 F.2d 532 (7th Cir. 11191) involved a discretionary account from which the United States Corps of Engineers could draw monies for projects under the Flood Control Act of 1962. In this case, the specific Congressional designation of Yucca Mountain as the sole repository for nuclear waste and other statutory mandates governing the processing of the Yucca Mountain license in the NWPA have not been altered. Moreover, as demonstrated previously, sufficient funds have been appropriated to continue discovery.

Contrary to DOE's assertions, completion of discovery on alleged safety issues is also not wasteful, and has value far beyond the cost to the parties and the monies already appropriated by Congress for the adjudication of the licensing proceeding. Even the President and DOE Secretary Chu recognized, at least initially, that the Yucca Mountain licensing proceeding should continue because it would produce valuable scientific information for future nuclear waste management efforts, regardless of the ultimate fate of the Yucca Mountain project.⁹ Indeed, it is DOE's own action in seeking to withdraw the license application that is wasteful of taxpayers' dollars. DOE seeks to abandon a license that has already cost many billions of dollars to produce-- without first capturing the full scientific value of the application by completing the licensing proceeding,

⁹ In May 2009, the Secretary of DOE testified before Congress that DOE would "continue participation in the Nuclear Regulatory Commission (NRC) license application process, consistent with the provisions of the Nuclear Waste Policy Act." FY-2010 Appropriations Hearing Before the Subcomm. on Energy and Water Development, and Related Agencies of the S. Comm. on Appropriations, 111th Cong. (2009).

and without determining that the repository is unsafe. DOE admits that “the Secretary’s judgment here [to withdraw the LA] is not that Yucca Mountain is unsafe or that there are flaws in the LA.”¹⁰

CAB04 properly recognized the federal government's duty to proceed with the licensing adjudication proceeding under the Nuclear Waste Policy Act. Far from being an *undue* burden and *waste* as stated in DOE's Motion, it is precisely what the law requires. As CAB04 has properly held “both DOE and the NRC are bound to follow the existing law.”¹¹ When the County filed its reply brief before this Commission supporting CAB04's denial of DOE's Motion to Withdraw, it stated "that establishment of 'special counsel' to prosecute the LA, as advocated by numerous other opponents of the Motion to Dismiss at oral argument, is an effective method of assuring independence and good faith prosecution of the application." ¹² That is still an option if DOE remains reluctant to proceed.

II. THE NRC ALSO HAS A MANDATORY OBLIGATION TO CONTINUE THE LICENSING PROCEEDING UNDER THE NWPA AND SHOULD TAKE IMMEDIATE ACTION ON PENDING ISSUES

Any further delay or suspension of this licensing proceeding would appear to be an official sanctioning of DOE’s desire to abandon its Nuclear Waste Policy Act duties relative to the repository. NRC funding for this licensing proceeding continued through April of 2011 at or near the previous years' levels, and DOE admits that Congress added an additional ten million to that funding. Completion of this phase of discovery, issuance of withheld staff safety evaluation reports ("SERs"), and even adjudication of phase one factual contentions can be completed with that funding.

¹⁰ DOE Reply Brief in Support of the Motion to Withdraw (May 27, 2010) at 31, note 102.

¹¹ Memorandum and Order (June 29, 2010) at 18-19; *see also McCready v. Nicholson*, 465 F.3d 1, 12 (D.C. Cir. 2006) (stating that the Veterans Administration is free to raise concerns regarding the Privacy Act to Congress, which can amend the law, but the Courts and Veterans Administration must follow its text).

¹² Nye County Reply Brief Supporting CAB04 Decision Denying Department of Energy's Motion to Withdraw Its License Application with Prejudice and Granting Intervention (July 19, 2010) at 16, n.22

Unfortunately, the Chairman of the NRC must share with DOE the blame for unjustifiably delaying the orderly completion of the Yucca licensing proceeding. Congress is now investigating a series of actions by the Chairman, foremost of which is the possible mischaracterization of other Commissioners' votes on the DOE's Motion to Withdraw as preliminary rather than final,¹³ and the unjustifiable delay in the release of the Commission's decision on DOE's Motion to Withdraw because the Commission can not reach what the Chairman refers to as a "majority" position on the wording of a final order.¹⁴

Simply because two of the four Commissioner's voting on the decision can block the issuance of **any** final order, no matter how neutrally worded, is not a justification for NRC to fail to discharge its responsibilities in this case. NRC rules provide for tie votes, and final orders in such cases. Of course, the final NRC order may be issued at any time by simply releasing the final votes and the individual Commissioner's reasoning for their disparate positions.

The Chairman unilaterally ordered NRC staff to begin an orderly closeout of Yucca Mountain, over the objection of senior staff and other Commissioners, because he had determined, for budgetary purposes, that the DOE license application had already been withdrawn.¹⁵ For example, staff consideration and finalization of critical safety evaluation reports (SER) have been delayed by the Chairman's "budgetary" actions, in spite of assurances the staff gave to CAB04 in 2010 regarding the scheduling and release of the SERs in the licensing proceeding. Just as DOE has done, in dismantling the Yucca program, the Chairman

¹³ Joint Hearing of the Energy and Power Subcommittee and the Environment and Economy Subcommittee of the House Energy and Commerce Committee. The Role of the Nuclear Regulatory Commission (NRC) in America's Energy Future (May 5, 2011). Testimony by Commissioners Suinicki, Magwood, and Ostendorf testified that their votes were indeed final votes on the Motion to Withdraw.

¹⁴ Testimony of NRC Chairman Gregory Jaczko on May 4, 2011 (un-paginated preliminary transcript)

¹⁵ Chairman Jaczko testified as follows: "And on a separate track, we are--because of the budget situation- we are working to close down our review of the application. And that was based on a decision that I made in early October..." *Id.* He later testified that that in March of 2010 there was "a memo indicating that, based on the fact that the application was being withdrawn, that the staff was moving into closeout." Of course, this was before CAB04 had even ruled on the legality of the withdrawal.

has assumed his position (and DOE's arguments on the Motion to Withdraw) are legally correct and initiated termination of the Yucca licensing process. He testified that "We had had an application for the Yucca Mountain project that had been withdrawn." No, that is the very question still pending before the NRC. DOE maintains it has unilateral authority to withdraw its application, and *moved* to withdraw its application, but that Motion was denied by CAB04 on June 29, 2010.

The Chairman also maintains that the budget matters are his domain, that he acted legally, and that the decision on the merits of the Motion to Withdraw is separate.¹⁶ Nonsense, they are clearly related, and he has turned the adjudicatory and budget processes on their head. First, NRC must decide whether DOE may properly withdraw its application, and then order the appropriate staff action in either terminating the licensing proceeding, or not. If the DOE withdrawal is contrary to law, as this CAB has determined, there are no legal grounds for making budgetary decisions which undermine the licensing process.¹⁷

Whatever the outcome of the Congressional process, NRC's reputation for independence and scientific and technical neutrality has been damaged. That damage, however, need not be permanent. Immediate release of a final appealable order by the NRC, together with the unredacted staff SER, would go a long way to restoring reason and order to the licensing process. On the other hand, the damage to NRC could be exacerbated should the NRC refuse to ever issue the long delayed "majority" order, as the Chairman suggested might happen, or if NRC waits to issue the order when a Commissioner's term of office expires. Similarly, failing to provide funding for CAB04, an independent adjudicatory body, or the necessary staff and hearing

¹⁶ Id.

¹⁷ Judicial appeals and stays of the NRC final order are potentially available to aggrieved parties in the United States Court of Appeals for the DC Circuit.

facilities for continuing the Yucca licensing proceeding, would seriously undermine NRC's position as an independent and neutral licensing agency.

NRC directed CAB04 to expeditiously resolve the DOE Motion to Withdraw on April 23, 2010, when the Commission vacated the April 6, 2010, CAB04 Order suspending the licensing case and noted that the CAB should render a decision on DOE's Motion to Withdraw no later than June, 2010.¹⁸ Even though CAB04 rendered its decision denying the Motion to Withdraw on June 29, 2010, and the parties re-briefed the issue before the Commission in July of 2010,¹⁹ no final NRC decision has been issued.

Had NRC done so, the first phase of discovery on party contentions might be completed, with the possible exception of deposing NRC staff and experts regarding the unredacted version of Volume 3 of the Safety Evaluation Report ("SER"). NRC staff recently informed the CAB04 that it cannot release the unredacted SER because it is a "preliminary draft" and not a "circulating draft."²⁰ The NRC staff's belabored response to the CAB04's show cause order repeated numerous irrelevant details from a previous explanation found wanting by the CAB04. At the time of its response, staff curiously failed to provide any concrete reasons why a schedule for the SER's release is "indeterminate due to circumstances beyond the Staff's control."²¹ It is now clear from the recent Congressional testimony that the issuance of an unredacted SER was blocked by the NRC Chairman, and further staff work on the application impeded, over the strong objection of senior staff and two other Commissioners.²² It is clear, however, that NRC or

¹⁸ *U.S. Dep't of Energy* (High-Level Waste Repository), CLI-10-13, 71 NRC ____ (slip op. at 5.) (Apr.23, 2010).

¹⁹ On June 30, 2010, the Secretary to the Commission issued an Order establishing the briefing schedule for participants to support or oppose CAB04s decision.

²⁰ NRC Staff Response to February 25, 2011, Board Order, filed March 3, 2011 at 6.

²¹ See NRC Staff Response to February 25, 2011, Board Order, filed March 3, 2011 at ¶ 6 of Catherine Haney affidavit.

²² Commissioners Ostendorf and Sviniciki voted to have the staff continue with its processing the license application. The Chairman and Commissioner Magwood testified that they abstained. The Chairman further noted

this Board has the authority to reverse the previous February 17, 2011, decision to release only a redacted version of the SER, referenced in the staff response, and to direct the staff to expeditiously finalize the SER.²³ That action should be taken immediately.

Granting a further delay in this proceeding is inimical to the mandates of the Nuclear Waste Policy Act governing this proceeding. That Act includes a statutory requirement that the licensing proceeding be completed, on the merits, in three years (four with extension) from the date of DOE's filing of the license application. *See* 42 U.S.C. § 10134(d). Had it not been for the Commission's failure to act and DOE's delaying tactics following the decision of the CAB04 on the Motion to Withdraw, considerable discovery would already have been completed.

CONCLUSION

Congress has not amended the NWPA to eliminate Yucca Mountain as the sole site for the nuclear repository, nor has it altered NRC's statutory duty to reach a decision on the merits of the license application within a prescribed period of time, or seek an extension from Congress. Just as importantly, the CAB04 ruling that the license application may not be unilaterally withdrawn by DOE is the law of the case. DOE does not assert that sufficient funds are unavailable to conduct discovery. Therefore, CAB04 should reject DOE's Motion for Protective Order and allow discovery to commence. In the alternative, a hearing should be scheduled for the purpose of determining whether an independent counsel should be appointed to prosecute the license application on behalf of the DOE given its continued reluctance to fulfill its obligations under the NWPA.

that a third Commissioner also abstained, even though that Commissioner had previously recused himself from consideration of any Yucca issue due to his work at Sandia. It remains unclear why the Chairman's view, after abstaining, prevailed under the circumstances.

²³ NRC Staff Response to February 25, 2011, Board Order, filed March 3, 2011 at 3.

Respectfully submitted,

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