

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

In the Matter of

U.S. DEPARTMENT OF ENERGY

(High Level Waste Repository)

Docket No. 63-001-HLW

ASLBP No. 09-892-HLW-CAB04

September 30, 2011

MEMORANDUM AND ORDER  
(Suspending Adjudicatory Proceeding)

This adjudicatory proceeding concerns the application of the Department of Energy (DOE) for authorization to construct a national high-level nuclear waste repository at Yucca Mountain, Nevada.

On March 3, 2010, DOE moved to withdraw the application with prejudice.<sup>1</sup> On June 29, 2010, this Board denied the motion on the ground that the Nuclear Waste Policy Act of 1982, as amended, does not permit DOE to withdraw the application.<sup>2</sup> On June 30, 2010, the Secretary of the Commission invited participants to submit briefs on an expedited schedule as to whether it should review, and reverse or uphold, the Board's decision.<sup>3</sup>

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<sup>1</sup> U.S. Department of Energy's Motion to Withdraw (Mar. 3, 2010).

<sup>2</sup> LBP-10-11, 71 NRC \_\_, \_\_ (slip op. at 20) (June 29, 2010).

<sup>3</sup> Secretary Order (June 30, 2010) at 1 (unpublished).

On September 9, 2011, the Commission announced that it was evenly divided on whether to take the affirmative action of overturning or upholding the Board's decision.<sup>4</sup> The Board's decision to deny DOE's motion to withdraw, LBP-10-11, therefore stands.

The seven-year history of this adjudicatory proceeding has involved the work of six Licensing Boards in three phases: (1) preliminary document discovery and case management matters before the Pre-License Application Presiding Officer Board and the Advisory Pre-License Application Presiding Officer Board; (2) consideration of initial petitions and identification of participants and admitted contentions by three separate Construction Authorization Boards (i.e., CAB-01, CAB-02, CAB-03); and (3) consideration of additional proffered contentions, new petitions, and various case management matters by this Board (the fourth Construction Authorization Board — CAB-04 ). The full history of the adjudicatory proceeding is contained in the principal substantive and procedural rulings of the six Licensing Boards and of the Commission, as well as in certain key pleadings of the parties, as set forth in the attached Appendix.

As of this date, fourteen parties have been permitted to intervene in the proceeding: (1) the State of Nevada; (2) the Nuclear Energy Institute; (3) Nye County, Nevada; (4) the four Nevada Counties of Churchill, Esmeralda, Lander, and Mineral (jointly); (5) the State of California; (6) Clark County, Nevada; (7) the County of Inyo, California; (8) White Pine County, Nevada; (9) the Joint Timbisha Shoshone Tribal Group; (9) the Native Community Action Council; (10) the State of Washington; (11) the State of South Carolina; (12) Aiken County, South Carolina; (13) the Prairie Island Indian Community; and (14) the National Association of Regulatory Utility Commissioners. Two Nevada counties — Eureka County and Lincoln County — have been permitted to participate as interested governmental bodies pursuant to 10 C.F.R. § 2.315(c), and the Florida Public Service Commission was permitted to participate as

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<sup>4</sup> CLI-11-07, 74 NRC \_\_, \_\_ (slip op. at 1) (Sept. 9, 2011).

amicus curiae. Two hundred eighty-eight admitted contentions are pending. They would be ripe for adjudication at evidentiary hearings after deposition discovery, issuance by the NRC Staff of applicable Safety Evaluation Reports and (in the case of contentions arising under the National Environmental Policy Act) any necessary supplementation by the NRC Staff of DOE's Environmental Impact Statement.

Although we have been informed that the agency has current appropriated Fiscal Year 2011 Nuclear Waste Funds (NWFs) that could be carried over into the next fiscal year, there are no Full-Time Equivalent (FTE) positions (i.e., federal employee positions) requested in the President's Fiscal Year 2012 Budget for Yucca Mountain High-Level Waste activities. Therefore, because both future appropriated NWF dollars and FTEs for this proceeding are uncertain, and consistent with the Commission's Memorandum and Order of September 9, 2011, this proceeding is suspended.

It is so ORDERED.

THE ATOMIC SAFETY  
AND LICENSING BOARD

***/RA/***

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Thomas S. Moore, Chairman  
ADMINISTRATIVE JUDGE

***/RA/***

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Paul S. Ryerson  
ADMINISTRATIVE JUDGE

***/RA/***

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Richard E. Wardwell  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
September 30, 2011

**APPENDIX**

**1. Pre-License Application Presiding Officer (PAPO)/Advisory Pre-License Application Presiding Officer (APAPO)**

<b>Date</b>	<b>Entity</b>	<b>Citation</b>	<b>Title/Description</b>
7/7/2004	Commission	CLI-04-20, 60 NRC 15 (2004)	Commission Appointment of Pre-License Application Presiding Officer (PAPO) in Accordance with 10 C.F.R. § 2.1010
7/8/2004	ASLBP Chief Administrative Judge	69 Fed. Reg. 42,218 (July 14, 2004)	Establishment of PAPO Atomic Safety and Licensing Board
8/31/2004	PAPO Board	LBP-04-20, 60 NRC 300 (2004)	Memorandum and Order Granting State of Nevada's July 12, 2004 Motion to Strike DOE's Licensing Support Network (LSN) Document Collection Certification
11/10/2004	Commission	CLI-04-32, 60 NRC 469 (2004)	Commission Memorandum and Order Advising that it is Holding DOE's Appeal of LBP-04-20 in Abeyance
1/24/2005	PAPO Board	(unpublished)	First Case Management Order Regarding Preparation of Privilege Logs
7/8/2005	PAPO Board	(unpublished)	Second Case Management Order Regarding Pre-License Application Phase Document Discovery and Dispute Resolution
9/22/2005	PAPO Board	LBP-05-27, 62 NRC 478 (2005)	Memorandum and Order Granting State of Nevada's June 6, 2005 Motion to Compel DOE to Place Draft License Application on the LSN
2/2/2006	Commission	CLI-06-05, 63 NRC 143 (2006)	Commission Memorandum and Order Reversing PAPO Board's Decision (LBP-05-27) Requiring DOE to Place the Draft License Application on the LSN
2/9/2006	PAPO Board	(unpublished)	Order Suspending Monthly Supplementation Requirement
2/16/2006	PAPO Board	(unpublished)	Memorandum and Order Regarding Deletions of Documents From the LSN
7/6/2007	PAPO Board	(unpublished)	Revised Second Case Management Order Regarding Pre-License Application Phase Document Discovery and Dispute Resolution

8/16/2007	PAPO Board	(unpublished)	Order Amending Appendix H of the Revised Second Case Management Order
8/30/2007	PAPO Board	(unpublished)	Third Case Management Order Concerning Procedures Regarding Official Use Only Information, Naval Nuclear Propulsion Information, and Unclassified Controlled Nuclear Information
8/31/2007	PAPO Board	(unpublished)	Memorandum Alerting Commission to the Possibility of Significant Delays in the High-Level Waste Proceeding Because of the Months It Will Take Potential Parties to the Proceeding to Gain Access to Safeguards Information
10/5/2007	PAPO Board	(unpublished)	Fourth Case Management Order Concerning Electronic Filing, the Digital Data Management System (DDMS), Safeguards Information, and Other Items
11/1/2007	PAPO Board	(unpublished)	Fifth Case Management Order Regarding Supplementation, Correction, and Changing of Privilege Logs
1/4/2008	PAPO Board	LBP-08-01, 67 NRC 37 (2008)	Memorandum Setting Forth Full Reasoning for Denying Nevada's Motion to Strike DOE's Certification of LSN Document Collection
2/13/2008	ASLBP Chief Administrative Judge	73 Fed. Reg. 9358 (Feb. 20, 2008)	Establishment of Advisory Pre-License Application Presiding Officer (APAPO) Board Pursuant to COMSECY-07-0030
3/20/2008	ASLBP Chief Administrative Judge	73 Fed. Reg. 16,077 (Mar. 26, 2008)	Notice of APAPO Board Reconstitution
3/31/2008	APAPO Board	(unpublished)	Memorandum Requesting that the Commission Grant Additional Authority to Issue Binding Case Management Orders
4/23/2008	PAPO Board	LBP-08-05, 67 NRC 205 (2008)	Memorandum and Order Denying DOE's Motion To Strike State of Nevada's LSN Document Collection Certification
6/17/2008	Commission	CLI-08-12, 67 NRC 386 (2008)	Memorandum and Order Affirming PAPO Board's Decision in LBP-08-01 Denying Nevada's Motion to Strike DOE's LSN Document Collection Certification
6/17/2008	Commission	CLI-08-14, 67 NRC 402 (2008)	Memorandum and Order Authorizing APAPO Board to Issue Binding Case Management Orders

6/20/2008	APAPO Board	LBP-08-10, 67 NRC 450 (2008)	APAPO Case Management Order Concerning Petitions To Intervene, Contentions, Responses and Replies, Standing Arguments, and Referencing or Attaching Supporting Materials
8/13/2008	Commission	CLI-08-18, 68 NRC 246 (2008)	Memorandum and Order Modifying Schedule in 10 C.F.R. Part 2, Appendix D to Allow Filing of Petitions to Intervene within Sixty Days of Notice of Hearing
8/22/2008	ASLBP Chief Administrative Judge	(unpublished)	Memorandum of Atomic Safety and Licensing Board Panel Responding to August 13, 2008 Commission Request for Scheduling Comments
9/8/2008	Commission	CLI-08-22, 68 NRC 355 (2008)	Memorandum and Order Affirming PAPO Board's Decision in LBP-08-05 Denying DOE's Motion to Strike Nevada's LSN Document Collection Certification
10/17/2008	Commission	CLI-08-25, 68 NRC 497 (2008); 73 Fed. Reg. 63,029 (Oct. 22, 2008)	Notice of Hearing and Opportunity to Petition for Leave to Intervene on DOE Application for Authority to Construct a Geologic Repository at Yucca Mountain, Nevada
6/5/2009	PAPO Board	(unpublished)	Sixth Case Management Order Regarding State of Nevada's Access to Classified Information

**2. Construction Authorization Boards 01, 02, 03 (CAB-01, CAB-02, CAB-03) and Pertinent Pleadings**

<b>Date</b>	<b>Entity/ies</b>	<b>Citation</b>	<b>Title/Description</b>
12/19/2008	Nye County, Nevada		Nye County, Nevada Petition to Intervene and Contentions
12/19/2008	Nevada Counties of Churchill, Esmeralda, Lander, and Mineral		Nevada Counties of Churchill, Esmeralda, Lander, and Mineral Petition to Intervene
12/19/2008	State of Nevada		State of Nevada's Petition to Intervene as a Full Party
12/19/2008	Nuclear Energy Institute		The Nuclear Energy Institute's Petition to Intervene
12/20/2008	State of California		State of California's Petition for Leave to Intervene in the Hearing
12/22/2008	Native Community Action Council		Native Community Action Council Petition to Intervene as a Full Party
12/22/2008	Clark County, Nevada		Clark County, Nevada's Request for Hearing, Petition to Intervene and Filing of Contentions
12/22/2008	White Pine County, Nevada		White Pine County's Request for Hearing and Petition for Leave to Intervene Including Supporting Contentions on the Application by the U.S. Department of Energy for Authority to Construct a Geologic Repository at a Geologic Repository Operations Area at Yucca Mountain
12/22/2008	Timbisha Shoshone Tribe		Timbisha Shoshone Tribe's Petition for Leave to Intervene in the Hearing
12/22/2008	County of Inyo, California		Petition for Leave to Intervene by the County of Inyo, California on an Application by the U.S. Department of Energy for Authority to Construct a Geologic High-Level Waste Repository at a Geologic Repository Operations Area at Yucca Mountain, Nevada

12/22/2008	Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation (TSO)		Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation Petition to Intervene as a Full Party
1/16/2009	ASLBP Chief Administrative Judge	74 Fed. Reg. 4477 (Jan. 26, 2009)	Establishment of Three Atomic Safety and Licensing Boards (Construction Authorization Boards (CABs) 01, 02, and 03) to Preside over Petitions to Intervene and Requests to Participate in the High-Level Waste Repository Construction Authorization Application Proceeding
1/29/2009	CAB-01, CAB-02, CAB-03	(unpublished)	Joint CABs' Case Management Order #1 Adopting Prior PAPO and APAPO Case Management Orders and Setting Times for Filing New and Amended Contentions
3/5/2009	TSO		Amended Petition of TSO to Intervene as a Full Party
5/11/2009	CAB-01, CAB-02, CAB-03	LBP-09-06, 69 NRC 367 (2009)	Joint CABs Memorandum and Order Rulings on Intervention Petitions (Identifying Participants) and Admitting Contentions
5/12/2009	State of Nevada		State of Nevada's New Contentions Based on Final NRC Rule
6/8/2009	State of Nevada		State of Nevada's New Contentions Based on DOE's February 19, 2009 License Application Update
6/10/2009	Clark County, Nevada		Clark County, Nevada's New Contention Arising from the Department of Energy's February 19, 2009 License Application Update
6/30/2009	Commission	CLI-09-14, 69 NRC 580 (2009)	Memorandum and Order Reversing CABs' Ruling in LBP-09-06 on the Admissibility of Four Contentions

**3. Construction Authorization Board 04 (CAB-04) and Pertinent Pleadings**

Date	Entity	Citation	Title/Description
6/19/2009	ASLBP Chief Administrative Judge	74 Fed. Reg. 30,644 (June 26, 2009)	Establishment of Atomic Safety and Licensing Board Construction Authorization Board 4 (CAB-04) to Preside Over Matters Regarding Discovery, LSN Compliance, New or Amended Contentions, Grouping or Consolidation of Contentions, Scheduling, and Case Management Matters
7/21/2009	CAB-04	(unpublished)	Order Concerning Phased Schedule for Deposition Discovery due to NRC Staff's Announcement of Serial Issuance of Safety Evaluation Reports (SERs) over Three Years and the NRC Staff's Inability to Comply with 10 C.F.R. Part 2, Appendix D
8/27/2009	CAB-04	(unpublished)	Order Granting Party Status to the Native Community Action Council
8/27/2009	CAB-04	(unpublished)	Order Granting Party Status to the Joint Timbisha Shoshone Tribal Group
9/30/2009	CAB-04	(unpublished)	Case Management Order #2 Identifying Phase I Contentions and Outlining Procedures for: Contention Consolidation and Grouping, Identification of Witnesses, Depositions, Document Production, and Dispute Resolution
12/22/2009	CAB-04	(unpublished)	Order Concerning LSN Administrator (LSNA) Memorandum Alerting Board to Potential LSN Technical Problems Should LSN be Decommissioned
12/30/2009	CAB-04	(unpublished)	Order Consolidating and Grouping Certain Contentions
2/1/2010	CAB-04	(unpublished)	Case Management Order #3 Extending Phase I Deposition Discovery Through January 31, 2011 due to NRC Staff's Announced Delay for Issuance of SER Volume 3 from September 2010 to November 2010
2/16/2010	CAB-04	(unpublished)	Order Granting DOE's Motion for Stay of Proceeding Until Resolution of DOE's Expected Motion to Withdraw License Application

2/26/2010	State of South Carolina	Petition of the State of South Carolina to Intervene		
3/3/2010	State of Washington	State of Washington's Petition for Leave to Intervene and Request for Hearing		
3/4/2010	Aiken County, South Carolina	Petition of Aiken County, South Carolina, to Intervene		
3/15/2010	National Association of Regulatory Utility Commissioners	National Association of Regulatory Utility Commissioners Petition to Intervene		
3/15/2010	Prairie Island Indian Community	Petition to Intervene of the Prairie Island Indian Community		
4/6/2010	CAB-04	Memorandum and Order Suspending Briefing and Consideration of DOE's Withdrawal Motion Pending Guidance from U.S. Court of Appeals for District of Columbia Circuit in Actions Challenging DOE's Authority to Withdraw its License Application	(unpublished)	
4/23/2010	Commission	Memorandum and Order Vacating CAB-04's April 6, 2010 Suspension Order and Directing Board to Decide DOE's Motion to Withdraw Application	CLI-10-13, 71 NRC 387 (2010)	
6/29/2010	CAB-04	Memorandum and Order Granting Intervention to Five New Petitioners and Denying DOE's Withdrawal Motion	LBP-10-11, 71 NRC (slip op.) (June 29, 2010)	
6/30/2010	Secretary of the Commission	Order Setting Expedited Briefing Schedule on Whether Commission Should Review, and Reverse or Uphold, LBP-10-11 Denying DOE's Motion to Withdraw Application	(unpublished)	
7/15/2010	Commissioner Apostolakis	Notice of Recusal by Commissioner George Apostolakis in High-Level Waste Adjudicatory Proceeding	(unpublished)	
8/11/2010	Commissioner Magwood	Commissioner William D. Magwood, IV Decision Refusing Recusal on the Motion of the State of Washington, the State of South Carolina, Aiken County, South Carolina, and White Pine County, Nevada for Recusal/Disqualification	(unpublished)	

8/11/2010	Commissioner Ostendorff	(unpublished)	Commissioner William C. Ostendorff Decision Refusing Recusal on the Motion of the State of Washington, the State of South Carolina, Aiken County, South Carolina, and White Pine County, Nevada for Recusal/Disqualification
12/14/2010	CAB-04	LBP-10-22, 72 NRC ___ (slip op.) (Dec. 14, 2010)	Memorandum and Order Deciding Phase I Legal Issues and Denying Rule Waiver Petitions
2/25/2011	CAB-04	(unpublished)	Memorandum and Order Denying DOE's Motion to Renew Temporary Suspension of the Proceeding
3/24/2011	CAB-04	(unpublished)	Order Dismissing Five Nevada Safety Contentions
4/11/2011	CAB-04	(unpublished)	Order Directing all Parties to Preserve LSN Collections in PDF Format and to Submit LSN Document Collections Together with Associated Bibliographic Files to the Secretary of the Commission on Optical Storage Media for Inclusion into the Docket
5/10/2011	CAB-04	(unpublished)	Order Dismissing Nuclear Energy Institute Safety Contention 05
5/13/2011	CAB-04	(unpublished)	Order Granting DOE's Motion for Clarification of Board's April 11, 2011 Order, Allowing DOE to Submit LSN Collection on External Hard Drives, and Exempting DOE from Other Agency Information Technology Requirements
5/20/2011	CAB-04	(unpublished)	Memorandum and Order Granting DOE's Motion to Quash Depositions and Warning that Board Expects the State of Nevada to Withdraw Additional Deposition Notices In Light of Events Beyond Board's and Parties' Control
6/9/2011	CAB-04	(unpublished)	Order Granting in Part and Denying in Part NRC Staff's Reconsideration Motion of Board's April 11, 2011 Order and Providing that NRC Staff Need Not Duplicate its Collection in the Agencywide Documents Access and Management System (ADAMS) and that the Secretary of the Commission Need Only Place Documents in ADAMS as Funding Permits
7/13/2011	CAB-04	(unpublished)	Memorandum and Order Granting in Part DOE's Motion to Dismiss by Dismissing One Nevada Safety Contention and Parts of Three Others

7/26/2011	LSNA	(unpublished)	Memorandum of LSNA that LSN will Cease Operations on or about August 5, 2011
7/28/2011	CAB-04	(unpublished)	Order Suspending LSN Document Collection Supplementation Effective August 2, 2011 but Directing Parties to Retain LSN Document Collections for Potential LSN Reconstitution
9/9/2011	Commission	CLI-11-07, 74 NRC (slip op.) (Sept. 9, 2011)	Memorandum and Order Announcing Commission Divided 2-2 on Whether to Take Affirmative Action on LBP-10-11 Denying DOE's Motion to Withdraw License Application and Directing Board to Complete All Necessary and Appropriate Case Management Activities, Including Documenting the History of the Proceeding by Close of Fiscal Year 2011
9/16/2011	CAB-04	(unpublished)	Order Directing LSNA to Submit DOE Employee Concern Program Documents to Secretary of the Commission and Each Party to Retain All Documentary Material Represented in LSN only by Bibliographic Header Information
9/28/2011	CAB-04	(unpublished)	Memorandum and Order Dismissing without Prejudice Timbisha Shoshone Tribal Council's Motion for Recognition as Representative of Timbisha Shoshone Indian Tribe
9/30/2011	CAB-04	LBP-11-24, 74 NRC (slip op.) (Sept. 30, 2011)	Memorandum and Order Suspending High-Level Waste Adjudicatory Proceeding

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
)  
U.S. DEPARTMENT OF ENERGY )  
(High-Level Waste Repository) )  
)

Docket No. 63-001-HLW  
ASLBP No. 09-892-HLW-CAB04

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MEMORANDUM AND ORDER (Suspending Adjudicatory Proceeding) (LBP 11-24) dated September 30, 2011, have been served upon the following persons by Electronic Information Exchange.

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**Construction Authorization Board 04 (CAB04)**

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U.S. DEPARTMENT OF ENERGY (High Level Waste Repository) Docket No. 63-001-HLW  
MEMORANDUM AND ORDER (Suspending Adjudicatory Proceeding) (LBP 11-24)

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U.S. DEPARTMENT OF ENERGY (High Level Waste Repository) Docket No. 63-001-HLW  
MEMORANDUM AND ORDER (Suspending Adjudicatory Proceeding) (LBP 11-24)

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