

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

Before Administrative Judges:

Thomas S. Moore
Paul S. Ryerson
Richard E. Wardwell

In the Matter of)	Docket No.	63-001-HLW
)		
U.S. DEPARTMENT OF ENERGY)	ASLBP No.	09-892-HLW-CAB04
)		
(High-Level Waste Repository))	May 17, 2010	

**COUNTY OF INYO’S RESPONSE TO THE DEPARTMENT
OF ENERGY’S MOTION TO WITHDRAW ITS LICENSE
APPLICATION**

I. INTRODUCTION

On March 3, 2010, the United States Department of Energy (DOE) filed a motion pursuant to 10 C.F.R. § 2.107 to withdraw its License Application for a construction authorization for the proposed Yucca Mountain high-level radioactive waste disposal facility. In its motion, DOE asked this Atomic Safety Licensing Board (Board) to dismiss its License Application with prejudice and to impose no additional terms of withdrawal. DOE explained among other things that the Secretary of Energy has determined that “Yucca Mountain is not a workable option for long-term disposition of these materials [spent nuclear fuel and high-level radioactive waste]” (DOE Motion at pg. 1). DOE also explained that “it does not intend ever to refile an application to construct a permanent geologic repository for spent nuclear fuel and high-level radioactive waste at Yucca Mountain” (DOE Motion at pg. 3, note 3).

In this proceeding, the County of Inyo (County) contends that the Nuclear Regulatory Commission (NRC) cannot issue a license to the 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 NRC regulations have not been fulfilled. While the County takes no position on whether the Board should or should not grant DOE's motion to withdraw its License Application, the County requests that, should the Board grant DOE's motion with or without prejudice, the terms and conditions and identified below be imposed and that Board make express findings.

II. BACKGROUND

Ten contentions submitted by the County (Iny-Safety-001 to 003 and Iny-NEPA-001 to 007) have been admitted in this proceeding. Briefly, the 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 that may threaten the repository and the socioeconomic impacts of the repository in the County.

Pursuant to Section 114(f) the Nuclear Waste Policy Act, DOE prepared the NEPA documents described above. The U.S. Nuclear Regulatory Commission Staff (NRC Staff) conducted a review to determine whether it was practicable to adopt the NEPA documents in accordance with criteria stated in 10 C.F.R. § 51.109(c). On September 5, 2008, the NRC Staff

concluded that the environmental documents did not adequately characterize the potential impact of the proposed action on groundwater and from surface water discharges. Accordingly, the NRC Staff found that further supplementation of the documents was needed.

On October 24, 2008, DOE announced its intent to prepare a Supplement to the Yucca Mountain Final EIS and the Repository SEIS. However, 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.*” During a pre-hearing conference on September 14, 2009, NRC Staff announced that, in view of DOE’s decision to not prepare a supplement addressing the groundwater impacts, the NRC Staff would prepare a supplemental analysis of postclosure groundwater impacts; however, the NRC Staff stated 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 the first phase of this proceeding. On February 16, 2010, the Board granted (with exceptions) a motion by DOE to stay discovery pending its submittal of a motion to withdraw its license application. On March 3, 2010, DOE filed its motion to withdraw the License Application. With regard to the County’s contentions, no discovery has been conducted, no dispositive motions have been filed, no arguments on the merits of the contentions (except as to their admissibility) have been heard, and no rulings have been issued on the merits of the contentions.

III. STANDARD FOR DISMISSING A LICENSE APPLICATION

DOE's motion requests that its License Application be dismissed with prejudice and DOE further requests that no additional terms of withdrawal be imposed. If the Board grants DOE's motion with or without prejudice, the Board is under no legal obligation to accede to DOE's request to impose no additional terms on the dismissal of its License Application. It is clear that once a Notice of Hearing has been issued, the Board may grant an applicant's motion to withdraw its application for a license, may dismiss that application with prejudice, and may "regulate the terms and conditions of withdrawal." If terms and conditions are imposed, such terms must be rationally related to the state of the licensing proceeding, and any findings must be supported by the record." (10 C.F.R. § 2.107(a); *Philadelphia Electric Company (Fulton Generating Station, Units 1 and 2)*, ALAB-657, 14 N.R.C. 967, 974 (1981).)

IV. IF THE BOARD GRANTS DOE'S MOTION TO WITHDRAW, THE BOARD SHOULD IMPOSE CERTAIN TERMS AND CONDITIONS ON THE WITHDRAWAL OF THE LICENSE APPLICATION AND SHOULD MAKE EXPRESS FINDINGS

It has been held that a dismissal with prejudice of a license application may "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). In this proceeding, if the Board were to grant DOE's application to withdraw the License Application with or without prejudice, the record 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, nor a finding that the supplemental groundwater EIS has been completed. Consequently, if the Board 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 Board exercise its authority under 10 C.F.R. § 2.107(a) and 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 Board grants the DOE's motion with or without prejudice, that the Board include the following terms and conditions in its order:

- (1) that the withdrawal does not prejudice the County's ability to litigate its admitted contentions in any future licensing proceeding,
- (2) that DOE protect and preserve all Yucca Mountain technical information, records, documents, physical samples and scientific data for future scientific and policy purposes, and
- (3) that DOE's and the other parties' LSN information be preserved in a format that will permit the existing parties and future interested parties to search that information and retrieve the documents and information.

IV. CONCLUSION

The Board has the authority to prescribe the terms and conditions upon which any withdrawal of DOE's application to construct Yucca Mountain may be granted and to make findings supported by the record. If the Board grants DOE's motion to withdraw the License

Application with or without prejudice, the County requests that any such ruling include the terms, conditions and findings identified above.

Respectfully submitted,

/Signed electronically by/

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Dated at Bishop, California
this 17th day of May, 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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CERTIFICATE OF SERVICE

I hereby certify that copies of the “**COUNTY OF INYO’S RESPONSE TO THE DEPARTMENT OF ENERGY’S MOTION TO WITHDRAW ITS LICENSE APPLICATION**” in the above-captioned proceeding have been served on the following persons this 17th day of May, 2010, by Electronic Information Exchange.

CAB 04

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