

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Commission

In the Matter of)	
)	
U.S. DEPARTMENT OF ENERGY)	Docket No. 63-001-HLW
)	
(High Level Waste Repository))	

**NEVADA REQUEST TO LIFT THE SUSPENSION OF THE
ADJUDICATORY PROCEEDING FOR LIMITED PURPOSES**

I. INTRODUCTION

Nevada respectfully asks the Commission to lift the current suspension of the Yucca Mountain adjudicatory proceeding for the limited purpose of considering three Nevada motions for summary disposition and, depending on how the Commission rules on the summary disposition motions, a motion to disapprove the issuance of the construction authorization. Nevada believes that consideration of these dispositive motions is required by the mandamus issued in *In re Aiken County*, 725 F.3d 255 (D.C. Cir. 2013), fundamental fairness, and Commission precedent.

The summary disposition motions would relate to (1) the Department of Energy's (DOE's) failure to obtain necessary ownership and controls over land in and surrounding the repository, (2) DOE's failure to obtain, from the U.S. Air

Force (USAF), necessary restrictions on military aircraft flights over and near the repository, and (3) DOE's refusal to include an analysis of human-induced climate change in its license application (LA). As the summary disposition motions will demonstrate, both DOE and the NRC Staff have conceded that the LA fails to comply with NRC regulations applicable to these three safety matters.¹ All three motions are simple, straightforward, and based on clearly uncontested facts, including facts (admissions) in the LA, the NRC Staff's Safety Evaluation Report, and correspondence between DOE and NRC Staff related to Staff's review of the LA. Available appropriations are limited but should be sufficient to allow the Commission to give full and fair consideration to all three motions and any follow-on motion that may be appropriate.

The proposed Yucca Mountain repository is now an unfunded zombie-like federal project that has staggered around the halls of Congress begging for appropriations support for more than a decade with no success. Uncertainty over whether deadly high-level radioactive waste will be shipped through and placed in Nevada, against its will, has loomed over Nevada's citizens and economy for thirty-five years (Congress chose Yucca Mountain as the only potential repository site in 1987). Nevada believes strongly that the time has come to put this long-

¹ The candidate issues for summary disposition are the subject of admitted contentions that include NEV-SAFETY-009, 010, 011, 012, 013, 174, 184, 185, 188, and 193. If summary disposition motions are taken up but denied, Nevada reserves the right to litigate these contentions in an evidentiary hearing.

dormant and unproven Federal project out of its misery so that Nevada can devote its attention and resources to other matters and the United States can move on to consider other more viable solutions for the disposal of high-level radioactive waste. If successful, Nevada's summary disposition motions would provide the basis for a final decision on the merits disapproving the issuance of the construction authorization, an outcome that is expressly authorized by Section 114(d) of the Nuclear Waste Policy Act, 42 U.S.C. § 10134(d). And, even if the application is not formally disapproved, favorable decisions on Nevada's summary disposition motions would make it eminently clear that the application as filed and docketed cannot be granted.

II. BACKGROUND

DOE's application for a construction authorization to build its proposed repository for disposal of high-level radioactive waste in Yucca Mountain, Nevada, was docketed on September 8, 2008, after DOE gave itself a 17-year extension of time to file the application.² The adjudicatory licensing proceeding began nearly 14 years ago, on October 22, 2008, with the publication on that date of a notice of

² Section 302(a) of the Nuclear Waste Policy Act of 1982 (NWPA), 42 U.S.C. § 10222(a), required DOE to begin accepting waste in 1998. Section 114(d) of the NWPA, 42 U.S.C. §10134(d), required the NRC to rule on the application for a construction authorization within four years. Assuming, very optimistically, that construction of the repository would have required three years, the application would need to have been filed by 1991 at the latest to meet the 1998 deadline, assuming the NRC would have granted the necessary construction and operating authorizations.

hearing on the LA (73 Fed. Reg. 63029). After extensive prehearing proceedings, the admission of 17 intervenors and interested governmental participants, the admission of 288 contentions, and numerous rulings on complex legal issues, the adjudicatory proceeding was suspended indefinitely on September 30, 2011 (LBP-11-24, 74 NRC 368, at 370 (2011)). Congress stopped NRC funding for Yucca Mountain more than a decade ago, despite continued and determined efforts by Yucca Mountain proponents to secure funding.³ This request is being filed after the Congress denied funding for the eleventh year in a row.

III. ARGUMENT

The NRC Staff completed its Safety Evaluation Report and Supplement to the Environmental Impact Statement but, according to the NRC's most recent monthly report to Congress, the Commission still has about \$294,812.00 remaining in Nuclear Waste Fund appropriations.⁴ The writ of mandamus issued in the above-cited *Aiken* case provides that “unless and until Congress authoritatively says otherwise or there are no appropriated funds remaining, the Nuclear Regulatory Commission must promptly continue with the legally mandated licensing process” (725 F.3d 255, *supra.* at 267). The adjudicatory proceeding is a critical part of the “legally mandated licensing process” but it is also the *only*

³ DOE funding was stopped after FY 2010; NRC funding stopped after FY 2011.

⁴ “U.S. Nuclear Regulatory Commission Nuclear Waste Fund Expenditures monthly status report (ML22206A045) for July 2022.

significant part of the Yucca Mountain licensing process where absolutely no progress has been made to comply with the mandamus. Indeed, there is little else in the “legally mandated licensing process” to spend money on. At this point in time, the mandate to continue with the legally mandated licensing process requires the Commission to spend its remaining resources to make some significant progress in the adjudicatory proceeding.⁵

Of course, merely restarting the adjudicatory proceeding from the point where it stopped – beginning deposition discovery – would not be prudent at this time because no meaningful progress could be made given the limited resources that are available.⁶ However, Nevada’s motions for summary disposition offer a unique potential that can be realized with limited resources. Key issues would be resolved, and there is the potential to conclude the adjudicatory proceeding with a dispositive decision on the merits.

⁵ Assuming that \$290,000 remains available to NRC from the Nuclear Waste Fund, and a professional hourly rate of \$290 (*see* NRC’s most recent license fee rule, 87 Fed. Reg. 37197, 37199 (June 22, 2022)), the NRC could spend 1000 hours reviewing, responding, and ruling on Nevada’s filings without exceeding its budget. The Commission may be reserving some portion of the remaining money to pay for Yucca Mountain related judicial litigation expenses. Nevada will take no steps to revive its pending challenges to 10 C.F.R. Part 63 and 40 C.F.R. Part 197 while funds are so limited.

⁶ Little progress has been made on a new Licensing Support Network (LSN) rule. A new rule would be needed if the proceeding were to restart where it left off – beginning deposition discovery – but no discovery is needed to consider and decide Nevada’s motions.

Also, fundamental fairness requires that this proceeding be ended if possible. Contingent future planning requires Nevada, with over 200 admitted contentions, to preserve relevant documents, retain sufficient legal and technical experts so that over 100 depositions may be conducted or defended, numerous pre-trial motions can be filed and defended, and witnesses can be presented and cross-examined in hundreds of days of hearings. Experts must keep up-to-date with scientific developments related specifically to existing contentions and possible new ones, and experts must be replaced when they die or retire. This requires time and resources. Nevada should be able to devote its resources to other matters besides the proposed Yucca Mountain repository and the United States should be able to move on to consider other solutions for the disposal of high-level nuclear waste without being hindered by fantasy dreams that the Yucca Mountain project can be brought back to life.

The key NRC precedent is *Hydro Resources, Inc. (P.O. Box 15910, Rio Rancho, N.M. 87174)*, CLI-01-04, 53 NRC 31 (2001). In that proceeding, intervenors challenged the validity of NRC materials licenses to conduct *in situ* leach mining at four sites in New Mexico. The contested proceeding involved a large number of complex technical issues and (then) unprecedented legal questions. After the presiding officer concluded the first phase of the hearing, which addressed only one of the four sites, he indefinitely suspended all further proceedings on the remaining three sites because the applicant had advised that it

had not decided whether to proceed with mining on them. The Commission reversed, explaining as follows:

The amount and complexity of information the Intervenors and their experts reviewed before the hearing was bifurcated (and then placed in abeyance) most certainly were formidable. To compel them now to wait years without knowing when or if there will be any further hearing imposes an unacceptable and unfair burden. The intervenors responded to a 1994 notice of hearing and were admitted to this proceeding over 2 1/2 years ago. The Commission believes it is time to resume the hearing process and allow the Intervenors to litigate the rest of their concerns. Our decision furthers the Administrative Procedure Act's directive that an agency "within a reasonable time, shall set and complete proceedings required to be conducted . . . and shall make its decision."⁷

(*Id.* at 43.)

The circumstances in Yucca Mountain are even more egregious. The Yucca Mountain adjudicatory proceeding involves even more novel and complex issues; the proceeding continued for three years before it was suspended (many more years if you count the pre-application phase); 17 parties and participants, and 288 contentions were admitted; and 103 expert depositions were scheduled for just the first of multiple phases of the proceeding before it was suspended indefinitely.

⁷ The Commission ordered the proceedings to be resumed in six months, but per agreement of the parties, the proceedings were not resumed until several years later after settlement negotiations failed. The proceeding concluded in 2006 with the Commission affirming the granting of the license. *See Hydro Resources (P.O. Box 15910, Rio Rancho, N.M. 87174)*, CLI-06-29, 64 NRC 417 (2006). No mining took place during the pendency of the proceeding.

Of course, the Commission cannot grant the kind of relief ordered in *Hydro Resources* – a resumption of the adjudicatory hearing process for all contentions – because there are not, and likely never will be, sufficient funds to pay for it.⁸ However, the underlying legal principle is the same – an indefinite suspension of the Yucca Mountain adjudicatory proceeding imposes an “unacceptable and unfair burden” if there is a way to make dispositive rulings and possibly terminate the proceeding with the limited resources that are available. Nevada’s proposed summary disposition motions would provide a unique opportunity to eliminate a unacceptable and unfair burden on Nevada and other parties as well.

IV. TIMING

A. Request to Lift Suspension

10 C.F.R. § 2.323(a)(2) provides that motions, other than motions for summary disposition, must be made no later than ten days after the occurrence or circumstance from which the motion arises. The ten-day rule does not apply to the instant request to lift the suspension because, in the circumstances of this case, that request is inextricably connected to the three motions for summary disposition and,

⁸ In 2014 NRC estimated that it would need as much as \$ 330 million and up to five years to complete the Yucca Mountain adjudicatory proceeding. *See* GAO - 17-340, “COMMERCIAL NUCLEAR WASTE: Resuming Licensing of the Yucca Mountain Repository Would Require Rebuilding Capacity at DOE and NRC, Among Other Key Steps,” April, 2014 at 31.

as the rule states, the ten-day rule does not apply to such motions.⁹ Nevertheless whether, as Nevada argues, the indefinite suspension of the proceeding imposes an unacceptable and undue burden on Nevada cannot be decided solely by reference to some point in time, after which some ten-day clock would begin to run, or some excuse for not filing earlier would be needed. Instead, the burden increased gradually as time passes. As indicated, approximately eleven years has elapsed since the proceeding was suspended and Congress appropriated money for the proceeding. Nevada has been very patient but waiting until still another appropriation is denied creates the risk that the NRC would have insufficient money left in its Nuclear Waste Fund appropriation to consider Nevada's motions.¹⁰

⁹ Indeed, Nevada could have included the instant request to lift the suspension with the summary disposition motions themselves, but that would have imposed an extra burden on the other parties when they responded to Nevada's request for their position pursuant to 10 C.F.R. § 2.323 (b) because Nevada would be consulting them on four issues, not just one.

¹⁰ The most recent applicable appropriations legislation, for Fiscal Year 2022, was enacted as Public Law 117-103 on March 15, 2022. As the text above indicates, it did not include any funds for Yucca Mountain. From June 30, 2021 until August 9, 2022 there were only three NRC commissioners, the minimum number needed to constitute a quorum for the transaction of Commission business. Nevada could not file its request to lift the suspension shortly after the enactment of Public Law 117-103, using that enactment as a trigger event, because the request would, in effect, ask that a quorum be constituted to rule on the request and that quorum would necessarily include Commissioner Wright. A filing under these circumstances could constitute a waiver of Nevada's objection to Commissioner Wright's participation on Yucca Mountain issues. *See Nevada Request that*

B. Motions for Summary Disposition

The licensing hearing schedule in 10 CFR Part 2, Appendix D, and Commission practice generally (10 C.F.R § 2.710) provides for filing motions for summary disposition after completion of discovery (*e.g.*, depositions). In the Yucca Mountain licensing proceeding, discovery by document production started before the LA was docketed (access to the Licensing Support Network in 10 C.F.R. Part 2, Subpart J), but deposition discovery was just beginning when the proceeding was suspended. However, the Commission has departed from its Appendix D schedule twice before. *See* CLI-13-08, 78 NRC 219, 233 (2013) and CLI-08-25, 68 NRC 497, 505 (2008). In the 2013 example, the Commission held that a departure from the schedule was needed “to maximize progress in the overall [Yucca Mountain] licensing process given current funding.” *Id.* Consideration of Nevada’s motions would clearly serve this same purpose and, therefore, a departure to allow consideration of Nevada’s summary disposition motions is clearly warranted. Indeed, no other kind of motion or request would serve this purpose as well inasmuch as Nevada’s motions offer a unique potential to make

Commissioner Wright Be Recused, filed June 7, 2018; Commissioner Wright’s denial of that request on July 2, 2018; and the December 28, 2018 decision of the U.S. Court of Appeals for the D.C. Circuit (No. 18-1232) dismissing Nevada’s petition for review of Commissioner Wright’s decision on ripeness grounds, thereby preserving the issue for later judicial review should the proceeding resume.

final decisions on the merits of important admitted contentions and conclude the proceeding.

Also, no discovery is needed because, as the motions will demonstrate, the facts are indisputable and supported by unambiguous admissions by both DOE and NRC Staff. For example, NRC regulations (10 CFR § 63.121(a)) require that the Yucca Mountain repository operations area be located in and on lands that are either acquired lands under the jurisdiction and control of DOE, or lands permanently withdrawn and reserved for its use. The NRC Staff and DOE concede that DOE has not complied with § 63.121(a) (*see* ML14346A071, Safety Evaluation Report, NUREG-1949, Vol. 4 at 11-2 and 11-7). And, while the proposed above-ground facilities containing high-level radioactive wastes (including spent fuel storage facilities) must be designed to withstand aircraft crashes unless the crash probability is less than one in ten-thousand before permanent closure (or 1×10^{-6} per year) (10 C.F.R. § 63.2), both DOE and NRC Staff determined that the crash probability was sufficiently low only by relying on USAF flight restrictions over and near Yucca Mountain that they concede do not actually exist (*see* Safety Evaluation Report, NUREG-1949, Vol. 2 (ML15022A146) at 3-25 and Vol. 5 (ML15022A488) at 1-32). Finally, while climate change is one of the many processes that must be considered in assessing the long-term ability of the repository to contain the radioactive waste (10 C.F.R. § 63.305(c)), DOE conceded that its LA does not explicitly consider human-induced

climate change – DOE claimed doing so would “involve speculation.” (See DOE response to NRC Staff question, ML091830071, Encl. 8.)¹¹ The bases for Nevada’s belief that its summary disposition motions rely on undisputed facts will be explained in more detail in the motions.¹²

V. CONCLUSION

The Commission should lift the current suspension of the Yucca Mountain adjudicatory proceeding for the limited purpose of considering Nevada’s three motions for summary disposition and a potential follow-on request to disapprove the issuance of the construction authorization based on the summary disposition decisions. A proposed Commission Order is attached as Appendix A.

VI. CERTIFICATION

In accordance with 10 C.F.R § 2.323(b), Nevada’s counsel certify that they have made a sincere effort to contact all the other parties in the proceeding and resolve the issue raised in the motion. This effort began on September 2, 2022 and continued through midnight on September 19. (On September 2, Nevada sent all

¹¹ The NRC Staff Safety Evaluation Report included an evaluation of human induced climate change (see ML14288A121, NUREG-1949, Vol. 3, chapter 8), but the regulations require DOE, not NRC, to perform this evaluation. See 10 C.F.R. §§ 63.21(c)(1) and 63.31(a). Nevada has serious problems with the Staff’s evaluation but, as the Commission well knows, contentions must be directed at the license application, not the NRC Staff’s Safety Evaluation Report.

¹² NRC Staff sometimes recommended license conditions to address violations. Nevada will establish that license conditions do not represent a lawful option for curing the violations cited in its motions for summary disposition.

the other parties a copy of the description attached hereto as Exhibit 1 detailing the planned request and identifying the three motions for summary disposition which would be filed if this request is granted.)

Those efforts to resolve the issue had this result:

The following parties stated they will oppose Nevada's Request: National Association of Regulatory Utility Commissioners, White Pine County, U.S. Nuclear Regulatory Commission Staff and Nuclear Energy Institute.

Nye County stated that it will "likely" oppose Nevada's Request.

The following parties took no position, but reserved their right to respond when Nevada files its Request: State of California, Clark County, Eureka County, Inyo County, Native Community Action Council, State of South Carolina, State of Washington and U.S. Department of Energy.

Nevada has received no response from: Aiken County, South Carolina, Four Nevada Counties (Churchill, Esmeralda, Lander, Mineral), Joint Timbisha Shoshone Tribal Group, Lincoln County, and Prairie Island Indian Community.

Respectfully submitted,

/s/ signed electronically

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Dated: September 20, 2022.

CERTIFICATE OF SERVICE

I certify that the Nevada Request to Lift the Suspension of the Adjudicatory Proceeding for Limited Purposes has been served automatically by the NRC EIE on its service list, and served by email upon the following persons who are on the State of Nevada's group consultation email this 20th day of September, 2022:

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(signed electronically)
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Appendix A

APPENDIX A: PROPOSED ORDER

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Commission

In the Matter of)
)
U.S. DEPARTMENT OF ENERGY) **Docket No. 63-001-HLW**
)
(High Level Waste Repository))

CLI-22-_____

**COMMISSION ORDER GRANTING NEVADA’S
REQUEST TO LIFT THE SUSPENSION OF THE
ADJUDICATORY PROCEEDING FOR LIMITED PURPOSES**

On September 20, 2022, the State of Nevada asked the Commission to lift the current suspension of the Yucca Mountain adjudicatory proceeding for the limited purpose of considering three Nevada motions for summary disposition and, depending on how the Commission rules on the summary disposition motions, a motion to disapprove the issuance of the construction authorization. The request was supported by/opposed by [insert positions of the parties in their formal answers to Nevada’s request].

After considering the views of the parties, the Commission finds that lifting the suspension for these limited purposes is necessary and appropriate for the reasons set forth by Nevada in its request. Accordingly, the Commission orders as follows:

Within 15 days of the date of this order, Nevada shall file its three motions for summary disposition pursuant to 10 C.F.R. § 2.710. Efforts to contact other parties in the proceeding in order to resolve the issues raised in the motions will not be necessary. The motions shall be limited to (1) the Department of Energy's (DOE's) alleged failure to obtain necessary ownership and controls over land in and surrounding the repository, (2) DOE's alleged failure to obtain, from the U.S. Air Force (USAF), necessary restrictions on military aircraft flights over and near the repository, and (3) DOE's alleged refusal to include an analysis of human-induced climate change in its license application.

As provided in 10 C.F.R. § 2.710, any other party admitted to the proceeding may serve an answer supporting or opposing any of the motions, with or without affidavits. Such answers shall be filed within 20 days after service of the motions. The party shall attach to any answers opposing the motions a short and concise statement of the material facts as to which it is contended there exists a genuine issue to be heard. All material facts set forth in the statement required to be served by the moving party will be considered to be admitted unless controverted by the statement required to be served by the opposing party. The opposing party may, within ten days after service, respond in writing to new facts and arguments presented in any statement filed in support of the motion. No further supporting statements or responses to the motion will be entertained.

The Commission intends to rule promptly on Nevada's summary disposition motions. The Commission's ruling will include a description of what further actions, if any, must or may be taken by the parties in light of its ruling.

It is so ordered.

For the Commission:

Rockville, Maryland
_____, 2022

Exhibit 1

The State of Nevada is planning to file a motion before the Commission asking it to lift the current suspension of the Yucca Mountain adjudicatory proceeding for the limited purpose of allowing Nevada to file three motions for summary disposition and, depending on how the Commission rules on the summary disposition motions, a motion to disapprove the issuance of the construction authorization. The Commission's Rules of Practice at 10 C.F.R. § 2.323(b) provide that, before any motion such as this is filed, the moving party must make a sincere effort to contact other parties in the proceeding and resolve the issues raised in the motion. That is the purpose of this e-mail, and Nevada's plan is subject to the outcome of these consultations with the other parties. Please let us know right away if you are not the correct person to contact about this matter and, if appropriate, provide us with the more correct contact. Please provide your views on Nevada's motion to lift the suspension by next Monday, September 12, 2022. Whether you support or oppose Nevada's motion will be noted in the Nevada motion. At this time, your views should focus on the motion to lift the suspension because the other motions cannot be filed unless and until the Commission allows Nevada to file them. Nevertheless, in the interest of full disclosure, the planned motions for summary disposition would be as follows.

1. First, human- induced climate change. Nevada would argue that while climate change is one of the many processes that must be considered in assessing the long-term ability of the repository to contain the radioactive waste, the application itself does not explicitly consider human-induced climate change – DOE claimed doing so it would “involve speculation.” Nevada would argue that this violates 10 CFR 63.114(a)(5).
2. Second, land ownership and control. NRC regulations at 10 CFR 63.121(a) require that the Yucca Mountain repository operations area be located in and on lands that are either acquired lands under the jurisdiction and control of DOE, or lands permanently withdrawn and reserved for its use. DOE has not complied with this requirement.
3. The third summary disposition motion would address aircraft crashes. The proposed above-ground facilities containing high-level radioactive wastes (including spent fuel storage facilities) must be designed to withstand aircraft crashes unless the crash probability is less than one in ten thousand before permanent closure (one in one million per year). The applicable regulation is 10 CFR 111(b)(2). Both DOE and NRC Staff determined that the crash probability was sufficiently low only by relying on USAF flight restrictions over and near Yucca Mountain that they concede do not actually exist. This constitutes a violation of 10 CFR 111(b)(2).

If you have any questions, e-mail or call Marty Malsch, Charlie Fitzpatrick, or John Lawrence as follows, and when you report your positions on the planned Motion to Lift the Suspension, please “reply all” so that all parties and Nevada counsel (Mr. Malsch is currently on travel) will be advised:

MMalsch@nuclearlawyer.com (tel 301 704 8659); CFitzpatrick@nuclearlawyer.com (tel 518 647 80); JLawrence@nuclearlawyer.com (tel 505 610 8564). Please note that Mr. Lawrence is in the Mountain Time Zone and Mr. Fitzpatrick is in the Eastern Time Zone.