

21. AVAILABILITY OF RESOURCES FOR PARTICIPANTS AND LATE-IDENTIFIED PARTICIPANTS

This section discusses participation in the high-level waste (HLW) repository proceeding by potential intervenors who have timeliness and/or resource problems in connection with providing LSN “access” to their documentary materials. These issues arise from the requirement of 10 C.F.R. Part 2, Subpart J, that mandates all HLW repository intervention petitioners make any “documentary material” (as defined in § 2.1001) they possess electronically available before they can be admitted as a party.

Relative to the timeliness issue, the focal concern is the governmental entity, organization, or individual that, in accordance with § 2.1014(a)(1), seeks to intervene in the HLW repository adjudication but is unable to demonstrate substantial and timely compliance with the § 2.1003(a) requirement mandating timely access be provided to documentary material.²¹⁻¹ Specifically, § 2.1012(b)(1) requires that any person who wishes to obtain party status in the HLW repository adjudicatory proceeding must provide access to its documentary material by the deadline set forth in § 2.1003(a), i.e., ninety days after the DOE certification of compliance under § 2.1009(b). Moreover, § 2.1014(c)(4) indicates that a petitioner’s failure to participate as a potential party in the pre-license application phase of the proceeding, which could include making documentary material available in accordance with § 2.1003(a), is a factor that a presiding officer can consider in determining whether to grant party status. These two provisions give a presiding officer the authority to deny intervention to a petitioner that has not complied with the § 2.1003 requirement to provide access to an “electronic file” of all non-graphic-oriented documentary material and directions for obtaining an “image” of that document. Section 2.1012(b)(2), however, provides that any person denied party status based on a failure to comply with § 2.1012(b)(1) may thereafter request party status upon a showing of subsequent compliance with the requirements of § 2.1003. Essentially, this is a “cure” provision that permits a presiding officer to grant party status if an intervenor can demonstrate subsequent compliance with § 2.1003. Thus, an intervenor that has not participated in the LSN prior to the time it seeks intervention nonetheless can still become a party if it brings itself into compliance at the time it seeks intervention.²¹⁻²

²¹⁻¹ If, at the time intervention is sought, an individual or organization can demonstrate it previously did not possess, and currently does not possess, any § 2.1001 “documentary material,” then compliance with the § 2.1003(a) access requirement seemingly would not be a relevant factor in determining whether party admission is appropriate.

²¹⁻² Despite this “cure” opportunity, successful documentary material access compliance is more likely to be achieved if potential parties are LSN participants well before the time that intervention petitions can be filed.

Yet, this opportunity to cure untimely compliance seems to assume that the petitioner, in fact, has the financial wherewithal to bring itself into compliance. The costs to achieve access compliance likely will not be substantial.²¹⁻³ Nonetheless, experience in dealing with public interest litigants, particularly pro se individuals, suggests that making documents accessible via the web and utilization of the central LSN website potentially may require more financial resources than some parties could afford. Accordingly, attempts to determine what, if any, avenues are available to address this concern are being made.

Section 502 of the Energy and Water Development Appropriations Act, 1992 prohibits NRC or DOE, both of which derive their HLW repository funding from these acts, from providing intervenor funding. Specifically, that provision declares:

None of the funds in this Act or subsequent Energy and Water Development Appropriations Acts shall be used to pay the expenses of, or otherwise compensate parties intervening in regulatory or adjudicatory proceedings funded in such Acts.

DOE, however, has indicated that this prohibition does not preclude the so-called "affected units of local government" (AULGs) (i.e., Yucca Mountain-area counties) from using DOE-provided financial assistance to achieve compliance with LSN requirements. During a February 2000 LSNARP meeting, a DOE representative reported to the LSNARP that she had obtained a legal opinion from DOE lawyers that, notwithstanding the general prohibition on funding intervenors from Energy and Water Development Appropriations Act funds, the AULG HLW repository activity funding by DOE pursuant to section 116(c) of the Nuclear Waste Policy Act of 1982 (NWPA), as amended, 42 U.S.C. § 10136(c), could be utilized for LSN activities. See Tr. at 1317 (Feb. 23, 2000). Although the DOE representative did not directly address the status of "affected Indian tribes" (i.e., those Native American tribes whose reservation encompasses, or whose possessory or usage rights to other land would be substantially and adversely affected by, the repository), the same interpretation may well apply because those entities obtain funding under similarly-worded NWPA section 118(b), 42 U.S.C. § 10138(b). As noted during the LSNARP meeting, the State of Nevada is not included with these governmental entities receiving assistance because its DOE-derived funding is subject to other congressional restrictions. See Tr. at 1317-18.

LSN-related financial assistance for other potential participants is more problematic. Previously, citing the section 502 intervenor funding prohibition, the Commission has indicated that it will not offer assistance to other participants, which would include private individuals and public interest groups. See 63 Fed. Reg. 71,729, 71,732-33 (Dec. 30, 1998). Although DOE has not publicly stated that it will not help other participants, there is no indication that DOE will take a different view of its authority under section 502.

²¹⁻³ The costs for a party with a small collection of documents to establish their own dedicated website to participate in the LSN have been estimated by the LSNARP TWG to be \$1,000 for hardware and software costs with an additional \$200 per year for Internet connecting services.

The possibility thus exists that, based on this potential lack of funding, some private individuals and public interest groups may be unable to participate in the LSN. Further, as described above, their lack of participation in the LSN could foreclose intervention in the HLW repository adjudication. However, the same resource problems that would preclude them from participating in the LSN also would make it unlikely they would generate a significant volume of "documentary material." Thus, such intervenors are candidates to share/borrow space on another, better funded LSN participant's website without imposing a significant financial burden on the host site or the intervenor with resource concerns.

The NRC continues to explore options regarding participation in the HLW repository proceeding by potential intervenors who may have timeliness and/or resource problems relating to documentary material access via the LSN.