

NUCLEAR REGULATORY COMMISSION

Docket No. 63-001; CLI-08-25

In the Matter of U.S. Department of Energy (High Level Waste Repository); Notice of Hearing and Opportunity to Petition for Leave to Intervene on an Application for Authority to Construct a Geologic Repository at a Geologic Repository Operations Area at Yucca Mountain

COMMISSIONERS:

Dale E. Klein, Chairman

Gregory B. Jaczko

Peter B. Lyons

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I. Notice of Hearing

By letter dated June 3, 2008, the Department of Energy (DOE) submitted an application seeking authorization to construct a geologic repository at a geologic repository operations area at Yucca Mountain in Nye County, Nevada. The NRC published a notice of receipt and availability of this application in the *Federal Register* (73 FR 34348, corrected in 73 FR 40883 (June 17, 2008)). Notice is hereby given that a hearing on the application will be held at a time and place to be set in the future by the Nuclear Regulatory Commission (the Commission) or an Atomic Safety and Licensing Board (Board).

The hearing will consider the application for construction authorization filed by DOE pursuant to Section 114 of the Nuclear Waste Policy Act of 1982 (NWPA), 42 USC 10134, and pursuant to 10 CFR Parts 2 and 63. The NRC Staff accepted the DOE application for docketing on September 8, 2008 (73 FR 53284 (September 15, 2008)), and the docket number established for this application is 63-001.

The NRC Staff determined that it is practicable to adopt, with further supplementation, the Environmental Impact Statement (EIS) and supplements prepared by DOE. The Staff concluded that neither the 2002 Final Environmental Impact Statement (FEIS) nor the 2008

Final Supplemental Environmental Impact Statement (Repository Supplemental EIS) adequately address all the impacts on groundwater, or from surface discharges of groundwater, from the proposed action. The Staff therefore found that additional supplementation is needed to ensure that the 2002 FEIS and 2008 Repository Supplemental EIS are adequate. The basis for the Staff's position is presented in the "U.S. Nuclear Regulatory Commission Staff's Adoption Determination Report for the U.S. Department of Energy's Environmental Impact Statements for the Proposed Geologic Repository at Yucca Mountain," which is available in the Agencywide Documents Access and Management System (ADAMS) online document system at <http://www.nrc.gov/reading-rm/adams/web-based.html>, at accession number ML082420342.

The NRC Staff will complete a detailed technical review of the DOE application, and will document its findings in a safety evaluation report. If the Commission finds that the DOE application meets the applicable standards of the Atomic Energy Act of 1954, as amended (AEA), the NWSA, and the Commission's regulations, then the Commission will issue a construction authorization, in the form and containing such conditions and limitations, if any, as the Commission finds appropriate and necessary.

II. Opportunity to Petition for Leave to Intervene

A hearing on DOE's construction authorization application will be held in the public interest pursuant to 10 CFR 2.101(e)(8). The hearing will be governed by the rules of procedure in 10 CFR Part 2, Subpart C, "Rules of General Applicability: Hearing Requests, Petitions to Intervene, Availability of Documents, Selection of Specific Hearing Procedures, Presiding Officer Powers, and General Hearing Management for NRC Adjudicatory Hearings"; Subpart J, "Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository"; and Subpart G, "Rules for Formal Adjudications." The matters of fact and law to be considered are whether the application satisfies the applicable safety, security, and technical standards of the AEA and NWSA and the NRC's standards in 10 CFR Part 63 for a construction authorization for a high-level waste

geologic repository, and also whether the applicable requirements of the National Environmental Policy Act (NEPA) and NRC's NEPA regulations, 10 CFR Part 51, have been met.

Any person whose interest may be affected by this proceeding and who desires to participate as a party must file a written petition for leave to intervene in accordance with the requirements in 10 CFR 2.309, including contentions that satisfy the admissibility standards in section 2.309. Petitioners seeking to intervene as parties must also comply with the procedural case management requirements set forth in the Advisory Pre-License Application Presiding Officer (PAPO) Board's Memorandum and Order, LBP-08-10 (Case Management Order Concerning Petitions to Intervene, Contentions, Responses, Replies, Standing Arguments, and Referencing or Attaching Supporting Materials), dated June 20, 2008, available at ADAMS accession number ML081720154, and the Advisory PAPO Board's Order (Regarding Contention Formatting and Tables of Contents), dated September 29, 2008, available at ADAMS accession number ML082730764. In addition, as outlined further below, the regulations in 10 CFR Part 2, Subpart J require electronic production, filing and service of all documents in this proceeding.

In ruling on a petition to intervene in this proceeding, the presiding officer shall consider any failure of the petitioner to participate as a potential party in the pre-license application phase under 10 CFR Part 2, Subpart J, in addition to the factors on standing to intervene outlined in 10 CFR 2.309(d).

A petition for leave to intervene must be filed no later than 60 days after the date of publication of this notice in the *Federal Register*. A non-timely petition or contention will not be entertained unless the Commission, an Atomic Safety and Licensing Board, or a presiding officer designated to rule on the petition determines that the late petition or contention meets the late-filed requirements of 10 CFR 2.309(c)(1)(i)-(viii).

Certain hearing schedule milestones in Appendix D to 10 CFR Part 2, as well as the 30-day hearing petition and contention-filing deadlines set forth in 10 CFR 2.309(b)(2) and

51.109(a)(2) are superseded by this notice. A revised hearing schedule with new milestones for actions through the First Prehearing Conference Order appears in Section VI of this notice.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and will have the opportunity to participate fully in the conduct of the hearing.

The regulations in 10 CFR Part 2, Subpart J require electronic document production (via the Licensing Support Network) and electronic filing and service of adjudicatory documents via the Electronic Information Exchange (EIE). This requirement applies to all documents filed in the proceeding, including a petition for leave to intervene, and any motion or other document filed in the proceeding prior to the submission of a petition to intervene. Pursuant to 10 CFR 2.1012(b)(1), a petitioner, including a potential party given access to the Licensing Support Network, may not be granted party status under 10 CFR 2.309, or status as an interested governmental participant under 10 CFR 2.315, if the petitioner cannot demonstrate substantial and timely compliance with the requirements in 10 CFR 2.1003 at the time of the request for participation in the high-level waste proceeding.¹ In addition, a petitioner will not be found to be in substantial and timely compliance unless the petitioner complies with all orders of the Pre-License Application Presiding Officer (PAPO) regarding electronic availability of documents. PAPO orders are available on the NRC's high-level waste electronic hearing docket at: http://hlwehd.nrc.gov/Public_HLW-EHD/home.asp, under HLW-EHD, folder titled PAPO_HLW, subfolder titled Orders_PAPO.

A petition for leave to intervene, and all filings in the adjudicatory proceeding, must be filed electronically in accordance with 10 CFR 2.1013(c)(1). At least 30 days prior to the filing

¹ A person denied party or interested governmental participant status under 10 CFR 2.1012(b)(1) may request such status upon a showing of subsequent compliance with the requirements of 10 CFR 2.1003. The subsequent admission of such a party or interested governmental participant shall be conditioned on accepting the status of the proceeding at the time of admission.

deadline for a petition to intervene, the petitioner must contact the Office of the Secretary (SECY) by e-mail at: HEARINGDOCKET@NRC.GOV or by calling (301) 415-1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and/or (2) creation of an electronic docket for the proceeding (even in instances in which the petitioner, or its counsel or representative, already holds an NRC-issued digital certificate). Each petitioner will need to download the Workplace Forms Viewer™ to access the EIE, a component of the E-Filing system. The Workplace Forms Viewer™ is free and is available at <http://www.nrc.gov/site-help/e-submittals/install-viewer.html>. Information about applying for a digital ID certificate is available on the NRC's public website at <http://www.nrc.gov/site-help/e-submittals/apply-certificates.html>.

Once a petitioner has obtained a digital ID certificate, has had a docket created, and has downloaded the EIE viewer, the petitioner can then submit a petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public website at <http://www.nrc.gov/site-help/e-submittals.html>. *Guidance for Electronic Submissions to the NRC* is a consolidated guidance document that sets forth the technical standards for electronic transmission and formatting electronic documents, and provides instructions on how to obtain and use the agency-provided digital ID certificate. A person who holds a current digital ID certificate for use in the proceedings before the PAPO or the Advisory PAPO need not obtain a new certificate. That certificate will remain valid for this proceeding.

Section 2.1013(c) defines service as completed when the filer/sender receives electronic acknowledgement ("delivery receipt") that the electronic submission has been placed in the recipient's electronic mailbox. To be timely, an electronic filing must be submitted to the EIE system no later than 11:59 p.m. Eastern Time on the due date.

Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The EIE system also distributes an e-mail notice that provides access to the document to the NRC Office of General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, the applicant and any other participant (or their counsel or representative) must apply for and receive a digital ID certificate before a petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically may seek assistance through the "Contact Us" link located under the heading "Additional Information" on the NRC website at <http://www.nrc.gov/site-help/e-submittals.html> or by calling the NRC technical help line, which is available between 8:30 a.m. and 4:15 p.m., Eastern Time, Monday through Friday. The help line number is (800) 397-4209 or locally (301) 415-4737.

Documents submitted in adjudicatory proceedings will appear in the NRC's high-level waste electronic hearing docket at http://hlwehd.nrc.gov/Public_HLW-EHD/home.asp, unless excluded pursuant to an order of the Commission, an Atomic Safety and Licensing Board, or a presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in the filing. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filing and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area 01 F21, 11555 Rockville Pike (first floor), Rockville, Maryland, and will be accessible electronically through the ADAMS Public Electronic Reading Room link at the NRC website <http://www.nrc.gov/reading-rm/adams.html>. The ADAMS accession number for the ADAMS package containing the DOE application is

ML081560400. The ADAMS accession number for the ADAMS package containing DOE's Final Environmental Impact Statement is ML032690321, and the accession number for the ADAMS package containing DOE's Final Supplemental Environmental Impact Statement is ML081750191. The ADAMS accession number for the ADAMS package containing DOE's Final Rail Corridor Supplemental EIS and Rail Alignment EIS is ML082460227. The application is also available at www.nrc.gov/waste/hlw-disposal/yucca-lic-app.html. Persons who do not have access to ADAMS or who encounter problems in accessing documents located in ADAMS should contact the NRC Public Document Room (PDR) Reference staff by telephone at 1-800-397-4209, or 301-415-4737, or by e-mail to pdr@nrc.gov.

III. Additional Matters Pertaining to the Hearing and Intervention Requests

A. Standing as of right.

Pursuant to 10 CFR 2.309(d)(2)(iii), the Commission shall permit intervention by the State and local governmental body (county, municipality or other subdivision) in which the geologic repository operations area is located, and by any affected Federally-recognized Indian Tribe, as defined in 10 CFR Part 63, if the contention requirements in 10 CFR 2.309(f) are satisfied with respect to at least one contention. Section 2.309(d)(2) specifies that such State, affected Federally-recognized Indian Tribe, and local governmental body need not address the standing requirements in 10 CFR 2.309(d).

In LBP-08-10, the Advisory PAPO Board requested that the Commission clarify whether an "affected unit of local government" (AULG), as defined in section 2 of the NWPA, as amended (42 USC 10101), also need not address the standing requirements of section 2.309(d). Any AULG seeking party status shall be considered a party to this proceeding, provided that it files at least one admissible contention in accordance with 10 CFR 2.309. An AULG need not address the standing requirements under that section.

B. Environmental Contentions.

In addition to meeting NRC's regular contention admissibility requirements in 10 CFR 2.309(f), environmental contentions addressing any DOE environmental impact statement or supplement must also conform to the requirements and address the applicable factors outlined in 10 CFR 51.109 governing NRC's adoption of DOE's environmental impact statements. The requirements of section 51.109 should be applied consistent with *Nuclear Energy Institute, Inc. v. EPA*, 373 F.3d 1251, 1313-14 (D.C. Cir. 2004), a court decision discussing section 51.109, and consistent with the Commission's denial of the State of Nevada's petition to amend section 51.109 (73 FR 5762; January 31, 2008), and the Office of the General Counsel's subsequent letter clarifying the Commission's denial (Letter from Bradley W. Jones, Assistant General Counsel to Martin G. Malsch, dated March 20, 2008, ADAMS accession number ML080810175). Under 10 CFR 51.109(c), the presiding officer should treat as a cognizable "new consideration" an attack on the Yucca Mountain environmental impact statements based on significant and substantial information that, if true, would render the statements inadequate. Under 10 CFR 51.109(a)(2), a presiding officer considering environmental contentions should apply NRC "reopening" procedures and standards in 10 CFR 2.326 "to the extent possible."

C. Hearing Procedures.

The construction authorization hearing will be conducted by one or more presiding officers (licensing boards) that will be designated by the Chief Judge of the Atomic Safety and Licensing Board Panel. The Commission anticipates and authorizes the establishment of multiple licensing boards throughout the proceeding. Notice as to the membership of the board(s) will be published at a later date.

In 1991, the Commission suggested that it would use the notice of hearing for a high-level waste (HLW) proceeding to announce detailed case management procedures (56 FR 7787, 7793-94 (February 26, 1991)). In the intervening years, however, the Atomic Safety and Licensing Board Panel has engaged in extensive case management planning for this proceeding. The Commission therefore believes that the presiding officer(s) in this proceeding

will be in the best position to establish and efficiently resolve case management issues, some of which the Commission-authorized Advisory PAPO Board resolved in LBP-08-10.

D. Scope of the Hearing.

In accordance with 10 CFR 2.1027, in any initial decision on the application for construction authorization, the presiding officer shall make findings of fact and conclusions of law on, and otherwise give consideration to, only material issues put into controversy by the parties and determined to be litigable in the proceeding. The Commission has determined that the scope of the adjudicatory proceeding on safety, security, or technical issues is limited to litigable contested issues. See *State of Nevada; Denial of Petition for Rulemaking*, Docket No. PRM-2-14, available at ADAMS accession number ML082900618. The presiding officer has no authority or duty to resolve uncontested issues in those areas. See 10 CFR 2.1023(c)(2) and 10 CFR 2.1027.

Notwithstanding the provisions in 2.1023(c)(2) and 10 CFR 2.1027, the presiding officer shall make the environmental findings required by 10 CFR 51.109(e), even on uncontested issues, “to the extent it is not practicable to adopt the environmental impact statement prepared by the Secretary of Energy.”

E. Participation by a non-party.

A person who is not a party may be permitted to make a limited appearance statement by making an oral or written statement of his or her position on the issues at any session of the hearing or any pre-hearing conference within the limits and conditions fixed by the presiding officer, but may not otherwise participate in the proceeding.

IV. Access to Non-public information

Those petitioners who seek access to non-public information must follow the access requirements contained in the PAPO Board’s Third Case Management Order (August 30, 2007), available at ADAMS accession number ML072420327. This and other case management

orders issued by the PAPO Board govern protection of various categories of protected and privileged information. The Board's case management orders are available on the high-level waste electronic hearing docket, Docket No. PAPO-00, at http://hlwehd.nrc.gov/Public_HLW-EHD/home.asp, under HLW-EHD, folder titled PAPO_HLW, subfolder titled Orders_PAPO.

V. Motions

To avoid unnecessary disputes and filings, a party who files a motion must certify, pursuant to 10 CFR 2.323, that he or she has made a reasonable effort to consult with counsel for the applicant and counsel for the NRC staff, as well as other interested counsel or litigants, in an effort to resolve the matter in advance of filing the motion. Motions must also meet all other section 2.323 requirements.

VI. Revised Hearing Schedule Milestones

In CLI-08-18 (August 13, 2008), available at ADAMS accession number ML082261241, the Commission granted the State of Nevada, as well as any other petitioner, an additional thirty (30) days in which to file a petition to intervene, or a petition for status as an interested government participant, in this proceeding. In addition, the Commission proposed further modifications to the schedule codified in 10 CFR Part 2, Appendix D.

The Commission invited any party or potential party participating in the matters before the PAPO Board to provide comments on certain additional proposed extensions of time. The Commission also sought the views of the Atomic Safety and Licensing Board Panel on the reasonableness of current and proposed time frames. The Commission has considered the comments received, and has determined that the revised schedule below will replace certain hearing milestones set forth in Appendix D to 10 CFR Part 2.

The Commission hereby doubles the time permitted to file answers and replies, pursuant to 10 CFR 2.309(h)(1) and (2), respectively, to fifty (50) and fourteen (14) days, respectively.

The Commission also extends the period for the First Prehearing Conference from eight (8) to sixteen (16) days after the deadline for filing replies, and extends the period for issuance of the First Prehearing Conference Order from thirty (30) to sixty (60) days after the First Prehearing Conference. The revised Appendix D schedule, reflected in the table below, replaces only the milestones up to, and including, the First Prehearing Conference Order. The presiding officer retains authority to grant extensions of time of no more than fifteen days, and the Commission retains authority to grant extensions of longer than fifteen days, but in either case the litigant seeking the extension must follow the requirements of 10 CFR 2.1026.

Partially Revised Appendix D Schedule

Day	Action
0	Federal Register Notice of Hearing.
60	Petition to intervene/request for hearing, w/contentions.
110	Answers to intervention and interested government participant Petitions.
124	Petitioner's response to answers.
140	First Prehearing Conference.
200	First Prehearing Conference Order identifying participants in proceeding, admitted contentions, and setting discovery and other schedules.

The regulatory requirements governing the balance of the Appendix D schedule remain unchanged.

VII. September 9, 2008, Petition

On September 9, 2008, the State of Nevada submitted to the Commission a "petition" directed to the content of this hearing notice.² In this petition, Nevada argues that the

² *Petition to Publish a Fair and Reasonable Notice of Hearing on DOE's Yucca Mountain Application* (Sept. 9, 2008), available at ADAMS accession number ML082550289 (September

Commission cannot issue a notice of hearing unless it first resolves “at least three important legal and procedural issues.”³

Nevada’s first issue, now partially mooted, is the lack of final Environmental Protection Agency (EPA) standards and implementing NRC rules for the post-10,000 year period. The EPA has now established post-10,000 year standards, and the Staff is developing implementing regulations.⁴ Nevada argued that potential parties cannot draft contentions based upon standards that have not been finalized. As a possible remedy, Nevada proposed that today’s notice of hearing include a delay — essentially a bifurcation of contention-filing deadlines — with respect to all issues related to the EPA standards and the NRC’s implementing rules until some date to be determined after the standards and rules are issued. Nevada argued alternatively that this delay could be avoided if the Commission declined to be bound by its Staff’s decision to docket the application.

The Commission recognizes Nevada’s concern but does not believe Nevada’s extraordinary remedies are necessary, especially since the EPA has now issued the relevant standards, and the NRC’s regulations are in preparation. Under the NRC’s ordinary practice, Nevada and other hearing petitioners are free to file contentions arguing that the Commission may not authorize construction in the absence of implementing NRC rules. And they are also free to file contentions maintaining that DOE’s application does not meet EPA’s standards.

9 Petition). The procedural identity of Nevada’s “petition” is not obvious. The Commission addresses the issues Nevada raises as part of this notice of hearing solely as a matter of expedience since they touch on topics the Commission already addresses independently.

Both DOE and the NRC Staff responded to the September 9 Petition. *See U.S. Department of Energy Response to State of Nevada “Petition to Publish a Fair and Reasonable Notice of Hearing on DOE’s Yucca Mountain Application”* (Sept. 19, 2008); *NRC Staff’s Response to the State of Nevada’s Petition to Publish a Fair and Reasonable Notice of Hearing on DOE’s Yucca Mountain Application* (Sept. 19, 2008).

³ September 9 Petition at 3.

⁴ Final Rule, Public Health and Environmental Radiation Protection Standards for Yucca Mountain, Nevada 73 Fed. Reg. 61,256 (October 15, 2008).

Such contentions would require no change in the contention-filing schedule set out in CLI-08-18. Nevada or other hearing petitioners may amend their “EPA standards”-related contentions later, after the NRC’s implementing rules are issued, if the new NRC rules establish fresh grounds for contentions. Under the unusual circumstances of this case, where controlling agency rules have been delayed, and to ensure that no one is prejudiced, any contentions so amended — *on EPA standards-related issues only* — will be deemed timely for admissibility purposes if filed within sixty days after the *Federal Register* publication of the NRC rules implementing the new EPA standards.⁵

The second issue Nevada raises in its September 9 Petition concerns a petition for rulemaking it filed regarding the specification of issues for the mandatory hearing portion of this proceeding.⁶ That petition has now been ruled on, and the Commission’s rulemaking decision is reflected in the discussion of the scope of the hearing addressed in Section III.D, above.⁷

Finally, the third issue Nevada raises in its September 9 Petition concerns the status of security clearances and access to classified information in the Yucca Mountain construction authorization application. Nevada argues that its representatives have not been informed of decisions on their security clearances and on access to classified information, “notwithstanding

⁵ NRC rules ordinarily call on licensing boards to balance several factors in deciding whether to allow late-filed (or amended) contentions. See 10 CFR 2.309(c)(i)-(viii). In the case of the yet-to-issue NRC rules, however, the Commission is dispensing in advance with all “late-filed” factors except the “good cause” factor. It is obvious even now that promptly-filed and well-pled contentions based on new, previously unavailable NRC rules — rules that will govern important aspects of NRC’s safety review — must be admitted for hearing. There plainly would be “good cause” for filing such contentions late, and no conceivable justification for rejecting them at the threshold.

⁶ Petition by the State of Nevada for Rulemaking to Specify Issues for the Yucca Mountain Mandatory Hearing (June 19, 2007).

⁷ See State of Nevada; Denial of Petition for Rulemaking, Docket No. PRM-2-14, available at ADAMS accession number ML082900618.

timely applications,” so no contentions based on classified information can be prepared.⁸ To remedy this, Nevada again asks for a bifurcation of contention-filing deadlines.

It is the Commission’s understanding that, as of the end of July, one of Nevada’s security clearance applications was complete and was being processed, another application was incomplete, and two applications had been withdrawn.⁹ From this, the Commission concludes that the timeliness of Nevada’s security clearance applications is factually ambiguous. Moreover, it is not immediately clear that the perceived problem could not be remedied by the provision of redacted versions of classified documents that could provide a basis for the formulation of contentions before the security clearance application reviews are completed. The Commission directs the PAPO Board to resolve both of these questions.

IT IS SO ORDERED.

For the Commission.

/RA/

Annette L. Vietti-Cook,
Secretary of the Commission.

Dated at Rockville, Maryland,
this 17th day of October, 2008.

⁸ September 9 Petition at 6.

⁹ See Letter from Aby Mohseni, Deputy Director, Licensing and Inspection Directorate, Division of High-Level Waste Repository Safety, Office of Nuclear Material Safety and Safeguards to Robert R. Loux, Executive Director, Agency for Nuclear Projects, Office of the Governor, State of Nevada (July 31, 2008), available at ADAMS accession number ML081910097.