

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

July 21, 2009

ORDER
(Concerning Serial Case Management)

On July 10, 2009, the NRC Staff responded to the Board's July 2, 2009 order concerning scheduling.¹ The Staff stated that it will not be able to issue its Safety Evaluation Report (SER) in accordance with the schedule in 10 C.F.R. Part 2, Appendix D.

Rather, at present, the Staff intends to issue the SER serially. The Staff estimates that the SER will be issued as follows: Volume 1 (Review of General Information) in March 2010 and Volume 3 (Review of Repository Safety After Permanent Closure) in September 2010. The Staff asserts that completion dates for three other volumes – Volume 2 (Review of Repository Safety Before Permanent Closure); Volume 4 (Review of Administrative and Programmatic Requirements); and Volume 5 (License Specifications and Conditions) – cannot be estimated with a reasonable degree of certainty at this time. In the absence of a Staff estimate, unless and until informed to the contrary, the Board will assume solely for case management purposes that these volumes will be issued approximately as follows: Volume 4 (December 2010); Volume 2 (October 2011); and Volume 5 (February 2012).

¹ NRC Staff Answer to the CAB's July 2, 2009 Order Concerning Scheduling (July 10, 2009); Licensing Board Order (Concerning Scheduling) (July 2, 2009) (unpublished).

The fact that the Staff will likely issue the SER serially, over several years, requires a different approach to scheduling discovery and hearings than would be appropriate if the entire SER were available in April 2010, as contemplated by Appendix D. Few non-NEPA contentions can be adjudicated before relevant portions of the SER are issued. To proceed expeditiously and efficiently, therefore, the Board believes that discovery and hearings should proceed serially as well. Accordingly, to assist the Board in preparing a Case Management Order, the Board directs the parties as follows:

First, the NRC Staff shall clarify the subject matter of each of the five volumes of the SER. Specifically, on or before July 31, 2009, the Staff shall file and serve electronically an explanation of which specific sections of the Safety Analysis Report (SAR) or other portions of the Application pertain to each of the five SER volumes.

Second, all parties shall consult and seek agreement upon responses to the following questions:

1. Which admitted contentions are associated with each of the five proposed volumes of the SER?
2. Separately, which admitted legal issue contentions, as identified in the Construction Authorization Boards' May 11, 2009 Memorandum and Order,² are associated with each of the five proposed volumes of the SER?
3. As to each admitted legal issue contention, what other admitted Safety, NEPA or Miscellaneous contentions might potentially be resolved on the basis of how that legal issue contention is decided?
4. Which admitted NEPA contentions have no safety component, such that they could efficiently and appropriately be adjudicated without regard to the status of the SER or any similar safety-related contention?
5. Which, if any, admitted NEPA contentions (in addition to NYE-NEPA-001) involve matters that are the subject of pending supplementation of DOE's environmental impact statement concerning the proposed repository?
6. Which, if any, contentions identified in response to question 4, but not in response to question 5, require discovery before being ripe for adjudication? Describe the general nature of any such discovery.

² U.S. Dep't of Energy (High Level Waste Repository), LBP-09-06, 69 NRC __ (May 11, 2009).

The parties shall file their joint response to the foregoing six questions on or before August 17, 2009. To avoid potential confusion, contentions should be identified in the same manner as in Attachment A to the Construction Authorization Boards' May 11, 2009 order (e.g., JTS-NEPA-001). In the event one or more parties cannot agree, any differing views shall be filed within five (5) days of the majority filing.

Given the range of issues to be addressed in light of the Staff's July 10 response, it will be more productive to meet with the parties in person, rather convene a teleconference as originally contemplated by the Board's July 2 order. Accordingly, after receiving the parties' responses to the foregoing questions, the Board expects to schedule a further prehearing conference in the Las Vegas Hearing Facility. The parties should hold September 14 and, if necessary, September 15, 2009, as tentative dates. The order scheduling the conference will specify issues that the Board wishes the parties to be prepared to address, in light of the parties' various June filings concerning a Case Management Order and the responses to be filed in August.

The NRC Staff is reminded of the commitment in its July 2, 2009 filing to advise the Board of any significant changes to the SER completion schedule. Additionally, the Staff should immediately advise the Board if it has reason to believe that any of the Board's projections of SER volume completion dates are unrealistic.

Finally, DOE is reminded of the Board's request, in our July 2, 2009 order, that counsel for DOE undertake or cause to be undertaken a reasonable investigation in good faith whether there may be constraints upon DOE's ability to proceed in this matter. Because the Board no

longer intends to convene the teleconference at which such constraints might have been discussed, the Board requests that DOE submit a written report concerning these matters on or before August 17, 2009.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 21, 2009

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **ORDER (Concerning Serial Case Management)**, dated July 21, 2009, have been served upon the following persons by Electronic Information Exchange.

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