

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
August 25, 2009

MEMORANDUM AND ORDER
(Concerning Further Prehearing Conference)

The Board will convene a further prehearing conference, at the NRC Las Vegas Hearing Facility, on Monday, September 14, 2009 at 9:00 a.m. PDT. If required, the conference may continue through Tuesday, September 15, 2009. The Board intends to issue a Case Management Order shortly thereafter.

Details concerning admission to the facility, parking, and other administrative matters will be addressed in a subsequent order.

Presently before the Board are three sets of documents that bear upon case management: (1) the parties' initial filings in response to CAB-01's March 20, 2009 memorandum and order regarding the first prehearing conference;¹ (2) the NRC Staff's answer to this Board's July 2, 2009 order concerning scheduling;² and (3) the parties' filings in response

¹ Joint Proposed Discovery Schedule (June 10, 2009); Joint Proposed Process and Schedule for Grouping and Consolidating Contentions (June 10, 2009); Supplemental Filing Identifying Additional Parties Supportive of the Joint Proposed Pleadings Filed June 10, 2009 (June 12, 2009); Department of Energy's Response to Joint Proposed Discovery Schedule (June 15, 2009); Differing Views of the NRC Staff to the Proposed Discovery Schedule (June 15, 2009).

² NRC Staff Answer to the CAB's July 2, 2009 Order Concerning Scheduling (July 10, 2009).

to this Board's July 21, 2009 order concerning serial case management.³ In essence, the first set of filings addressed anticipated discovery and related issues; the second filing disclosed a new schedule for the NRC Staff's issuance of its Safety Evaluation Report (SER); and the third set of filings consists primarily of the parties' responses to the Board's questions pertaining to the impact of the new schedule.

Additionally, by separate orders to be issued shortly, the Board will address (1) Eureka County's motion for leave to participate by videoconference in the September prehearing conference and request for webcasting; (2) the joint motion of certain parties for an extension of time to file new or amended contentions that are based upon the Department of Energy's (DOE) July 30, 2009 groundwater analysis; and (3) the status of the Native Community Action Council and the Joint Timbisha Shoshone Tribal Group.

The Board will hear argument on Nevada's pending motion to compel production of certain NRC Staff documents⁴ and (if necessary) the NRC Staff's motion to correct its privilege log supplement⁵ immediately following the lunch break on September 14, 2009. Each side should prepare for 15 minutes of argument, including responding to questions from the Board.

The Board has also reached preliminary decisions concerning the following issues:

1. The Board will not refer in the Case Management Order to possible awards of attorney fees or costs as a sanction. The Board need not address, at this time, the limits of its

³ NRC Staff Answer to the CAB's July 21, 2009 Order Concerning Serial Case Management (July 28, 2009); U.S. Department of Energy's Answer to the Board's Request Concerning Constraints on DOE's Ability to Continue to Participate in the Licensing Proceeding (Aug. 17, 2009); Joint Response to July 21, 2009 Order (Concerning Serial Case Management) (Aug. 17, 2009); Notice by the State of Nevada Regarding DOE's Joint Response to July 21, 2009 Order (Aug. 17, 2009); Response of the State of Nevada to July 21, 2009 Order (Concerning Serial Case Management) (Aug. 21, 2009); NRC Staff Comment on Joint Response to CAB's July 21, 2009 Order (Aug. 24, 2009); Department of Energy's Response to Notice of State of Nevada Regarding DOE's Joint Response to July 21, 2009 Order (Aug. 24, 2009).

⁴ State of Nevada's Motion to Compel Production of Documents Asserted as Privileged by NRC Staff (Aug. 10, 2009).

⁵ NRC Staff Motion for Leave to Correct Its July 30, 2009 Deliberative Process Privilege Log Supplement (Aug. 19, 2009).

authority under the Commission's regulations to sanction improper conduct during discovery, if such conduct were to occur.

2. The provisions of the Joint Proposed Discovery Schedule concerning entry upon land must be rejected. As the NRC Staff points out, the Joint Schedule does not identify the locations to which the provision applies and would deny the Board ultimate authority to determine whether an inspection request should be granted.⁶ Under 10 C.F.R. § 2.319, responsibility for the fair and impartial conduct of the proceeding rests with the Board.

3. Unless the parties consent, available discovery procedures under NRC regulations do not include subject matter depositions such as those permitted under Rule 30(b)(6) of the Federal Rules of Civil Procedure.

4. Although the Board concurs with the parties' judgment that certain aspects of the Federal Rules of Civil Procedure might usefully be reflected in a Case Management Order, the Board agrees with the NRC Staff that the Case Management Order should not purport to incorporate any such Rule by reference.⁷

5. All parties apparently support appointment of a Discovery Master (or multiple Discovery Masters) to be available by telephone during depositions and otherwise charged with ruling on discovery disputes, subject to appeals to the Board. Nonetheless, the Board does not presently anticipate a need for a Discovery Master. The Board expects that counsel will continue to conduct themselves professionally throughout this proceeding, and refrain from inappropriate behavior (including but not limited to making frivolous objections, "coaching" a witness, or otherwise engaging in improper conduct during depositions). If rules need to be clarified, the Board will endeavor to clarify them. While, should they occur, the Board will deal with persistent violations of such rules, the Board does not intend to continuously monitor depositions conducted by responsible lawyers or to appoint Discovery Masters to do so.

⁶ Differing Views of the NRC Staff to the Proposed Discovery Schedule (June 15, 2009) at 4.

⁷ See id. at 5-7.

6. CAB-01's March 20, 2009 order did not seek comments concerning motions for summary disposition, as the Applicant and NRC Staff point out.⁸ Nonetheless, the parties may wish to take into account the Board's view that such motions are of limited usefulness in administrative proceedings. In a jury trial, in contrast, the judge's determination that a claim need not be presented to the jury may save considerable time. That is less often the case when, as here, the same board that must consider the evidence in connection with a motion for summary disposition would also consider the evidence in a hearing on the merits. To be sure, motions for summary disposition serve a proper purpose in some instances, such as (1) where a board's ruling on a legal issue contention may in effect resolve other contentions; (2) where, after discovery, it becomes apparent that an admitted contention truly presents no genuinely disputed issue of material fact; or (3) when a contention of omission is rectified. The parties should plan and allocate resources, however, with the expectation that the Board will be skeptical if eventually presented with motions purporting to argue that virtually no admitted contention presents a genuinely disputed issue of material fact. If necessary the Board may subsequently impose appropriate limitations on the filing of summary disposition motions.

The Board is advised that, prior to the September conference, the parties will seek agreement on priorities and schedules for briefing legal issues, and that DOE and California are discussing a possible joint motion seeking deferral of litigation, including discovery, of certain NEPA contentions.⁹

Two other principal kinds of issues are as yet unresolved: (1) matters on which all parties did not agree in their initial June 2009 filings; and (2) matters that should now be addressed in light of the NRC Staff's announced schedule for the SER. In order to make the scheduled conference as useful as possible, the Board directs that the parties further consult

⁸ Department of Energy's Response to Joint Proposed Discovery Schedule (June 15, 2009) at 5; Differing Views of the NRC Staff to the Proposed Discovery Schedule (June 15, 2009) at 5.

⁹ Joint Response to July 21, 2009 Order (Concerning Serial Case Management) (Aug. 17, 2009) at 3-4, 7.

and seek agreement upon the following such issues (in addition to any other areas of disagreement on which agreement may be possible):

1. In light of the NRC Staff's plans to issue the SER serially and associated scheduling uncertainties, will it be appropriate to proceed with adjudication of contentions on multiple tracks: that is, for the parties to conduct discovery on certain related groups of contentions while simultaneously participating in hearings on other related groups of contentions that are ready for adjudication?

2. It appears that most or all parties wish to conduct some form of further discovery before adjudication of any factual NEPA contentions. Specifically, what discovery will be required and how long should it take?

3. Given the parties' apparent belief that further discovery is necessary before any factual contention can be adjudicated, what is the earliest date on which the parties agree that at least some factual contentions can be ready for adjudication?

4. In light of the NRC Staff's plans to issue the SER serially and associated scheduling uncertainties, should limits on the total number of depositions be imposed by a Case Management Order at this time?

5. If so, what should such limits be?

6. Given that discovery will now likely take place over several years, rather than in less than one year, are the limitations in the Joint Proposed Discovery Schedule on the timing of depositions (e.g., no more than three depositions per week, at least one "off-week" per month) now acceptable to all parties?

7. If not, what limits do the parties now propose?

8. In light of the NRC Staff's plans to issues the SER serially and associated scheduling uncertainties, would it still be reasonable for the Case Management Order to specify that each witness shall be presented for deposition only once?

9. Rather, in negotiating a deposition schedule, should the parties accord a high priority to avoiding multiple depositions of the same witness, while recognizing that some witnesses may have to be deposed more than once if their testimony pertains to more than one group of contentions set for hearing?

10. If not, what guidance regarding multiple depositions of the same witness should be included in a Case Management Order?

11. Consistent with 10 C.F.R. § 2.1018(a)(1)(vi), the Joint Proposed Discovery Schedule provides that the parties' identification of an expert witness should include, at a minimum, the "subject matter" and contentions that the expert will address.¹⁰ In contrast, Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure requires a more detailed explanation of an expert's proposed testimony, including "a complete statement of all opinions the witness will express and the basis and reasons for them," as well as specification of the "data or other information considered by the witness in forming them." Would depositions be more useful and efficient if the parties were to agree upon a disclosure similar to Rule 26(a)(2)(B) requirements for expert witnesses in this proceeding?

12. Can the parties agree upon voluntary disclosure of the proposed content of expert witness testimony, similar to that required by Rule 26(a)(2)(B)?

13. If not, is there any such disclosure – more specific than expected "subject matter" and "contentions" – upon which the parties can agree?

14. It appears that Intervenors would like to depose all the Applicant's witnesses before depositions of any of their own witnesses, and that the Applicant would like to depose all the Intervenors' witnesses before depositions of any of the Applicant's witnesses. In light of the NRC Staff's plans to issue the SER serially and associated scheduling uncertainties, can the parties now agree upon a plan for sequencing depositions?

¹⁰ Joint Proposed Discovery Schedule (June 10, 2009) at 4.

15. Would voluntary disclosure of more detailed information concerning proposed expert witness testimony, of the sort described above, assist the parties in agreeing upon the sequence of depositions?

16. In light of the NRC Staff's plans to issue the SER serially and associated scheduling uncertainties, should limits on the total number of requests for admissions be imposed by a Case Management Order at this time?

17. If so, what should such limits be?

18. Applicable regulations expressly contemplate "[i]nformal requests for information" and specify that the Board should authorize formal interrogatories or depositions upon written questions only "in the event that the parties are unable, after informal good faith efforts, to resolve a dispute in a timely fashion concerning the production of information."¹¹ The Board does not wish to decide numerous motions for permission to obtain information that should have been made available voluntarily. Is any mechanism required to discourage the need to resort to such motions?

19. If so, what should the mechanism be?

20. In light of the NRC Staff's plans to issue the SER serially and associated scheduling uncertainties, are there provisions in the Joint Proposed Discovery Schedule (other than provisions referenced above) that one or more parties previously supported but no longer support?

21. If so, what are such provisions?

22. In light of the NRC Staff's plans to issue the SER serially and associated scheduling uncertainties, are there additional provisions (not suggested above) that the parties wish to propose for inclusion in a Case Management Order?

23. If so, what are such provisions?

¹¹ See 10 C.F.R. § 2.1018(a)(1)(vi), (a)(2).

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MEMORANDUM AND ORDER (Concerning Further Prehearing Conference), dated August 25, 2009, have been served upon the following persons by Electronic Information Exchange.

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MEMORANDUM AND ORDER (Concerning Further Prehearing Conference)

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U.S. DEPARTMENT OF ENERGY (High Level Waste Repository) Docket No. 63-001-HLW
MEMORANDUM AND ORDER (Concerning Further Prehearing Conference)

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MEMORANDUM AND ORDER (Concerning Further Prehearing Conference)

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[Original Signed by Linda D. Lewis]
Office of the Secretary of the Commission

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