

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

Before Administrative Judges:

**09-892-HLW-CAB04
Thomas S. Moore, Chairman
Paul S. Ryerson
Richard E. Wardwell**

_____)	
In the Matter of:)	
)	
U.S. Department of Energy)	September 10, 2009
)	
(High Level Waste Repository)	Docket No. 63-001
Construction Authorization Application))	
_____)	

**NYE COUNTY SUPPLEMENTAL AND DIFFERING VIEWS IN
RESPONSE TO CAB AUGUST 25, 2009 MEMORANDUM AND ORDER**

Nye County participated in discussions with all parties and commented on the joint and separate responses that other parties intend to file either today or tomorrow in accordance with the August 25, 2009, Construction Authorization Board-04 ("Board") Memorandum and Order (Concerning Further Prehearing Conference) ("Order"). Consistent with the Board's Memorandum and Order, Nye County offers the following supplemental and/or differing view in response to the Board's questions #1 and #2. Nye County supports the expeditious scheduling of necessary discovery and adjudication of all contentions, consistent with the Board's previous guidance.

I. Nye County's Position Regarding The Need for Prompt Initiation of the Discovery Process

Parties have offered differing proposals identifying contentions that should be subject to the first round of discovery in response to Board questions 1 and 2. Nye County agrees, in

principle, with the State of Nevada's proposal to begin discovery with those contentions related to SER Volumes 1 and 3. Therefore, Nye County urges the Board, as soon as possible following the hearing on September 14, 2009, to order the initiation of discovery on a substantial subgroup of the contentions that are acknowledged by the parties to require discovery.

II. Nye County's Position Regarding Need for Prompt Initiation of Briefing on Legal Contentions

Nye County also urges the Board to establish a briefing schedule as soon as possible for the forty-one "legal contentions" listed in the August 17, 2009 Parties Joint Response to July 21, 2009 Order (Concerning Serial Case Management) at Spreadsheet 2. DOE has circulated for comment a proposed briefing schedule for legal contentions which is acceptable to Nye County. Nye County maintains that the above-referenced Spreadsheet 2 reflects the designation of legal contentions by Board or Commission Order. Briefing on the legal contentions should begin in October, 2009, to take advantage of the fact that the actual taking of depositions probably will not, as a practical matter, commence until at least December, 2009. Consistent with the Commission's findings earlier, these threshold legal contentions should be briefed and dealt with as expeditiously as possible. *See*, U.S. Department of Energy (High Level Waste Repository), CLI-09-14, __ NRC ___, slip op. at 14 (2009) ("Boards should be prompt in issuing an appropriately efficient briefing schedule for these contentions.") This same concept was recently reiterated by numerous parties in the Joint Response to July 21, 2009 Order (Concerning Serial Case Management), at page 4.

III. Clarification of Nye County's Position Regarding NEPA Contentions

Nye County supports the position of those parties seeking the joint scheduling of discovery for NEPA contentions that have safety components along with other Safety contentions related to the same volume of the SER. For example, many NEPA contentions listed

in Spreadsheet 3 of the August 17, 2009, Joint Response to July 21, 2009 Order (Concerning Serial Case Management), relate to groundwater issues. Discovery for such NEPA contentions could be scheduled contemporaneously with Safety contentions related to groundwater issues. Nye County also notes that the some parties have filed parallel NEPA and safety contentions with many similar, if not identical, factual allegations supporting both contentions. Therefore, combined discovery and adjudication of related safety and NEPA contentions would be both cost effective and efficient.

However, Nye County opposes wholesale postponement of adjudication of all other “non-safety” or “pure” NEPA contentions until after the close of all discovery. Nye County believes that prompt resorting and regrouping of this set of NEPA contentions will result in efficient and effective scheduling. Therefore, Nye County recommends that those NEPA contentions without safety components and listed as “unrelated to any SER” in Spreadsheet 3 of the August 17, 2009, Joint Response to July 21, 2009, Order (Concerning Serial Case Management) should be resorted and grouped for disposition into three separate groups:

- (1) NEPA contentions that raise threshold, or predominantly, legal questions, or are subject to a threshold legal defense which would be dispositive, in whole or in part, of the contention.
- (2) NEPA that are *directly* tied to ongoing litigation.
- (3) NEPA contentions that raise factual issues that actually require discovery, noting that NEPA challenges are ordinarily based upon alleged inadequacies in the EIS record and proceed as challenges to a record of decision after the “major federal action significantly affecting the quality of the environment” has been issued.

NEPA contentions that fit the first category (including many transportation-related NEPA contentions) should be scheduled for full briefing, and then brought to a hearing, together with other legal contentions. For category two NEPA contentions, Nye County has no objection to postponement of those contentions that are directly tied to ongoing litigation. For the final

category, Nye County does not oppose a discovery schedule for such contentions that tracks or ties to discovery regarding related Safety contentions. This is a variant to NEPA contentions Option 1 which is outlined in the Nevada Joint Response filed on August 10, 2009.

With respect to NEPA contentions in the first group described above, threshold legal questions such as jurisdiction, res judicata, and claim preclusion issues, particularly with respect to the transportation-related contentions, were raised when DOE challenged the admissibility of nearly all NEPA contention. *See, generally*, DOE's January 16, 2009, Answer to the Petitions to Intervene of the States of Nevada and California. The Boards determined that, at the admissibility stage, dismissal on legal grounds, without further briefing of the issues, was inappropriate. CABs Memorandum and Order (May 11, 2009) at pp. 40-41. DOE and NRC did not appeal that portion of the Memorandum and Order to the Commission. Nye County believes that such NEPA contentions are now ripe for briefing and adjudication on the merits along with legal contentions. Therefore, it would make sense to resolve, one way or another, or narrow the issues through briefing before the parties engage in costly and time-consuming discovery on contentions raising threshold legal issues.

CONCLUSION

Given that discovery apparently will now be spread over a much longer period of time than the one year anticipated by Appendix D, Nye County believes that the additional time

available should be used to adjudicate or resolve threshold legal and other issues at the earliest possible date, in order to avoid unnecessary and costly discovery later in the process.

Respectfully submitted

(electronically signed)

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CERTIFICATE OF SERVICE

I hereby certify that copies of the “**NYE COUNTY SUPPLEMENTAL AND DIFFERING VIEWS IN RESPONSE TO CAB AUGUST 25, 2009 MEMORANDUM AND ORDER**” have been served on the following persons on this 10th day of September 2009 through the Nuclear Regulatory Commission’s Electronic Information Exchange.

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