

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 11-1271

In re AIKEN COUNTY, et al., Petitioners

U.S. NUCLEAR REGULATORY COMMISSION, et al., Respondents

ON PETITION FOR WRIT OF MANDAMUS

RESPONSE BY THE U.S. NUCLEAR REGULATORY COMMISSION, et al.,
TO PETITIONERS'S MOTION FOR EXPEDITED CONSIDERATION

Introduction.

On July 29, 2011 petitioners filed a petition for writ of mandamus seeking a judicial remedy for allegedly unreasonable NRC delay in resolving the pending Yucca Mountain proceeding. They now have filed a “motion for expedited consideration” of their mandamus petition. *See* Response To “Notice of Underlying Decision” and Motion for Expedited Consideration (Sept. 16, 2011). The NRC, of course, defers to this Court’s judgment on matters of scheduling, but we are constrained to point out that petitioners’ motion does not mention this Court’s standards for expediting cases (*see Handbook on Practice and Internal Procedures*, Part VIII B (D.C. Cir.)). Furthermore, petitioners’ motion overlooks pragmatic funding considerations that render near-term completion of NRC’s Yucca Mountain proceeding highly problematic.

1. *This Court's Standards for Expedited Consideration.*

Petitioners' motion for expedited consideration ignores this Court's well-established standards for expediting an appeal. For example, this Court's *Handbook of Practice and Internal Procedures* states that "[t]he movant *must* demonstrate that the delay will cause irreparable injury[.]" *Id.* at 33 (emphasis added). And "the reasons [for expedition] must be strongly compelling." *Id.* But petitioners make no claim they would suffer "irreparable injury" if this proceeding takes its ordinary course.

That absence is not surprising. Under any conceivable scenario, Yucca Mountain is still many years, and many intervening steps, away from being built. Relieving petitioners' concern about continued on-site storage of spent nuclear fuel in no realistic sense turns on how fast the current mandamus petition is litigated.

The NRC has not taken any actions that are irreversible. For example, when faced with funding limitations requiring NRC to shut down its "Licensing Support Network" (a computerized discovery document retrieval system), the NRC's Atomic Safety and Licensing Board has issued several orders ensuring that the parties maintain their documents for potential future use. In April and June, for example, the Board issued orders directing the preservation of public documents. *See* Exhibits 1 and 2. And the Board recently issued an order providing directions for maintaining non-public documents. *See* Exhibit 3.

In a similar vein, the NRC Staff has advised the Board that it has preserved its technical evaluation of the Yucca Mountain application in the form of technical evaluation reports (or “TERs”). *See* Exhibits 4, 5, and 6. The Staff has advised the Board that it has conducted “orderly closure” actions in a manner calculated to ensure that issuance of the TERs will not preclude issuance of the corresponding Safety Evaluation Reports if conditions warrant. *See* Exhibit 7 at 5.¹

In short, if petitioners ultimately prevail on their claim of unreasonable agency delay, the NRC is in position to “repair” their injury (assuming Congress provides sufficient funding, as we discuss, *infra*). Petitioners’ mandamus claim thus presents no “ticking time bomb” scenario; should petitioners prevail, judicial relief next month, or several months from now, would be just as effective as judicial relief this month in terms of repairing petitioners’ injury.

It is true that there is Congressional and public interest in the Yucca Mountain proceeding. *See Handbook*, at 33 (“unusual” public interest may warrant expediting a case). Whether that interest constitutes a “strongly compelling” reason for giving this case priority over others on this Court’s docket is a discretionary matter for the Court.

¹ The Staff does not take a position on a safety issue until it completes a Safety Evaluation Report (“SER”) on that issue. Thus, all SERs must be completed before the Staff makes a licensing determination.

2. *Congressional Funding and the NRC Proceeding.*

Petitioners' motion discusses various aspects of the Nuclear Waste Policy Act ("NWP") of 1982, 42 U.S.C. § 10101 *et seq.*, and claims the NRC has failed to comply with its requirements. Indeed, the motion goes so far as to say that the "NRC continues to refuse to perform its duties" and is "hiding behind 'budgetary limitations' of its own making." Pet. Motion at 6. But the motion fails to advise this Court of several significant, relevant factors affecting the NRC's ability to consider the Yucca Mountain application.

The NWP designates the Department of Energy ("DOE") as the agency responsible for designing, constructing, operating, and decommissioning a permanent disposal facility, *see* § 10134(b), and the NRC as the agency responsible for licensing its construction, § 10134(d). The NWP also directs the NRC to "consider an application for construction authorization for all or part of a repository *in accordance with the laws applicable to such applications ...[,]*" 42 U.S.C. § 10134(d) (emphasis added); thus, the NRC must process the DOE application under its applicable regulations and normal regulatory process.

NRC regulations establish hearing procedures specifically governing a proceeding to license a high-level waste repository. *See* 10 C.F.R. Part 2, Subpart J, 10 C.F.R. 2.1000, *et seq.* Subpart J specifically incorporates portions of Subpart C ("Rules of General Applicability," 10 C.F.R. 2.300, *et seq.*) and Subpart G

(“Rules for Formal Adjudications,” 10 C.F.R. 2.7.00, *et seq.*). Taken together, this regulatory framework establishes a trial-type adjudicatory proceeding held before the Licensing Board to review a waste repository application. This process includes, *inter alia*, (1) availability of subpoenas; (2) examination and cross-examination of experts; and (3) formal discovery – including depositions – directed to all parties, including the license applicant (*i.e.*, DOE) and the NRC Staff, as well as the parties challenging the application.

In May 2009, the Licensing Board admitted approximately 300 contentions (challenges to specific portions of the DOE Application) for litigation in the adjudicatory proceeding. *Department of Energy* (High-Level Waste Repository), LBP-09-06, 69 NRC 367 (2009). Many contentions involve highly technical questions of engineering, hydrology, seismology and other technical (and legal) subjects on which experts have expressed significant disagreement. Thus, the agency “trial” of this case is expected to be long and complex.

But Congress subsequently passed appropriations legislation that reduced funding for the Yucca Mountain proceeding significantly. Both the NRC and DOE may only conduct activities associated with the Yucca Mountain proceeding through expenditure of funds appropriated from the Nuclear Waste Fund, which the NWPA created specifically for the purpose of funding nuclear waste disposal activities. *See* 42 U.S.C. § 10222(d). Having this specific appropriation, both the

NRC and DOE must use only Nuclear Waste Fund money for Yucca Mountain-related activities, and may not use general appropriations or any other funds for this purpose, even if the limited Nuclear Waste Fund money is exhausted. *See generally* PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, VOL. I, 2-21 GAO-04-261SP (3d ed. 2004).

For fiscal year (“FY”) 2011 (*i.e.*, October 1, 2010 through September 30, 2011) Congress appropriated \$10 million from the Nuclear Waste Fund to the NRC. *See* Pub. L. No. 112-10, § 1423, 125 Stat. 38, 126 (Apr. 15, 2011). At the same time, Congress appropriated \$0 from the Fund to DOE. *Id.* at §§ 1446, 1456, 125 Stat. at 129, 130. In contrast, Congress had appropriated \$29 million for the NRC from the Fund in FY 2010 (October 1, 2009 through September 30, 2010). *See* Pub. L. No. 111-85, 123 Stat. 2845, 2877. Similarly, Congress appropriated \$196.8 million for DOE from the Fund for FY 2010. *Id.*, 123 Stat. at 2864, 2868. Thus, the Congressional action in the FY 2011 appropriations legislation reflected a significant reduction in appropriated funds available for Yucca Mountain work at both DOE and NRC. This reduction is especially significant at DOE – a change from \$196.8 million to \$0 – a fact that petitioners’ motion ignores.

In fact, the NRC’s original estimate of the money required for completion of the proceeding was significantly more than Congress has appropriated. For example, NRC initially requested an appropriation of \$99.1 million for FY 2010 in

its budget submission to the Office of Management and Budget (“OMB”) for both the adjudicatory proceeding and the Staff’s technical review. *See* Petition for Writ of Mandamus, Exhibit 7, at p.8. As noted above, Congress responded with an appropriation of \$29 million. Similarly, NRC initially requested \$39.5 million from OMB for FY 2011. *Id.* Congress ultimately provided \$10 million. Thus, it is clear that NRC has always estimated that completion of the proceeding will involve significant expenditures from the Nuclear Waste Fund.²

Obviously, conducting a trial-type proceeding with approximately 300 contentions requires an enormous, resource-intensive effort on all sides, especially as these contentions are (for the most part) highly technical. For the proceeding to be meaningful DOE, as the license applicant, would be required to participate in discovery and provide evidence and witnesses to support the application. After all, DOE (as the applicant) has the burden of proof to establish that the application meets the NRC’s regulatory requirements. *See* 10 C.F.R. § 2.325.

But Congress did not provide DOE with *any* Nuclear Waste Fund money in the current appropriations legislation. As DOE advised the Licensing Board when seeking a protective order earlier this summer:

² The NRC has limited “carryover” money appropriated from the Nuclear Waste Fund that was not spent in previous years; however, given the prior budget requests noted above, those funds do not approach the amount needed to complete the Yucca Mountain proceeding. And NRC funds would not enable DOE to participate in the proceeding.

Congress has not appropriated sufficient funding for this proceeding to be completed. Any funds DOE and NRC retain are insufficient to take this proceeding to completion. To the extent parties contend that this proceeding should continue as long as DOE has any remaining balance from prior year appropriations, the answer is that such action would be “imprudent” and “futile,” as there is no significant likelihood at this time that DOE or NRC would have the funds to complete the proceeding.

Exhibit 8 at 6 (emphasis in original) (citation omitted).

Providing zero funds for Yucca Mountain activities in the most recent appropriations cycle presumably reflects a Congressional intent that DOE not continue to pursue a license at this time. And as noted above, neither DOE nor NRC can lawfully reprogram ordinary appropriated funds to conduct activities that fall under the purview of the Nuclear Waste Fund. Thus, currently both DOE and NRC are severely restricted in the actions they can take regarding the Yucca Mountain proceeding.

The bottom line is that current-year Nuclear Waste Fund appropriations are limited – zero in DOE’s case – and the NRC hearing process cannot go forward in a meaningful way without the participation of DOE, who is the license applicant and thus an indispensable party. Given these circumstances, NRC has devoted much of its limited funds over the past year to so-called “orderly closure,” which involves – in part – record preservation so that NRC is in a position to resume its review should Congress restore funding. In fact, the Commission itself, while recently announcing that it was evenly split on the question whether the Licensing

Board had properly refused to allow DOE to withdraw its application, unanimously held that “budgetary limitations” required the Board to dispose of pending matters by the end of the current fiscal year and to document the history of the adjudicatory process. *See* Notice of Underlying Decision in Case, No. 11-1271 (filed Sept. 9, 2011) (attaching Commission decision).

Petitioners may believe, as their motion states (p.6), that “Congress has ... *already* appropriated funding for that process, and been ignored” (emphasis in original). But in actuality the Commission has now bowed to fiscal reality and is trying to use its limited Nuclear Waste Fund money reasonably. Petitioners never claim that Congress has given NRC enough money to complete its license review, including resolving the still-pending, and quite complex, 300 contentions challenging DOE’s application. And petitioners’ motion completely ignores Congress’s deliberate action in the current appropriations legislation (FY 2011) not to fund any DOE Yucca Mountain activity.

CONCLUSION

In sum, petitioners’ motion for expedited consideration does not, in our view, fairly reflect all pertinent considerations. But, ultimately, whether to expedite this case is a matter for the informed discretion of this Court. NRC will abide by whatever schedule the Court issues. Should the Court ask for an NRC response to the mandamus petition, or set the petition for full briefing, we ask for a

full briefing period – at least 30 days – to file a well-considered response to petitioners’ claims.

Respectfully submitted,

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Dated: September 29, 2011
Filed by EC/CMF

EXHIBIT 1

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

April 11, 2011

ORDER

(Concerning LSNA Memorandum and Parties' LSN Document Collections)

On February 18, 2011, the Licensing Support Network (LSN) Administrator (LSNA) submitted to CAB-04, and served on all parties, a memorandum addressing the likely end of funding for the LSN.¹ According to the LSNA's memorandum, "under the Administration's budget proposal for fiscal year (FY) 2012, no Nuclear Waste Fund (NWF) resources, either funding or full-time equivalent (FTE) staffing, are allocated to the Nuclear Regulatory Commission to conduct the Yucca Mountain Licensing proceeding."² Should Congress acquiesce in the Administration's proposal, the LSNA's memorandum states that LSN shutdown must be completed by September 30, 2011 "regardless of the status of the adjudication or the provisions of 10 C.F.R. Part 2, Subpart J, that govern the operation of, and party participation in, the LSN."³

¹ Memorandum from Daniel J. Graser, Licensing Support Network Administration, to Administrative Judges (Feb. 18, 2011) [hereinafter LSNA Memorandum].

² Id. at 1 (internal citation omitted).

³ Id. (internal citation omitted). It should be noted that Congress appropriated substantial funding to both the NRC and DOE for Yucca Mountain in FY 2010 and, to date, each of the FY 2011 continuing resolutions have continued funding for Yucca Mountain.

At two case management conferences and in various orders and filings,⁴ the Board and the parties previously addressed the subject of the preservation of the parties' LSN document collections should the Department of Energy's (DOE) motion to withdraw its application be granted. In an appendix to its June 29, 2010 decision, LBP-10-11, 71 NRC __ (slip op.) (June 29, 2010), denying the motion to withdraw the construction authorization application of DOE, the Board also proposed to the Commission a set of conditions to be imposed on DOE should its motion to withdraw be granted.⁵ As the LSNA's memorandum points out, however, the Board's earlier efforts aimed at preserving the LSN document collections of all parties presumed, inter alia, that the LSN website would be operational and that there would be an LSNA to accept custody of the parties' LSN document materials.⁶

⁴ See CAB Order (Concerning LSNA Memorandum) (Dec. 22, 2009) (unpublished); Case Management Conference, Jan. 27, 2010 (Tr. 354-383); NRC Staff Comments Concerning LSNA Memorandum (Jan. 21, 2010); Response of the Four Nevada Counties of Churchill, Esmeralda, Lander and Mineral to the December 22, 2009 Board Order (Jan. 21, 2010); State of Nevada's Comments on LSNA Queries (Jan. 21, 2010); White Pine County's Comments on Archival of LSN Documents (Jan. 21, 2010); County of Inyo's Response to December 22, 2009 ASLB Order Regarding Disposition of LSN Documents (Jan. 22, 2010); Lincoln County's Response to December 22, 2009 ASLB Order Regarding Disposition of LSN Documents (Jan. 22, 2010); Nye County, Nevada Response to LSNA Questions (Jan. 25, 2010); The Department of Energy's Answers to the Board's Questions at the January 27, 2010 Case Management Conference (Feb. 4, 2010); Nye County, Nevada Preliminary Response to DOE's February 4, 2010 Answers to CAB LSN Questions (Feb. 16, 2010); Reply of the Nuclear Energy Institute to the Department of Energy's Answers to Board Questions (Feb. 16, 2010); The Department of Energy's Status Report on Its Archiving Plan (Feb. 19, 2010); CAB Order (Questions for Several Parties and LSNA) (Apr. 21, 2010) (unpublished); Lincoln County, Nevada's Response to ASLB's April 21, 2010 Order (May 14, 2010); NRC Staff Answers to Board's Questions Regarding the Staff's LSN Collection (May 24, 2010); U.S. Department of Energy Answers to ASLB Questions from Order (Questions for Several Parties and LSNA) Dated April 21, 2010 (May, 24, 2010); Nye County Comments Regarding DOE's LSN Preservation Plan (June 1, 2010); State of Nevada's Comments on DOE's Preservation Plans for Documentary Material (June 1, 2010); Case Management Conference, June 4, 2010 (Tr. 324-446); CAB Order (June 7, 2010) (unpublished); Joint Report Concerning Conditions Regarding DOE LSN Document Collection (June 18, 2010).

⁵ LBP-10-11, 71 NRC __ (slip op.) (June 29, 2010), Appendix, Proposed License Conditions Should DOE's Motion to Withdraw be Granted.

⁶ LSNA Memorandum at 1-2.

Those underlying assumptions may no longer be valid. Accordingly, in order to fulfill our responsibility to preserve the document discovery materials residing on the LSN, a system mandated by 10 C.F.R. Part 2, Subpart J, and over which CAB-04 was established to preside,⁷ the Board directs, pursuant to its authority under 10 C.F.R. § 2.319, that each party shall take the following actions:

- preserve all LSN documents in "PDF" format;
- submit its LSN document collection together with the associated bibliographic files to the NRC Office of the Secretary (SECY) on optical storage media as specified in Guidance for Electronic Submissions to the Commission⁸ for inclusion into the docket, notifying all other parties when the submission has been completed;
- for large collections taking more than a month to complete the PDF conversion, submit the documents that have been converted no later than the seventh day of the month for those documents converted the previous month.

Once received, SECY shall install the documents and associated bibliographic information into a separate LSN docket library of ADAMS for public access via www.nrc.gov taking care to: (1) utilize all existing LSN bibliographic header information; and (2) maintain the integrity and availability of the existing LSN Accession Number and Participant Accession Number identifications.⁹

⁷ Establishment of Atomic Safety and Licensing Board; Department of Energy, 74 Fed. Reg. 30,644, 30,644 (June 26, 2009).

⁸ Guidance for Electronic Submissions to the NRC, Revision 6 (May 17, 2010), [available at http://www.nrc.gov/site-help/e-submittals/guide-electronic-sub-r6.pdf](http://www.nrc.gov/site-help/e-submittals/guide-electronic-sub-r6.pdf). In the event any party has questions concerning the Guidance on the appropriate storage media, it should contact the LSNA.

⁹ The Board suggests that SECY consult with the LSNA for any surplus equipment that may be available to assist with accommodating this installation.

Each party shall certify at the time of submission to SECY the accuracy and completeness of its submission stating that it is a true and accurate representation of the materials available on the LSN at the time of submission. Delivery to SECY shall be completed by August 31, 2011.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 11, 2011

EXHIBIT 2

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

June 9, 2011

ORDER

(Granting in Part and Denying in Part Reconsideration Motion)

The NRC Staff moves for (1) reconsideration of CAB-04's April 11, 2011 order¹ addressing, inter alia, the preservation of the parties' Licensing Support Network (LSN) document collections;² and (2) a stay of that order pending the Board's resolution of its reconsideration motion.³ Under 10 C.F.R. § 2.323(e), reconsideration requires a showing of "compelling circumstances, such as the existence of a clear and material error in a decision."

¹ See CAB Order (Concerning LSNA Memorandum and Parties' LSN Document Collections) (Apr. 11, 2011) (unpublished) [hereinafter April 11 Order].

² See NRC Staff Request for Leave to File Motion for Reconsideration and Motion for Reconsideration of the Board's April 11, 2011 Order, or Petition for Certification (Apr. 21, 2011) [hereinafter Staff Reconsideration Motion]. As evident from its title and required by 10 C.F.R. § 2.323(e), the Staff's motion also seeks leave to file the reconsideration motion. The Staff motion for leave to file, in contrast to the motion itself, is granted.

³ NRC Staff Motion for Stay of April 11, 2011 Board Order (Apr. 21, 2011) [hereinafter Staff Stay Motion].

Only the State of Nevada filed an answer to the Staff's motions.⁴ Nevada stated that it did not object to the Board's reconsideration or to a temporary stay, but took no position on whether, upon reconsideration, the April 11 order should be modified.⁵ According to the Staff's Section 2.323(b) certification, the State of California, the State of South Carolina, the Nuclear Energy Institute (NEI), Inyo County, California, Clark County, Nevada, Nye County, Nevada, Eureka County, Nevada, Aiken County, South Carolina, the Prairie Island Indian Community, the Native Community Action Council, the National Association of Regulatory Utility Commissioners (NARUC), and the Florida Public Service Commission, an amicus curiae, took no position on the Staff's motions, while the Department of Energy (DOE) did not object.⁶

The Board's April 11 order was the most recent directive in a series of case management conferences, party submissions and Board orders aimed at preserving the electronic document discovery database residing on the LSN—a system mandated by 10 C.F.R. Part 2, Subpart J, and over which CAB-04 was established to preside. The Board's efforts, as catalogued in the April 11 order,⁷ have been necessitated by the technological design of the LSN, the uncertain fiscal environment surrounding this unique proceeding, and the importance of preserving the decades of history and extensive research underlying DOE's application for authorization to construct the proposed Yucca Mountain geologic repository that resides on the LSN.

⁴ See Nevada Answers to (1) NRC Staff Request for Leave to File Motion for Reconsideration and Motion for Reconsideration of the Board's April 11, 2011 Order, or Petition for Certification, and (2) NRC Staff Motion for Stay of April 11, 2011 Board Order (May 2, 2011).

⁵ See id. at 1-2.

⁶ Staff Reconsideration Motion at 1-2 n.1; Staff Stay Motion at 8.

⁷ See April 11 Order at 2 n.4.

Specifically, our April 11 order was triggered by a memorandum from the LSN Administrator (LSNA) addressing the likely end of funding for the LSN.⁸ The LSNA's memorandum noted that the Administration's proposed fiscal year 2012 budget had not allocated to the NRC any Nuclear Waste Fund resources—either dollars or staffing—for the Yucca Mountain licensing proceeding.⁹ Therefore, the LSNA concluded, should Congress acquiesce in the Administration's budget proposal, he must complete the shutdown (and disposition) of the LSN by September 30, 2011, regardless of the status of the ongoing adjudicatory proceeding or the provisions of 10 C.F.R. Part 2, Subpart J, mandating operation of the LSN.¹⁰ As the LSNA's memorandum pointed out, the Board's earlier efforts to preserve the LSN document collections of the parties presumed that the LSN website would be in operation and that there would be an LSNA to accept custody of the parties' LSN documentary materials.¹¹

Because these underlying assumptions were no longer valid, the Board's April 11 order directed each party to submit its LSN document collection, along with the associated bibliographic files, in portable document format (PDF), to the NRC Office of the Secretary on approved optical storage media by August 31, 2011.¹² The Board's order also instructed the Secretary to install the submitted document collections into a separate LSN docket library of

⁸ Memorandum from Daniel J. Graser, Licensing Support Network Administrator, to Administrative Judges, Construction Authorization Board 4 (Feb. 18, 2011) [hereinafter LSNA Memorandum].

⁹ Id. at 1.

¹⁰ Id.

¹¹ Id. at 2.

¹² April 11 Order at 3-4.

ADAMS for public access via the agency's public website.¹³ The order did not specify a deadline for the Secretary's actions.

The Board's April 11 order imposed no significant new burden on most of the parties. Previously, all parties and interested governmental participants, except NARUC,¹⁴ the Staff, and DOE, committed to provide the LSNA a copy of their LSN document collections in a data format and via a transfer medium as mutually agreed upon by the party and the LSNA.¹⁵ For its part, the Staff had represented to the Board that its LSN document collection, in PDF, already resides on ADAMS so the Board did not seek the same commitment from the Staff as it had from the other parties.¹⁶ DOE, which has the largest LSN document collection, variously represented to the Board, inter alia, that portions of its LSN document collection were already in PDF, that it was investigating whether to convert the remainder of its collection into PDF, and that ultimately

¹³ Id.

¹⁴ NARUC did not participate in the last, June 4, 2010, case management conference and, as a new petitioner, the Board thereafter failed to follow up with questions to NARUC as to whether it would make the same commitment as the other parties regarding its LSN document collection should it be admitted as a party to the proceeding. NARUC's intervention petition was granted by the Board in LBP-10-11, 71 NRC __, __ (slip op. at 47) (June 29, 2010), and NARUC has not filed any objection to the Board's April 11, 2011 order.

¹⁵ See White Pine County, Nevada, Tr. at 357 (Jan. 27, 2010); Inyo County, California, Tr. at 358 (Jan. 27, 2010); Churchill, Esmeralda, Lander, and Mineral Counties, Nevada, Tr. at 359-60 (Jan. 27, 2010); Eureka County, Nevada, Tr. at 360 (Jan. 27, 2010); Nye County, Nevada, Tr. at 361 (Jan. 27, 2010); Clark County, Nevada, Tr. at 361-62 (Jan. 27, 2010); Joint Timbisha Shoshone Tribal Group, Tr. at 362 (Jan. 27, 2010); Native Community Action Council, Tr. at 363 (Jan. 27, 2010); NEI, Tr. at 363-64 (Jan. 27, 2010); State of Nevada, Tr. at 364-65 (Jan. 27, 2010); State of California, Tr. at 394 (Jan. 27, 2010); State of South Carolina, Tr. at 325 (June 4, 2010); Aiken County, South Carolina, Tr. at 326 (June 4, 2010); State of Washington, Tr. at 326-27 (June 4, 2010); Prairie Island Indian Community, Tr. at 327 (June 4, 2010); Lincoln County, Nevada's Response to ASLB's April 21, 2010, Order (May 14, 2010) at 1-2.

¹⁶ See NRC Staff Comments Concerning LSNA Memorandum (Jan. 21, 2010) at 1-2; Tr. at 354-55 (Jan. 27, 2010); NRC Staff Answers to Board's Questions Regarding the Staff's LSN Collection (May 24, 2010) at 3-4.

its collection would be rendered into PDF image files.¹⁷ After the Board's April 11 order, DOE filed a motion for clarification of that order,¹⁸ which the Board granted.¹⁹ In its motion, DOE noted that it had conferred and reached agreement with the LSNA and the Secretary's technical staff on various technical requirements, that DOE believed it would be able to complete the conversion of all its LSN document collection to PDF/A format (an agency-accepted form of PDF) by August 31, 2011, and that it sought permission to submit its LSN document collection to the Secretary on high capacity external hard drives.²⁰

The Staff seeks reconsideration of our April 11 order, however, on the ground that the order imposes fiscal burdens on the NRC without addressing budgetary and administrative issues, funding limitations, Commission policy and principles of appropriations law.²¹ Accompanying the Staff's Reconsideration Motion is the affidavit of the Director of the NRC Office of Information Services (OIS).²² That affidavit sets out the steps purportedly needed to be taken and estimated costs the Director believes the NRC would incur in complying with the Board's order.²³

The Board's April 11 order directed "each party"—a term that necessarily included the Staff—to submit its LSN document collection to the NRC Office of the Secretary on optical

¹⁷ See Tr. at 372-74 (Jan. 27, 2010); The Department of Energy's Answers to the Board's Questions at the January 27, 2010 Case Management Conference (Feb. 4, 2010) at 4-5, Attachment A; U.S. Department of Energy Answers to ASLB Questions from Order (Questions for Several Parties and LSNA) dated April 21, 2010 (May 24, 2010) at 31, 33-34.

¹⁸ See U.S. Department of Energy's Motion for Clarification and Status Report Regarding the Board's Order dated April 11, 2011 (Apr. 21, 2011) [hereinafter DOE Clarification Motion].

¹⁹ See CAB Order (Granting DOE's Motion for Clarification) (May 13, 2011) (unpublished).

²⁰ See DOE Clarification Motion at 2-4.

²¹ See Staff Reconsideration Motion at 6-9.

²² See *id.*, Affidavit of Thomas M. Boyce Regarding the April 21, [sic] 2011 Board Order (Apr. 20, 2011) [hereinafter Boyce Affidavit].

²³ See Boyce Affidavit at 2-3.

storage media as specified in Guidance for Electronic Submissions to the Commission.²⁴ The Board failed to take into account, however, the fact that the Staff LSN document collection already resides on ADAMS.²⁵ It would be unnecessary and repetitious to require the Staff to provide its LSN document collection to the Secretary on optical storage media. Thus, the Board's April 11 order is amended to exclude the Staff from that requirement, and the Staff need not submit its LSN document collection to the Secretary on optical storage media by August 31, 2011.²⁶ To that extent, the Staff's motion for reconsideration is granted. In all other respects, the Staff's reconsideration motion is denied.

The remainder of the Staff's arguments for reconsideration seemingly emanates from a misapprehension of the Board's order. The April 11 order did not specify a deadline for the Secretary to initiate or complete any actions. The order requires each party (now with the exception of the Staff) to submit its LSN document collection to the Secretary by August 31, 2011, and then to notify "all other parties when the submission has been completed."²⁷ The parties' August 31 deadline does not apply to the Secretary. Once each party's LSN document collection on optical storage media (or in the case of DOE on external hard drives) is received by the Secretary, initially those physical objects need only be placed by the Secretary in the docket for this proceeding just as physical objects are placed in the docket for any other proceeding in the ordinary course of business.

The Board's April 11 order further instructed the Secretary to install the documents in a separate LSN library docket of ADAMS for public access via the agency's website. The Board

²⁴ April 11 Order at 3. To ensure there is no misunderstanding, in using the term "party," the Board intended that term to include Eureka County, Nevada and Lincoln County, Nevada that are participating as interested governmental bodies pursuant to 10 C.F.R. § 2.315(c). See LBP-09-6, 69 NRC 367, 484 (2009).

²⁵ See supra text accompanying note 14.

²⁶ The NRC Staff shall not, however, remove its LSN document collection from ADAMS.

²⁷ April 11 Order at 3.

set no deadline. In so doing, the Board fully recognized that the Secretary can comply with the Board's instructions only by starting, in good faith, the administrative, budgetary, and financial processes and procedures necessary to accomplish that end.²⁸ As we would have thought was obvious, the Board cannot order the impossible any more than the Secretary can perform the impossible. The Secretary need only comply with that portion of the April 11 order creating a separate LSN docket library on ADAMS to the extent it is successful in completing the necessary procedures and to the extent funding is available.

Read in this light, the Staff's motion for reconsideration of the Board's April 11 order clearly fails to satisfy the standard for granting such a motion under 10 C.F.R. § 2.323(e). As the Commission stated in the 2004 Statement of Considerations, this standard "is a higher standard than the existing case law, [and] is intended to permit reconsideration only where manifest injustice would occur in the absence of reconsideration."²⁹ No injustice of any kind will result from our April 11 order, which was designed to preserve the LSN electronic discovery database representing decades of research and history. The April 11 order imposes no deadline on the Secretary and requires no actions for which funding is not available. Accordingly, the Staff's motion for reconsideration of that portion of the order concerning ADAMS is denied.³⁰

²⁸ In the April 11 order, the Board suggested that the Secretary consult with the LSNA regarding surplus computer equipment suitable for this purpose that may be available to assist the Secretary. See April 11 Order at 3 n.9. The Board again urges the Secretary's technical staff and OIS to consult with the LSNA regarding computer equipment (i.e., new servers), which would help offset a tiny portion of the enormous waste from the dismantlement of the LSN due to fiscal constraints forced upon the Atomic Safety and Licensing Board Panel and beyond the Panel's control.

²⁹ Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2207 (Jan. 14, 2004).

³⁰ In its Reconsideration Motion, the Staff also requests that, in the event its motion is denied, the Board certify its April 11 order to the Commission. See Staff Reconsideration Motion at 9-10. Under the Commission's Rules of Practice, 10 C.F.R. § 2.323(f)(1), the Staff should have requested the alternative relief of referral of the April 11 order because rulings are referred to the Commission and issues are certified to the Commission. See 10 C.F.R. § 2.323(f)(2). Nonetheless, the Staff's request for alternative relief is denied, and we decline to refer our April

The Staff's motion for a stay of our April 11 order pending the Board's reconsideration is denied as moot.³¹

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

/RA/

Paul S. Ryerson
ADMINISTRATIVE JUDGE

/RA/

Richard E. Wardwell
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 9, 2011

11 order to the Commission. Suffice it to note that the Commission has before it, as the Staff should be well aware, a number of long pending motions and rulings in this proceeding. In the current circumstances, the Board sees no utility in lengthening that list as the Staff requests.

³¹ Moreover, even if the motion were not moot, the stay must be denied for failing to meet the well-known standards for granting a stay. See 10 C.F.R. § 2.342(e). For example, as the Commission stated in Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237 (2006) (internal citations omitted), "[i]rreparable harm is the most important of the four standards—the sine qua non of obtaining a stay. A party seeking a stay must show it faces imminent, irreparable harm that is both 'certain and great.'" The Board's April 11 order, as amended, causes no harm, much less irreparable harm, to the Staff because it does not require the Staff to take any action regarding its LSN collection. With respect to the Secretary, the Board's order initially only instructs the Secretary to receive the parties' LSN collections on storage media and treat those physical objects in the same manner it handles physical objects in any other proceedings. With respect to ADAMS, the Board's order, without any deadline, only directs the Secretary to begin the administrative, budgetary and financial procedures for placing the parties' LSN collections on ADAMS, as funding allows. Thus, any conjectured harm is not irreparable and cannot possibly be imminent.

EXHIBIT 3

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

September 16, 2011

ORDER

(Concerning Preservation of Certain LSN Documents)

Two categories of Licensing Support Network (LSN) documents might not necessarily be preserved under the Board's prior orders. This order is intended to ensure preservation of all LSN document collections.

First, because of confidentiality concerns, redacted Employee Concern Program documents submitted by the Department of Energy were not placed on the LSN. Rather, such documents remain in the possession of the LSN Administrator (LSNA). Therefore, the LSNA is directed to submit to the Secretary on optical storage media, for inclusion in the docket under seal, all such materials in the LSNA's possession.

Second, each party shall retain, in either electronic form or paper copy, all documentary material in its possession that—because of claims of privilege or confidentiality or otherwise—is represented in the LSN only by bibliographic header information.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Paul S. Ryerson
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 16, 2011

EXHIBIT 4

July 21, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
U. S. DEPARTMENT OF ENERGY)	Docket No. 63-001-HLW
)	
(High-Level Waste Repository))	ASLBP No. 09-892-HLW-CAB04
)	

NRC STAFF NOTIFICATION OF
ISSUANCE OF TECHNICAL EVALUATION REPORT

The U.S. Nuclear Regulatory Commission (NRC) staff (Staff) previously indicated that the commencement of orderly closure activities under the Continuing Resolution would include documenting technical insights. See NRC Staff Response to December 8, 2010 Board Order and Notification Regarding SER Volume 4 Issuance, dated December 22, 2010, at 5; NRC Staff Answer to Motion for an Order Restoring Technical Review of the Yucca Mountain License Application, dated October 18, 2010, at 3-5. The Staff also informed the Board that it had been using draft Safety Evaluation Report Volume 3 to develop a technical evaluation report. See NRC Staff Response to February 25, 2011, Board Order, dated March 3, 2011, at 8 (citing Affidavit of Catherine Haney in Response to February 25, 2011, Board Order, dated March 3, 2011, at ¶ 4).

This notification is to inform the Board that on July 21, 2011, the Staff issued "Technical Evaluation Report on the Content of the U.S. Department of Energy's Yucca Mountain Repository License Application; Postclosure Volume: Repository Safety After Permanent

Closure." This document is available in the Publicly Available Records System of the NRC's Agencywide Documents Access and Management System (ADAMS), at Accession Number ML111990436.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 21st day of July, 2011

EXHIBIT 5

September 1, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
U. S. DEPARTMENT OF ENERGY)	Docket No. 63-001-HLW
)	
(High-Level Waste Repository))	ASLBP No. 09-892-HLW-CAB04
)	

NRC STAFF NOTIFICATION OF
ISSUANCE OF TECHNICAL EVALUATION REPORT

The U.S. Nuclear Regulatory Commission (NRC) staff (Staff) previously indicated that the commencement of orderly closure activities under the Continuing Resolution would include documenting technical insights on information in the Department of Energy's license application. See NRC Staff Response to December 8, 2010 Board Order and Notification Regarding SER Volume 4 Issuance, dated December 22, 2010, at 5; NRC Staff Answer to Motion for an Order Restoring Technical Review of the Yucca Mountain License Application, dated October 18, 2010, at 3-5.

This notification is to inform the Board that on September 1, 2011, the Staff issued "Technical Evaluation Report on the Content of the U.S. Department of Energy's Yucca Mountain Repository License Application; Preclosure Volume: Repository Safety Before

Permanent Closure." This document is available in the Publicly Available Records System of the NRC's Agencywide Documents Access and Management System (ADAMS), at Accession Number ML112411460.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 1st day of September, 2011

EXHIBIT 6

September 12, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
U. S. DEPARTMENT OF ENERGY)	Docket No. 63-001-HLW
)	
(High-Level Waste Repository))	ASLBP No. 09-892-HLW-CAB04
)	

NRC STAFF NOTIFICATION REGARDING TECHNICAL EVALUATION
REPORT ISSUANCE AND SAFETY EVALUATION REPORT VOLUMES 2 AND 5

The U.S. Nuclear Regulatory Commission (NRC) staff (Staff) previously indicated that orderly closure activities under the Continuing Resolution would include documenting technical insights on the Department of Energy's license application. See NRC Staff Response to December 8, 2010 Board Order and Notification Regarding SER Volume 4 Issuance, dated December 22, 2010, at 5; NRC Staff Answer to Motion for an Order Restoring Technical Review of the Yucca Mountain License Application, dated October 18, 2010, at 3-5. This notification is to inform the Board that on September 12, 2011, the Staff issued "Technical Evaluation Report on the Content of the U.S. Department of Energy's Yucca Mountain Repository License Application; Administrative and Programmatic Volume." This is the last volume of the technical evaluation report on the Department of Energy's license application and is available in the Publicly Available Records System of the NRC's Agencywide Documents Access and Management System (ADAMS), at Accession Number ML112500484.

In addition, the Staff previously advised the Board that, for case management purposes, it could assume that Safety Evaluation Report (SER) Volumes 2 and 5 would be issued in October 2011 and February 2012, respectively, and that the Staff would inform the Board if this assumption was no longer realistic. See NRC Staff Answer to the CAB's July 21, 2009 Order

Concerning Serial Case Management, dated July 28, 2009, at 2. This notification is also to inform the Board that, due to orderly closure activities and uncertainty regarding future funding, it is no longer realistic to assume that the Staff will issue SER Volumes 2 and 5 in October 2011 and February 2012, respectively, and the Staff is unable to provide issuance dates for these SER Volumes at this time.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 12th day of September, 2011

EXHIBIT 7

December 22, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
U. S. DEPARTMENT OF ENERGY)	Docket No. 63-001-HLW
)	
(High-Level Waste Repository))	ASLBP No. 09-892-HLW-CAB04
)	

NRC STAFF RESPONSE TO DECEMBER 8, 2010
BOARD ORDER AND NOTIFICATION REGARDING SER VOLUME 4 ISSUANCE

INTRODUCTION

The U.S. Nuclear Regulatory Commission staff (Staff) files this answer in response to the Construction Authorization Board 04 (Board) "Order (Addressing Nevada's Motion and Discovery Status)," dated December 8, 2010 (unpublished) (Order). The Board directed the Staff to provide a full explanation for (1) the timing of its November 29, 2010, notification regarding the schedule for issuance of Volume 3 of the Safety Evaluation Report (SER) related to Yucca Mountain,¹ and (2) why it cannot establish a date for issuance. *Id.* at 2. The Staff's explanation is provided below.

BACKGROUND

On September 30, 2009, the Board issued a case management order pacing Phase I discovery in the above-captioned proceeding with the planned SER schedule. See CAB Case Management Order #2, dated September 30, 2009 (unpublished), at 3. This schedule was based on Staff responses to Board inquiries as to whether the SER would be issued in accordance with the 10 C.F.R. Part 2, Appendix D schedule or serially, and the Staff's

¹ NRC Staff Notification Regarding SER Schedule, dated November 29, 2010 (Notification).

anticipated schedule for SER issuance. See *id.* at 1, 3.² Phase 1 discovery, which includes all safety, environmental and legal contentions related to the subject matters in SER Volume 1 or 3 began in the fall of 2009, and was initially scheduled to end on November 30, 2010 (or two months after issuance of Volume 3, whichever is later). *Id.* at 3.

In February, after DOE stated its intent to withdraw its license application (LA), the Board granted a suspension of discovery and stay of the proceeding, pending disposition of DOE's expected motion to withdraw. See Order (Granting Interim Suspension of Discovery), dated February 2, 2010 (unpublished); Order (Granting Stay of Proceeding), dated February 16, 2010 (unpublished). On March 3, 2010, DOE filed its motion to withdraw. U.S. Department of Energy's Motion to Withdraw, dated March 3, 2010 (Motion to Withdraw). In June, the Board denied the Motion to Withdraw³ and the Secretary of the Commission invited briefs "as to whether the Commission should review, and reverse or uphold, the Board's decision." See Order, dated June 30, 2010 (unpublished). Petitions for review were filed in July 2010.⁴

Also during this period, the State of Nevada filed a motion requesting, among other

² The Staff informed the Board that SER Volumes 1 and 3 would be issued in March 2010 and September 2010, respectively, and that the Board's assumption that remaining SER volumes would be issued in December 2010 (Volume 4), October 2011 (Volume 2), and February 2012 (Volume 5) was not unrealistic. See NRC Staff Answer to the CAB's July 2, 2009 Order Concerning Scheduling, Dated July 10, 2009 (Staff July 10 Answer); NRC Staff Answer to the CAB's July 21, 2009 Order Concerning Serial Case Management, dated July 28, 2009. However, the Staff noted that Volumes 2, 4, and 5 may not be completed according to the Board's estimated schedule. See Differing Views of the NRC Staff to the Response of the State of Nevada to Memorandum and Order dated August 25, 2009, dated September 10, 2009, at 3 n.3. At oral arguments in January and June 2010, the Staff stated that target dates for SER Volumes 1 and 3 were August 2010 and November 2010, respectively. Transcript at 398 (Jan. 27, 2010); Transcript at 328-29 (June 4, 2010). The Staff issued SER Volume 1 in August 2010. See Letter from Daniel W. Lenehan to Administrative Judges, dated August 23, 2010; NUREG-1949, Safety Evaluation Report Related to Disposal of High-Level Radioactive Wastes in a Geologic Repository at Yucca Mountain, Nevada (Aug. 2010) (ML102350193).

³ U.S. Dep't of Energy (High-Level Waste Repository), LBP-10-11, 71 NRC __ (June 29, 2010) (slip op.) (LBP-10-11).

⁴ See, e.g., Brief of the State of Nevada in Support of Review and Reversal of the Licensing Board's Decision Denying the Department of Energy's Motion to Withdraw its License Application with Prejudice, dated July 9, 2010; U.S. Department of Energy's Brief in Support of Review and Reversal of the Board's Ruling on the Motion to Withdraw, dated July 9, 2010; NRC Staff Brief in Response to the Secretary of the Commission's June 30, 2010 Order, dated July 9, 2010.

things, that the Commission direct the Staff to suspend all efforts to complete and issue Volume 3 pending a final Commission decision on DOE's Motion to Withdraw. State of Nevada Petition for Relief with Respect to Possible Issuance of a Partial Safety Evaluation Report for Yucca Mountain, dated June 14, 2010, at 3 (Nevada Petition). The Staff responded, stating, in part, that it would comply with any direction it receives from the Commission regarding issuance of SER volumes. NRC Staff Response to State of Nevada Petition for Relief with Respect to Possible Issuance of Partial Safety Evaluation Report, dated June 24, 2010, at 2 (June 24 Response). In addition, in response to a July 2, 2010, motion by the NRC and Department of Justice, the Federal Court issued an order holding the related proceedings challenging the authority to withdraw the LA in abeyance pending further proceedings before the Nuclear Regulatory Commission. See *In re: Aiken County* (No. 10-1050) (D.C. Cir. July 28, 2010).⁵

On October 1, 2010, the Commission began operating under a Continuing Resolution (CR). See Pub. L. 111-242, 124 Stat. 2607 (Sept. 30, 2010).⁶ In response to an October 7, 2010, motion by Aiken County, joined by the States of Washington and South Carolina requesting, in part, that the Commission direct the Staff to resume its review of the LA,⁷ the Staff informed the Commission that it had been directed to "continue its activities on the Yucca Mountain license application in accordance with the Commission's decisions on the FY 2011 budget . . . during the period of the" CR. See NRC Staff Answer to Motion for an Order Restoring Technical Review of the Yucca Mountain License Application, dated October 18, 2010, at 3 (October 18 Answer) (quoting Memorandum from J.E. Dyer, Chief Financial Officer, and R.W. Borchardt, Executive Director of Operations, to the Office Directors and Regional

⁵ On December 10, 2010, the Court lifted the stay and set an expedited briefing schedule. *In re: Aiken County* (No. 10-1050) (D.C. Cir. Dec. 10, 2010).

⁶ See *also* Pub. L. 111-290, 124 Stat. 3063 (Dec. 4, 2010); Pub. L. 111-317 (Dec. 17, 2010); H.R. 3082, 111th Cong. (Dec. 22, 2010).

⁷ Motion for a Commission Order Resorting the Technical Review of the Yucca Mountain License Application, dated October 7, 2010, at 2, 7 (Aiken County Motion).

Administrators, Guidance Under a Fiscal Year 2011 Continuing Resolution, dated October 4, 2010 (ML102770484) (October 4 Memorandum)).

The Commission has received Congressional inquiries regarding the Yucca Mountain proceeding and LA review activities.⁸ On August 18, 2010, the Secretary of the Commission stated that the Commission was "moving with all due haste in arriving at a decision relative to review" of LBP-10-11. See Letter from Annette L. Vietti-Cook to Congressman Hastings, dated August 18, 2010 (ML102310231) (August 18 Letter). By October 29, 2010, Chairman Jaczko and Commissioners Ostendorff, Svinicki and Magwood had voted on petitions related to the Motion to Withdraw.⁹ On November 19, 2010, the Commission received a Congressional inquiry requesting release of a Commission decision on DOE's Motion to Withdraw.¹⁰

On November 29, 2010, the Staff filed its Notification indicating that it would not be issuing SER Volume 3 in November and that a revised schedule is "indeterminate." On December 8, 2010, the Board directed the Staff to provide a full explanation for (1) the timing of its November 29, 2010, Notification regarding the schedule for issuance of Volume 3 of the SER related to Yucca Mountain, and (2) why it cannot establish a date for issuance. Order at 2.

⁸ See, e.g., Letter from Congressmen Sensenbrenner, Hastings, Hall, & Barton to Chairman Jaczko, dated October 13, 2010 (ML102880534); Letter from Congressman Hastings to Chairman Jaczko, dated August 17, 2010 (ML102310519); Letter from Annette L. Vietti-Cook to Congressman Sensenbrenner, dated July 30, 2010 (ML102160118); Letters from Annette L. Vietti-Cook to Senators Hewitt & Honeyford, dated July 30, 2010 (ML102160121); Letter from Annette L. Vietti-Cook to Senator Delvin, dated July 30, 2010 (ML102160120).

⁹ See Letter from Chairman Jaczko to Senator Inhofe, dated November 5, 2010 (ML103120483); Letter from Commissioner Ostendorff to Senator Inhofe, dated November 4, 2010 (ML103090280); Letter from Commissioner Svinicki to Senator Inhofe, dated November 4, 2010 (ML103090048); Letter from Commissioner Magwood to Senator Inhofe, dated November 5, 2010, *available at* http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=e70db547-7058-4f1f-aa27-87d80de5f2e9. Commissioner Apostolakis filed his "Notice of Recusal" from this matter on July 15, 2010.

¹⁰ See Letter from Congressmen Hastings, Issa, & Sensenbrenner to Chairman Jaczko, dated November 19, 2010 (ML103400123). The Secretary of the Commission responded, stating that the Commission did not have a completion date for its decision. See Letters from Annette L. Vietti-Cook to Congressmen Hastings, Issa, & Sensenbrenner, dated December 6, 2010 (ML103410010).

DISCUSSION

As indicated by the events described in the preceding section, there has been interest in and uncertainty about the future of the Yucca Mountain proceeding. This uncertainty and the commencement of orderly closure activities explain the timing of the November 29, 2010, Notification and why the Staff is currently unable to provide a date for issuance of remaining SER volumes.

Petitions for review of LBP-10-11, the Nevada Petition seeking an order directing the Staff to suspend its work on Volume 3, and the Aiken County Motion seeking an order directing the Staff to resume its review of the LA are currently pending before the Commission. The Commission's resolution of these matters will impact when, or if, the Staff will issue Volume 3 and remaining SER volumes. *See, e.g.*, June 24 Response at 5 (stating that the Staff will not issue any pending SER volumes if the Commission decides to grant the Motion to Withdraw). Issuance of a Commission decision would enable the Staff to provide the Board with information regarding future issuance dates, if necessary. Accordingly, the Staff decided to await Commission action before filing its Notification on November 29, 2010.

The Staff also previously informed the Board and Commission that budget decisions could affect licensing activities. *See* October 18 Answer at 4-5; June 24 Response at 6-7; Staff July 10 Answer at 2. In October 2010, when the Commission began operating under a CR, the Staff indicated that it was commencing orderly closure activities that would not preclude future completion of an SER. *See* October 18 Answer at 4-5. As the Chairman explained in a letter to Congress, "the first step of this process is to preserve the staff's work products, and complete and implement a detailed and comprehensive plan for this effort." Letter from Chairman Jaczko to Congressman Sensenbrenner, dated October 27, 2010, encl. at 1 (ML102980673). Uncertainty regarding whether future appropriations will include funding for Yucca Mountain licensing activities impacts the Staff's ability to provide SER issuance dates, if necessary. Accordingly, the Staff also decided to await Congressional action before filing its Notification.

The Staff is mindful of, and takes seriously, its commitment to inform the Board of its SER schedule. See, e.g., Transcript at 329 (June 4, 2010); Order (Concerning Serial Case Management), dated July 21, 2009, at 3 (unpublished) (July 21 Order); Staff July 28 Answer at 2; Staff July 10 Answer at 2. Consistent with its commitment to keep the Board informed of its SER schedule, the Staff hereby advises the Board that it is no longer realistic for the Board to assume for case management planning purposes that SER Volume 4 will be issued in December 2010. See July 21 Order at 1; July 28 Answer at 2. Due to commencement of orderly closure, and in the absence of Commission adjudicatory decisions and/or Congressional budget approvals, the Staff will not issue SER Volume 4 in December 2010 and the schedule for issuance of Volume 4 is also indeterminate.

CONCLUSION

The timing of the Notification was due to uncertainty regarding, and the decision to await, potential Commission action on the pending adjudicatory matters and Congressional action on the FY 2011 budget. In addition, due to these uncertainties and the commencement of orderly closure, the Staff will not be issuing SER Volume 4 in December 2010. The Staff will provide the Board information regarding the issuance of remaining SER volumes after Commission and Congressional actions.

Respectfully submitted,

/Signed (electronically) by/

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/Executed in accord with 10 C.F.R. § 2.304(d)/

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Dated at Rockville, Maryland
this 22nd day of December, 2010

EXHIBIT 8

**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**

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In the Matter of)	Docket No. 63-001-HLW
)	
U.S. DEPARTMENT OF ENERGY)	ASLBP No. 09-892-HLW-CAB04
)	
(High Level Waste Repository))	May 5, 2011
<hr/>)	

**U.S. DEPARTMENT OF ENERGY'S MOTION
FOR PROTECTIVE ORDER**

Introduction:

The U.S. Department of Energy ("DOE") hereby moves, pursuant to 10 CFR § 2.1018(c)(1) and consistent with this Board's February 25, 2011 Memorandum and Order,¹ for a protective order quashing the two notices of deposition by the State of Nevada served on April 25, 2011.² DOE seeks this relief because, in the Fiscal Year (FY) 2011 Full-Year Continuing Resolution (CR), Congress appropriated zero funds to DOE for this proceeding and \$10 million to NRC for the proceeding's orderly closure. While Congress has not yet acted for FY 2012, no funds have been requested in the President's FY 2012 budget for this proceeding for either DOE or NRC.

¹ Construction Authorization Board, Memorandum and Order (Denying Motion to Renew Temporary Suspension of the Proceeding), February 25, 2011 ("February 25 Order").

² State of Nevada's Notice *Duces Tecum* of the Intention to Take the Oral Deposition of Kevin Coppersmith, April 25, 2011; State of Nevada's Notice *Duces Tecum* of the Intention to Take the Oral Deposition of Michael Gross, April 25, 2011.

Argument:

To undertake deposition discovery now—without a reasonable prospect of adequate funding to complete the proceeding—would needlessly waste resources and would contravene the clear intention of Congress. Indeed, deposition discovery at this time would cause precisely the “undue burden [and] expense” that this Board is charged with preventing. 10 CFR § 2.1018(c). That is true not only for the two noticed depositions that are the focus of this motion, but would apply equally to any additional depositions that might be noticed under the current circumstances. So while, as discussed below, the Board and the parties may wish to revisit this matter and establish a new schedule if Congress appropriates funding for FY 2012, it would not be appropriate to spend money on further discovery at this time.

In this regard, circumstances have changed significantly from last January, when DOE unsuccessfully requested a general suspension of this proceeding from the Board.³ When this Board denied DOE’s motion, it observed that no active discovery was “threatened or underway.”⁴ That is no longer true. On April 25, 2011, Nevada served DOE with two notices of deposition. It has further advised DOE that it wishes to notice at least eleven additional (and potentially many more) depositions. Likewise, Clark County has informed DOE that it too may seek to take depositions this fiscal year.

Even more to the point, Congress has now acted in a way that makes continuing this proceeding wasteful and inappropriate. In denying DOE’s suspension motion, the Board

³ U.S. Department Of Energy’s Motion To Renew Temporary Suspension Of The Proceeding, January 21, 2011 (before the Construction Authorization Board), at 2-5.

⁴ February 25 Order at 2.

recognized the budgetary uncertainties confronting DOE, and, in particular, the fact that “continuation of the Yucca Mountain project remains subject to Congressional funding.”⁵ Congress has now made its decision as to funding, and it has decided that there will be no funding for this proceeding in FY 2011. In particular, Congress has enacted, and the President has signed, the Department of Defense and Full-Year Continuing Appropriations Act, 2011, which provides that DOE’s funding for nuclear waste disposal activities, including this proceeding, “shall be \$0”⁶ and additionally rescinds \$2.8 million of prior appropriations.⁷

The only FY 2011 funding appropriated to the NRC for the Yucca Mountain project is \$10 million, which is the amount the NRC requested for the “orderly closure” of this proceeding.⁸ More specifically, in its FY 2011 request, the NRC sought \$10 million with the following explanation:

Resources will support work related to the orderly closure of the agency’s Yucca Mountain licensing support activities. This would involve archiving material, completion of some technical work, knowledge capture and management, and maintenance of certain electronic systems to support these efforts. Resources will also support closing the adjudicatory aspects upon actual notice from the Congress or DOE.

The \$10 million appropriated in response to the NRC’s request stands in marked contrast to the version of the FY 2011 full-year CR that originally passed the House of Representatives. The House bill would have appropriated to the NRC \$29 million – an amount in line with past years

⁵ *Id.*

⁶ Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, div. B, tit. IV, §§ 1446 & 1456 (2011).

⁷ *Id.* at § 1469.

⁸ U.S. Nuclear Regulatory Commission, Congressional Budget Justification for FY 2011, NUREG-1100, Vol. 26, at 95.

when the licensing proceeding was active – and contained the following provision, intended to ensure the active resumption of this proceeding:

No funds made available by this division or any other Act may be used by the [Commission] to conduct closure of adjudicatory functions, technical review, or support activities associated with the Yucca Mountain geologic repository license application until the Commission reverses ASLB decision LBP-10-11.⁹

By appropriating \$10 million in response to the NRC's request for close-out funds rather than the \$29 million in the House bill for active licensing, by striking the above-quoted language in the House bill, and by removing all FY 2011 funding for DOE to litigate this proceeding, Congress has made it wasteful and inappropriate to continue this proceeding right now. *See Walton v. Hammons*, 192 F.3d 590, 600 n.10 (6th Cir. 1999) (inferring Congressional intent from rejection of language in an amendment to proposed legislation: "Courts often scrutinize the rejection of amendments and the choice of particular language over other proposed language to derive the legislative purpose behind the statute ultimately adopted"), citing *Jett v. Dallas Indep. Sch. Dist.* 491 U.S. 701, 726-27, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989); *United States v. Yermian*, 468 U.S. 63, 72-73, 104 S.Ct. 2936, 82 L.Ed.2d 53 (1984); *Federal Election Comm'n v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 36, 102 S.Ct. 38, 70 L.Ed.2d 23 (1981).

Moreover, while Congress has not yet acted for FY 2012, the President's FY 2012 budget request includes no funding for nuclear waste disposal activities at either DOE or NRC.¹⁰ With only NRC closeout funds appropriated for FY 2011 and without a reasonable expectation of

⁹ H.R. 1, 112th Cong., 1st Sess., § 1419 (2011). In the House floor debate, a proposal to remove that prohibition had been defeated on a voice vote. 157 Cong. Rec. H1325 (daily ed. Feb. 18, 2011).

¹⁰ Budget of the United States Government, Fiscal Year 2012, Appendix at 396, 415; U.S. Nuclear Regulatory Commission, Congressional Budget Justification for FY 2012, NUREG-1100, Vol. 27, at 14, 98.

funds to complete this proceeding going forward, it would be wasteful to conduct depositions this fiscal year. There is no reason to expend money for depositions that cannot reasonably be expected to serve any purpose under the current circumstances.¹¹

This situation is similar to that addressed in *County of Vernon v. United States*, 933 F.2d 532 (7th Cir. 1991), where a locality sued the Corps of Engineers for abandoning a partially completed dam project authorized under the Flood Control Act of 1962. There, Congress ratified the Corps's decision to abandon a project by discontinuing appropriations. It was undisputed that, even after Congress ceased appropriating funds, the Corps was not without funding; rather, the Corps argued, its extant funds were insufficient to complete the project. Upholding the district court's grant of summary judgment in favor of the Corps, the Court of Appeals stated:

The Flood Control Act of 1962 created an account from which the Corps could draw funds should Congress decide to appropriate funding. *See Environmental Defense Fund v. Froehlke*, 473 F.2d 346, 353-55 (8th Cir. 1972). Legislation authorizing a Project does not constitute an appropriation of public monies, but rather contemplates future action by Congress to provide funding. 37 Comp.Gen. 306 (1955). Therefore, the Corps could not continue with construction on the Project absent continuing appropriations from Congress. Regardless of the amount specified in the program authorization, Congress has not appropriated sufficient funds to complete the Project. Thus, we agree that the lack of funding precluded the Corps from completing the Project.¹²

¹¹ Counsel for the State of Nevada made precisely the same point in a covering letter to the notices of deposition. Noting a likelihood of “incurring potentially large and unnecessary expenses in the process” of deposition discovery, as to which Nevada felt “little choice” in light of the CAB’s February 25 Order, counsel stated that Nevada “continues to believe that the licensing proceeding, including discovery, should not go forward until the future of the Yucca Mountain program has been finally clarified in the courts and in Congress.” Letter, Martin G. Malsch to Donald P. Irwin, Re: Docket 63-001 (April 25, 2011) (covering notices of deposition).

¹² *County of Vernon*, 933 F.2d at 534-35.

Based on this finding and on its conclusion that “the decision of Congress not to appropriate funds for a particular Project normally is not reviewable by the judiciary,”¹³ the court sustained the District Court’s award of summary judgment and the Corps’s abandonment of the project. *See also Alabama v. North Carolina*, __ U.S. ___, 130 S.Ct. 2295, 2310 (2010) (characterizing governmental expenditures on a project as “imprudent” and “futile” when the governmental body is not expected to have sufficient funds to complete the project); *Environmental Defense Center v. Babbitt*, 73 F.3d 867 (9th Cir. 1995) (holding that postponement, stay, or other type of “freeze” in some discrete part of the process is appropriate when Congress appropriates no funds to follow through on a duty Congress has authorized in another statute).

The same is true here. Congress has not appropriated sufficient funding for this proceeding to be completed. Any funds DOE and NRC retain are insufficient to take this proceeding to completion. To the extent parties contend that this proceeding should continue as long as DOE has *any* remaining balance from prior year appropriations, the answer is that such action would be “imprudent” and “futile,” as there is no significant likelihood at this time that DOE or NRC would have the funds to complete this proceeding. *Alabama*, __ U.S. at ___, 130 S.Ct. at 2310. These cases also demonstrate that authorizations without appropriations do not justify continued spending in the face of inadequate financial resources.

Conclusion:

DOE respectfully requests that this Board issue a protective order quashing the depositions of Kevin Coppersmith and Michael Gross, noticed by the State of Nevada. To avoid further motions practice, the Board may also wish to consider indicating that it will not require the parties to accede to deposition requests at least through the end of Fiscal Year 2011.

¹³ *Id.* at 535, citing, *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 527, 61 S.Ct. 1050, 1060, 85 L.Ed. 1487 (1941).

Finally, to avoid prejudice to any party, DOE respectfully suggests that the Board may wish to instruct the parties, if funding to reactivate this proceeding is appropriated by Congress, to propose a modified schedule for the completion of discovery provided in the Second Case Management Order that accounts for Congress's action as to the Fiscal Year 2011 budgets.¹⁴

CERTIFICATION PURSUANT TO 10 CFR § 2.323(b): Counsel for DOE hereby certifies that it has made a sincere effort to notify, and to meet and confer with, counsel for all other parties of record in this matter with respect to the relief requested, with the following results:

- The NRC Staff does not oppose the relief requested by this motion.
- The following thirteen parties take no position but reserve the right to respond to DOE's motion once filed: the States of California, Nevada, South Carolina and Washington; Aiken, Clark, Eureka, Inyo and Lincoln Counties; the Prairie Island Indian Community and the Native Community Action Council; the Nuclear Energy Institute; and the National Association of Regulatory Utility Commissioners.
- Nye County opposes the motion.
- Amicus Florida State Public Service Commission takes no position but reserves the right to respond to the motion once filed.

Respectfully submitted,

U.S. DEPARTMENT OF ENERGY

By Electronically Signed by Michael R. Shebelskie

Donald P. Irwin
Michael R. Shebelskie
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¹⁴ When CMO2 was issued, the parties anticipated a discovery period of at least 10 months for Phase 1. The re-set discovery period should be of the same duration.

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