

February 2011 High-level Waste Hearings Summary Table

(Also contains order and motion through March 7th)

High-Level Waste hearing

Request for Additional Information table (RAI's) [here](#)

ORDERS Electronic Hearing Docket Board Orders for February - CAB 4

Date

February 25th, 2011

February 25th, 2011

<p>MEMORANDUM AND ORDER (Denying Motion to Renew Temporary Suspension of the Proceeding)</p> <p>On January 21, 2011, the United States Department of Energy (DOE) moved to stay further proceedings before the Board through May 20, 2011, without prejudice to moving for additional stays.</p> <p>In support of its motion, DOE asserts that, after an earlier stay expired on June 29, 2010, the parties “have continued as though this proceeding were still suspended.” According to DOE, “[n]o party has requested to take any depositions in the six months since the suspension expired.” Rather, citing various uncertainties that might affect the future course of the proceeding, DOE asserts that “[a]ll parties appear to have implicitly understood that it makes little sense to devote scarce public and private resources to this proceeding until those uncertainties are resolved.”⁸Moreover, DOE points out, “there is no looming discovery deadline or practical need to conduct discovery in the next 120 days.”</p> <p>DOE fails to demonstrate the threat of irreparable harm or any other reason for granting a stay. On the contrary, DOE’s request is not so much a motion to stay discovery—given that reportedly none is threatened or underway—as a request for the Board’s unqualified approval of the parties continued “collective inaction.”</p> <p>The Board appreciates that the parties confront conflicting realities. On the one hand, although the Board has denied DOE’s motion to withdraw, continuation of the Yucca Mountain project remains subject to congressional funding and the possibility that our ruling might be reversed on appeal. Likewise,</p> <p>(Continued next column).</p>	<p>for reasons beyond the control of the Board or of most of the parties, there is currently no fixed deadline for the close of discovery and thus no hearing date. That is because, under Case Management Order #2, the current phase of discovery ends two months after the NRC Staff issues Volume 3 of its Safety Evaluation Report (SER), and the Staff has notified us that its schedule for that volume is indeterminate.</p> <p>On the other hand, when the Staff’s SER becomes available, the Board intends to move this proceeding forward as expeditiously as circumstances permit.</p> <p>Understandably, in the presently uncertain environment, the parties face difficult choices. Prudence and common sense may counsel careful allocation of resources. However, if the parties elect to abandon deposition discovery entirely, they should understand they do so at their own risk. DOE’s motion is therefore denied, without prejudice to the right of DOE or any other party to seek a stay or a protective order in the event that any party initiates discovery that it deems unduly burdensome</p>	<p>ORDER(Directing NRC Staff’s Show Cause)</p> <p>On February 17, 2011, the NRC Staff filed a notification stating that, on that same date in response to a Freedom of Information Act request, it had “made available redacted copies of preliminary drafts of Volumes 2 and 3 of the SER.” Previously, the Staff notified the Board on the penultimate day of the Staff’s schedule for issuing Volume 3 of the SER, that it would not meet its longstanding schedule and on December 8, 2010, the Board directed the Staff to provide an explanation of its last minute schedule change.</p> <p>Nothing in the Staff’s December 22, 2010 purported explanation for its last minute schedule change, or in the various documents the Staff quotes and cites therein, sheds light on how SER Volume 3, on the day before it was long scheduled to be issued, comports with the Staff’s characterization of SER Volume 3 being a preliminary draft. Accordingly, the Staff shall, by March 3, 2011, show cause why the Staff should not be ordered to place, in unredacted form except for classified and safeguards information, Volume 3 of the SER in its LSN document collection as circulated draft documentary material in accordance with 10 C.F.R. § 2.1001 and its continuing obligation to “make a diligent good faith effort to include all after created . . . documents as promptly as possible in each monthly supplementation of documentary material.”</p>
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ORDERS Electronic Hearing Docket Board Orders for February and beginning of March - CAB 4

Date	March 7 th , 2011		
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	<p><u>ORDER</u> <u>(Denying Nevada's Reconsideration Motion)</u></p> <p>Before us is the January 20, 2011 motion of the State of Nevada for reconsideration of the 2009 rejection by CAB-01, one of the three original contention admission licensing boards, of Nevada's contention, NEV-MISC-001. According to Nevada, reconsideration is required because CAB-04's December 2010 ruling in LBP-10-22, 72 NRC__ (slip op.) (Dec. 14, 2010) undercut the CAB-01's premise for rejection of the contention. The DOE and the NRC Staff oppose the motion. As explained below, Nevada's reconsideration motion is denied.</p> <p>I. BACKGROUND</p> <p>The context for Nevada's motion involves two Nevada contentions, NEV-MISC-001 and NEV-SAFETY-041, and two different Licensing Board rulings, LBP-09-6, 69 NRC 367, 472-73 (2009)4 and LBP-10-22, 72 NRC at __ (slip op. at 14-17). NEV-MISC-001 was proffered by Nevada as a legal issue contention in its December 19, 2008 intervention petition. The contention asserted that construction authorization must be denied because, as NEV-SAFETY-041 establishes, Yucca Mountain will erode to the level of the repository drifts beginning around 500,000 years after waste emplacement and continuing thereafter so that the facility will no longer constitute a repository. Rather, the contention asserts that the facility would, at best, constitute a retrievable storage facility in violation of, inter alia, enumerated provisions of the Nuclear Waste Policy Act.</p> <p>For its part, NEV-SAFETY-041 alleges that DOE's exclusion of land-surface erosion as a feature, event, or process (FEP) in its Yucca Mountain performance assessment is incorrect because modeling studies and field observations demonstrate that erosion will significantly affect infiltration and seepage fluxes at Yucca Mountain within the first 10,000 years after-closure. The contention then asserts that erosion will progressively and grossly change the topography of the mountain within one million years. (Continued next column)</p>	<p>In ruling that NEV-MISC-001 was inadmissible, CAB-01 held that [t]he contention does not satisfy section 2.309(f)(1)(vi) because it does not present a genuine dispute on a material issue of law or fact. The contention raises a legal issue that depends upon resolution of factual issues presented in NEV-SAFETY-041. If those factual issues are ultimately proven valid, the Application fails and the legal issue raised in NEV-MISC-001 is moot. If, on the other hand, the factual issues underlying NEV-SAFETY-041 are invalid, then this legal issue contention is irrelevant.</p> <p>In LBP-10-22, CAB-04 addressed the overarching legal issue that the affected parties agreed was involved with NEV-SAFETY-041, i.e., whether the Commission's regulation, 10 C.F.R. § 63.342(c) requires the post-10,000-year performance assessment to include the effects of erosion if there is no showing that erosion causes increases in radiological exposures or releases within the first 10,000 years.10 CAB-04 answered the question in the negative.</p> <p>II. ANALYSIS</p> <p>The Commission's Rules of Practice, 10 C.F.R. § 2.323(e), govern motions for reconsideration and require that the motion "be filed within ten (10) days of the action for which reconsideration is requested." The regulation also mandates that the movant makes a showing of "compelling circumstances, such as the existence of a clear and material error in a decision . . . that renders the decision invalid."12 Here, Nevada's motion fails to meet either requirement.....</p>	
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MOTIONS AND PLEADINGS			
Date	February 17th	February 18 th	

	<p>NRC STAFF NOTIFICATION OF DISCLOSURE PURSUANT TO FREEDOM OF INFORMATION ACT</p> <p>The U.S. Nuclear Regulatory Commission staff (Staff) previously advised the Board that it would “notify the Board of any future developments regarding SER [Safety Evaluation Report] Volume 3.” NRC Staff Notification Regarding SER Schedule dated November 29, 2010, at 1.</p> <p>This notice is to inform the Board that on February 17, 2011, in response to a request submitted pursuant to the Freedom of Information Act, as amended, 5 U.S.C. § 552, the Staff made available redacted copies of preliminary drafts of Volumes 2 and 3 of the SER. These documents are posted in the Publicly Available Records System (PARS) of the Commission’s Agencywide Documents Access and Management System (ADAMS), Accession Number ML110480651.</p> <p>Safety Evaluation Report Related to Disposal of High-Level Radioactive Wastes in a Geologic Repository at Yucca Mountain, Nevada Volume 3: Repository Safety After Permanent Closure – warning – 35MB files</p>	<p>Budgetary Support for Licensing Support Network (Dan Graser Memo)</p> <p>In accord with the Construction Authorization Board Order of February 9, 2006, this communication is to advise that, under the Administration’s budget proposal for fiscal year (FY) 2012, no Nuclear Waste Fund (NWF) resources, either funding or full-time equivalent staffing, are allocated to the NRC to conduct the Yucca Mountain Licensing proceeding. Assuming the Administration’s approach to FY 2012 funding is accepted by the Congress, given the agency’s longstanding position that the agency’s fee-based funding cannot be used for activities that relate purely to HLW matters, the LSN thus faces a shutdown that must be completed as of October 1, 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.</p> <p>When the LSN website is shut down, the parties’ document collections will no longer be electronically accessible by others. Accordingly, as per the February 9, 2006 Order, I am providing my technical analysis and recommendations regarding this situation: When CAB-4 examined the issue of potential LSN termination previously, it anticipated that in such an eventuality the parties could forward the contents of their document collections to the LSN Administrator (LSNA). However, that strategy presumed that the LSN website would be operational, and that there would be an LSNA to accept and take custody of those materials. Given the time period now available for system shutdown, that likely will not be the case. That strategy also presumed that the records of the LSNA would be accorded some degree of longevity in a proposed NRC records disposition schedule under consideration by the National Archives and Records Administration (NARA). Unfortunately a NARA determination that would allow such a records disposition is not likely to be forthcoming by the time system shutdown now will be necessary. As a consequence, the Board may want to consider alternative technology solutions that, while not analyzed for legality (as outside my purview) or compliance with the agency regulations under 10 C.F.R. §§ 2.1000 and 2.1007(a)(2), nonetheless could preserve the Commission’s ability to resume the adjudication should circumstances change. (continued next column)</p>	<ol style="list-style-type: none"> 1. Revert to the classic document discovery process wherein, upon receipt of a document production request, each party provides a copy of its documentary material to other interested parties, so that they may continue to have access to documentary material. One major shortcoming of this approach, however, is that the parties are likely to need to know the LSN Accession Number or Participant Access Number to retrieve already identified items. 2. Each party could establish an internet search and retrieval capability of its own choosing for its existing document collection, and make that available, at a minimum, to all of the other parties in the proceeding. A major shortcoming of this approach is that it shifts what was formerly an NRC fiscal and administrative responsibility to the participants. Additionally, it has the potential for introducing a wide range of non-standardized search and retrieval products. 3. The agency could apply its existing Enterprise Content Management search and retrieval capabilities (ADAMS P8) to participant collections that would have to be added to the document collections section of the NRC website. While potentially expensive and time consuming, the benefit of this approach is that, while consistent with the general intent of § 2.1007(a)(2) regarding availability of the material, it potentially could still be maintained using fee-based resources given the documentary material would not necessarily be utilized “exclusively” for HLW activity. 4. Direct that the materials, including bibliographic headers, be submitted to the official agency docket in searchable PDF format. This alternative has benefits similar to those noted above, and has the added benefit of being under an ongoing NARA records disposition schedule. Additionally, because the official docket is controlled by the Office of the Secretary, which is a Commission-level office, the Subpart J criteria of having the documentary material collection maintained by an entity that is not a party to the proceeding is maintained. . . Because of the relatively short timeframe available in which to effectuate an orderly shutdown, I recommend that the Board expedite its consideration of these matter.
	March 3, 2011	March 4 th , 2011	

[NRC STAFF RESPONSE TO FEBRUARY 25, 2011, BOARD ORDER INTRODUCTION](#) On February 25, 2011, the Construction Authorization Board 04 (Board) issued an order directing the U.S. NRC staff to show cause why it should not be ordered to place Volume 3 of the Safety Evaluation Report (SER) in unredacted form, except for classified and safeguards information, in its LSN collection as a circulated draft. For the reasons set forth below, the Staff should not be ordered to place an unredacted version of SER Volume 3 on the LSN because it is a preliminary draft, not a circulated draft.

..... [Argument](#)

CONCLUSION

For the reasons set forth above, the Board should not order the Staff to place an unredacted version of SER Volume 3 on the LSN because it is a preliminary draft.

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION**

**U.S. DEPARTMENT OF ENERGY'S MOTION TO
RENEW TEMPORARY SUSPENSION OF
PROCEEDING - Request for Relief**

The United States Department of Energy (DOE) respectfully requests that the Commission hold this proceeding in abeyance through May 20, 2011. Both temporary and limited, the requested suspension would be without prejudice to any party's right to move to lift the suspension prior to that date if it believes changed circumstances warrant that relief. It would be without prejudice to any party's right to oppose an extension of the suspension past May 20. And it would not apply to the parties' continuing obligation to make their documentary material available on the Licensing Support Network (LSN) or to the Commission's consideration of the pending requests for review of LBP-10-11. DOE requested identical relief from the CAB on January 21; the CAB denied its request last Friday, February 25.

The Commission should exercise its inherent authority to suspend this proceeding because of the significant budgetary, legal, and legislative uncertainties overshadowing this matter. Abeyance would preserve what has been, effectively, the status quo for the past year, and there is no pressing need to go forward now. To the contrary, resuming discovery in the face of those uncertainties would be impractical, counterproductive, wasteful, and counter to the public interest. Simply put, going forward at this point risks an on-again, off-again proceeding that would involve the expenditure of substantial resources for potentially no purpose. Yo-yoing back and forth in that manner is not necessary and is contrary to sound policy. The modest suspension DOE requests would help avoid those adverse consequences and allow time for the uncertainties to be resolved, or at least narrowed.

(continued next column)

Importantly, the requested suspension is the prudent and sensible course of action regardless of one's views on the proper disposition of DOE's motion to withdraw its License Application. However the Commission or the courts ultimately resolve that issue, it makes little sense to resume discovery until the parties know whether this proceeding will move forward. At the same time, it makes a great deal of sense to await resolution of the present budgetary uncertainty so the parties will know whether there will be appropriations for this proceeding going forward.

Mindful of NRC practice that allows parties to seek stays before either the Commission or a licensing board, but not both simultaneously, cf. 10 C.F.R. § 2.342, DOE first sought this relief before the CAB.¹ DOE did so as a prudential matter in response to the CAB's sua sponte order of December 8, 2010, which asked the parties for a status report on discovery and appeared to indicate the CAB's desire for resumption of active discovery. The CAB denied that relief in an order issued on February 25, 2011.