

March 2011 High-level Waste Hearings Summary Table

High-Level Waste hearing

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ORDERS Electronic Hearing Docket Board Orders for February - CAB 4

Date	March 7 th , 2011		
	<p>ORDER (Denying Nevada's Reconsideration Motion)</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 afterclosure. 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>	<p>ORDER (Dismissing Contentions)</p> <p>In LBP-10-22, CAB-04 resolved ten Phase I legal issues raised by admitted contentions sponsored by the State of Nevada (Nevada) and the NEI and denied two Nevada rule waiver petitions. The Board also instructed the affected parties to seek agreement on a stipulation regarding the effects of its rulings on admitted contentions. On behalf of the affected parties, the DOE filed the joint stipulation of DOE, the NRC Staff, Nevada, and NEI. The stipulation identifies the contentions that the parties agree are subject to dismissal and the contentions on which the parties do not agree as to the effect on them of the Board's legal rulings.</p> <p>The affected parties agree that four of Nevada contentions, NEV-SAFETY-041, NEV SAFETY-146, NEV-SAFETY-169, and NEV-SAFETY-201 are subject to dismissal. The Board agrees, accepts the joint stipulation as to those contentions, and dismisses NEV-SAFETY-041, NEV-SAFETY-146, NEV-SAFETY-169, and NEV-SAFETY-201.</p> <p>Finally, with regard to the remaining Phase I contentions identified by the parties in the joint stipulation as directly or indirectly affected by the Board's rulings in LBP-10-22, DOE or the NRC Staff should timely file dispositive motions seeking appropriate relief, such as a motion to dismiss a contention in whole or in part. Because the parties already have fully briefed the legal issues resolved by the Board in LBP-10-22 and filed memoranda regarding the effect of those rulings on the admitted contentions of NEI and Nevada, any such motions should be very brief.</p>

MOTIONS AND PLEADINGS

March 3, 2011	March 4, 2011	
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	<p>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.</p> <p>..... Argument</p> <p>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.</p>	<p>U.S. DEPARTMENT OF ENERGY'S MOTION TO RENEW TEMPORARY SUSPENSION OF PROCEEDING - Request for Relief</p> <p>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.</p> <p>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.</p> <p>(continued next column)</p>	<p>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.</p> <p>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.</p>
	March 10, 2011	March 11, 2011	

STATE OF NEVADA ANSWER TO DOE MOTION TO RENEW TEMPORARY SUSPENSION OF PROCEEDING

The State of Nevada did not oppose DOE's requested suspension, according to its terms, in the proceedings before the Atomic Safety and Licensing Board. Likewise, the State does not oppose DOE's motion before the Commission. However, a fair reading of the Licensing Board's February 25 Memorandum and Order suggests strongly that the State (and other affected parties) must now proceed with costly, and potentially unnecessary, deposition discovery or face the risk that such discovery will be curtailed or be considered waived. Under the NRC's rules, this risk of a highly prejudicial curtailment or loss of discovery persists notwithstanding the pendency of DOE's instant motion.

AIKEN COUNTY RESPONSE TO U.S. DEPARTMENT OF ENERGY'S MOTION TO RENEW TEMPORARY SUSPENSION OF PROCEEDING

Aiken County intervened in this proceeding to oppose the Department of Energy's (DOE's) Motion to Withdraw its license application, filed March 3, 2010, as a violation of DOE's obligations under the Nuclear Waste Policy Act (NWPA) and to argue that the controversy regarding DOE's attempt to withdraw its license application was properly before the Court of Appeals.¹ While acknowledging that DOE's March 4, 2011, Motion to Renew Temporary Suspension of Proceeding ("Suspension Motion") is beyond the strict purpose of Aiken County's intervention, Aiken County nonetheless finds DOE's motion sufficiently related to the issues addressed in DOE's Motion to Withdraw to warrant a response on the record. Aiken County explicitly opposes DOE's Suspension Motion

BACKGROUND

For the second time since Aiken County petitioned to intervene in this licensing proceeding, DOE has taken the extraordinary step of asking this Commission to invoke its inherent supervisory authority to overrule an interlocutory order of the Atomic Safety and Licensing Board (ASLB). DOE has made these two extraordinary requests in the face of clear Commission precedent that it is improper for a party to ask the Commission to exercise its inherent review authority. Ironically, DOE's previous appeal to the Commission's inherent authority sought the exact *opposite* relief of its current motion. DOE's previous request sought reversal of a ASLB Order which *stayed* this proceeding and *suspended* briefing on DOE's motion to withdraw and several intervention petitions.³ That ASLB Order was entered in order to await resolution of the same legal issues the Federal Court of Appeals of the District of Columbia Circuit, because the Court's ruling had the potential to "resolve or moot" issues before the ASLB. DOE now asks for a stay of this licensing proceeding because of, *inter alia*, legal uncertainties. DOE states that the Court of Appeals decision "could affect this proceeding in fundamental ways."⁵ As discussed below, DOE's requested suspension is unfounded and unnecessary. A suspension of this licensing proceeding would only give the appearance of official Commission sanction of DOE's seeming desire to abandon its NWPA duties.