

United States Of America Nuclear Regulatory Commission

Before Administrative Judges

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

In the Matter of)	Docket No. 63-001-HLW
)	
U.S. DEPARTMENT OF ENERGY)	
)	
(High-Level Waste Repository))	September 10, 2009
)	

**THE FOUR NEVADA COUNTIES OF CHURCHILL, ESMERALDA, LANDER AND MINERAL
RESPONSE TO MEMORANDUM AND ORDER DATED AUGUST 25, 2009**

In accordance with the Board’s August 25, 2009 Memorandum and Order, the Four Nevada Counties of Churchill, Esmeralda, Lander and Mineral (the Four Counties) offer the following response to the twenty-three questions posed by the Board. The Four Counties have made a good faith effort to consult and reach an agreement with all of the Parties to the proceeding before filing this Response.

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

Yes.

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

The Four Counties do not anticipate conducting a significant amount of discovery before the hearings and suggest approximately 60 to 90 days to conduct discovery on our contentions.

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

The Four Counties are prepared to proceed with adjudication approximately 30 to 60 days after the completion of discovery by the parties.

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

No, limits on the total number of depositions should not be addressed until after a schedule for grouping and hearing contentions is established.

5. If so, what should such limits be?

Not applicable.

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

No, the Four Counties do not think that setting specific limits on the number of depositions is feasible. Rather, the Four Counties propose that the deposition schedule be reasonable based on factors such as the complexity of the subject matter, the witnesses’ and parties’ location, the anticipated length of the deposition and the proximity of counsel to the deponents.

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

Not applicable.

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

No, the Four Counties prefer the scenario posed in question number nine.

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

Yes.

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

Not applicable.

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

Yes, following FRCP Rule 26(a)(2)(B) would lead to more efficient case management and case handling.

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

Yes, the Four Counties are prepared to discuss and agree with other parties on the content of voluntary disclosure.

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

Not applicable.

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

Applicant, as the initiator of the proceeding and the party with the burden of proof, should have their witnesses deposed first.

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

Yes.

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

The Four Counties do not anticipate extensive use of request for admissions, but a limit may be necessary with respect to parties with a significant number of contentions.

17. If so, what should such limits be?

The Four Counties defer the answer of what the limit should be to other Parties with an extensive number of contentions.

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

The Board could revisit the issue of sanctions if the need arises.

19. If so, what should the mechanism be?

The Board should impose sanctions for failure to act in good faith.

20. In light of the NRC Staff's plans to issue the SER serially and associated scheduling uncertainties, are there provision in the Joint Proposed Discovery Schedule (other than provisions referenced above) that one or more parties previously supported but not longer support?

No.

21. If so, what are such provisions?

Not applicable.

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

Yes.

23. If so, what are such provisions?

The Four Nevada Counties request that the admitted NEPA contentions which **do not** have a corresponding SER Volume ("NEPA Only Contentions") be heard in advance of the other contentions in the hearing process for the reasons set forth below.

First, Petitioners based the NEPA Only Contentions on the Final Environmental Impact Statement and Final Supplemental Environmental Impact Statement, both of which are complete and final documents. Given that the NEPA documents are final, no reason for delaying the discovery and hearing process on contentions related to these documents and the NEPA requirements exist. In contrast, the SER documents are not yet complete. NRC Staff has stated the issuance of SER Volumes will begin March 2010, with no date even set for Volume 2 (Review of Repository Safety Before Permanent Closure), Volume 4 (Review of Administrative and Programmatic Requirements) and Volume 5 (License Specifications and Conditions). *See NRC Staff Answer to the CAB's July 2, 2009 Order Concerning Scheduling*, July 10, 2009, at page 2. It is inefficient and illogical to schedule hearings on contentions related to incomplete, unissued documents before those related to an already final, issued document.

Further, hearing the NEPA Only Contentions in advance of the other contentions would efficiently utilize the NRC Board Panels and Staff during the time the SER Volumes are being finalized.

Finally, in view of the Secretary of Energy's stated intention to use the Yucca Mountain Repository Licensing proceeding as an information gathering process to establish a model for other potential SNF and HLW storage sites, the NEPA Only Contentions serve this purpose. They discuss environmental impacts which are universal to any future nuclear waste repository sites. The NEPA Only Contentions discuss impacts on transportation and emergency response planning; these are subject areas that any future NEPA documents must address, as waste will have to be transported to a geologic repository or dry cask storage site and similar NEPA planning will be required. Disposition of these contentions will provide additional, much needed guidance on the necessary scope of NEPA documents and planning for similar, future projects.

In summary, no valid reason exists to delay the hearing of these NEPA Only Contentions. The NEPA Only Contentions are based upon already complete, final documents, proceeding with these contentions first would utilize time efficiently while the Parties wait for SER Volumes, and hearing these contentions would provide valuable insight into the scope of issues DOE and NRC Staff would need to take into consideration in the NEPA process related to any future repository licensing proceeding.

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In the Matter of U.S. DEPARTMENT OF ENERGY (High-Level Waste Repository)) Docket No. 63-001-HLW)) ASLPB Nos. 09-892-HLW-CAB04))))) September 10, 2009
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CERTIFICATE OF SERVICE

I hereby certify that copies of the “The Four Nevada Counties of Churchill, Esmeralda, Lander and Mineral Response Memorandum and Order Dated August 25, 2009” has been served on the following persons this 10th day of September 2009 through the Nuclear Regulatory Commission’s Electronic Information Exchange.

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