

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

February 25, 2011

MEMORANDUM AND ORDER

(Denying Motion to Renew Temporary Suspension of the Proceeding)

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.<sup>1</sup> Eureka County, Nevada and the Nuclear Energy Institute support DOE's motion.<sup>2</sup> Aiken County, South Carolina and Nye County, Nevada oppose the motion.<sup>3</sup> The other parties either do not object or take no position.<sup>4</sup>

In support of its motion, DOE asserts that, after an earlier stay expired on June 29, 2010,<sup>5</sup> the parties "have continued as though this proceeding were still suspended."<sup>6</sup> According

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<sup>1</sup> See U.S. Department of Energy's Motion to Renew Temporary Suspension of the Proceeding (Jan. 21, 2011) at 1 [hereinafter DOE Motion to Renew Stay].

<sup>2</sup> Id.

<sup>3</sup> See Aiken County Response to U.S. Department of Energy's Motion to Renew Temporary Suspension of the Proceeding (Jan. 28, 2011) at 3.

<sup>4</sup> DOE Motion to Renew Stay at 2.

<sup>5</sup> See CAB Order (Granting Stay of Proceeding) (Feb. 16, 2010) (unpublished). The previous stay, which was entered without opposition, was in effect during the pendency of the Board's

to DOE, “[n]o party has requested to take any depositions in the six months since the suspension expired.”<sup>7</sup> 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.”<sup>8</sup> Moreover, DOE points out, “there is no looming discovery deadline or practical need to conduct discovery in the next 120 days.”<sup>9</sup>

DOE fails to demonstrate the threat of irreparable harm or any other reason for granting a stay.<sup>10</sup> 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.”<sup>11</sup>

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, 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

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consideration of DOE’s motion to withdraw, and expired by its terms upon the Board’s June 29, 2010 order denying DOE’s motion. Id. at 1-2.

<sup>6</sup> DOE Motion to Renew Stay at 2.

<sup>7</sup> Id.

<sup>8</sup> Id. at 3.

<sup>9</sup> Id. at 6.

<sup>10</sup> See U.S. Dep’t of Energy (High-Level Waste Repository: Pre-Application Matters), CLI-05-27, 62 NRC 715, 718 (2005).

<sup>11</sup> DOE Motion to Renew Stay at 3.

months after the NRC Staff issues Volume 3 of its Safety Evaluation Report (SER),<sup>12</sup> and the Staff has notified us that its schedule for that volume is indeterminate.<sup>13</sup> On the other hand, when the Staff's SER becomes available, the Board intends to move this proceeding forward as expeditiously as circumstances permit.

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.

It is so ORDERED.

FOR THE ATOMIC SAFETY  
AND LICENSING BOARD

**/RA/**

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Thomas S. Moore, Chairman  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
February 25, 2011

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<sup>12</sup> See CAB Case Management Order #2 (Sept. 30, 2009) at 3 (unpublished).

<sup>13</sup> See NRC Staff Notification Regarding SER Schedule (Nov. 29, 2010); NRC Staff Response to December 8, 2010 Board Order and Notification Regarding SER Volume 4 Issuance (Dec. 22, 2010).

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Board **MEMORANDUM AND ORDER (Denying Motion to Renew Temporary Suspension of the Proceeding)**, dated February 25, 2011, have been served upon the following persons by Electronic Information Exchange.

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U.S. DEPARTMENT OF ENERGY (High Level Waste Repository) Docket No. 63-001-HLW  
**MEMORANDUM AND ORDER (Denying Motion to Renew Temporary Suspension of the Proceeding)**

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U.S. DEPARTMENT OF ENERGY (High Level Waste Repository) Docket No. 63-001-HLW  
**MEMORANDUM AND ORDER (Denying Motion to Renew Temporary Suspension of the Proceeding)**

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U.S. DEPARTMENT OF ENERGY (High Level Waste Repository) Docket No. 63-001-HLW  
**MEMORANDUM AND ORDER (Denying Motion to Renew Temporary Suspension of the Proceeding)**

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U.S. DEPARTMENT OF ENERGY (High Level Waste Repository) Docket No. 63-001-HLW  
**MEMORANDUM AND ORDER (Denying Motion to Renew Temporary Suspension of the Proceeding)**

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[Original Signed by Linda D. Lewis]  
\_\_\_\_\_  
Office of the Secretary of the Commission

Dated at Rockville, Maryland  
this 25<sup>th</sup> day of February 2011